

JUDGES OF THE HIGH COURT

1935

1ST JANUARY TO 31ST DECEMBER.

CHIEF JUSTICE.

The Hon'ble Sir OWEN BEASLEY, *Kt.*, Barrister-at-Law
(*on leave from 22nd July to 8th October*).

The Hon'ble Sir V. RAMESAM, *Kt.*, B.A., B.L. (*officiating from 22nd to 26th July*).

The Hon'ble Mr. M. VENKATASUBBA RAO, B.A., B.L.
(*officiating from 27th July to 29th September*).

The Hon'ble Mr. C. MADHAVAN NAIR, B.A., Barrister-at-Law (*officiating from 30th September to 8th October*).

PUISNE JUDGES.

The Hon'ble Sir V. RAMESAM, *Kt.*, B.A., B.L. (*on leave from 5th April to 3rd May*) (*retired on 27th July*).

The Hon'ble Mr. M. VENKATASUBBA RAO, B.A., B.L. (*on leave from 24th April to 9th May*) (*Member, Delimitation Committee, from 1st October*).

The Hon'ble Mr. C. MADHAVAN NAIR, B.A., Barrister-at-Law.

The Hon'ble Mr. G. H. B. JACKSON, I.C.S. (*on leave till 25th January*) (*retired on 25th January*).

The Hon'ble Mr. A. J. CURGENVEN, I.C.S. (*on leave from 22nd July, preparatory to retirement*).

The Hon'ble Mr. H. D. CORNISH, Barrister-at-Law (*on leave from 3rd to 9th May*).

The Hon'ble Mr. K. SUNDARAM CHETTI, B.A., B.L.
(*Diwan Bahadur*) (*on leave till 23rd September*)
(*retired on 24th September*).

The Hon'ble Mr. G. STONE, Barrister-at-Law (*on leave from 22nd July to 16th August*).

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The Hon'ble Mr. V. MOCKETT, Barrister-at-Law.

The Hon'ble Mr. V. PANDRANG ROW, I.C.S. (*on leave from 22nd July to 23rd August*).

The Hon'ble Mr. A. J. KING, I.C.S. (*confirmed on 25th January*).

The Hon'ble Mr. S. WADSWORTH, I.C.S. (*from 19th June*).

The Hon'ble Mr. P. VENKATARAMANA RAO NAYUDU, B.A., B.L. (Rao Bahadur) (*from 27th July*).

The Hon'ble Mr. K. P. LAKSHMANA ROW, B.A., B.L. (Diwan Bahadur) (*confirmed on 24th September*).

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The Hon'ble Mr. K. S. MENON, Barrister-at-Law (*from 5th April to 9th May and from 22nd July*).

The Hon'ble Mr. J. C. STODART, I.C.S. (*from 22nd July*).

ADVOCATE-GENERAL.

Sir A. KRISHNASWAMI AYYAR, *Kt.*, B.A., B.L. (Diwan Bahadur).

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1935

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ERRATA.

Page 564, line 24.—For “ provides ” read “ providing.”

Page 734, line 20.—For “ District Munsif ” read “ Subordinate Judge.”

Page 802.—Practitioner’s names, for “ D. Ramaswami Ayyar ” read “ D. Ramaswami Ayyangar.”

Page 863.—Practitioner’s names, for “ H. Suryanarayana for appellant. D. Ramaswami Ayyangar for Government Pleader (P. Venkataramana Rao) for respondents ” read “ D. Ramaswami Ayyangar for H. Suryanarayana for appellant. P. Venkataramana Rao (Government Pleader) for respondents.”

Page 928.—Delete “ King J.” in the margin.



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THE INDIAN LAW REPORTS (MADRAS SERIES).

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 8.

v.

U. CHENGALROYA MUDALIAR, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 10 (2) (ix)—Capital expenditure—Lime shell—Excavation from Government lands of—Agreement by assessee with Government for—Sum payable by assessee under agreement for that privilege—Capital expenditure or deductible item.

The assessee entered into an agreement with the Secretary of State for India in Council for the excavation of lime shells from certain Government lands. Under that agreement he was to have the exclusive privilege of excavating chunam shells within the area specified in the agreement for a period of three years. He also agreed to pay the sum of Rs. 27,750 for that privilege in twelve equal quarterly instalments payable in advance. In the agreement the assessee was described as the lessee and the document was described as a lease.

Held that the sum of Rs. 27,750 payable by the assessee under the agreement was neither rent nor the purchase price of the shells lying upon and under the land which under the agreement was to be excavated but that it was a capital expenditure and therefore not a deductible item in computing the income derived by the assessee from the excavation and sale of lime shells.

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The payment in question was not made in order to carry on an already existing business and to earn a profit out of it. The payment to be made was merely for the purpose of starting that particular venture. The fact that the assessee had previously entered into a number of similar agreements did not affect the question.

City of London Contract Corporation v. Styles, (1887) 2 T.C. 239, and *John Smith & Son v. Moore*, [1921] 2 A.C. 13, relied upon.

REFERENCE to the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922).

M. Subbaraya Ayyar for assessee.—The sum of Rs. 11,775 in question is the amount expended for earning profits which is not of the nature of capital expenditure. The right acquired by the assessee is the right of removing the lime shells in the area during the period of the lease. The amount is one spent in getting in the stock-in-trade for the business. This is not the assessee's only business as in the case of *Commissioner of Income-tax, Madras v. Alaganan Chetty*(1). He is a person who carries on this business and in the course of running his business he enters into the contract in question for the purpose of providing himself with the stock-in-trade required for his business. [*Golden Horse Shoe (New), Ltd. v. Thurgood*(2), *Anglo-Persian Oil Company, Limited v. Dale (H. M. Inspector of Taxes)* (3) and *Green v. J. Gliksten & Son, Ltd.*(4) referred to.] *The Commissioners of Inland Revenue v. Adam*(5), referred to by the Commissioner, is distinguishable; see pages 401 and 402.

[The principle of that case is applicable to the present case. The assessee in the present case may be said to acquire the area from the Government for the purposes of his lime shell business.—The CHIEF JUSTICE.]

The assessee pays the amount in question for the purpose of acquiring raw material or the stock-in-trade required for his business. The amount paid is rent due under the lease taken by the assessee from Government.

M. Patanjali Sastri for Commissioner of Income-tax.—The question is concluded by the decision in *The Alianza Company, Limited v. Bell*(6).

(1) (1928) 55 M.L.J. 66; 3 I.T.C. 44.

(3) (1931) 16 T.C. 253, 267, 269.

(5) (1928) 14 T.C. 34.

(2) [1934] 1 K.B. 548.

(4) (1929) 14 T.C. 378, 379-80, 383-4.

(6) [1904] 2 K.B. 666; 5 T.C. 60, 67.

[The distinction made in that case is between the expense of acquiring a concern and the expense of carrying it on. What according to you is the concern in the present case?—SUNDARAM CHETTI J.]

Excavating lime shells. The transaction is not a lease because there is no transfer of immovable property. It is merely a licence. *Golden Horse Shoe (New), Ltd. v. Thurgood*(1) is distinguishable as being a case of purchase of raw material ready to be taken away. The transaction in the present case is really the acquisition of the right to excavate lime shells in the land. *The Commissioners of Inland Revenue v. Adam*(2) illustrates the distinction between capital payment and rent. A lump sum has been fixed as the price of the privilege of excavating lime shells from out of the area within a certain period and, to suit the convenience of the assessee, the price instead of being made payable at once and in a lump sum is allowed to be paid by instalments. It is not rent in any sense of the term. The acquisition of this privilege is a condition precedent to the assessee carrying on any business. The importance of this is recognised in several cases; see *Robert Addie & Sons' Collieries, Ltd. v. Commissioners of Inland Revenue*(3). The acquisition of the right to excavate lime shells is an essential part of the capital equipment of the assessee. [*The Commissioner of Income-tax, Madras v. The Minsararasam Co., Ltd., Salem*(4) referred to.]

M. Subbaraya Ayyar in reply.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The question referred to us is : BEASLEY C.J.

"Whether the decision of the Assistant Commissioner that Rs. 11,775 is not deductible in arriving at the profits of the petitioner's business is correct in law."

The facts out of which the question referred arises are that the assessee entered into an agreement with the Secretary of State for India in Council represented by the Revenue Divisional Officer, Gudur, on the 29th June 1930 for the

(1) [1934] 1 K.B. 548.

(3) (1924) 8 T.C. 671, 677, 678.

(2) (1928) 14 T.C. 34, 40.

(4) (1931) 63 M.L.J. 11.

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excavation of lime shells from certain Government lands in the Nellore District. Under this agreement he was to have the exclusive privilege of excavating chunam shells within the area specified in the agreement from the 1st July 1930 to the 30th June 1933, that is to say, for three years. He also agreed to pay the sum of Rs. 27,750 for this privilege in twelve equal quarterly instalments payable in advance.

The Income-tax Officer held that these payments were of a capital nature and were not therefore deductible in computing the income derived from the excavation and sale of lime shells and with that opinion the Commissioner of Income-tax agrees.

The agreement in question is Exhibit A and it is true that in it the assessee is described as the lessee and the document as being a lease. One of the contentions of the assessee is that the sum paid in the course of the year 1931-32, namely, Rs. 11,775, in part payment of the Rs. 27,750 already referred to was paid as rent and as such is deductible. A further contention is that the Rs. 27,750 is really the purchase price of the shells lying upon and under the land which under the agreement is to be excavated.

Dealing with the latter contention first, I am clearly of the opinion that this cannot by any stretch of imagination be considered a purchase of lime shells. It might be different had the lime shells been previously excavated and heaped up in heaps upon the land. It might then have been argued that it was a purchase of so much raw material. Here the amount of shells won is entirely dependent upon the will or the efforts of

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the assessee. He need not, unless he so desires, dig up more than a few tons of shells. On the other hand, he may be able to obtain a very large weight of them. Nor do I consider that the amount paid can be regarded in any sense as rent. The fact that it is payable by instalments does not make it so. The total amount payable is first mentioned and the payment of that total amount is merely spread over a certain time. In my view, the payment in question was not made in order to carry on an already existing business and to earn a profit out of it. The payment to be made was merely for the purpose of starting that particular venture. Any expenditure made thereafter would of course be deductible. But this was an initial expenditure without which the assessee could not even have begun winning the shells. I do not think that the fact that the assessee had previously entered into a number of similar agreements affects the question. It seems to me that the observations made by BOWEN L.J. in *City of London Contract Corporation v. Styles*(1), which are referred to in *The Commissioner of Income-tax, Madras v. Alaganan Chetty*(2), are very much in point. In the former case the assessees took over a business of another company which had a number of unexecuted contracts on hand and the taking-over company paid a lump sum of money to the outgoing company to obtain the benefit of those contracts and claimed it as a deduction. BOWEN L.J. said :

"You do not use it 'for the purpose of' your concern but you use it to acquire the concern."

(1) (1887) 2 T.C. 239.

(2) (1928) 55 M.L.J. 66; 3 I.T.C. 44, 47.

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In *John Smith & Son v. Moore*(1) Lord SUMNER says :

“ They (the company) said, much as has been said in this case, that before profits can be made out of working a contract, the contract has got to be got and the payment of its price is the root of its profits. The Court held that this sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business ; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on. The same is true of the appellants. The whole price paid, in cash or in account, was a sum employed or intended to be employed as capital in the trade of the company, and therefore cannot be deducted in ascertaining profits for income-tax or excess profits duty.”

In that case the appellant's father carried on business as a shipping and coal agent for many years prior to his death on March 7, 1915, when the appellant acquired the business under his father's trust disposition and settlement on the terms of taking over the assets of the business at a valuation but without paying anything for goodwill. The assets included certain forward coal contracts made by the father with several colliery owners for the delivery of coal by the latter in periodic instalments at prices which ultimately turned out to be very advantageous to the purchaser. These coal contracts were valued at £30,000. The appellant claimed, in arriving at the amount of the profits of the business chargeable to excess profits duty under the Finance Act, 1915, to deduct this £30,000 as representing part of the purchase price of the stock-in-trade. Viscount HALDANE and Lord SUMNER held that the deduction was not permissible upon the ground

that it was in respect of a capital expenditure and, on page 20, the former says :

“ My Lords, in the case before us the appellant, of course, made profit with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and reselling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ a circulating capital in buying under them. I am accordingly of opinion that, although they may have been of short duration, they were none the less part of his fixed capital. That he had paid a price for them makes no difference. Indeed the description of their value by the accountants, in the words I have earlier referred to, as of doubtful validity in the hands of outsiders, emphasises this conclusion. The £30,000 paid for the contracts or for its equivalent, therefore, became part of the appellant's fixed capital and could not properly appear in his revenue account. If that be so, then it was a sum employed as capital in his trade, and has to be excluded as a deduction from the profits on which he is assessed.”

In my view, the sum in question here was a capital expenditure and therefore not a deductible item.

The question referred to us must, therefore, be answered in the affirmative. Costs to the Commissioner of Income-tax, Rs. 250.

RAMESAM J.—I agree.

SUNDARAM CHETTI J.—I agree.

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(1) [1921] 2 A.C. 13.

INCOME-TAX REFERENCE.

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

1934,
May 4.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

SRIMAN MADHWA SIDDHANTHA ONNAHINI NIDHI,
LIMITED RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 10 (2) (iii) explanation—Capital borrowed—Limited company not a Mutual Benefit Society but an ordinary banking concern—Paid-up share capital of—Capital borrowed for purpose of business of company if—Guaranteed interest paid by company to its shareholders on paid-up share capital—Allowance in respect of, under sec. 10 (2) (iii)—Permissibility.

A limited company registered under the Indian Companies Act claimed that an amount representing the guaranteed interest paid by the company to its shareholders on the paid-up share capital according to the Articles of Association of the company was not liable to be assessed to income-tax by reason of section 10 (2) (iii) of the Indian Income-tax Act of 1922. The company was not a Mutual Benefit Society but was an ordinary banking concern. It was not confined to transactions only with its own members. There was no mutuality and the company made its ordinary profits. Further under the Articles of Association of the company the shares were to be paid for in one lump sum.

Held that the paid-up share capital of the company was not capital borrowed for the purpose of the business of the company and that the allowance claimed under section 10 (2) (iii) in respect of the guaranteed interest paid thereon was therefore not permissible.

In order to satisfy the requirements of the explanation to section 10 (2) (iii), there must be recurring subscriptions paid periodically and the company must be a Mutual Benefit Society.

* Original Petition No. 33 of 1934.

Commissioner of Income-tax, Madras v. Madura Hindu Permanent Fund, Ltd., (1932) I.L.R. 56 Mad. 415, distinguished.

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PETITION under section 66 (2) of the Indian Income-tax Act (XI of 1922).

M. Patanjali Sastri for Commissioner of Income-tax.

K. S. Krishnaswami Ayyangar and N. Srinivasa Ayyangar for assesseees.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The assesseees are a limited company registered under the Indian Companies Act with an authorized capital of Rs. 3,00,000 divided into 12,000 shares of Rs. 25 each. The subscribed and paid-up capital on the 30th November 1932 was Rs. 2,47,475 in 9,899 shares. The objects of the company as set out in its Memorandum and Articles of Association are :

- (1) to enable shareholders to save money,
- (2) to grant loans on jewels, landed property, Government promissory notes and other approved securities,
- (3) to receive fixed deposits from the public on such terms and conditions as may be fixed by the Managing Committee from time to time,
- (4) to make a permanent provision for payment of a grant-in-aid to Sriman Madhwa Siddhanta Onnahini Sabha, and
- (5) to do all such other things as are incidental or conducive to the attainment of the above objects.

The important Articles of Association are: Article 2 (b) which provides that the full amount of capital due on a share is to be paid in one lump sum, Article 5 (a) which provides that the paid-up capital of the shareholders is to carry guaranteed interest at the rate of six and a half per cent per

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annum, Article 5 (b) which provides that the net income earned by the company after deducting the cost of establishment, the other incidental charges and the interest payable under Article 5 (a) is to be treated as the Nidhi's profits for the year, Article 6 (b) which provides that a shareholder may, with the sanction of the directors, transfer the whole of his paid-up capital on any particular share or shares to any other person and Article 7 (a) according to which the shareholder or his heir and legal representative or his registered nominee is entitled to withdraw the whole or any part of his share capital after giving six months' previous notice and in such a case the shareholder is to be paid also the interest accrued on the share capital up to the date of withdrawal. Article 19 authorizes the company to receive deposits from the public and Article 20 to give loans both to the shareholders and non-shareholders.

The respondents claim that an amount of Rs. 16,569, which is the guaranteed interest paid to their shareholders on the paid-up share capital according to Article 5 (a), is not liable to be assessed to income-tax by reason of section 10 (2) (iii) of the Indian Income-tax Act. Section 10 (1) provides that the tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him and, sub-section 2, that such profits or gains shall be computed after making the following allowances, namely, *inter alia*, (iii) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of interest paid. The respondents contend

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that the paid-up capital which carried interest is capital borrowed for the purpose of the business, the interest payable upon it not being in any way dependent on the earning of profits. Hence they claim that this sum of Rs. 16,569, the interest upon that borrowed capital, must be deducted from the profits and gains of the business. In support of the respondents' case, reliance was placed upon *Commissioner of Income-tax, Madras v. Madura Hindu Permanent Fund, Ltd.*(1), a decision upon an Income-tax Reference of a Bench consisting of five Judges. It is contended that the facts of the present case are indistinguishable from the facts there. In my view, that decision cannot be applied to this case as the facts are clearly distinguishable. There, the assessee company was a Mutual Benefit Society although it had not been prescribed. It was, like the respondent company here, incorporated as a limited company under the Indian Companies Act of 1882. It had its capital contributed by "A" and "B" class subscribers at the rate of Re. 1 per mensem per share. The subscribers in "A" class paid their subscriptions for 45 months and those in "B" class for 84 months. As soon as an "A" class subscriber had paid Rs. 45 for one share in that manner, his account, in so far as that particular share was concerned, was closed and he was paid off with a sum of Rs. 50. A "B" class subscriber was paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to "A" and "B" class subscribers in excess of their subscriptions to the Fund were called "guaranteed interest". Although the rules of the Fund made

(1) (1932) I.L.R. 56 Mad. 415.

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provision for deposits and loans by and to non-subscribers or co-operative societies, in fact all the transactions of the Fund were with its own members. The members of the Fund subscribed the capital and the subscribed capital was lent to them. A sum of Rs. 68,000 odd was in the year of account distributed by the Fund in the shape of guaranteed interest to the "A" and "B" class subscribers and the Fund claimed to be entitled to deduct that sum from its total income during the year of account. It was held that this guaranteed interest was interest on capital borrowed for the purpose of the Fund's business within the meaning of section 10 (2) (iii) of the Income-tax Act, that its payment was not in any way dependent on the earning of profits and that the Fund was entitled to claim a deduction in respect of the amount distributed as guaranteed interest. It was also held that the Fund was a Mutual Benefit Society with a fluctuating capital dependent entirely upon the amount subscribed by its members and the repayment of subscriptions plus guaranteed interest to the members and that the subscriptions, though called share-capital, were not really so, nor were they capital borrowed for the purpose of the business as that capital is ordinarily understood, this being shown by the explanation to section 10 (2) (iii) of the Income-tax Act. It is clear upon an examination of the answers given to the questions referred that they were based entirely upon a construction of the latter explanation. This was a Mutual Benefit Society, the subscriptions were recurring and were paid periodically by the shareholders or subscribers and as such were deemed to be capital

borrowed within the meaning of section 10 (2) (iii). It was contended there on behalf of the assessee that this was not really share-capital at all but subscription-capital raised by recurring subscriptions paid periodically by shareholders. In dealing with this contention on page 427 I say:

"In my opinion, although these subscriptions are called share-capital, they are not really so as that description is understood in its ordinary sense; nor is this capital borrowed for the purpose of the business as that capital is ordinarily understood. It is something different from both. That this is so and that the Legislature recognized the distinction is clearly shown by the explanation to section 10 (2) (iii) of the Indian Income-tax Act where recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed are to be 'deemed' to be capital borrowed within the meaning of section 10 (2) (iii). If it is to be deemed to be capital borrowed, then it is not really capital borrowed but is for the purpose of the Indian Income-tax Act to be so considered. The fact that no Mutual Benefit Societies have as yet been prescribed may be due to various causes with which we are not really here concerned. What we are concerned with is the apparent intention of the Legislature to recognise an association of persons not having share-capital but borrowing and lending from and to themselves for the mutual benefit of themselves. This borrowing is to be deemed to be a borrowing of capital."

The facts of the present case are very different. The respondents are not a Mutual Benefit Society but are an ordinary banking concern. They are not confined to transactions only with their own members. There is no mutuality and they make their ordinary profits. The shares are to be paid for in one lump sum, and to my mind this is an all-important distinguishing feature. In order to satisfy the requirements of the explanation to section 10 (2) (iii), there must be recurring subscriptions paid periodically. "Recurring" means a happening again and again—not that which

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occurs only once. There is here no periodical payment and this is not a Mutual Benefit Society. It is only if those conditions are to be found that that which is not capital borrowed is to be deemed to be capital borrowed. This capital then clearly cannot be given that description and unless it is capital borrowed the allowance claimed under section 10 (2) (iii) cannot be permissible. Not being capital borrowed, the question as to whether the interest thereon is or is not in any way dependent on the earning of profits does not arise.

The answer to the question referred must, therefore, be in the negative. The Commissioner of Income-tax will get Rs. 250 costs.

RAMESAM J.—I agree.

SUNDARAM CHETTI J.—I agree.

A.S.V.

APPELLATE CIVIL.

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

V. KUPPUSAMI PILLAI (FIRST DEFENDANT), APPELLANT,

1934,
March 15.

v.

JAYALAKSHMI AMMAL (PLAINTIFF), RESPONDENT.*

*Indian Succession Act (X of 1865), sec. 100, corresponding to
Indian Succession Act (XXXIX of 1925), sec. 113—
Omission of, in The Hindu Transfers and Bequests Act
(VIII of 1921)—Hindu Wills Act (XXI of 1870), sec. 2—
Effect of, on Hindu wills executed in the City of Madras
not bequeathing the full interest in remainder in favour
of a person not in existence at the date of testator's death.*

A Hindu testator by his will executed in the City of Madras bequeathed certain properties to his son for life and, after his son's lifetime, to his son's wife for life and, after her lifetime, to certain other persons. The son's wife was not in existence at the date of the testator's death.

Held, (1) that the disposition in favour of the son's wife was void under section 100 of the Succession Act of 1865 (corresponding to section 113 of the Succession Act of 1925) in that the gift in her favour was not of the full interest in remainder, she being a person not in existence at the date of the testator's death, (2) that the omission of section 100 of the Succession Act, 1865, from Act VIII of 1921 cannot take away the effect of the express declaration in section 2 of the Hindu Wills Act, 1870, making section 100 of the Succession Act applicable to Hindu wills executed in the City of Madras.

Dinesh Chandra Roy Chowdhury v. Biraj Kamini Dasee, (1911) I.L.R. 39 Calc. 87, explained and distinguished.

APPEAL from the judgment of STONE J., dated the 3rd day of May 1933, in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 481 of 1927.

* Original Side Appeal No. 83 of 1933.

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*S. Doraiswami Ayyar for Srinivasaraghavan
and Thyagarajan for appellant.*

K. Narasimha Ayyar for respondent.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—Plaintiff sues for a declaration that certain alienations made by her deceased husband are inoperative beyond his lifetime. She contends that under the will of her father-in-law (Exhibit A, dated 28th August 1901) her husband was given only a life interest in the properties in question, that she was given a life interest by way of remainder after her husband's death, with a further gift by way of remainder, after her death, to certain other persons. In this appeal we are concerned only with one of the transactions of her husband, viz., a mortgage dated 5th May 1921 in favour of the first defendant. The first defendant, who is the appellant, contends that, as the plaintiff was not in existence at the testator's death and as the gift under Exhibit A in her favour is not of the full interest in remainder, that disposition is void under section 100 of the Indian Succession Act of 1865 (corresponding to section 113 of the Succession Act of 1925) and that the plaintiff therefore cannot maintain the suit. The learned Judge on the original side held that as a result of Act VIII of 1921 the disposition in favour of the plaintiff was valid and he has accordingly given her a declaration in terms of her prayer in the plaint so far as the mortgage in favour of the first defendant is concerned.

The judgment under appeal proceeds on the footing that the disposition would have been void under the Succession Act, but it holds that this

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result is "prevented by the Act of 1921, because that saves bequests from being defeated by the fact of non-existence at the time of death". This line of argument was not pressed on us by the learned Counsel for the respondent, apparently because it does not give sufficient effect to the word "only" which is deliberately used in section 3 of Madras Act I of 1914 and India Act VIII of 1921. As is well known, the object of that legislation was to do away with the rule in the *Tagore case*(1) and care was accordingly taken to indicate by the word "only" that this was all that was intended. It was not its purpose to do away with other statutory provisions, if and so far as such provisions governed Hindu wills. But, as the Act was to apply to the whole of the Presidency and there were no statutory restrictions governing Hindu wills outside the Presidency-town, it was considered expedient to embody in the Act itself the rule against perpetuities. The effect of this legislation will be dealt with more fully later on. It may however be observed at this stage that section 100 of the Succession Act applies to several communities who are not governed by any rule prohibiting gifts in favour of unborn persons merely on the ground of their non-existence, and the removal of this prohibition in the case of Hindus can only put them on the same footing with those communities (so far as that section applied to Hindus) and not preclude or defeat the operation of section 100.

It was suggested before us on behalf of the respondent that, even under the law as it stood prior to 1914, the provision in favour of the son's

(1) (1872) 9 B.L.R. 377 (P.C.).

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wife would not offend the rule laid down in the *Tagore case*(1), because their Lordships of the Privy Council have in that case made a reservation in favour of family settlements. It is unnecessary to deal with this question as we propose to rest our decision on the provisions of section 100 of the Indian Succession Act of 1865. As observed in *Sivasankara Pillai v. Soobramania Pillai*(2), the combined effect of sections 2 and 3 of the Hindu Wills Act is that a disposition permitted by the Succession Act may be invalidated, but a disposition invalid under the Succession Act cannot be validated by any rule of Hindu Law. (See also *Soundararajan v. Natarajan*(3) at pages 446, 461 bottom and 462 top, 469 and 470.)

In the arguments before us Mr. Narasimha Ayyar, the learned Counsel for the respondent, contended that, notwithstanding section 2 of the Hindu Wills Act, section 100 of the Succession Act of 1865 must not be held to invalidate the bequest in question, if it would be otherwise valid under the Hindu Law and he relied on the decision in *Dinesh Chandra Roy Chowdhury v. Biraj Kamini Dasee*(4) in support of this contention. If this contention were correct, he was unable to suggest how any effect could be given to the express declaration in section 2 of the Hindu Wills Act making section 100 of the Succession Act applicable to Hindu wills of the class therein described. As pointed out in *Radha Prasad Mallick v. Ranimoni Dasi*(5) the legal effect of that declaration is to write that section into the Hindu Wills Act.

(1) (1872) 9 B.L.R. 377 (P.C.).

(2) (1908) I.L.R. 31 Mad. 517, 521.

(3) (1920) I.L.R. 44 Mad. 446.

(4) (1911) I.L.R. 39 Calc. 87.

(5) (1910) I.L.R. 38 Calc. 188, 197

The argument based upon *Dinesh Chandra Roy Chowdhury v. Biraj Kamini Dasee*(1) is not really supported by that decision. The disposition there in question had been made by a testator to the would-be wife of his son. The son married only after the testator's death, but the girl he so married had in fact been born before the testator's death. The disposition was therefore not in favour of an unborn person, in which case it might be invalid according to the decision in *Radha Prasad Mallick v. Ranimoni Dasi*(2), and the only objection raised was that the lady did not answer the description of "son's wife" at the date of the testator's death. In these circumstances, the transfer would be void under the first part of section 99 of the Succession Act, but it would be valid under the exception to that section, if the relationship of the daughter-in-law could be held to fall within the meaning of the word "kindred". On behalf of the party who attacked the validity of the disposition it was contended that the exception to section 99 cannot be availed of in that case, as the result of that course would be to enable a Hindu testator to make a disposition which he could not have made before 1870 and this, it was contended, was opposed to section 3 of the Hindu Wills Act. The judgment of MOOKERJEE J. in that case therefore deals mainly with section 3 of the Act and not with section 2. The appellant's argument was repelled on two grounds:—(i) that the disposition then in question was valid even under the Hindu Law as held in *Nafar Chandra Kundoo v. Ratan Mala*

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(2) (1910) I.L.R. 38 Calc. 188, 197.

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Debi(1) and that there was accordingly no contra-vention of section 3 of the Hindu Wills Act; (ii) that, if section 99 of the Succession Act should be held applicable, it must apply as a whole, i.e., including the exception, and that the disposition was therefore valid under the exception to section 99. This being the effect of the judgment, it does not seem to us right to attach undue significance to the guarded observation of MOOKERJEE J. at the bottom of page 95 that "possibly the true intention was to make neither the rule nor the exception applicable to Hindus", or to the expression (on page 94) of an "inclination" in favour of the view that "the true intention of the Legislature was to leave matters where they were before the enactment of the Hindu Wills Act". As pointed out already, this view fails to give effect to section 2 of the Hindu Wills Act and is opposed to the decision of this Court in *Sivasankara Pillai v. Soobramania Pillai*(2).

Mr. Narasimha Ayyar advanced another contention based on the fact that, both in Madras Act I of 1914 and in (India) Act VIII of 1921, section 100 of the Succession Act has not been reproduced, while section 101 (enacting the rule against perpetuities) has been reproduced. One may go further and point out that, in the statement of objects and reasons accompanying the Bill which became Madras Act I of 1914, it was expressly stated that it was

"thought undesirable to introduce the highly artificial exceptions contained in section 13 of the Transfer of Property Act and the corresponding provisions in section 100 of the Succession Act."

(1) (1910) 15 C.W.N. 66.

(2) (1908) I.L.R. 31 Mad. 517.

In dealing with this argument it may be convenient to refer at the outset to the history of certain legislative provisions.

It has long been the opinion of many eminent Hindu lawyers that the indefinite tying up of property by way of gift to or for the benefit of unborn generations was quite in conformity with Indian ideas and systems of law. Muhammadan lawyers too held the same opinion, as will be evident from the controversy that culminated in the passing of the Mussalman Wakf Validating Act (VI of 1913). The Legislature was accordingly persuaded in 1865 to exclude Hindus, Muhammadans and Buddhists from the operation of the Succession Act. For the same reason it was declared, even as late as 1882, that nothing in the second chapter of the Transfer of Property Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law. By 1870, however, the Legislature though fit to enact that, in certain parts of India (including the Presidency-towns), Hindu wills should be subject to the operation of certain sections of the Succession Act. But, as it was still a matter of controversy what exactly were the limits under the Hindu law of a person's powers of disposition, a limited saving clause was inserted as section 3 of the Hindu Wills Act. When the decision in the *Tagore Case*(1) was reaffirmed by their Lordships in successive pronouncements, it turned out that the power of disposition permitted to Hindus was considerably narrower than under the Succession Act and the Transfer of Property Act. It was accordingly considered necessary to resort to legislation for the purpose of getting rid

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of the decision in the *Tagore Case*(1). Madras Act I of 1914 was the first fruit of this movement and India Act XV of 1916 (The Hindu Disposition of Property Act) introduced similar provisions for the benefit of the other provinces in British India.

It may be noticed, in passing, that, while in the statement of objects and reasons accompanying the Bill, which became the India Act XV of 1916, its effect was stated to be to enable Hindus

“to make dispositions of their property to the same extent and subject to the same limitations as other communities in British India”,

the Madras Bill was described by its framers as intended to carry out the wishes of a testator “subject to the very same limitations which exist under the English Law”. It thus happened that in the India Bill both section 100 and section 101 of the Succession Act were reproduced and in the final Act these two sections were specifically referred to, whereas, in the Madras Bill and in Madras Act I of 1914, only section 101 was adopted. When Madras Act I of 1914 was declared *ultra vires* of the Provincial Legislature so far as it applied to the Presidency-town, the Indian Legislature solved the difficulty by enacting Act VIII of 1921. But, as Mr. Narasimha Ayyar points out, the Indian Legislature when dealing with this matter thought fit to adopt the language of the Madras Act instead of following that of Act XV of 1916.

In determining the effect of the omission to reproduce section 100 of the Succession Act in Madras Act I of 1914, it must be remembered that

Act I of 1914 was applicable to the whole of the Presidency whereas section 100 of the Succession Act had been declared by the Hindu Wills Act to be applicable only to wills executed in the City of Madras or relating to immovable property in the city. And, as the extract already quoted from the statements of objects and reasons will show, the sponsors of the measure were not prepared to make section 100 applicable to the whole of the Presidency. This is very different from enacting that section 100 shall not *continue* to apply even to cases to which it had already been declared applicable by the Hindu Wills Act. This certainly is not the effect of the Madras Act. It was argued, with some justification, that, as the India Act VIII of 1921 dealt only with the law applicable to the City of Madras, the omission of section 100 even from that Act has greater significance. But Mr. Doraiswami Ayyar, the learned Counsel for the appellant, points out that the scope and extent of application of Act VIII of 1921 are not even as to the City of Madras identical with those stated in the Hindu Wills Act, because the former relates to wills executed by persons *domiciled* in Madras and is not, like the latter, limited to wills executed in the city or relating to immovable property in the city. Even apart from this difference, the frame of Act VIII of 1921 shows that, as the only purpose of that legislation was to remove the objection of *ultra vires* in respect of the Madras Act, the Indian Legislature merely reproduced the language of the Madras Act. Whatever may be the reason for the omission of section 100 from Act VIII of 1921, it is not possible to hold that, merely by reason of this

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omission, the *express* declaration in section 2 of the Hindu Wills Act making section 100 applicable to Hindu wills in the City of Madras must be deemed to have been taken away. This will be carrying the doctrine of repeal by implication far beyond its legitimate limits.

Though it may not be permissible to refer to later legislation to control the effect of a clear enactment in an earlier statute, it is, in the circumstances above explained, not without significance that, when the attention of the Legislature was pointedly directed to this subject in 1929, it made the position clearer by The Transfer of Property (Amendment) Supplementary Act (XXI of 1929), section 13 of which subjects the power of disposition given by Act VIII of 1921 to the limitations contained in section 113 of the Succession Act of 1925 (corresponding to section 100 of the Succession Act of 1865). It is true that this amending Act (by section 11) extends section 113 of the Succession Act even to dispositions outside the City of Madras, and to this extent makes a *new* provision. But the importance of sections 11 and 13 of the Act of 1929 lies in this, that they indicate that the Legislature did not consider it inappropriate to apply section 113 to Hindu wills. This is also clear from the fact that by section 3 of Act XV of 1916 and by section 57 of the Succession Act of 1925 this provision has been made applicable to Hindu wills. There is accordingly no reason for assuming that Act VIII of 1921 intended to repeal by implication so much of the Hindu Wills Act as applied the corresponding provision in the Succession Act of 1865 to Hindu wills in the City of Madras.

We are therefore of opinion that the disposition in favour of the plaintiff under Exhibit A is void under section 100 of the Succession Act of 1865 and this invalidity is not prevented or cured by Act VIII of 1921. The appeal must therefore be allowed and the suit dismissed even as against the appellant. The appellant will have the costs of this appeal but we do not propose to interfere with the order as to costs of the trial Court.

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AMMAL.

APPELLATE CIVIL.

Before Mr Justice Ramesam and Mr. Justice Madhavan Nair.

K. PITCHIAH CHETTIAR (SECOND DEFENDANT), APPELLANT,

v.

G. SUBRAMANIAM CHETTIAR AND TWO OTHERS (PLAINTIFF,
FIRST DEFENDANT AND THIRD DEFENDANT), RESPONDENTS.*

1934,
February 9.

Indian Contract Act (IX of 1872), sec. 253—Indian Evidence Act (I of 1872), sec. 114—Partnership—Unequal shares in respect of profits—Absence of special agreement to the contrary regarding losses—Same inequality applicable to losses also.

The fair inference that could be drawn from sections 253 of the Indian Contract Act and 114 of the Indian Evidence Act is that, in the absence of a special agreement to the contrary, if unequal shares between partners are admitted in a partnership in respect of the sharing of profits the same inequality of shares apply to losses also.

APPEAL from the judgment of STONE J., dated the 27th day of November 1933, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 571 of 1931.

* Original Side Appeal No. 2 of 1934.

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V. Radhakrishnayya and K. P. Mahadeva Ayyar for appellant.

T. G. Raghavachari for first respondent.

R. Thirumalaithathachari for second respondent.

R. V. V. Tatachariar for third respondent.

RAMESAM J. The JUDGMENT of the Court was delivered by RAMESAM J.—This appeal arises out of a partnership action. The plaintiff and the three defendants carried on the partnership. Towards the end it was working at a loss and the plaintiff filed the suit on 16th November 1931 for winding up the partnership. In the plaint the plaintiff alleged that the shares were as follows :—

Plaintiff	...	...	Four annas,
First defendant	...	...	Four annas,
Second defendant	...	...	Four annas,
Third defendant	...	...	Two and a half annas,

out of a total of fourteen and a half annas, in other words, the shares were eight twenty-ninth, eight twenty-ninth, eight twenty-ninth and five twenty-ninth. It is unnecessary to notice the written statement of the first defendant.

Defendants 2 and 3 filed a joint written statement in which they admitted that there was a partnership of which they were members but denied that they were liable to bear any proportion of the losses. At the first hearing two issues were framed :

(1) What are the terms of the partnership agreement between the plaintiff and the defendants?

(2) Are the defendants 2 and 3 partners and if so are they not liable for the losses of the partnership?

On 19th April 1932 the matter was referred to the Official Referee for taking accounts.

order expressly reserved the question of whether some partners are or are not liable for losses. A preliminary decree was passed on 28th April in which it was stated that all the partners were interested in the assets and profits in equal proportions. This seems to be a mistake because neither the pleadings nor the issues nor the order of the learned Judge referring the matter to the Official Referee stated that the parties were to be interested in the assets and liabilities in equal proportions. But, however, as nobody is affected by it and as everybody knew that the partnership ended in loss, nobody cared to question the correctness of this statement in the preliminary decree by an appeal. Clause 7 of the preliminary decree provided that the question whether some partners are or are not liable for losses of the said partnership be and is hereby reserved. The Official Referee submitted his report on 24th November 1932. Objections were filed by both parties and when the case came on for disposal before our brother, STONE J., on 27th November 1933, the objections were not pressed by the learned Advocate who appeared for the second and third defendants, Mr. V. V. Srinivasa Ayyangar, and nothing more was said by him. Thereupon the learned Judge passed a decree directing that the losses also should be borne in the proportions alleged in the plaint. The second defendant has filed this appeal. The third defendant says that he is too poor to file an appeal and that he supports the second defendant.

On this appeal it is argued that the second defendant had witnesses ready and they ought to have been examined by the learned Judge. Upon

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this argument being put forward we wanted to ascertain what exactly happened at the time of the final hoaring. We accordingly requested Mr. Srinivasa Ayyangar to state what happened before the learned Judge. He told us that he said that he would not press the objections and nothing else. He admitted that he never offered to examine his witnesses. Mr. Radhakrishnayya, who now appears for the appellant, argues that even if this were so the burden of proof is on the plaintiff to prove the case set up by him in his plaint and if he does not prove his case he ought to fail even if the defendant does not examine his witnesses. The question thus reduces itself to one of burden of proof, in other words, who should fail if no evidence is offered on either side. Section 253 (2) of the Indian Contract Act lays down that 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. As I read the section, it lays down two presumptions with which the Court should start. The two presumptions are clubbed in one sub-section. The first is, if no specific contract is proved, the shares of the partners must be presumed to be equal. In the present case the plaintiff alleged unequal shares which were not denied by the defendants. So the parties being agreed on their pleadings as to the shares possessed by them in the profits, there is no scope for the application of this first presumption. The second presumption is that where the partners are to participate in the profits in certain shares they should also participate in the losses in similar shares. Now the section says that both

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should be in equal shares but implies that if unequal shares are admitted by the partners as to profits that applies equally to losses. In the absence of a special agreement, that this should be the presumption with which one should start is merely a matter of common sense and in India one has only to rely on section 114 of the Evidence Act for such a principle. This principle is in consonance with the decision in *Nowell v. Nowell*(1) where there was an agreement to share the profits and losses in certain shares but the question arose whether that agreement as to losses covered the case of a partner advancing a larger capital and the capital being lost. JAMES V.C. observed :

“Whether moneys are brought in originally as capital, or advanced subsequently, or paid by one partner at the winding up, is, in my judgment, wholly immaterial. In the absence of stipulation to the contrary, the community of profit involves like community of loss.”

Though the agreement in that case covered only the actual loss in the carrying out of the partnership and did not cover excess advance of capital followed by loss of capital, still the principle that the community of profit involves like community of loss was applied by the learned Judge. The learned Judge then gives an arithmetical example where one partner advances £1,000 for speculation in cotton, and winds up like this :

“If it only produces £900 could it be contended that the capitalist partner is to put up with the entire loss; and that the game of partnership between the man without money, and the man with, was to be on the principle of ‘heads, I win; tails, you lose?’”

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We entirely agree with those remarks of the learned Judge. The same principle is also inferable from the remarks of JESSEL M.R. in *In re Albion Life Assurance Society*(1). This case related to an insurance company which is of course a more complicated matter than a partnership. In an insurance company it is the shareholders that advance the capital, and, though the shareholders and the policyholders participate in the profits, the shareholders are to participate first in certain percentage in the profits and then only all are to share in the profits equally. On this ground it was held that their position is not similar in an insurance company where, if there was a loss, the shareholders must share the losses and the policyholders cannot be asked to bear them. But in discussing the matter JESSEL M.R. states the principle thus :

"It is said, as a general proposition of law, that in ordinary mercantile partnerships where there is a community of profits in a definite proportion, the fair inference is that the losses are to be shared in the same proportion."

This principle, though it could not be applied in that particular case, states a general principle applicable to all cases of ordinary partnerships. The learned Judge then proceeds to say that it must be logically carried out to its legitimate extent and where the capital is lost the partners should bear the loss. In some respects it resembles the case before JAMES V.C. The principle above stated by us is exactly the same as in these two cases and we think that it is embodied in section 253 of the Contract Act. That being so, it is for the second and third defendants to adduce

(1) (1880) 16 Ch. D. 83, 87.

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evidence to show that while they participated in the profits they were not liable for any share of the loss. It is so peculiar a contract and so much out of the ordinary partnerships that, if no such contract is proved, the general presumption that profits and losses are to be shared in equal or similar shares would apply and the plaintiff would get a decree. Therefore the burden of proof is on the defendants and, they not having offered to adduce evidence, the learned Judge's judgment is right. The appeal must therefore fail and is dismissed with costs.

MADHAVAN NAIR J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

NETI VENKATA SOMAYAJULU GARU (PLAINTIFF),
APPELLANT,

1934,
February 16.

v.

ADUSUMILLI VENKANNA (DEFENDANT), RESPONDENT.*

*Appeal—Right of—Proceedings extra cursum curiae and not so
—Distinction—Abridgement of trial by seeking decision on
incomplete evidence—Proceeding not extra cursum curiae
in case of—Right of appeal when nevertheless lost in such
a case.*

If a proceeding is *extra cursum curiae*, the decision is in the nature of a consent order and generally the right of appeal against it is barred. If, on the other hand, the proceeding is not *extra cursum curiae*, unless there is a clear waiver of the right, the right of appeal will not be lost; in that case, the person who contends that no appeal will lie must clearly show that

* Second Appeal No. 107 of 1930.

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the right has, either expressly or by necessary implication, been given up.

Where the parties to a suit abridged the trial by seeking a decision on incomplete evidence,

held that that being no more than some deviation from the ordinary procedure, the judgment was not *extra cursum curiae*.

Where the joint statement filed by the parties for the purpose of abridging the trial ran as follows:—

“At the request of the defendant herein, this Court personally inspected the suit plot . . . Both the parties by consent pray that the Court may be pleased to consider the evidence already on the record and the documents filed so far and give a final, decisive adjudication between the parties, without there being any necessity for examining further witnesses and so on. Both the parties further agree to be bound by the decision and to act according to it by giving full effect thereto. We therefore pray that the Court may make an order accordingly.”,

held that the intention of the parties was to give up their right of appeal.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 23 of 1929 (Appeal Suit No. 109 of 1928 on the file of the District Court of East Gōdāvari) preferred against the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 612 of 1926.

G. Lakshmananna for appellant.

A. Lakshmayya for respondent.

JUDGMENT.

This appeal raises an important question and has been fully argued by the Counsel on both sides. The facts may be briefly stated. In the suit the plaintiff claimed an easement of necessity in respect of certain lands. At the defendant's request, the District Munsif made a local inspection of the site. Then, after the plaintiff was

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examined-in-chief and some documents were filed, the parties requested the Court to give a decision on the evidence already on the record and intimated that they proposed to adduce no further evidence. A joint statement to that effect was filed and the decision in the case really turns upon the proper construction of that document. To resume the story, the Munsif gave his decision partly in favour of the plaintiff and partly against him. The plaintiff, dissatisfied with that judgment, appealed to the Subordinate Judge. He held that, by reason of the joint statement to which I have referred, the plaintiff was debarred from filing the appeal. The plaintiff, whose appeal has thus been dismissed, questions the correctness of that view.

The proper test to apply is whether the judgment in regard to which the question arises has been pronounced *extra cursum curiae*; if so, it is in the nature of an arbiter's award and, as a general rule at least, no appeal from it will lie. This position is well illustrated by *Burgess v. Morton*(1). The rules which govern the procedure on the Common Law side of the High Court of Justice do not contemplate or permit the use of a special case, except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted. But what happened there was, that the parties agreed to withdraw the case from trial and to state a special case for the purpose of trying a question of fact. It was held that the proceedings were not in the ordinary course of law but *extra cursum curiae* and that

(1) [1896] A.C. 136, 137.

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the decision should therefore be regarded as a consent order, from which no appeal will lie.

A mere deviation from the ordinary procedure does not necessarily, however, render a proceeding *extra cursum curiae*. As observed by the Judicial Committee in *Pisani v. Attorney-General for Gibraltar*(1):

“Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, such departures have never been held to deprive either of the parties of the right of appeal.”

Of the Indian cases cited at the Bar, the two most useful are *Sankaranarayana v. Ramaswamiah*(2) and *Ballabh Das v. Sri Kishen*(3); the other cases, *Chinna Venkatasami Naicken v. Venkatasami Naicken*(4), *Shahzadi Begam v. Muhammad Ibrahim*(5), *Sita Ram v. Pirai Lal*(6) and *Sri Sri Sri Ramachandra Deo Garu v. Chaitana Sahu*(7), do not throw much light on the question.

The result, however, of the cases, is, that, if the proceeding is *extra cursum curiae*, the decision is in the nature of a consent order and generally the right of appeal is barred. If, on the other hand, it is not *extra cursum curiae*, unless there is a clear waiver of the right, the right of appeal will not be lost; in that case, the person who contends that no appeal will lie must clearly show that the right has, either expressly or by necessary implication, been given up. In the present instance, the parties abridged the trial by

(1) (1874) L.R. 5 P. C. 516.

(2) (1925) 89 I.C. 586.

(5) (1920) I.L.R. 43 All. 266.

(2) (1922) I.L.R. 47 Mad. 39.

(4) (1919) I.L.R. 42 Mad. 625.

(6) (1925) I.L.R. 47 All. 921.

(7) (1920) 39 M.L.J. 68 (P.C.).

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seeking a decision on incomplete evidence, and this being no more than some deviation from the ordinary procedure, the judgment was not *extra cursum curiae*. Then the question really is, whether, on a true construction of the document, the right of appeal has clearly and unequivocally been waived. With these observations, let me now turn to the document:

“At the request of the defendant herein, this Court personally inspected the suit plot on 5th February 1928. Both the parties by consent pray that the Court may be pleased to consider the evidence already on the record and the documents filed so far and give a final, decisive adjudication between the parties, without there being any necessity for examining further witnesses and so on. Both the parties further agree to be bound by the decision and to act according to it by giving full effect thereto. We therefore pray that the Court may make an order accordingly.”

There are of course no express words that the parties waive their right of appeal; but the conclusion is irresistible that their intention was to give up that right. There are two expressions in the Telugu original, which in my opinion clinch the matter. The first is “parishkaram”, used in connection with the final decision to be given and the second, “amool zarupu”, an expression often used in the sense of executing an order. I am therefore satisfied that, although the proceeding was not *extra cursum curiae*, the right of appeal is nevertheless barred by reason of the special agreement.

The second appeal therefore fails and is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and
Mr. Justice Anantakrishna Ayyar.

1934,
February 22.

AKAVANDE MULANHUR VATAKETHIL KIZHAKKE
NAYAR VEETIL KARNAVASTRI SREEDEVI
NETHIAR AND THIRTEEN OTHERS (RESPONDENTS 1 TO 14
IN SECOND APPEAL NO. 713 OF 1930), APPELLANTS,

v.

AKAVANDE MULANHUR ELAYAT VATAKKE NAIR
VEETIL KARNAVAN PERUVUNNI NAIR AND
TEN OTHERS (APPELLANT AND RESPONDENTS NOS. 16 TO
23, 15 AND 24 IN DO.) RESPONDENTS.*

*Malabar Law—Tarwad or tavazhi properties—Division of,
per capita or per stirpes—Collateral succession—Case of—
Nearness in degree of relationship if countenanced by
Malabar Law in—Question as to—Letters Patent Appeal—
Raising of question for first time in—Permissibility—
Representation—Principle of—Applicability of, in case of
collateral succession in Malabar Law.*

When it is admitted that the properties of a tarwad or tavazhi should be divided and the only question is whether the division should be *per capita* or *per stirpes*, *prima facie* the division should be *per capita*, unless all persons interested agree to another mode of division. *Naraini Kutti Amma v. Achutan Kutti Nair*, (1913) I.L.R. 42 Mad. 292, is not an authority for the position that partition under Malabar Law of tarwad properties should be *per stirpes* and not *per capita*. The effect of that decision read with the decision in Appeal Suit No. 237 of 1918 is only that a *bona fide* partition arrangement assented to by all the adult members of the tarwad will not be set aside at the instance of a member who was a minor at the time

* Letters Patent Appeal No. 87 of 1931.

of partition on the sole ground that the partition was according to either of the two methods and not according to the other.

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Quaere whether nearness in degree of relationship is not countenanced by the Malabar Law in a case of collateral succession.

The question that in a case of collateral succession the nearest heirs are entitled to succeed to the properties of the deceased and that the claims of heirs more remote should be rejected cannot be allowed to be raised for the first time in Letters Patent Appeal.

Per ANANTAKRISHNA AYYAR J.—The principle of representation is inapplicable to cases of collateral succession under the Malabar Law.

APPEAL under Clause 15 of the Letters Patent against the judgment of CURGENVEN J., dated 16th September 1931 in Second Appeal No. 713 of 1930, preferred to the High Court against the decree of the Court of the Subordinate Judge at Ottapalam in Appeal Suit No. 77 of 1928—(Original Suit No. 266 of 1925, District Munsif's Court of Ottapalam).

T. R. Ramachandra Ayyar for *K. Kuttikrishna Menon* and *M. Chinnappan Nair* for appellants.

B. Sitarama Rao for *S. Venkatachala Sastri* and *N. R. Sesha Ayyar* for respondents.

Cur. adv. vult.

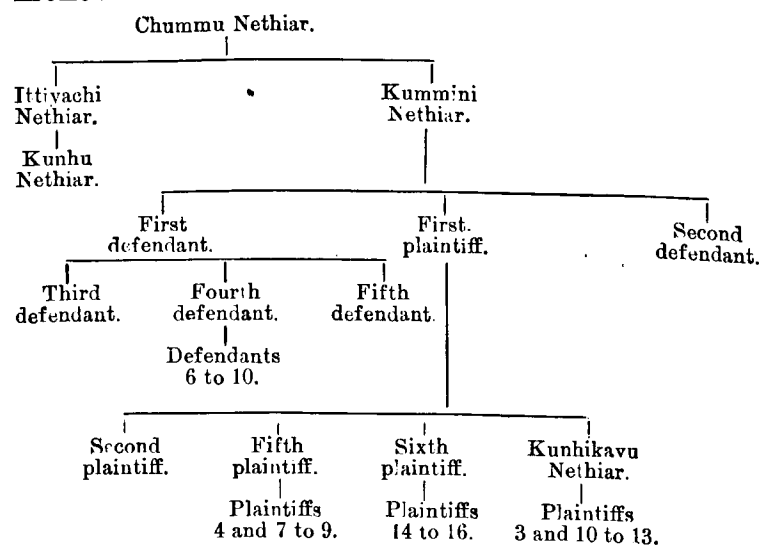
JUDGMENT.

MADHAVAN NAIR J.—Plaintiffs are the appellants. The suit out of which this Letters Patent Appeal arises was instituted by the plaintiffs for partition and recovery of their share of the plaintiff properties, together with mesne profits. The properties belonged to one Kunhu Nethiar who was the last member of a tarwad. The relationship of the parties will appear from the following

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genealogical table found in the Munsif's judgment:—



The plaintiffs and defendants 1 to 10 are the descendants of Kummini Nethiar who was the deceased Kunhu Nethiar's mother's sister. Kummini Nethiar died leaving three children, the first defendant and the first plaintiff, daughters, and the second defendant, a son. First defendant's descendants are defendants 3, 4, 5 and 6 to 10. The first plaintiff's descendants are plaintiffs 2, 5, 6, 4, 7 to 9, 14 to 16, 3 and 10 to 13. The descendants of Kummini Nethiar divided themselves on *per capita* basis into three branches consisting of the plaintiffs, defendants 1 and 3 to 10 and the second defendant by a deed of partition. Kummini Nethiar was the last to divide from the branch of the deceased Kunhu Nethiar. It is not now disputed that the heirs to Kunhu Nethiar's properties are the three divided tavazhis descended from Kummini Nethiar.

The plaintiffs form an undivided group of sixteen members. They claimed that the properties

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of Kunhu Nethiar should be divided into twenty six equal shares of which sixteen shares should be allowed to their branch. Defendants 1 and 3 to 10 and the second defendant claimed that the properties should be divided into three equal shares and that one share should be given to each of the branches. The contest between the parties relates to the question whether the division of the properties should be *per capita* as contended for by the plaintiffs or *per stirpes* as contended for by the defendants. If the plaintiffs' contention is accepted, they will be entitled to a larger share of the properties than they would get according to the defendants' contention.

The learned District Munsif held that the division of the properties should be *per stirpes* and not *per capita* and passed a decree on that basis. This was set aside by the learned Subordinate Judge who held that the partition should be *per capita* and not *per stirpes*. In second appeal the decision of the learned Subordinate Judge was set aside and that of the District Munsif was restored by CURGENVEN J. This Letters Patent Appeal is against his judgment.

The variations of opinion noted above show that the question whether the partition of tarwad property under the Malabar law should be according to the tavazhi (*per stirpes*) or according to the individuals (*per capita*) is not quite an easy one to decide. This difficulty arises from the fact that compulsory partition is not allowed under the Malabar law; and so necessarily there are no decisions directly bearing on the point. CURGENVEN J. based his decision on the following observation of

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the learned Judges in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) that

“the authorities show conclusively that partition *per stirpes*, or, what comes to the same thing, partition by *tavazhies*, has, to say the least, a greater body of authority in its favour than partition *per capita*.”

In that case it was held that members of a Malabar tarwad who were minors when a partition was made with the consent of all the adult members at the time cannot upset the partition on the ground that the division was *per stirpes*, namely by *tavazhies*, and not *per capita*. This decision cannot in my opinion be understood as deciding that partition under the Malabar law of tarwad properties should be *per stirpes* and not *per capita*. What was decided was only this, that a partition which was effected with the consent of all the adult members cannot be said to prejudice those who were minors at the time of the partition, on the mere ground that the method of partition adopted was *per stirpes* and not *per capita*. This appears to be clear from the reference made in the judgment to the decisions in *Veluthakkal Chirudevi v. Veluthakkal Tarwad Karnavan*(2) and *Yechuri Ramamurti v. Yechuri Ramamma*(3). In the former case SANKARAN NAIR J. observed :

“Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be reopened”

In the latter case it was pointed out that “the partitions effected by the adult members of the family are binding on the minor members in the absence of negligence or fraud.”

(1) (1918) I.L.R. 42 Mad. 292.

(2) (1916) 31 M.L.J. 879.

(3) (1915) 30 M.L.J. 308.

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In another decision of this Court relied on by the respondents (in second appeal)—appellants—, Appeal Suit No. 237 of 1918, which was apparently not brought to the notice of CURGENVEN J., the impropriety of partition agreed to by all the adult members was once again raised by the members who were minors at the time of the partition not on the ground that the partition effected was *per stirpes* but on the ground that it was *per capita* when it should have been *per stirpes*. The learned Judges repelled this contention and made the following observations which show the exact scope of that decision and also of the decision in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) referred to in their judgment:—

“The appellants contended that the partition was improper because the division was *per capita* when it should have been *per stirpes*. There is no rule that a partition *per capita* is bad on that account alone. It must be left largely to the parties to a partition to decide how far it should be *per capita* and how far *per stirpes*. No rigid rule can be laid down on the point. As partition can only be effected by consent of parties, it will be a serious obstacle in the way of partition if any rigid rule is laid down as contended. We are of opinion that there is no rule that a partition *per capita* should be considered as an improper partition by itself.”

The substance of the two decisions read together is only this, that the minors at the time of partition on attaining majority cannot claim to set aside the partition on the ground that the partition effected was *per stirpes* or *per capita*; they will have to show real prejudice to set aside the partition, and the adoption of either of the above methods, which can have been according to law only by the consent of all the members, cannot be said to prejudice them. Viewed in this light,

(1) (1918) I.L.R. 42 Mad. 292.

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neither the decision in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) nor the decision in Appeal Suit No. 237 of 1918 helps us in this case. The same may be said about the decision in Second Appeal No. 656 of 1922. In that case the observations already quoted from *Naraini Kutti Amma v. Achutan Kutti Nair*(1) were used to support the proposition that as a male cannot found a tavazhi he must be excluded from the division altogether. It was held that the learned Judges in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) did not mean any such thing. In *Sulaiman v. Biyaththumma*(2) the Judicial Committee observed in a case from Malabar in which the parties were governed by the Marumakkathayam Law :

“It is true that for the purpose of arriving at the proper mode of division there is a reference to the three stocks of descent, Bavumma, Kunhi Kathiya and Thaki, but this was so of necessity, and was merely an application of the rule that division for the purpose of partition is stirpital, though, as between the members of any one class, it is capital.”

These observations relied on by both parties in support of their respective arguments are not conclusive on the question that we are called upon to decide, that question not being before their Lordships and their observations having been made with reference to the mode of division adopted in a razi-petition referred to as Exhibit XLII in the suit. The decision in *Ammu v. Kunhunni Menon*(3) does not deal with the question under consideration. This being the state of the authorities, and there being no evidence as to custom, which if available would be the deciding factor, we have to arrive at our conclusion on the

(1) (1918) I.L.R. 42 Mad. 292.

(2) (1916) 32 M.L.J. 137 (P.C.).

(3) (1893) 4 M.L.J. 43.

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general principles underlying the Malabar Law. There are no doubt passages in Wigram's Book on Malabar Law (page 6) and in Strange's Manual of Hindu Law (*see* section 389) which may support the contention that partition must be *per stirpes* and not *per capita*. The views of these and other writers were examined by Mr. Justice SUNDARA AYYAR in an article on Topics of Malabar Law appearing in 9 Madras Law Journal, page 135 at 140 (Journal portion). In that article the view is propounded that division is made not *per stirpes* but *per capita*. With this view I agree. Mr. Strange's observation that the basis of such a division would be according to the thavazhies or branches of the family does not mean necessarily that the property given to the members of the thavazhies on partition is not allotted *per capita*. Mr. Wigram refers to a decision of 1810 by the Provincial Court of Western Division, but the decision not being available due weight cannot be given to the author's statement that partition is made *per stirpes* and not *per capita*. The opinions referred to are no doubt entitled to consideration but they cannot be given the weight of decisions of Courts of law. Having regard to the fact that there are no reported decisions either way, the question has to be decided, as already stated, on the general principles underlying the Malabar Law.

In this Court Mr. Sitarama Rao raised a new point of law which was not raised at any previous stage. I will deal with it first. It will be observed that the properties sought to be divided belonged to the deceased Kunhu Nethiar and the present claimants claim it as her heirs. It is

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argued that the case being one of collateral succession, the nearest heirs entitled to it are the first defendant, the first plaintiff and the second defendant and that the claims of the others being claims of people more remote should be rejected. This would be so according to the Hindu Law, but the question has not been raised or decided under the Malabar Law. In support of his contention Mr. Sitarama Rao referred us to *Krishnan v. Damodaran*(1), in which it was decided that self-acquisitions of a female member of a Marumakkathayam tarwad do not lapse on her death to her tarwad, but descend to her tavazhi, which will be her issue, if she has any, and, in the absence of the issue, her mother and her descendants. In this case, as pointed out by SADASIVA AYYAR J. in *Manjappa Ajri v. Marudevi Hengsu* (2), and as will appear clearly from the judgment in the case itself, the learned Judges had in contemplation

“only two alternatives, namely inheritance by all the members of the larger tarwad or inheritance by all the members of the smaller tavazhi, and not a third alternative, namely, inheritance by those members only of the smaller tavazhi who were nearest in blood relationship to the deceased.”

Having regard to the terms of reference to the Full Bench, which was,

“whether the self-acquisitions of a female member of a Marumakkathayam tarwad would on her death lapse to her tarwad of which she was a member or whether they would descend to her *nearest heirs* (the italics are mine) or her tavazhi”,

SANKARAN NAIR J. said: “The reference also suggests whether the nearest heirs take” and “this, if intended to refer to a class of heirs

other than the tavazhi, may raise another question.” It is this observation which was made the basis of his argument by the learned Counsel; but in the judgment there is no further reference to it; and SUNDARA AYYAR J. uses the expressions “nearest heirs” and “tavazhi” indiscriminately to mean the same thing. In *Manjappa Ajri v. Marudevi Hengsu* (1) a female member of an Aliyasanthana family died issueless leaving self-acquired property. There was no issue of her mother then living, and the only relations the deceased left behind her were her own deceased mother's sister and the issue of another sister of her mother. It being contended that the sole heir was the deceased's mother's sister as being the nearest relation to her, to the exclusion of the other members of the branch to which the deceased belonged at the time of her death, it was held that,

“under the Aliyasanthana law all the members of the nearest non-extinct branch to which the issueless deceased belonged at the time of her death (namely her maternal grandmother's descendants) were entitled to succeed and not only one of them, namely, her mother's sister who is nearer in degree than the others.”

This decision is relied on by Mr. Ramachandra Ayyar to show that nearness in degree of relationship is not countenanced by the Malabar Law in a case of collateral succession. Beyond making this reference to the arguments on this question I do not think it is necessary to deal with the point any further as in my opinion the respondents should not be allowed to raise this question which is altogether a new one at this late stage of the case.

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(1) (1912) I.L.R. 38 Mad. 48 (F.B.). (2) (1915) I.L.R. 39 Mad. 12.

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We should deal with the case as it was dealt with throughout as if the property sought to be divided was the property which *belonged* to the tarwad of the plaintiffs and defendants, the question being whether in partitioning between them the division should be *stirpital* or *capital*. The difficulty in accepting Mr. Sitarama Rao's contention that division should be *per stirpes* is that the second defendant cannot constitute a tavazhi by himself.

"A tavazhi means a woman and her descendants in the female line. . . . A female without issue or a male belongs to the tavazhi consisting of his or her mother and the mother's descendants in the female line; and when it is said that the property of that person descends to his or her tavazhi, it is meant that it devolves on this body of persons."

See *Krishnan v. Damodaran* (1). If the second defendant's contention is accepted, then it will follow that the one-third share which is claimed to be his portion of the properties will not go exclusively to himself but will have to be shared with a body of persons stated above as constituting his tavazhi. This conclusion is not acceptable to the second defendant. The law is well settled that the properties of a Malabar tarwad belong to all the members constituting the tarwad. Each member of the tarwad is a co-owner of the properties along with the other members and on this co-ownership depends amongst other rights his right to be maintained by the karnavan and his right to a share of the properties if a partition were made and the tarwad is broken up by common consent. In suits for maintenance each individual can claim maintenance for himself or herself and as a rule a

(1) (1912) I.L.R. 38 Mad. 48, 53 (F.B.).

per capita share is allowed to the claimant by the Court. If the right to partition is based on co-ownership of the tarwad properties, then I fail to see how on principle such co-ownership can be enforced except by ordering *per capita* partition as is done in the case of maintenance. Partition according to tavazhies being fraught with difficulties with respect to a male who cannot be the root of a tavazhi, as in the present case, the only alternative is to hold that partition of the tarwad properties should be *per capita*. And this was the opinion of the learned Subordinate Judge. On principle we cannot see any escape from this conclusion. In the Cochin Report on Marumakathayam Legislation it is stated that according to the customary law partition is *per capita* and not *per stirpes*. [See paragraph 157 at page 41 of the Report of the Nair Regulation Committee (1095 M.E.)]. In the absence of any binding decision of this Court we hold that the plaintiffs are entitled to claim partition *per capita*.

For the above reasons we set aside the decision of the learned Judge and restore that of the Subordinate Judge. The plaintiffs will get all their costs in the High Court.

ANANTAKRISHNA AYYAR J.—I agree. Kummini Nethiar was divided from her elder sister Ittyachi Nethiar. Kummini had two daughters—(the first defendant and the first plaintiff)—and one son—(the second defendant). Defendants 3, 4 and 5 are the children of the first defendant, and defendants 6 to 10 are the children of the fourth defendant. Plaintiffs 2, 5, 6 and the mother of plaintiffs 3 and 10 to 13 are the children of the first plaintiff, the other plaintiffs—4 and 7 to 9—

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are the children of the fifth plaintiff, and plaintiffs 14 to 16 are the children of the sixth plaintiff. Kummini Nethiar is dead. Ittyachi died leaving her daughter—Kunhu Nethiar. In 1920, Kunhu Nethiar died leaving some property, and the question is which of the parties to the present suit are entitled to the same. Kummini Nethiar died before 1908. In 1908, the plaintiffs and the defendants divided the properties of their tarwad among members of three branches consisting of (a) plaintiffs; (b) defendants 1 and 3 to 10; and (c) the second defendant. The partition was effected on *per capita* basis; the second defendant was given one share; the plaintiffs were given as many shares as there were members in their branch, and so also defendants 1 and 3 to 10. Kunhu Nethiar died in 1920.

The plaintiffs stated that they—sixteen in number—and the defendants—ten in number—in all twentysix, were equally entitled to Kunhu Nethiar's properties; and in the plaint, the plaintiffs asked for partition and delivery to them of their 16/26 shares in the property of Kunhu Nethiar.

The written statement filed by the first defendant stated that the heirs of Kunhu Nethiar were the three divided tavazhies, namely, (a) that of the plaintiffs, (b) that of defendants 1 and 3 to 10, and (c) that of the second defendant, and that the plaintiffs were entitled only to one-third share of the properties left by Kunhu Nethiar and not to 16/26 shares.

The second defendant raised exactly similar contentions, adopting first defendant's written statement.

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The learned District Munsif held that the plaintiffs were not entitled to division on *per capita* basis, and that the proper mode of division was *per stirpes*;—that is, one share to the plaintiffs' group, the second to the group of defendants 1 and 3 to 10, and the third to the second defendant who is the sole member of his tavazhi.

On plaintiffs' appeal, the learned Subordinate Judge held that the plaintiffs were entitled to a division on *per capita* basis, and that the plaintiffs were entitled to a division of 16/26 shares of the properties and not to one-third therein.

The second defendant preferred Second Appeal No. 713 of 1930 and the learned Judge of this Court held as follows:—

"The principle I propose to follow is that, in the absence of an agreement or of specific proof of the custom to the contrary, the division must be on *per stirpes*."

The decree of the District Munsif was accordingly restored. The learned Judge granted leave to appeal, having regard to the importance of the question, and the plaintiffs have preferred this Letters Patent Appeal.

The learned Advocate for the second defendant wanted to raise the question that the principle of propinquity should govern the present case and that the heirs to Kunhu Nethiar's properties would be only the first defendant, the first plaintiff and the second defendant, they being the members nearest related to the deceased Kunhu Nethiar; but, in the written statements filed by both the first and the second defendants, it was admitted that the heirs of Kunhu Nethiar were the three divided tavazhies, namely, (a) that of plaintiff, (b) that of defendants 1 and 3 to 10, and

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(c) that of the second defendant, and that the properties left by Kunhu Nethiar belonged equally to the three tavazhies. Before the learned Judge of this Court, a similar admission was evidently made, for the learned Judge specifically stated in his judgment as follows :—

“The property of that tavazhi (Kunhu Nethiar’s tavazhi)—it is not disputed—devolves upon the three branches —(branches of the first plaintiff, the first defendant and the second defendant).”

That being so, we do not think it right at this stage to allow the defendants to raise a new case in Letters Patent Appeal, namely, that succession in this case should be governed by the principle of propinquity or nearness, and that only the first plaintiff, the first defendant and the second defendant would be entitled to succeed as heirs. No doubt the learned Advocate for the second defendant also stated that the first plaintiff might take her one-third share on behalf of her tavazhi (descendants) and that similarly the first defendant might take her one-third share on behalf of her tavazhi (descendants); but, seeing that the case before us is one of collateral succession (as understood in Hindu Law) and not of direct succession, it is difficult to understand how the principle of representation comes in at all in such a case, since, admittedly, no such principle of representation would apply to cases of collateral succession under Hindu Law. Again, seeing that the second defendant is a male and his mother died many years before Kunhu Nethiar, it is not clear how the second defendant could be said to constitute by himself a “tavazhi”. Under Marumakkathayam Law, a female and her children would form a tavazhi, and the only tavazhi of a male is

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that of his mother. In the present case, the second defendant’s mother is dead and the second defendant’s mother’s tavazhi would include the first plaintiff and the first defendant and their descendants. I therefore share “the theoretical difficulty” experienced by the learned Judge of this Court in regarding the second defendant as forming a “tavazhi”. But, as noticed by the learned Judge, it was admitted by all parties to the present suit that the second defendant was entitled to a share, though the exact extent of the said share was in dispute. In the circumstances, in my opinion, the second defendant should not be allowed to raise quite a new point at the hearing of this Letters Patent Appeal, different from the case of the parties in all the earlier stages of this litigation.

At page 53 of *Krishnan v. Damodaran*(1), SANKARAN NAIR J. observed as follows :—

“The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the tavazhi, may raise another question.”

The exact question had not to be decided in that case, as the plaintiffs in that suit should fail unless the tarwad be the heir. In the circumstances of the present case, and for reasons mentioned above, the question formulated above need not be answered in the present appeal.

The facts not being in dispute, the only question is in what way the properties should be divided.

There are no specific texts governing the rights of parties to the present suit. As observed by

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the Privy Council in the case reported as *Raman Menon v. Raman Menon*(1) :

"The litigation is between Nayers in South Malabar and has to be decided according to the laws and usages of those persons. Those laws and usages are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognized and enforced."

We are therefore to be guided by judicial decisions and the customs and usages of the people concerned.

In *Krishnan v. Damodaran*(2) a Full Bench of this Court held :

"The self-acquisitions of a female member of a Marumakkathayam tarwad do not lapse on her death to her tarwad, but descend to her tavazhi, which will be her issue, if she has any, and, in the absence of the issue, will be her mother and her descendants."

BENSON Offg. C.J. held that

"in the absence of issue to her, the property would descend to the tavazhi to which she would in that case belong, according to the customary law of Malabar."

SUNDARA AYYAR J. held that

"the self-acquisitions of a female would descend to her nearest heirs or to her tavazhi."

SADASIVA AYYAR J. had to consider in *Manjappa Ajri v. Marudevi Hengsu*(3) as to what exactly was the effect of SUNDARA AYYAR J.'s opinion in the case reported as *Krishnan v. Damodaran*(2). At page 16 of *Manjappa Ajri v. Marudevi Hengsu*(3) SADASIVA AYYAR J. stated as follows :—

"I am reasonably clear that we had in contemplation only two alternatives, namely, inheritance by all the members

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of the larger tarwad or inheritance by all the members of the smaller tavazhi, and not a third alternative, namely, inheritance by those members only of the smaller tavazhi who were nearest in blood relationship to the deceased. SANKARAN NAIR J., however, at page 53 says :—'The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the tavazhi, may raise another question.' He however did not deem it necessary to decide that question and his answer to the reference is 'that the self-acquisitions of a female do not lapse to her tarwad but they descend to her tavazhi; if she has issue, the tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her tavazhi.' SUNDARA AYYAR and BENSON JJ. did not understand the referring order as raising any third question, and SUNDARA AYYAR J. uses the expression 'nearest heirs' and 'tavazhi' indiscriminately to mean the same thing."

If that be so, I may even take it that, according to the decision of the Full Bench, in the absence of issue, the nearest *tavazhi* of Kunhu Nethiar would take the property. The nearest tavazhi of Kunhu Nethiar would be the tavazhi of her mother's younger sister—Kummini Nethiar—in which case, all the parties to the present suit would be members of that tavazhi. Does the circumstance that Kummini Nethiar's children were divided from each other at the death of Kunhu Nethiar make any difference? The nearest tavazhi of Kunhu Nethiar succeeds. If the first defendant's and the first plaintiff's be taken to be the two nearest tavazhies to Kunhu Nethiar, then only the tavazhies of the first defendant and the first plaintiff would succeed,—the second defendant, a male, whose mother was dead, could not, apparently, have a tavazhi of his own. So the second defendant could not succeed to Kunhu Nethiar's properties, if this view be correct; but all the parties to the present litigation have

(1) (1900) I.L.R. 24 Mad. 73, 79 (P.C.). (2) (1912) I.L.R. 38 Mad. 48 (F.B.).
(3) (1915) I.L.R. 39 Mad. 12.

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admitted in all the Courts that the second defendant is entitled to a share, though there is a dispute as to the quantum of that share. Therefore, on the case and admission of the parties, the properties of Kunhu Nethiar belong to persons who are no longer members of one tavazhi, or to members of two tavazhies and to another (the second defendant). How is the property to be divided among such people? If they do not all belong to one tavazhi, then, the rule of impartibility attaching to Marumakkathayam property should not be invoked. All parties to the suit want partition. The second defendant should be given some share, and therefore, the just and proper way to do it would be to treat all persons interested as co-owners or tenants in common, and divide the property equally among all the members,—of course leaving it to them to take their shares joint (*inter se*) with any other members they like. Taking it, however, that the properties of Kunhu Nethiar devolved on the first plaintiff and her children, the first defendant and her children and also the second defendant, treating them as members of a tavazhi, or tarwad, how is the partition to be effected? There could not be partition of the properties of a Marumakkathayam tarwad except with the consent of all; see *Naraini Kutti Amma v. Achutan Kutti Nair*(1) and *Sulaiman v. Biyaththumma*(2). It was however argued that when partition takes place it should only be on *per stirpes* basis and that partition should not be on *per capita* basis. The decision in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) was strongly relied on for that position. As I read that judgment

(1) (1918) I.L.B. 42 Mad. 292. (2) (1916) 32 M.L.J. 137, 139 (P.C.).

it only decided that, where a partition was effected with the consent of all the adult members of a Marumakkathayam tarwad, it was not open to a member who was a minor at that time to impugne that partition on the mere ground that partition was effected on *per stirpes* and not on *per capita* basis and that such minor member could not upset the partition, if it was *bona fide* entered into by all the adult members of the tavazhi. In another case, Appeal No. 237 of 1918 decided by WALLIS C.J. and KRISHNAN J., a minor member sought to set aside a partition entered into by all the adult members on the sole ground that division was made *per capita*. The Court held that, if the partition was a *bona fide* arrangement come to by all the adult members of the tarwad, it could not be set aside by a minor member on that sole ground. The result is that a *bona fide* partition arrangement would be upheld, if assented to by all the adult members of the tarwad, whether the scheme of division be *per stirpes* or *per capita*. The decision of the Privy Council in *Sulaiman v. Biyaththumma*(1), in my opinion, is not against this view. The Privy Council had to construe the karar in that case and the observations of their Lordships have to be understood with reference to the facts of that case where there were three branches, one of which was given two shares, another three shares and the third four shares having regard to the number of members of each branch. I do not understand the Privy Council to have decided that partition in a Marumakkathayam tarwad should be on *per stirpes* basis only.

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(1) (1916) 32 M.L.J. 137, 139 (P.C.).

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When it is admitted that the properties of a tarwad or tavazhi should be divided, and the only question is whether the division would be *per capita* or *per stirpes*, the following circumstances should be kept in view. It has been decided that all the members of a tarwad are co-owners of the tarwad property. The seniormost male is entitled to succeed to the karnavanship, and, in the absence of an adult male, the seniormost female would be the karnavathi. In deciding on the rights of members to maintenance, the income of the tarwad property and the number of members in the whole tarwad are taken as the main considerations to be kept in view. The children of one sister are not given a lower rate of maintenance because they exceed in number the children of another. All members are equally interested in taking steps to preserve the tarwad property. It would therefore seem to follow that *prima facie*, when division has to take place, it should be *per capita*, unless all persons interested agree to another mode of division.

As observed by the Privy Council in the case reported as *Balabux v. Rukhmabai*(1), the separation of one member from a joint Hindu family does not imply that all the other members necessarily become separated from one another *inter se*. There is no presumption either way. It is open to all the other members to remain joint or to some of them only to remain joint; see Mulla's Hindu Law, seventh edition, paragraph 328. Similarly, it is open to the members of a Marumakkathayam tarwad also, when a partition takes place, to elect for some members remaining joint.

(1) (1903) I.L.R. 30 Cal. 725 (P.C.).

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They need not necessarily be the children of one female; though usually persons forming members of one tavazhi or tarwad being descendants of one female generally elect to remain joint, though separated from the others. Thus, though in practice, when a partition takes place, the children of one female remain joint with that female but separate from the others, and the shares of that female and her children are kept undivided as among themselves, yet, in fixing the number of shares, the principle of division *per capita* is the principle that is generally followed. With due respect, I am not able to follow the observations to the contrary of Mr. Strange in his Manual of Hindu Law and of Mr. Ormsby in his Marumakkathayam Law. No doubt, in one sense, the observations may be correct, namely, that the shares of the members of one tavazhi are all held by them together even after partition, and the property of the original tarwad will generally be held by a number of tavazhies after the partition. That circumstance would have been noticed by those learned authors; and probably they did not mean anything more; but, if they meant to go further and state that the division is not on *per capita* basis, I am unable to agree with them. The question was not raised in *Ammu v. Kunhunni Menon*(1). In Buchanan's Travels (Vol. 11—Canara and Malabar—page 96), it is remarked:

"A man's movable property after death is divided equally among the sons and daughters of all his sisters. His landed estate is managed by the eldest male of the family, but each individual has a right to a share of the income."

See Moore's Malabar Law, pages 176 and 177.

(1) (1893) 4 M.L.J. 43.

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All the recent writers are agreed that the existing practice in a partition is to calculate shares *per capita*. I may also state that I have come across several cases of partition in Marumakkathayam tarwads. Far from the principle of *per capita* being disregarded, it is followed to such an extent that when a female member is in her family way when the partition arrangement is being settled she is allotted another extra share for the child in her womb. This is considered quite natural, just and proper, and the claim not at all considered extraordinary. I very respectfully agree with the remarks made by Mr. Justice SUNDARA AYYAR in his article—Topics on Malabar Law—in 9 Madras Law Journal, page 135 at 139 (Journal portion). The observations to the contrary in *Naraini Kutti Amma v. Achutan Kutti Nair*(1) are merely *obiter*, and, with all respect, I feel myself unable to follow the same.

For the above reasons, I think that the division in the present case should be on *per capita* basis. In my opinion, the Letters Patent Appeal should be allowed, and the decision of the learned Subordinate Judge restored, with all costs in the High Court.

A.S.V.

(1) (1918) I.L.R. 42 Mad. 292.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

CHOKKALINGAM CHETTIAR AND TWO OTHERS (PETITIONERS
—DECREE-HOLDERS), PETITIONERS,

1934,
March 15.

v.

MUTHUSWAMI GOUNDAN AND TWO OTHERS (RESPONDENTS—
JUDGMENT-DEBTORS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 73—Satisfaction of decree obtained by decree-holder within meaning of—Date material for determination of question of—Sale in execution of a decree-holder's decree confirmed and sale proceeds available for satisfaction of his decree before date of order on application for rateable distribution—Satisfaction of his decree to extent of such sale proceeds if amounts to within meaning of sec. 73.

The petitioner, who held a decree against two defendants, brought to sale three items of properties in execution thereof. The respondent held a decree against only one of those defendants and that defendant owned only item 1 and a half of item 2 of the said items. The respondent could therefore claim rateable distribution only from out of the sale proceeds of item 1 and a half of item 2. The question was as to the basis on which the proportion as between the two rival decree-holders was to be fixed. The sales of the other items had been confirmed before the date of the lower Court's order so that their sale proceeds were available to the petitioner for satisfaction of his decree debt.

Held that the lower Court was right in proceeding on the footing that, in calculating the basis with reference to which the amount payable to the petitioner was to be fixed, his decree must be treated as satisfied to the extent of the proceeds realised by the sales of the other items which had been confirmed.

The date with reference to which the question of satisfaction or non-satisfaction of a decree within the meaning of section 73

* Civil Revision Petition No. 205 of 1931.

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of the Code of Civil Procedure has to be determined is not necessarily the date of the application for rateable distribution but may be some later date.

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 Coimbatore dated 26th August 1930 and made in Execution Petition Register No. 428 of 1929 in Original Suit No. 307 of 1927.

K. V. Ramachandra Ayyar for petitioners.

P. N. Marthandam Pillai for respondents.

JUDGMENT.

Mr. K. V. Ramachandra Ayyar has raised an interesting question in this case. Both sides admit that there is no decision dealing with this question and the arguments before me have proceeded mainly upon general considerations and a few rules of the Code.

At the outset, I pointed out to Mr. Ramachandra Ayyar that, though this Court has sometimes entertained revision petitions against orders under section 73 of the Civil Procedure Code, it is only as an exception, because this is one of the class of cases where the aggrieved party has another remedy by way of suit. Mr. Ramachandra Ayyar contended that, if the point raised in the civil revision petition is fairly clear and this Court can decide the matter once for all, it was scarcely necessary to drive the parties to another suit and I have accordingly heard him at some length. It may be that the learned Subordinate Judge was not justified in his remark that rateable distribution is a matter of equity [cf. however *Thakurdas*

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Motilal v. Joseph Iskender(1)] and it is true that the Court has got to deal with it on the terms of section 73. Having had the benefit of the argument, I see no reason to differ in the result from the lower Court's order. As the matter is one of first impression I should like to indicate the reasons for the above conclusion.

Section 73 of the Code provides that the application for rateable distribution must be made before the assets are received. Dealing with the persons to whom the money should be distributed, it speaks of them as persons who "have not obtained satisfaction" of their decrees. The relevant facts in this case are that the petitioner, who was the decree-holder in Original Suit No. 307 of 1927 on the file of the Sub-Court of Coimbatore, had obtained a decree against two sets of defendants and in execution thereof brought to sale three items of properties, all the sales taking place on 2nd April 1930. The respondent is the decree-holder in Original Suit No. 917 of 1928 on the file of the Court of the District Munsif of Tiruppur. His right to rateable distribution is not disputed, but the point raised is as to the basis on which the proportion as between the two rival decree-holders is to be fixed. The difficulty in determining this question has arisen from the fact that the decree-holder in Original Suit No. 917 of 1928 could claim rateable distribution only from out of the sale proceeds of item 1 and a half of item 2, because it is only against the owner of so much of the property sold that he has obtained a decree. The learned Subordinate Judge has proceeded on the footing that, in calculating the

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basis with reference to which the amount payable to the petitioner is to be fixed, he must treat his decree as satisfied to the extent of the proceeds realised by the sale of the properties belonging to the other judgment-debtor. It is stated in his order—and it has not been denied before me—that the sales of the other items had been confirmed before the date of his order, so that their sale proceeds were available to the decree-holder for satisfaction of his decree debt and, if there was any delay in applying them in part satisfaction of his decree, it was merely by reason of the decree-holder not taking steps to draw the money.

It cannot be disputed that in a question of rateable distribution, only the unsatisfied portion of the decree ought to be taken into account [see *Sarat Chandra Kundu v. Doyal Chand Seal*(1).] Mr. Ramachandra Ayyar contends that the learned Judge was not entitled to reduce the amount due to the decree-holder in Original Suit No. 307 of 1927 by taking into account the sale proceeds of the second set of properties because this amount could not be treated as having been received by the decree-holder either on the date of the application for rateable distribution or on the date on which the sale was held or even on the date on which the sale proceeds were paid into Court, because the sale may not be confirmed at all and it will therefore not be right to treat this amount as available to the decree-holder at all. In fact, he contends that it is the actual receipt by him before the date of the application for rateable distribution that ought to be the test or at least before the date of

(1) (1899) 3 C.W.N. 368.

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receipt of assets by the Court and not anything that may happen after the date of the application or the receipt of assets by the Court. I am unable to accept this extreme contention. When section 73 speaks of a person not having obtained satisfaction of his decree, the insertion of these words *after* the reference to the application having been made before the receipt of assets clearly suggests that the question of satisfaction or non-satisfaction may have to be determined with reference to some date later than the application for rateable distribution. I put to Mr. Ramachandra Ayyar, for the sake of illustration, a case in which a decree-holder to whom some amount was due when he applied for rateable distribution has in fact subsequently received the whole amount due to him under his decree before the time for rateable distribution arrived and wished to know whether according to his contention rateable distribution should be awarded even to such a decree-holder. Mr. Ramachandra Ayyar no doubt felt that logically he must go that length but it seems to me it proves too much [*cf. Sarat Chandra Kundu v. Doyal Chand Seal*(1) referred to *supra*]. He was no doubt right in his contention that the mere fact of the sale having taken place should not be treated as satisfying the decree-holder's decree to the extent of the possible sale proceeds; because it is clear from rule 84 of Order XXI that, if the sale is not completed by the purchaser, the 25 per cent deposit may be forfeited to the Government, and this shows that that amount cannot be treated as necessarily available to the decree-holder. It may even be that, after the whole sale

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price has been deposited into Court, application may be pending for setting aside the sale by some persons interested in the property. I am therefore willing to recognize that during such periods the sale proceeds cannot be regarded as earmarked for the satisfaction of any particular decree. But after the sale had been confirmed and when the sale proceeds paid into Court are at any moment available to the particular decree-holder, I do not see any reason why he should not be regarded as having obtained satisfaction of his decree to that extent.

The above considerations lead me to think that the learned Subordinate Judge came to a correct conclusion. At any rate, the case cannot be said to be one in which the point is so clear that it can be finally decided in revision proceedings. As already indicated, the petitioner has his remedy by suit to have this and all other cognate questions finally settled between the parties.

The revision petition is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Butler.

K. C. A. ARUNACHALA NADAR AND FOUR OTHERS
(FIRST PLAINTIFF AND LEGAL REPRESENTATIVES OF SECOND
PLAINTIFF), APPELLANTS,

1934,
February 20.

v.

SRIVILLIPUTTUR MUNICIPAL COUNCIL THROUGH ITS
CHAIRMAN (DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 65—Municipality—Agreement by, discovered to be void because not under signature of two councillors as provided by sec. 45 of Madras District Municipalities Act (IV of 1884)—Right to recover upon, under sec. 65 of Contract Act—Sec. 113 (v) of Madras District Municipalities Act (IV of 1884)—Distribution of rice in times of scarcity—Undertaking by Municipality of—Ultra vires of Municipality if.

During the period of scarcity after the war of 1914—1918 the plaintiff agreed to supply rice bags to a Municipality, which a committee duly appointed by the Municipality was to retail to private persons. The suit was for the recovery of a sum of money as the value as upon the date of delivery of certain bags of rice supplied by the plaintiffs to the Municipality pursuant to the said agreement. The plaintiffs could not sue upon contract because they had no written contract signed by two councillors as provided by section 45 of the then Madras District Municipalities Act IV of 1884.

Held that the plaintiffs were entitled to recover under section 65 of the Indian Contract Act.

A Municipality is a person who can make agreements. Sections 45 and 46 of the Madras District Municipalities Act IV of 1884 are only concerned with contracts, and that Act, while making special provision in terms as regards contracts, left agreements to be governed by the general law. If, therefore, a Municipality made an agreement which was discovered to be void because it was not under the signature of two

* Letters Patent Appeal No. 29 of 1933.

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councillors as provided by section 45 of that Act, it could not be said to go behind the statute or to render its provisions nugatory, if such an agreement was brought within the ambit of section 65 of the Indian Contract Act.

Held further that in undertaking the business of distributing rice the Municipality did not act *ultra vires*.

The safety, health, comfort and convenience of the people were all furthered by the arrangement in question within the meaning of section 113 (v) of the Madras District Municipalities Act of 1884.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of PAKENHAM WALSH J. dated the 15th day of November 1932 and passed in Second Appeal No. 1098 of 1928, preferred to the High Court against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Appeal Suit No. 99 of 1926 (Appeal Suit No. 558 of 1925, District Court, Ramnad, Appeal Suit No. 96 of 1925, late Additional Sub-Court, Ramnad) preferred against the decree of the Court of the District Munsif of Sattur in Original Suit No. 46 of 1924.

K. Rajah Ayyar (with him, *V. Ramaswami Ayyar* and *K. S. Rajagopalachari*) for appellants.—Assuming that in this case there was an agreement it directly comes within the principle of section 65 of the Indian Contract Act.

[Section 65 refers only to an agreement, while section 45 of the Madras District Municipalities Act refers to a contract which is an agreement enforceable at law. Where there is no contract and there is only an agreement, section 65 would *prima facie* seem to be directly applicable while section 45 of the Municipalities Act would have no application at all—JACKSON J.]

That is so; but the other side has successfully urged the contrary on the strength of *The Municipal Council, Tiruvarur v. Kannuswami Pillai* (1). An agreement which is void in its inception is as much within the principle of section 65 as a

(1) (1929) I.L.R. 53 Mad. 352.

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contract which becomes void; *Harnath Kunwar v. Indar Bahadur Singh* (1). It is not correct to say that the Privy Council laid down in *Annada Mohan Roy v. Gour Mohan Mullick* (2) that section 65 would not apply to the contract in that case. All that their Lordships say is that that was not a contract which could be enforced. The time at which an agreement is discovered to be void within the meaning of section 65 is the date of the agreement; *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company* (3). [*Thangammal Ayyar v. Krishnan* (4) and *Palaniswami Goundar v. English and Scottish Co-operative Wholesale Societies, Ltd.* (5) referred to.] Section 65 was applied to the case of a sale by a minor in *Appaswami Ayyangar v. Narayanaswami Ayyar* (6). *Gulabchand v. Fulbai* (7) points out the scope of that section; pages 416–7. It lays down that section 65 applies to all cases in which an agreement is discovered to be void. *Radha Krishna Das v. The Municipal Board of Benares* (8) lays down the older rule; page 601. The principle of section 65 is stated in *Mathura Mohan Saha v. Ram Kumar Saha and Chittagong District Board* (9); page 827. “Person” in that section will include also a corporation or a natural person; see *Pharmaceutical Society v. London and Provincial Supply Association* (10), page 861. If the case can be brought within the terms of section 65, reference to English cases will be irrelevant. The case is not one to which the provisions of sections 44 and 45 of the District Municipalities Act apply. *Douglass v. Rhyl Urban Council* (11) shows that the provisions of sections 44 and 45 of the District Municipalities Act as to writing, etc., apply only to cases that strictly come within those sections; page 413. In the present case the municipality acted not under the District Municipalities Act but under the Ordinance.

S. Srinivasa Ayyangar (with him, *S. Narayana Ayyangar*) for respondent.—If there is no contract there can be no privity and the provisions of the Ordinance and the Circulars will not entitle the appellants to sue. The contract is not taken out of the Municipalities Act. The respondent municipality is the

(1) (1922) I.L.R. 45 All. 179, 184 (P.C.).

(2) (1923) I.L.R. 50 Calc. 929, 934 (P.C.).

(3) (1932) I.L.R. 54 All. 1067, 1080 (P.C.).

(4) (1929) I.L.R. 53 Mad. 309.

(5) A.I.R. 1933 Mad. 145.

(6) (1930) I.L.R. 54 Mad. 112.

(7) (1909) I.L.R. 33 Bom. 411.

(8) (1905) I.L.R. 27 All. 592.

(9) (1915) I.L.R. 43 Calc. 790.

(10) (1880) 5 App. Cas. 857.

(11) [1913] 2 Ch. 407.

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creature of a statute and its capacity to contract depends upon its fulfilling the conditions imposed by that statute. In England a distinction is made between common law corporations and corporations created by statute and it has been held in the case of the former that they are liable on the principle of *quantum meruit*. Not so in the case of statutory corporations, for to allow a *quantum meruit* claim in their case would be to ignore statutory restrictions. In India there has been a conflict between the decisions. Section 65 applies to agreements void in their inception and to that extent *Harnath Kunwar v. Indar Bahadur Singh*(1) supports the appellants. That section would apply also in the case of common law corporations. But it would apply only to agreements which are within the competency of the parties. The suit in the present case is one to enforce a contract and section 44 of the District Municipalities Act is a bar to the suit. Sections 44 and 45, clause 2, referred to. "Contract" in these sections is used in the wider sense of agreement. Section 46 referred to. Unless a contract is made in the manner provided by the provisions of that Act, the funds in the hands of the municipality cannot be made liable even if there was an agreement. [*Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(2), *Annada Mohan Roy v. Gour Mohan Mullick*(3) and *Ramaswami Chetty v. The Municipal Council, Tanjore*(4) referred to.] In *The Municipal Council, Tiruvarur v. Kannuswami Pillai*(5) the point was conceded; see page 362 and Pollock and Mulla, Commentary on the Indian Contract Act, sixth edition, page 378. *Young & Co. v. Mayor & Corporation of Royal Leamington Spa*(6) is the case upon which the decisions of the Indian Courts are based. *Young v. Corporation of Leamington*(7) is the decision of the Court below in that case. Section 65 of the Contract Act is a general provision intended to apply to all agreements void on any account whatsoever. That section cannot be held to override sections 44 to 46 of the District Municipalities Act which lay down a special rule regarding contracts by statutory bodies like municipalities. Section 46 of the Municipalities Act gives the answer to section 65 of the Contract Act because the former section says that funds in the

(1) (1922) I.L.R. 45 All. 179 (P.C.).

(3) (1923) I.L.R. 50 Cal. 929, 931.

(5) (1929) I.L.R. 53 Mad. 352.

(7) (1882) 8 Q.B.D. 579.

(2) (1926) I.L.R. 54 Cal. 189.

(4) (1906) I.L.R. 29 Mad. 360.

(6) (1883) 8 App. Cas. 517.

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hands of a municipality are liable only for contracts duly made. It would be *ultra vires* of the municipality to enter into such a contract as that in the present case. The fiction of an implied contract will not be made where an express contract would be *ultra vires*; *Sinclair v. Brougham*(1). Section 65 of the Contract Act does not deal with transactions of parties which are *ultra vires*. The agreement in the present case is *ultra vires* of the municipality and section 65 is inapplicable to such a case. The section has been held to be inapplicable to the case of a mortgage by a minor; *Mohoru Bibi v. Dharmodas Ghose*(2). The incapacity to contract in the case of a minor is absolute, while in the case of a municipality it is partial, that is, it is subject to restrictions imposed by statute. In *Punjabhai v. Bhagwandas*(3) section 65 was held to be inapplicable to the case of a lunatic. *Thangammal Ayyiar v. Krishnan*(4) is distinguishable because the case was not one of incapacity to contract and the invalidity of the agreement existed apart from statute. The contract need not be *ultra vires* for all purposes; it is enough if it is *ultra vires* in the case in question. "Person" in section 65 does not include a minor; *Mohoru Bibi v. Dharmodas Ghose*(2). A corporation, which is a creature of a statute and which can speak and act only in a particular way, does not also come within that expression. Section 65 of the Contract Act must be read so as to be consistent with sections 44 to 46 of the District Municipalities Act.

V. Ramaswami Ayyar in reply.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—The plaintiffs are wholesale rice merchants of Sattur who agreed during the period of scarcity after the war of 1914-1918 to supply rice bags to the Srivilliputtur Municipality, which a committee duly appointed by the Municipality was to retail to private persons. After a consignment of bags had been made in February 1920 the price fell and the Municipality

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(1) [1914] A.C. 398, 417.

(2) (1903) I.L.R. 30 Cal. 539, 548 (P.C.).

(3) (1928) I.L.R. 53 Bom. 309.

(4) (1929) I.L.R. 53 Mad. 309.

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disposed of them at a loss and refused to pay the plaintiffs more than what it got by the sale. The plaintiffs claim Rs. 3,000 as the value of the bags as upon the date of delivery. The District Munsif and Sub-Judge decreed the suit except for a reduction made on account of gunny bags. This Court dismissed the suit on second appeal. Hence this Letters Patent Appeal.

The plaintiffs cannot sue upon contract because they have no written contract signed by the councillors as provided by section 45 of the then Act, Madras Act IV of 1884. They claim however under section 65 of the Indian Contract Act that the agreement having been discovered to be unenforceable in law on this account, they are still entitled to compensation in proportion to the advantage received by the Municipality.

This claim was originally met by citing *Radhakrishna Das v. The Municipal Board of Benares*(1) which has been followed in *Ramaswami Chetty v. The Municipal Council, Tanjore*(2) and evidently influenced PAKENHAM WALSH J. in our present case. It was held in Allahabad that section 65 cannot apply to a contract void *ab initio*, and it was also suggested hypothetically that if a Court were to hold otherwise "it would render nugatory the salutary provision of the Municipalities Act which provides that a contract executed otherwise than in conformity with it shall not be binding on the Board". In *Gulabchand v. Fulbai*(3) it was suggested that the scope of section 65 may be extended to contracts void *ab initio*, and now in the light of *Harnath Kunwar v. Indar*

(1) (1905) I.L.R. 27 All. 592. (2) (1906) I.L.R. 29 Mad. 360.
(3) (1909) I.L.R. 33 Bom. 411.

Bahadur Singh(1) that suggestion must be accepted as correct.

Now if a Municipality make an agreement which is discovered to be void because it is not under the signature of two councillors as provided by section 45, Madras Act IV of 1884, can it be said to go behind the statute or to render its provisions nugatory, if such an agreement is brought within the ambit of section 65, Indian Contract Act? The short answer to this question would seem to be that the Municipalities Act is silent about and therefore not concerned with such an agreement. The distinction between agreements and contracts is well-known, and it would have been quite easy to provide that every agreement made on behalf of a Municipal Council shall be immune from the provision of section 65, Indian Contract Act, but there is nothing of the kind in the Act. The Act only states that in certain circumstances contracts shall be not binding on the council. Sections 45 and 46 are only concerned with contracts. If a Council makes a promise it is an agreement, if that agreement is not enforceable by law it is said to be void, and when an agreement is discovered to be void any person who has received any advantage under such agreement is bound to restore it. If it is held that a Municipality is a person who can make agreements, then, if such person is treated under the general law can it be said that a salutary provision has been defeated? There is nothing salutary in allowing ratepayers to escape their statutory obligation more easily than other persons. The Legislature is considering the welfare of the

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community as a whole, and there is no cause for surprise that while making special provision in terms as regards contracts, it left agreements to be governed by the general law. Mr. Srinivasa Ayyangar argues that the special overrides the general; a maxim of universal acceptance, but before its application one must first find that there is a special law. If agreements are not specially mentioned they are under the general law. Probably the idea that to apply section 65 would go behind the statute is derived from the English leading case in this matter, *Young & Co. v. Mayor & Corporation of Royal Leamington Spa*(1) arising out of *Young v. Corporation of Leamington*(2). In that case an engineering firm had spent between £6,000 & 7,000 upon improvements in Leamington, and the Court held that inasmuch as the contract was not sealed as required by the statute the suit did not lie. On the facts of this particular case LINDLEY L.J. finds that to allow the claim would in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them. But this language need not necessarily be imported to India. We can hardly say that if this claim is allowed we shall in effect be repealing the Municipalities Act or depriving the ratepayers of that protection which the Legislature intended to secure for them. Because obviously by its language which is the best guide to a Legislature's intentions it has not made this provision in regard to agreements, and on general principles it is hard to see why it should make such a provision. In the same English case, *Young*

(1) (1883) 8 App. Cas. 517.

(2) (1882) 8 Q.B.D. 579.

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v. Corporation of Leamington(1), BRETT L.J. evidently considers that the decision to which he is constrained to come, causes injustice, and LINDLEY L.J. describes it as "hard and narrow". On appeal LORD BLACKBURN in *Young & Co. v. Mayor & Corporation of Royal Leamington Spa*(2) observed "it is true this works great hardship".

On the other hand the law in its present state in this Presidency works no hardship. If under an agreement such as that entered into by Young & Co. with Leamington or that between these plaintiffs and Srivilliputtur advantage has accrued to the Municipality, the Municipality makes good that amount to its promisees. If the agreement however does not redound to the advantage of the Municipality it is in no way bound, and the interests of the ratepayers are fully secured.

This argument has proceeded on the assumption that a Municipality is a person who can make agreements. The Act itself seems to assume as much, for even under section 45 a contract below Rs. 100 is left to its unhampered discretion. The Act does not specially empower Municipalities to make agreements, and then prescribe the form for agreements involving more than Rs. 100. It assumes the power and only prescribes a form for the larger amount. We see no force therefore in Mr. Srinivasa Ayyangar's suggestion that a Municipality is more like a lunatic or a minor than a juristic person.

Nor can it be said that in undertaking this business of distributing rice the Municipality acted *ultra vires*. The safety, health, comfort and convenience of the people were all furthered by

(1) (1882) 8 Q.B.D. 579.

(2) (1883) 8 App. Cas. 517.

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this arrangement at the end of the war. Cf. Section 113 (v) of Madras Act IV of 1884.

In *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(1) it is held that the contract is void, but Mr. Mitter argued that even so section 65 of the Contract Act would apply (page 194) and the Court did not see why plaintiffs should not recover *quantum meruit* (page 217). This case is followed by *PAKENHAM WALSH J.* sitting with *KUMARASWAMI SASTRI J.* in *The Municipal Council, Tiruvarur v. Kannuswami Pillai*(2). In that case the parties "agreed" to a decree on a *quantum meruit* basis, presumably because they did not think it worth disputing. Sir Frederick Pollock has questioned the wisdom of Counsel's conceding the point in *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(1) (see page 378 of his Commentary on the Contract Act, sixth edition) but he only follows the English decisions. It would be dangerous to ignore the plain statutory provision of section 65 and argue as though the matters were entirely dependent upon English rules of Equity as laid down in the English cases. On this general proposition the learned judgment of our late Chief Justice in *Municipal Council, Dindigul v. Bombay Co., Ltd.*(3) repays perusal.

It has been found that the quantum of the claim is just and we restore the decree of the Subordinate Judge with costs throughout to the appellants.

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(1) (1926) I.L.R. 54 Cal. 189.

(2) (1929) I.L.R. 53 Mad. 352.

(3) (1928) I.L.R. 52 Mad. 207.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and
Mr. Justice Pandrang Row.

K. GNANADESIKAM PILLAI AND THREE OTHERS
(DEFENDANTS 1 TO 4), APPELLANTS,

1934,
February 14.

v.

ANTOMY BENATHUTH BOOPALARAYAR (PLAINTIFF),
RESPONDENT.*

Mortgage—Usufructuary—Lease deed executed by mortgagor to mortgagee as part of the same transaction—Mortgagor remaining in possession—Construction of mortgage and lease—Mortgagor remaining in possession after period of lease—Character of possession—Rent during latter period—Charge for—Absence of.

A executed an usufructuary mortgage of certain lands in favour of B agreeing to repay the same in two years and as part of the same transaction executed a lease in respect of the said lands in favour of B at a fixed annual rent and remained in possession. After the said term of two years A continued in possession. A did not pay the mortgage amount. In a suit by B to recover the arrears of rent for about twelve years before the date of suit,

held (1) that both the mortgage and lease should be construed together and that the lease should be deemed to be also for a period of two years, (2) that in respect of the arrears of rent for the first two years it was secured by a charge on the land, (3) that, under section 116 of the Transfer of Property Act, in respect of the period when the tenant was holding over, a tenancy from year to year was created and (4) that in respect of the latter period there was no charge on the land for the rent due and as such the arrears of rent for this period for more than three years prior to the date of suit was barred.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin, dated 27th day

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of February 1928, and made in Original Suit No. 56 of 1926.

K. Rajah Ayyar and *V. Ramasami Ayyar* for appellants.

A. Swaminatha Ayyar for respondent.

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The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This appeal arises out of a suit filed by the plaintiff for the recovery of a sum of Rs. 8,981-14-8 alleged to be due under a registered lease deed, dated 19th January 1911, and executed by the first defendant, under which there was an agreement to pay an annual rent of Rs. 368-8-0. Properties comprised in the lease deed were mortgaged by the first defendant with possession to the plaintiff under a mortgage deed dated 18th January 1911, for Rs. 2,500. The mortgage deed and the lease deed have been filed as Exhibits A and E respectively. The suit is for the recovery of the arrears of rent due under the aforesaid lease deed and the charge created under Exhibit E is also sought to be enforced. According to the contention of the first defendant, the usufructuary mortgage was for a term of two years and the lease granted by the mortgagee was also for the same period of two years, and at the end of that term he surrendered possession to the plaintiff, as he did not pay either the arrears of rent or the mortgage amount. His case is that the plaintiff himself was in actual enjoyment of the properties since then. There is also the plea of limitation. One of the questions for consideration is whether the lease in question evidenced by Exhibit E must be deemed to have been granted for a term of two years only or for an indefinite term. On this

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point we have to construe the terms of Exhibits A and E. It is clear that the usufructuary mortgage deed and the lease deed are parts of the same transaction. Exhibit A recites in clear terms that the othi right is to be for a period of two years, on the expiry of which term the first defendant should redeem the mortgage by paying a sum of Rs. 2,500. Instead of actually taking possession of the mortgaged properties, the plaintiff granted a lease of the same to the mortgagor under Exhibit E. In this lease deed the rent fixed for each year is Rs. 368-8-0 which the first defendant as lessee had to pay up to the time of redeeming the othi. He agreed to pay rent every year by the 19th of January. Then there is the collateral agreement by way of mortgage, under which the properties mentioned in the schedule were offered as security for the payment of rent due under the lease deed. Exhibit E is virtually a combination of a lease and a mortgage. It is true that, in the lease deed, there is no specific mention of the term of the lease, but we have to read both these documents together in order to understand the true intention of the parties. When the parties chose to fix a period of two years for the enjoyment of the properties by the mortgagee and for the redemption of the mortgage by the mortgagor, it is not unlikely that the lease was also intended to be for the same period as that of the mortgage. It seems to us that the term in the lease deed that the rent is payable up to the time of the redemption of the othi should be understood as the time contemplated or fixed for redemption in the mortgage deed itself. Some argument was based upon the circumstance that

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the lease deed bears a stamp of four rupees. It is urged that if the lease is for a term of two years only, a stamp of two rupees would be sufficient, but if it is a lease for an indefinite term, then a stamp for four rupees would be necessary as per clauses 3 and 4 of article 35 of the Indian Stamp Act. In this view, the learned Subordinate Judge treats the lease evidenced by Exhibit E as one for an indefinite term. But we think that that is not the necessary inference to be drawn from the fact that the lease deed bears a stamp of four rupees, as we have already said that Exhibit E is a combination of a lease and mortgage. If the lease is for two years, the total rent payable would be between Rs. 700 and Rs. 800. If for the payment of this sum a collateral security of immovable property is also given, the document has to be viewed as a simple mortgage. When it is to be taken both as a lease and as a mortgage, it must bear the stamp which is leviable in the case of a mortgage, which requires a higher stamp duty. It is possible that a stamp of four rupees was used as the document evidenced a simple mortgage also as stated above. Further more, even if there is some ambiguity as to the period of the lease really intended by the parties in the recitals in Exhibit E, the evidence given by the plaintiff himself leaves no room to doubt what the real intention of the parties was. Even in his chief-examination he admits that two years' term was inserted to fit in with the period of the othi. And, in his cross-examination, he would say that the first defendant asked for the lease to last for the term of the othi, and that the talk was for two years from the beginning. He denies that there was any agreement for one year's lease. On

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the other hand, he says that the first defendant himself insisted on the lease being for two years. In the face of these admissions, the present contention raised on behalf of the plaintiff that the lease was intended for an indefinite term so as to last till the actual repayment of the mortgage amount cannot be accepted as correct.

If the lease evidenced by Exhibit E was for a fixed term of two years only, that lease must be deemed to have determined on the expiration of that period. If the lessee (first defendant) continued to be in possession of the properties even after the determination of the lease by efflux of time, in what capacity was he in possession like that? Either he must have been a tenant holding over or a trespasser. Under section 116 of the Transfer of Property Act, if a lessee remains in possession after the determination of the lease and the lessor accepts rent from the lessee or otherwise assents to his continuance in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year in the case of the lease of immovable property for agricultural or manufacturing purposes. According to the case of the plaintiff, there was a payment of Rs. 1,000, by the first defendant in 1916 towards rent due under the lease. If this is true, we can hold that the lessor assented to the lessee continuing the possession even after the determination of the lease. It is alleged in the plaint that the plaintiff granted receipt to the first defendant at the time of this payment. Even in the notice issued to the first defendant (Exhibit F-1) reference was made to this payment but no reply was sent by the first defendant to that notice. Even in a

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suit subsequently filed by the plaintiff for the recovery of a sum of money due on another simple mortgage deed executed by the first defendant, reservation of his right to sue for arrears of rent due under the lease was made. If the main plea of the first defendant that he surrendered possession at the end of the two years' term is not believed, then there is nothing improbable in the plaintiff's story that in 1916 a sum of Rs. 1,000 was paid to him towards rent. We shall deal with the question of the alleged surrender presently. The plaintiff has sworn to the truth of the alleged payment in his evidence and this fact is not even denied by the first defendant in the witness-box. The learned Subordinate Judge has believed the evidence of the plaintiff and we see no reason to disagree with his finding. If so, the first defendant's continuance of possession after the expiration of the original term of two years must be taken to be that of a tenant holding over.

Coming now to the question, whether, as a matter of fact, the first defendant did surrender possession at the end of two years, there is only oral evidence on both sides.

[His Lordship discussed the oral evidence and proceeded :]

On the whole, we are not inclined to think that the learned Subordinate Judge has misappreciated the evidence. The circumstance that the alleged surrender is not borne out by any sort of documentary evidence and the fact that the first defendant did not even send a reply to the notice issued by the plaintiff repudiating the claim sought to be made on the strength of the lease deed, are also factors which go against the truth of the

first defendant's statement. We therefore do not think fit to disturb the finding of the lower Court that the first defendant had been in possession of the properties in question even after the expiration of the original term of two years.

Now, a further question arises whether the plaintiff is entitled to recover arrears of rent for the whole period as claimed in the plaint. This claim is for more than twelve years before the date of the suit. The claim would not be barred by limitation if the mortgage or charge created under Exhibit E enures for the benefit of the whole of the claim and if the payment of Rs. 1,000 towards principal and interest mentioned in the lease deed is also true. As we have already stated, the first defendant must be deemed to be a tenant holding over, subsequent to the expiration of two years from the date of Exhibit E. If so, a tenancy from year to year is created by operation of law. In the absence of an agreement to the contrary, we can take it that the same terms of the lease for the fixed period of two years also hold good for the fresh tenancy from year to year. It is argued on behalf of the respondent that the charge created under Exhibit E for payment of rent should also hold good for the entire amount of rent due as arrears, since the creation of the fresh tenancy from year to year.

This involves a consideration of the question what really are the terms of the lease as such, and what are outside the scope of the lease transaction and are simply collateral to it. As we read the document, Exhibit E, we find that it evidences a grant of lease of immovable property, whereby an annual rent is fixed and such rent is also to carry interest. The other part of the

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document evidences a mortgage created by the first defendant as security for the payment of rent due under the lease deed. The decision of a Division Bench of this Court reported as *Kutti Umma v. Madhava Menon*(1) seems to be a direct authority against the contention put forward on behalf of the respondent. In that case, there was a verumpattam lease for one year executed by the mortgagor to the mortgagee which, after fixing the amount of rent, provided for payment of interest in case of default in the payment of rent on the due date, and it was a registered instrument. As regards the clause whereby the charge was created, the learned Judges were of opinion that that clause was not a term of the lease, as a lease, which could be deemed to be imported into the terms on which the lessee was allowed to hold over. In this view, they held that the claim for arrears of rent beyond the three years before the date of the suit was barred by limitation. In the present case, all that we can say is, that the mortgage created under Exhibit E can only be enforced for the recovery of rent due for the term of two years. After the determination of that lease, when the tenancy from year to year was created, it is not possible to carry over this collateral security, which is certainly no part of the lease transaction, so as to enable the plaintiff to claim the arrears of rent for the whole of the subsequent period, as if that mortgage was also created for the rent due subsequent to the transformation of the tenancy into one from year to year. The test is not whether this particular clause in Exhibit E is or is not repugnant to the terms of the lease. On the other hand, the true

(1) (1901) 11 M.L.J. 186.

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test is whether this clause can really be deemed to be any part of the terms which constituted the transaction of the lease itself. In a recent decision reported as *Dasarathi Kumar v. Sarat Chandra Ghose*(1) it was held that a stipulation in the original lease that, at the expiration of the term, the lessee should give up possession without notice, could not be imported into the new tenancy created by holding over and the acceptance of rent. The principle of that decision is in consonance with the view we have expressed. If the mortgage created under Exhibit E is of no avail to the plaintiff for the recovery of rent due subsequent to the expiration of the term of two years, he can only recover the rent due for three years prior to date of suit according to ordinary law.

The plaintiff is therefore entitled only to the arrears of rent at the rate of Rs. 368-8-0 per annum for three years before date of suit, together with interest at twelve per cent per annum on the amount of each year's rent from the date when it falls due, i.e., from 19th January 1924, 19th January 1925 and 19th January 1926, up to date of suit. In modification of the decree of the lower Court, a decree will be passed in plaintiff's favour for the aforesaid amount, viz., Rs. 1,312-12-6 together with interest at six per cent from the date of suit till realization, recoverable from out of the family properties in the hands of defendants 2 to 4. In the peculiar circumstances of this case, we think fit to direct the parties to bear their costs throughout.

G.R.

(1) (1933) 37 C.W.N. 971.

APPELLATE CIVIL.

*Before Mr. Justice Pandrang Row.*1934,
April 3.NELAKANTI SUNDARA SIVARAO AND ANOTHER
(RESPONDENTS—APPELLANTS—PLAINTIFFS), PETITIONERS,

v.

SAMMANGI GANGAMMA AND ANOTHER (PETITIONERS—
RESPONDENTS 1 AND 3—DEFENDANTS 1 AND 3),
RESPONDENTS.**Civil Procedure Code (V of 1908), sec. 151—Judgment pronounced under mistaken impression that parties had been fully heard—Inherent power of Court to vacate it and rehear case.*

Although there is no specific provision in the Code of Civil Procedure (Act V of 1908) which prescribes the procedure to be followed by a Court when it discovers that judgment has been pronounced by it under the mistaken belief that both parties had been fully heard, the Court can exercise its inherent powers under section 151, vacate its judgment and rehear the case.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the District Court of East Gōdāvari at Rajahmundry, dated 30th August 1933 in Interlocutory Application No. 421 of 1933 in Appeal Suit No. 129 of 1930 preferred against the decree of the Court of the Subordinate Judge of Cocanada in Original Suit No. 10 of 1926.

P. Somasundaram for petitioner.*D. Suryaprakasa Rao* for respondents.*Cur. adv. vult.*

* Civil Revision Petition No. 14-2 of 1933.

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JUDGMENT.

The District Judge of East Gōdāvari heard arguments in Appeal Suit No. 129 of 1930 on his file on 27th, 28th and 29th March 1933; a reference was thereupon made to the Deputy Tahsildar, Pithapuram, about the value of the suit properties and on receipt of his report the appeal was posted for hearing regarding the question of court-fee to 21st July 1933 and orders were reserved. On 14th August 1933 the District Judge pronounced judgment allowing the appeal with costs. The very next day the respondents applied under section 151, Civil Procedure Code, to vacate the judgment and rehear the appeal on the ground that judgment had been given without hearing their Counsel fully. The learned District Judge in his order dated 30th August 1933 allowed the application on the ground that he had given judgment under the mistaken impression that the appeal had been fully heard.

It is contended in revision that the learned District Judge had no power to allow the application. There is no specific provision in the Code of Civil Procedure which prescribes the procedure to be followed by a Court when it discovers that judgment has been pronounced by it under the mistaken belief that both parties had been fully heard, and, in the absence of such specific provision, the Court must necessarily have recourse to its inherent powers in order to remedy the mistake; it is a duty which the Court has to perform *ex debito justitiae* in order to satisfy its judicial conscience. It is with the object of enabling Courts to perform their duties in contingencies

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of this kind, i.e., when their mistakes have led to injustice, that their inherent powers are preserved intact by section 151 of the Code of Civil Procedure. I am therefore of opinion that the District Judge had inherent power to allow the application made to him by the respondents and was right in exercising it.

The revision petition must therefore fail, and it is dismissed with costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

1934,
August 20.

IN RE MAVUTHALAYAN AND OTHERS (ACCUSED), APPELLANTS.*

Indian Penal Code (Act XLV of 1860), sec. 107 (3)—Receiver of stolen property—Accomplice—Accessory after the fact—Criminal trial—Charge to the jury—Omission to direct jury that evidence of receiver should be received with caution—Accused prejudiced.

Although under the law prior to the Indian Penal Code (Act XLV of 1860) an accessory after the fact stood on a different footing from an accomplice, now a person who knowingly aids in the disposal of stolen property is an accomplice within the meaning of section 107, clause 3 of the Code; and an omission to tell the jury that the evidence of a receiver of stolen property, being that of an accomplice, should be received with caution, is a failure to direct the jury on a material point, thereby prejudicing the accused.

APPEALS against the Order of the Court of Session of the North Arcot Division at Vellore in Case No. 21 of the Calendar for 1934.

* Criminal Appeals Nos. 265 and 266 of 1934 and Criminal Revision Case No. 659 of 1934.

Accused were not represented by Counsol. Public Prosecutor (L. H. Bewes) for the Crown.

MAVUTHALAYAN, *In re.*

Cur. adv. vult.

JUDGMENT.

In this case the accused have been convicted of house-breaking and theft, offences under sections 457 and 380, Indian Penal Code. There is no direct evidence that any of them were seen at the place of house-breaking and the conviction rests on the subsequent recovery of certain of the stolen articles. The learned Sessions Judge says in his charge to the jury :

"There is hardly little or no evidence on record that these accused were arrested with these articles in their possession."

So the evidence against them is that of third persons to whom they handed over the property. One of these is Prosecution Witness 6 to whom six brass vessels, material objects 2 to 7, and a silk saree, material object 10, were sold.

As regards this witness the learned Judge instructed the jury as follows :—

"What Prosecution Witness 6, Abdul Rahim Sahib, says is that accused 1, 2 and 4, who are all brothers, brought to him these brass vessels and one silk saree, material objects 2 to 7 and 10, and wanted him to give them two rupees. As he had no money then he gave them six annas. You have seen this witness in the box. These three accused were living in his land. He knew them very well. He was compelled to say that these brass articles could not have been owned by these accused. He was also forced to answer that the silk saree, material object 10, is one which the womenfolk of accused 1, 2 and 4 could not have owned. This may show that he might have known at the time when he received these articles that they were stolen. But he is not at present in the dock. If it is an offence, it is for the authorities to proceed against him. What you are now concerned with is whether his testimony is

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true or not. That these articles were recovered from his possession is proved by Prosecution Witness 5 as well as by the Village Munsif of Desur. A mahazar too was prepared at the time, which has been filed as Exhibit C. Desur is not far away from the place of occurrence, Solai Arugavur: it is only three miles from it. So then, it comes to this that, if you believe the testimony of Prosecution Witness 6, it follows that very soon after the theft, most of the articles that had been stolen were sold or pledged with him by accused 1, 2 and 4."

CURGENVEN J. admitted this appeal with the note that the Sessions Judge omitted to point out the need for caution in accepting the evidence of a receiver of stolen property as that of an accomplice.

Mr. Bewes, for the Crown, raised the point whether a person who receives stolen property knowing it to be stolen is an accomplice.

Woodroffe in his Evidence Act says: "The term 'accomplices' may include all '*participes criminis*'"; and there is a note below that in English law it includes both principals of the first and second degree and accessories before and after the fact, but that in India it was held that an accessory after the fact (under the law prior to the Penal Code) stood on a very different footing from an accomplice. (Page 916, eighth edition.)

Mayne in his "Criminal Law of India" says (paragraph 756, second edition):

"Abettors of a crime are accomplices, and must be looked upon as such, if they are produced as witnesses against the principal offenders."

Section 107, Indian Penal Code, says:

"A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing; if an

act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing."

It appears to me that a person who knowingly aids in the disposal of stolen property falls under the third definition and is an "accomplice", and that whatever may have been the case in India before the Penal Code he is an accomplice under that Code. If so, the Judge was, I think, bound to tell the jury this, that Prosecution Witness 6 being on the evidence a receiver of property, which he must have known to be stolen, was a tainted witness whose evidence must be received with great caution. I therefore hold that there has been a failure to direct the jury on a material point and that the accused have been thereby prejudiced. On looking through the records I found another matter which in my opinion also vitiates the charge and which I pointed out to Mr. Bewes. As stated above there was no direct evidence that the accused committed the house-breaking and theft. Yet the charge against them was framed solely under sections 457 and 380, Indian Penal Code, with no alternative charge under section 411, Indian Penal Code.

In his charge to the jury the learned Judge did not mention section 411, Indian Penal Code, nor inform the jury that it was open to them either to find on the facts, that the accused committed the house-breaking and theft or that they were guilty under section 411, Indian Penal Code, or tell them that they might convict them in the alternative.

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He left them no choice between a conviction under sections 457 and 380, Indian Penal Code, and an acquittal. The offence under section 411 being punishable with a lesser sentence than the offences under the two former sections this was an omission which prejudiced the accused.

For both these reasons the conviction and sentence must be set aside and a retrial ordered.

The case will be transferred to the Sessions Judge, Chittoor, for disposal according to law.

The convictions and sentences passed on the accused 2 and 4, who have not appealed and whose cases are indistinguishable, are also set aside under sections 423 (d) and 439 (1), Criminal Procedure Code, for the reasons given in the judgment above and their retrial is ordered.

K.W.B.

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PRIVY COUNCIL.

KOMAN NAIR, APPELLANT,

v.

ACHUTHAN NAIR AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Religious Endowment—Malabar—Nair temples—Whether public or private—Public user—"Uralan"—"Uraima"—Code of Civil Procedure (Act V of 1908), sec. 92.

In the greater part of the Madras Presidency, where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trusts; but in Malabar, where the large tarwads often established private temples for their own use, there is no presumption one way or the other.

The word "uralan" means the guardian or manager of a temple, and "uraima" the office of "uralan."

Seven old Nair temples in Malabar were under the management of the karnavan of a once powerful tarwad, and were situated near the tarwad house. But in the revenue survey made in 1804-05 the private properties of the tarwad were recorded as their jenm or property, and the temple properties as the jenm or property of the temple; and a temple property was recorded as held under it by the tarwad on the customary kanam tenure. Until comparatively recent times the karnavan invariably described himself as uralan of the temple properties, and was so recorded in the Settlement in 1901. Public user of the temples was proved.

Held, upon the evidence, that the temples constituted a public religious trust within the meaning of section 92 of the Code of Civil Procedure, 1908; if there had been sufficient evidence to show that the temples and their endowments had been originally dedicated for the tarwad, the Judicial Committee would have been slow to hold that the admission of the public affected the private character of the trusts.

* Lord TOMLIN, Lord MACMILLAN and Sir JOHN WALLIS.

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CONSOLIDATED APPEAL (No. 3 of 1933) by special leave from a judgment and seven orders of the High Court (March 30, 1928) which reversed seven decrees of the Subordinate Judge of Ottapalam.

The seven suits which gave rise to the appeal related to seven temples in Malabar, and were instituted by the respondents under section 92 of the Code of Civil Procedure with the consent of the Advocate-General, who was joined as respondent No. 4 to the present appeal. On the death of the original defendant the appellant was brought upon the record in his place. The plaintiffs claimed decrees removing the defendant from the trusteeship of the temples and for the appointment of a new trustee, and other incidental reliefs.

Several issues were framed, but the only issue material to the present appeal was No. 2 :— “whether the properties in question are public religious trusts.”

The Subordinate Judge, who tried the suits together, found that it was not established that the properties were public religious trusts ; accordingly he dismissed the suits.

An appeal to the High Court was heard by PHILLIPS and ODGERS JJ. and was allowed, and the suits were remanded for disposal. The present appeal was from that order.

The facts appear from the judgment of the Judicial Committee.

Narasimham for the appellant.

Dunne, K.C. and *Wallach* for the respondent (The Advocate-General of Madras).

[Reference was made to *Rupa Jagshet v. Krishnaji Govind*(1), *Chintaman Bajaji Dev v.*

(1) (1884) I.L.R. 9 Bom. 169, 171.

Dhondo Ganesh Dev(1), *Jugalkishore v. Lakshman-das*(2), *Subramania Aiyar v. Venkatachala Vadh-yar*(3), *Subramania Aiyar v. Lakshmana Goundan* (4) affirmed by the Privy Council under title *Pujari Lakshmana Goundan v. Subramania Ayyar*(5), *Puraviya Goundan v. Poonachi Goundan and another*(6), *Ananda Chandra Chuckerbutty v. Braja Lal Singh*(7) and *Kelu Achan v. Sivarama Pattar Karikar*(8).]

The JUDGMENT of their Lordships was delivered by SIR JOHN WALLIS.—In this case the three plaintiffs, who describe themselves as Hindu Nairs residing within half a mile of the seven plaintiff temples and as habitual worshippers at the said temples, instituted seven suits, which have been tried together, under section 92, Civil Procedure Code, with the consent of the Advocate-General of Madras, against the first defendant, who is described in the plaint as a Hindu Nair residing in Peringod amsam and desam of the Palghat Taluk, but is admittedly the karnavan or managing member of a Malabar tarwad or joint family. The plaint alleged that the defendant's predecessors, who were originally samudayis or committee members of the aforesaid temples, had been, in such capacity, in management of the affairs of the devaswom ; that they had been for some time improperly styling themselves the uralans of the aforesaid devaswom ; and that recently the defendant and the members of his family had further begun to claim that the devaswom and its endowments belonged to the family, thereby repudiating

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(1) (1888) I.L.R. 15 Bom. 612, 622. (2) (1899) I.L.R. 23 Bom. 659, 664.
(3) (1916) 37 I.C. 688. (4) (1919) 54 I.C. 177.
(5) (1923) 29 C.W.N. 112 (P.C.). (6) (1920) 40 M.L.J. 289.
(7) (1922) I.L.R. 50 Calc. 292, 304. (8) (1927) 113 I.C. 635.

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the public character of the trust. After alleging various acts of mismanagement, they prayed for the removal of the defendant and the appointment of a new trustee, an order vesting the devaswom properties in such trustee, accounts and inquiries as to the alleged misappropriation by the defendant and his predecessor, and the settling of a scheme of management.

The defendant, in his written statement, alleged that the plaintiff temples were founded, owned and maintained by the defendant's ancestors. Seeing that the worship of God is a holy and meritorious act, the defendant and his ancestors had allowed those who came to the temples to worship there, not as a matter of right, but by the sufferance of the defendant's tarwad. By an understanding between the members of the tarwad, the income of certain tarwad properties was utilized for the maintenance of the devaswom, but there were no lands or properties forming the endowments of the devaswom. The plaintiffs were not interested in the devaswom within the meaning of section 92, Civil Procedure Code, but were men of straw set up by a Nambudiri or Malabar Brahmin (the twelfth witness for the plaintiffs), who was financing the suit to prevent his eviction from tarwad lands in his occupation under a melkanam, or new demise which had been granted, as appeared from the evidence, to a junior member of the defendant's tarwad. The statement in the plaint that the defendant's ancestors had been samudayis (that is to say, members of a temple committee) was false. The temples had never been public and the defendant's predecessors were never trustees, and could not be charged with repudiating the trust.

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The second issue "Whether the properties are public religious trusts" was tried first, and the Subordinate Judge, finding that they were not, dismissed the suit. On appeal to the Madras High Court, PHILLIPS and ODGERS JJ., in separate but concurring judgments, answered the issue in the affirmative, reversed the decree of the Subordinate Judge and remanded the suit for disposal on the other issues.

In the greater part of the Madras Presidency, where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trusts. This was laid down by SESHAGIRI AYYAR J. on an elaborate consideration of the whole subject in *Subramania Ayyar v. Lakshmana Goundan* (1), which was affirmed by the Board in *Pujari Lakshmana Goundan v. Subramania Ayyar* (2). In that case, which related to a temple in the Salem district founded by a religious devotee in 1814, SESHAGIRI AYYAR J. specially excepted temples in the Malabar district from the scope of this ruling, and in the later case of a Nair temple in Malabar, *Kelu Achan v. Sivarاما Pattar Karikar* (3), it was held by the High Court that there was no such presumption in Malabar. The learned Judges observed that it was very natural that the large family corporations or tarwads in Malabar should have established private temples for their own use, and that this had often happened, as stated in most treatises on Malabar law and polity. Consequently they held that in Malabar there was no presumption one way or the other, and that the

(1) (1919) 54 I.C. 177.

(2) (1923) 29 C.W.N. 112 (P.C.).

(3) (1927) 113 I.C. 635.

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issue must be determined upon the evidence in the particular case. In this and the earlier case of *Subramania Aiyar v. Venkatachala Vadhyar*(1), as also in other recent cases of which reports are not available to their Lordships, it has been held by the High Court on the evidence in the case that the temples and their endowments were public trusts. The prevailing impression in Malabar would seem to have been that these Nair temples were private, and this may have, to some extent, influenced the lower Courts, who so held both in this and in the two other cases already cited.

In all these cases the karnavan appears to have made no distinction between tarwad and temple properties, and, whilst maintaining the temples, to have used the temple income for tarwad purposes, and treated all these properties alike as belonging to the tarwad. This state of things may, however, be explained by the fact that the karnavan of the tarwad for the time being was in exclusive control of both sets of properties, and is of little weight as against direct evidence of temple ownership.

One difficulty in the case is that these Nair temples are of great and unknown antiquity. In one of the cases already cited, it was found on the evidence of a temple inscription that it was in existence in 1464 A.D. For generations before the conquest of Malabar by Hyder and Tipu in the third quarter of the eighteenth century, which was followed by the British annexation in 1792, the Nairs were a ruling class holding their lands on military service and furnishing the fighting forces of the ruling Rajas among whom

(1) (1916) 37 I.C. 688.

Malabar was then divided. Abundant contemporary evidence from European sources is set out in Mr. Logan's Manual of the Malabar District. When therefore the karnavan of a once powerful tarwad is found in management of seven temples in the neighbourhood of the tarwad house, the inference would appear to be that the temples were founded and endowed by the defendant's predecessors. The fact on which reliance is placed in the judgments of the High Court, that the lands now standing in the name of the tarwad bear an assessment of Rs. 85 as compared with an assessment of over Rs. 2,500 on the lands standing in the names of the temples, is no indication of the former state of things. These old tarwads, as observed by Mr. Logan, have long been in a state of disintegration, owing no doubt to divisions by mutual consent and alienations by the karnavans, not infrequently in the interests of their own children who belong to the mother's tarwad.

The judgment of BENSON and SUNDARA AYYAR JJ. in Appeal No. 180 of 1908, in which another branch of the family claimed a share in the proceeds of the sale of an elephant by this tarwad, throws some light on the history of the family. It was found that the family of the plaintiffs in that suit must have become separated from this branch for more than a hundred years before the date of the suit, and that they had then remained in possession of tarwad properties which had since been divided among three branches of their family. Acting apparently on the view that at the separation the defendant's tarwad also got their fair share of tarwad properties, the Court expressly refrained from expressing any opinion

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“as to the rights of the parties with respect to properties vested in the temples of the family (which are the subject of the present suit), as they might not stand on the same footing as real tarwad properties”. The karnavan of the defendant's tarwad holds the title of Mundacheri Muthu Nair, and there are two other titles in the family, one of which was claimed by the plaintiffs in that suit. The learned judges said it was not clear whether these were “merely honorific titles or real stanoms in the legal sense with specific properties attached”, or set apart for the holders of the titles, such as are found in formerly ruling families in Malabar. However this may be, there appears to be no reason for thinking that this family was not in a position in former times to found and endow these temples in the immediate neighbourhood of the tarwad house.

Nor is the fact that a family deity is worshipped in the tarwad house in any way inconsistent with the foundation and endowment by the tarwad of temples in honour of the greater gods of the Hindu Pantheon, either from purely religious motives or with a view of averting the calamities of which people in Malabar are said to have lived in constant dread, never even in more recent times taking any important step without first consulting their astrologers.

There is also another matter to which, in their Lordships' opinion, too much importance has been attached in the judgments of the High Court. In 1865 the Inam Commissioner confirmed, under the Inam Rules, as having been in existence for fifty years, a total remission of the assessment of Rs. 3, 4 as., 10 pice on 1.52 acres of land for the

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expenses attending the usual ceremonies in No. 6 temple so long as they were efficiently kept up. The existence of this inam, which was stated in some old accounts to have been granted by Tippu, shows at most that it was represented to the Mahratta officials, who were sent down to introduce the Indian system of assessment for land revenue, that this was a public temple; but on the other hand it might be argued, with equal or greater force, that the other six temples were regarded as private as they were fully assessed and received no remission such as they would have received in other parts of India if they had been regarded as public temples.

In their Lordships' opinion, the decision in this case really depends on the inferences to be derived from the evidence as to the way in which the temple endowments have been dealt with and the evidence as to the public user of the temples. As regards the first question, their Lordships agree with the conclusion arrived at by the learned Judges of the High Court that the documentary evidence shows conclusively that the properties standing in the names of the devaswom belonged to the temples and that the position of the defendant-karnavan was that of uralan or trustee.

The earliest evidence is to be found in the records of the paimash or revenue survey, at the beginning of last century, showing how the lands in Malabar were held. In this survey the private properties of the tarwad are recorded as their jenm or property, and the temple properties as the jenm or property of the particular temple. Further in the extract, Exhibit A, lands recorded as the jenm property of the devaswom are shown

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as held under it by defendant's tarwad on the customary kanam tenure. Until comparatively recent times, the Mutha Nair or karnavan of the defendant's tarwad invariably described himself as uralan of the temple properties, and was so recorded in the settlement at the beginning of the present century. Thus, in 1846, the defendant's predecessor sued as uralan of three of these temples to recover certain properties in the possession of tenants. The decree, Exhibit E, which in those days was also the judgment, shows that the properties were described in the plaint as belonging in jenm to the temples. Apparently, at the instance of the defendants, the Zamorin of Calicut and the Raja of Walavanad were impleaded as supplemental defendants, and the latter filed a written statement alleging that the temples and properties belonged exclusively to him and that he had appointed the plaintiff as manager. In his reply, the plaintiff pleaded that none but himself had uraima rights over these temples and devaswoms, and that the Raja had no rights in respect of the properties belonging to the devaswom. The Court, finding that the plaintiff and his predecessors had been in management for three generations, made a decree in his favour, leaving the Raja to assert his rights in another suit. It is stated by the Subordinate Judge that he filed two suits which were unsuccessful, but the decrees have not been included in the present record. When later this Raja attached certain properties in execution of a decree against a junior member of the tarwad, the defendant's predecessor and the other members of the tarwad sued in 1853 to set aside the attachment, alleging that the attached

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properties belonged some of them to the temples and some to their tarwad. The plaintiffs were directed to prove that the plaint items belonged in jenm to the temples and to the tarwad in ancestral jenm right, which in their Lordships' opinion clearly meant that the plaintiffs were to prove that, as alleged in the plaint, some of the attached properties belonged to the temples and some to the tarwad itself. For the appellant reliance has been placed on the recital in the decree in that suit that it had been proved that the attached properties belonged in jenm "*to the devaswoms belonging to the plaintiffs' tarwad*" and to the plaintiffs' tarwad itself." How this first statement came to be inserted in the decree it is now impossible to say, but in their Lordships' opinion it was quite irrelevant to the suit, and they agree with the High Court that it is not entitled to any weight.

In these suits the defendant's predecessors sued as uralans of the temples, and they are repeatedly so described in the documentary evidence, and also in the settlement register. The case for the defendant is that "uralan" means owner, and in the High Court and here reliance was placed on the definition in Dr. Gundert's Malayalam Dictionary, where it is said to mean the proprietor or manager of a temple. It is surmised by ODGERS J., with much probability, that the author belonged to the well-known Swiss-German Basel Mission on the West Coast. If this definition had been relied on before the Subordinate Judge and he had attached any weight to it, he would, no doubt, have referred to it in his judgment. As it is, their Lordships cannot regard it as in any way detracting from the

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weight of the definition in Wilson's well-known Glossary, where "uralan" is said to mean a guardian or manager of a temple, "uraima" to be the office of uralan to which is attached the superintendence of the affairs of the temple*. As pointed out by ODGERS J., this is the meaning which has been attached to the word uralan wherever it has come before the High Court.

The Subordinate Judge has cited the following passages from the late Mr. Sundara Ayyar's book on Malabar Law, in support of the view that uralan means owner :—

"If the temple is public the manager or uralan is said to be subordinate to God. He is styled God's uralan, while the uralan or manager of a private temple is said to be the proprietor of it, or to possess the uraima over it, and the God is said to be the God of the uralan" (page 264).

"Where the temple is a private institution, the uralan may be practically an owner. In the case of some public temples, he is not even the manager or dharmakartha which is the ordinary signification of the term, but only a subordinate manager acting under another who is the real dharmakartha" (page 273).

The learned author who belonged to a Brahmin family long settled in Malabar, was one of the leaders of the Madras Bar and afterwards a Judge of the High Court, and his opinions are therefore entitled to great respect, but, unfortunately, he died before the question of the ownership of these Nair temples and their endowments had been investigated in the decisions already mentioned.

In this case, their Lordships are of opinion that the use of the word "uralan" in the documents exhibited clearly imports a negation of

* Page 535, Col. 2 ; S.V. "Uranma".

ownership in the uralan, because as already shown, he is described as uralan of properties which are said to belong to the temples.

The Subordinate Judge has relied on the fact that in some of the documents the word "udama", which admittedly means owner, is used instead of uralan, but, as pointed out in the judgments of the High Court, the use of the word "udama" is comparatively recent, and cannot affect the inference arising from the earlier documents.

In their Lordships' opinion, the effect of the evidence is that the properties standing in the names of the different temples were dedicated for the support of the temples, the karnavan of the tarwad being the uralan or trustee, and the fact that the income from one temple was used for the expenses of another temple does not affect this conclusion.

From the fact that in this, as in other Nair temples, the tarwad has been making no distinction in the application of the income from tarwad and temple properties, and from the general impression that the temples and their properties belonged to the tarwads, the Subordinate Judge has inferred that there was no real dedication of the temple properties, but that for some reason tarwad properties had been put in the names of the temples. The only suggestion made by him was that this was done in Tippu's time to save them from forfeiture, in view of what he describes as Tippu's well-known real or apparent religious tolerance. This, however, is admittedly a mere surmise which their Lordships are unable to accept.

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The temple properties having, in their Lordships' opinion, been dedicated for the use of the temples, the only remaining question is whether they constituted a public religious trust within the meaning of section 92 of the Civil Procedure Code. Had there been any sufficient reason for holding that these temples and their endowments were originally dedicated for the tarwad, and so were private trusts, their Lordships would have been slow to hold that the admission of the public in later times, possibly owing to altered conditions, would affect the private character of the trusts. As it is, they are of opinion that the learned Judges of the High Court were justified in presuming from the evidence as to public user which is all one way that the temples and their endowments were public religious trusts. They will therefore humbly advise His Majesty that the appeals fail and should be dismissed.

After special leave to appeal had been granted, the Advocate-General of Madras obtained an order from the High Court certifying that, as the respondents were unable to raise funds to defend the appeal, he was a proper person to be brought on the record. In these circumstances the learned Counsel for the respondents were instructed to appear on behalf of the Secretary of State, who will recover the costs of this appeal from the second defendant who was brought on the record as the successor of the first defendant, who died after the institution of the suit.

Solicitor for appellant : *Harold Shephard.*

Solicitor for respondent No. 4 : *Solicitor, India Office.*

A.M.T.

INCOME-TAX REFERENCE.

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

S. R. M. S. SUBRAMANIA CHETTIAR (ASSESSEE),
PETITIONER,

1934,
May 2.

v.

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

Indian Income-tax Act (XI of 1922), sec. 4(3)(vii)—Business profit though casual and non-recurring in nature—Test of—Assessability to income-tax of—Money-lender—Assignment of mortgagee rights taken by—Profit made by money-lender out of transaction of—Business profit if—Transaction, though an isolated one and speculative in character, not essentially different in nature from money-lender's other transactions.

In order to claim the privilege of the exemption under section 4(3)(vii) of the Indian Income-tax Act of 1922 it must be shown that the receipts are not those arising from business or the exercise of a profession and that the receipts are of a casual and non-recurring nature. If in a particular case the receipts can be reasonably deemed to arise from a business or the exercise of a profession, they would be chargeable to income-tax, though casual and non-recurring in nature.

The assessee, who was a professional money-lender carrying on money-lending business at various places, was also a partner in a money-lending firm in Burma. In 1918 the assessee got an assignment in his favour of the right, title and interest of the mortgagee under a mortgage executed in the English form from a person who had become the owner of the mortgage right by reason of his purchase of the same in Court auction in execution of a money decree obtained against the mortgagee. At the time of the assignment a claim under an equitable sub-mortgage of his mortgage rights effected by the original mortgagee was the subject of litigation in the Privy Council.

* Original Petition No. 99 of 1932.

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Subsequent to the assignment in favour of the assessee the Privy Council decided that the sub-mortgage was invalid and was unenforceable on the mortgaged property. The assessee subsequently filed a suit to enforce the mortgage and obtained a decree for the amount sued for with a direction that, in default of payment by the mortgagor of the amount within the prescribed time, he should be debarred from his right to redeem the mortgage. Subsequent to the decree the assessee entered into a compromise with the mortgagor, whereby certain house properties the subject of the mortgage were delivered to the assessee in satisfaction of his claim under the mortgage. He retained those properties for a few years receiving the rents and profits thereof and then sold them. By the sale he realized a sum of Rs. 63,624 in excess of the outlay made by him, namely, the amount he paid for getting the assignment and the sum expended by him in the subsequent litigation relating to it. It was found that the initial outlay for the purpose of getting the assignment was out of the money which the assessee had lent to or deposited in a firm at Rangoon, that the transaction in question was not essentially different in nature from the assessee's other transactions, and that it was entered upon as a matter of business.

Held that the said sum of Rs. 63,624 was profit derived by the assessee in respect of a transaction connected with his money-lending business and was assessable to income-tax.

Commissioner of Income-tax v. Sir Purshottamdas Thakordas, (1925) 2 I.T.C. 8 ; 27 Bom. L.R. 478, relied upon.

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

S. T. Srinivasagopalachariar (with him, *P. R. Srinivasan*) for assessee.—What is income within the meaning of the Indian Income-tax Act, is dealt with in *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(1). Carrying on of business is a condition precedent to there being income within the meaning of the Act.

[The assessee is a money-lender. Instead of lending money himself on the security of immovable property he takes an assignment of a mortgage. Why should it not be said that

(1) (1932) I.L.R. 59 Cal. 1343, 1349 (P.C.).

this was incidental to his money-lending business?—SUNDARAM CHETTI J.]

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Neither the mortgagor nor the mortgagee-assignor was a debtor of the assessee nor was the assessee in the habit of engaging in such kind of business. It was a purely speculative transaction and an isolated one. Further, when as a result of the compromise the assessee acquired the immovable property, he had no idea of selling it and making a profit. He remained owner of the property for about three years, paid income-tax on the property during that period and then sold the property. He could not in any sense be said to have carried on a trade during that period. As to the test of a venture in the nature of a trade, see *per ROWLATT J.* in *Leeming v. Jones*(1) and *per LAWRENCE L.J.* on appeal, and *per LORD BUCKMASTER* in *Jones v. Leeming*(2). As to the meaning of an isolated transaction, see *per VISCOUNT DUNEDIN* in the last case. [*Balgownie Land Trust, Ltd. v. The Commissioners of Inland Revenue*(3), *Commissioners of Inland Revenue v. Livingston*(4), *Martin v. Lowry*(5), *Graham v. Green*(6) and *Assets Company, Limited v. Forbes*(7) referred to.]

M. Patanjali Sastri for Commissioner of Income-tax.—The present case is of the type of cases represented by *Board of Revenue v. Arunachalam Chettiar*(8).

[The argument of the Government Pleader at page 198 in that case seems to show that exchange speculation was a part of the assessee's business.—RAMESAM J.]

The assessee cannot have the benefit of the exemption unless both conditions are fulfilled, viz., (1) that the transaction is an isolated one and (2) that it is not so connected with his ordinary business that it may be said to be a part of such business. A transaction may be connected with a trader's ordinary business but may still be an isolated one because such transactions must from the very nature of things be rare. In such a case the assessee cannot claim the benefit of the exemption. Neither the fact that the transaction is not in the ordinary course of the assessee's business nor the

(1) [1930] I.K.B. 279.

(2) [1930] A.C. 415; 15 T.C. 333, 357.

(3) (1929) 14 T.C. 684, 691.

(4) (1926) 11 T.C. 538, 542.

(5) (1926) 11 T.C. 297, 309, 314.

(6) [1925] 2 K.B. 37; 9 T.C. 309.

(7) (1897) 3 T.C. 542, 549.

(8) (1923) I.L.R. 47 Mad. 197.

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fact that it is an isolated one singly is conclusive in favour of the assessee's right to exemption. [*In the matter of Chunni Lal, Kalyan Das*(1) and *Commissioner of Income-tax v. Sir Purshottamdas Thakordas*(2) referred to.] In the present case the assessee is a money-lender by profession and it is usual for such people to handle mortgage transactions such as the one in question. The assessee refused to produce the headquarters accounts which would have shown how this transaction had been dealt with by him. The Income-tax authorities were therefore justified in presuming that this transaction was allied to the assessee's business. Even otherwise on the facts and circumstances of the case the particular transaction in question must be held to be allied to the assessee's ordinary course of business. If that is so, the consideration of questions such as whether the transaction was an isolated one or whether there was a carrying on of business is irrelevant. *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(3) has therefore no bearing. [*Beynon and Co., Limited v. Ogg*(4) referred to.]

S. T. Srinivasagopalachariar in reply.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This is a reference by the Commissioner of Income-tax, Madras, under section 66 (3) of the Indian Income-tax Act XI of 1922 for the decision by the High Court of the following question, viz., “whether the sum of Rs. 63,624 is assessable to income-tax.” The assessee is S. R. M. S. Subramania Chettiar who is a Nattukottai Chetti residing at Nemathanpatti in the Ramnad District. He is a professional money-lender carrying on money-lending business at his headquarters (Nemathanpatti) and also at Muar in the Federated Malay States. He is also a partner in a money-lending firm known as S. R. M. S.

(1) (1924) I.L.R. 47 All. 368.

(2) (1925) 2 I.T.C. 8, 11; 27 Bom. L.R. 478.

(3) (1932) I.L.R. 59 Cal. 1343 (P.C.).

(4) (1918) 7 T.C. 125, 131.

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Firm, Meiktila in Burma. He was assessed to income-tax in the year 1930–31 on the basis of the income derived by him in the previous Tamil year “Sukla.” One of the items of income derived is a sum of Rs. 63,624 which is stated to be the profit derived by the assessee from the sale during the year of account of certain house properties in Rangoon. The question for determination is whether this profit is chargeable to income-tax or not.

A brief statement of the facts relating to the acquisition and sale of these properties is necessary. One M. L. R. M. A. Firm, Rangoon, had a mortgage executed in their favour in 1910 by one S. A. Seedat for a sum of Rs. 80,000. The aforesaid firm appears to have effected an equitable sub-mortgage of their rights in the original mortgage deed to one Malladi Sathialingam. The claim under the sub-mortgage was the subject of litigation in the Privy Council in 1918, when the present assessee got an assignment in his favour of the right, title and interest of the original mortgagees (M. L. R. M. A. Firm) for a sum of Rs. 4,000 from one Singaram Chetti, who had by that time become the owner of the mortgage right by reason of his purchase in Court auction in execution of a money decree obtained against M. L. R. M. A. Firm. Subsequent to this assignment in favour of the assessee, the appeal in the Privy Council, in which the present assessee got himself impleaded, was decided against Sathialingam and the result was that the equitable sub-mortgage held by Sathialingam became unenforceable on the mortgaged properties, as it was found to be invalid. The encumbrance on

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the original mortgage right having become nil, the assessee was in a position to file a suit in the Chief Court of Rangoon in 1923 on the mortgage deed of 1910 as the assignee of the mortgagees' rights thereunder for the recovery of a sum of Rs. 1,68,300 as the aggregate of the principal and interest due. In that suit, the transaction was found to be an English mortgage and a decree was given in favour of the assessee for the amount sued for with a direction that Seedat should pay the amount within six months from the date of the decree (19th May 1925), and that, in default of payment within the prescribed time, he should be debarred from his right to redeem the mortgage. In March 1926 the assessee entered into a compromise with the original mortgagor, whereby certain house properties in Rangoon (the subject of the mortgage) were delivered to the assessee in satisfaction of his claim under the mortgage. He retained these properties for a few years receiving the rents and profits thereof, and keeping accounts for the receipts and expenditure relating to them till October 1929, when he sold the same for a sum of Rs. 70,000. It was found by the Income-tax Officer that the assessee had incurred a net expenditure of Rs. 6,376 for the purchase of the mortgage right and in the subsequent litigation relating to it. The difference between the sale proceeds of the properties and the outlay made by the assessee, viz., Rs. 63,624, was treated as profit derived by him in this transaction and assessed to income-tax. The legality of this assessment is questioned by the assessee.

It is contended on his behalf that the receipt of the sum in question in the year of account did

not arise in the course of any business conducted by him, but it was an isolated venture, speculative and also casual or non-recurring in its nature. The question is whether this income is exempt from income-tax under section 4 (3) (vii) of the Income-tax Act of 1922. By virtue of that clause, any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, are exempt from income-tax. In order to claim the privilege of this exemption it must be shown that the receipts are not those arising from business or the exercise of a profession and that the receipts are of a casual and non-recurring nature. If in a particular case the receipts can be reasonably deemed to arise from a business or the exercise of a profession, they would be chargeable to income-tax, though casual and non-recurring in nature. Section 2, clause 4, of the Income-tax Act runs thus :—

“ ‘ Business ’ includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.”

It is unnecessary to consider for the purposes of this case whether the definition given is exhaustive or not. There is no doubt that the assessee is a professional money-lender and was carrying on money-lending business in 1918, when he got an assignment of the mortgage in question for a consideration of Rs. 4,000 as stated above. The Commissioner has rightly observed that the assessee's business is to handle money-lending transactions of various kinds including mortgages. As a money-lender, his ordinary business is to lay out moneys with a view to make a profit by advancing various loans secured and unsecured.

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Whatever he so lends out would be the principal sum invested, and the various sums of interest stipulated for would be the contemplated profit. There can be no doubt that, if the assessee had himself lent a sum of rupees under a mortgage bond, whatever profit he happens to derive in that transaction is a profit derived in his money-lending business. The effect of such a transaction is the creation of the relationship of creditor and debtor. By getting an assignment of a mortgage bond already obtained by another, the same result is achieved, as the assignee would be standing in the shoes of the assignor and could exercise the rights of the mortgagee, treating the mortgagor as his debtor. In the present case, the assessee virtually became the assignee of the mortgagees' rights under the mortgage bond in question, by a rather circuitous process, which however does not make his position anything different from that of an assignee of the mortgagees' rights. In fact, it was in the capacity of such an assignee of the mortgagees' rights that the assessee sued upon the original mortgage bond for a pretty large amount and got such a decree as could have been passed in favour of the original mortgagees themselves. The mortgage debt due to him was determined by the decree, and, instead of realizing the amount directly, he took possession of the mortgaged properties in satisfaction of his claim under the mortgage bond, and, after a few years, converted the same into cash by effecting a sale thereof for Rs. 70,000. That he thereby made a profit of a very large sum more or less in the nature of a windfall is a fact. Can it be said that the profit so derived by him is in respect of a transaction which is

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beyond the scope of the ordinary course of money-lending business carried on by him? If he becomes a mortgagee by advancing a loan on the security of immovable property any profit derived by means of such a transaction is unquestionably chargeable to income-tax as a business profit. Though, at the inception, the mortgage loan was not actually advanced by the assessee, the subsequent advance of Rs. 4,000 for getting an assignment of the mortgagees' rights is certainly a venture coming within the generally recognized ambit of the money-lending business and cannot be deemed to be so disconnected with the profession of a money-lender as to take it out of the category of business carried on by the assessee. All that can be said is that the profit realized was extraordinary, in the sense that it was beyond the usual expectations of a money-lender in respect of a normal money-lending transaction. The fact that a particular transaction in a money-lending business is speculative does not take it out of its category. Suppose an unscrupulous money-lender takes hold of an expectant heir or an inexperienced youth in an opulent family eager for handling money, and takes a promissory note or mortgage bond for twice the amount actually lent, and also stipulates for a high rate of interest. If he succeeds in realizing the full amount due under such a promissory note or bond in the year of account, would not the profit made thereby, which includes not only the stipulated interest but also an extraordinary profit which stood the risk of being disallowed in a Court of law if contested by the debtor, and therefore speculative in nature, become chargeable to income-tax? Though the

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transaction in question in this case may be said to be a special variety of money-lending business, it still partakes of the essential characteristics of a money-lending transaction.

In one portion of his reference, the Income-tax Commissioner states that it is perhaps not possible to link this up with his other transactions and to say that it formed a part of his ordinary business or was undertaken in the course of that business. He states that though it is an isolated transaction it was nothing else than an adventure in the nature of trade and the profit so derived was a business profit. This observation led to a good deal of argument, but, in the view we have taken as set forth, it is unnecessary to discuss the cases dealing with what is called an adventure in the nature of trade. If it is simply deemed to be an adventure in the nature of trade, then we have to see, as observed by the Lord PRESIDENT in the case of *Balgownie Land Trust, Ltd. v. The Commissioners of Inland Revenue*(1), whether it is a single plunge and if so whether it is shown to the satisfaction of the Court that the plunge is made in the waters of trade. It is only in such a case we have to see whether such speculative ventures have been systematically carried on and this venture is one of a series of such transactions so as to indicate a continuity in the occurrences of that kind.

In another part of the reference, the Commissioner has distinctly stated that, though it is an isolated transaction speculative in character, it was not essentially different in nature from the assessee's other transactions, and it cannot be said

(1) (1929) 14 T.C. 684.

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that it was not entered upon as a matter of business. We think that this observation is correct and is the proper legal inference from the proved facts. It appears that even the initial outlay of Rs. 4,000 for the purpose of getting the assignment was out of the money which the assessee had lent to or deposited in a firm at Rangoon known as S.M.A.R., Rangoon. As observed by the Income-tax Officer this item of investment must appear in the assessee's headquarters accounts, which he however refrained from producing.

The facts of the present case bear a close resemblance to the facts of the case dealt with by the Bombay High Court in the case of *Commissioner of Income-tax, Bombay v. Sir Purshottamdas Thakordas*(1). In that case, the assessee was found to be a cotton merchant. At the time of a serious crisis in the cotton market, the assessee came to be appointed under a power of attorney as an agent for the sale and disposal of all the cotton bales on behalf of the firm of Umar Sobhani. It was a venture of considerable magnitude, whereby the assessee earned a very large sum by way of commission. Though it was found to be an adventure of a casual and non-recurring nature, it was still found to be a profit connected with the business carried on by the assessee as a cotton merchant. Any receipts arising from the buying and selling of cotton would no doubt be considered as profit arising from the trade or business of a cotton merchant. As regards the special kind of profit earned by way of commission, MACLEOD C.J. states thus at page 11:

"The argument that receipts from an extraordinary transaction connected with business, such as the one in this

(1) (1925) 2 I.T.C. 8; 27 Bom. L.R. 478.

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case, which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted."

This observation is very pertinent to the facts of the present case. [*Vide* also the decision of a Bench of this High Court in *Board of Revenue v. Arunachalam Chettiar*(1).]

We therefore find that the sum of Rs. 63,624 is profit derived by the assessee in the year of account in respect of a transaction connected with his money-lending business, and answer the question in the affirmative. The assessee will pay the costs of the reference to the Income-tax Commissioner Rs. 250.

A.S.V.

APPELLATE CIVIL.

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

G. SUNDARAM CHETTIAR (PETITIONER), APPELLANT,

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P. A. VALLI AMMAL, (RESPONDENT), RESPONDENT.*

Original Side Rules, Madras (1927), O. VII—Leave to defend—Principles governing the grant of—"Triable issue"—Grant of conditional leave—Non-fulfilment of condition—Decree in consequence of—Appeal from order of conditional leave and no appeal from decree—Appellate Court setting aside the conditional order—Effect of—Application for stay in the appellate Court—Competency of—Civil Procedure Code (Act V of 1908), O. XXXVII, r. 3 and O. XLI, r. 5.

A suit on a promissory note was filed under the summary procedure prescribed under Order VII of the Original Side

(1) (1923) I.L.R. 47 Mad. 197.

* Original Side Appeal No. 36 of 1934 and C.M.P. No. 3065 of 1934.

Rules. The plaintiff did not produce the promissory note but, *inter alia*, stated that she had parted with the same to the defendant upon the fraudulent misrepresentation made by him that he would endorse a part-payment on the promissory note and return the same. The defendant took out an application before the Master for leave to defend supported by an affidavit denying the plaintiff's claim and, *inter alia*, stating that payment was made by him and accepted by the plaintiff in full satisfaction of the promissory note. The Master thought that the defence was not *bona fide* and gave conditional leave to defend, the condition being that the defendant should, within a certain time, pay the full amount claimed in the plaint into Court. The defendant appealed to the Judge sitting on the Original Side of the Court who upheld the Master's order granting conditional leave to defend but varied the condition. The defendant did not fulfil the condition but appealed. In the meantime, after the expiry of the time fixed in the condition, a decree was passed by the Master in the suit and no appeal was filed from the decree.

Held:—(1) That, if a defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and that unconditional leave to defend should be granted, because a "triable issue" has been raised by the defendant and it is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether the defence set up is true or false.

Periya Miyana Marakayar v. Subramania Aiyar, (1923) 46 M.L.J. 255, followed.

(2) That, where it is held by the appellate Court that an order consequential upon which a later decree is passed was wrong, the effect of the appellate ruling is to render the later decree as of no force and that, in such a case, even though no appeal has been filed from the later decree, the appellate Court can entertain an application for stay of proceedings under Order XLI, rule 5, of the Code of Civil Procedure.

Lakshmi v. Maru Devi, (1911) I.L.R. 37 Mad. 29, followed.

APPEAL from the order of STONE J., dated 9th May 1934, in the exercise of the Ordinary Original

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Civil Jurisdiction of the High Court in Application No. 1490 of 1934 in Civil Suit No. 150 of 1934.

K. S. Krishnaswami Ayyangar for appellant.

S. Doraiswami Ayyar with *Srinivasaraghavan* and *Thyagarajan* for respondent.

JUDGMENT.

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BEASLEY C.J.—This is an application by the defendant in Civil Suit No. 150 of 1934 for an order staying further proceedings in the suit, whether by way of execution or otherwise, pending disposal of Original Side Appeal No. 36 of 1934, which appeal is before us for admission.

The following are the facts of the case. Original Side Appeal No. 36 of 1934 is an appeal against an order of STONE J., which itself was made on an appeal from an order of the Master. It is necessary to go back to the inception of this matter. The respondent here is a woman. She filed a suit on a promissory note against the appellant claiming Rs. 3,150, the face value of the promissory note being Rs. 4,000. She was unable to produce the promissory note and sued for the lesser amount upon the following ground, namely, that the defendant had made a part-payment of Rs. 1,000. That accounts for the suit being for a lesser amount than the face value of the promissory note. As regards her inability to produce it with the plaint she stated in her plaint that she had parted with the promissory note under the following circumstances, namely, that when the defendant made the part-payment of Rs. 1,000 he got from her the promissory note in order to take it

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away with him and endorse thereon the part-payment and that he refused to return it to her or indeed endorse that part-payment upon it. In other words, she alleged that she had parted with the promissory note to the defendant who, she stated, occupied a position of confidence and trust, upon the fraudulent misrepresentation made by him that he would endorse the part-payment on the promissory note and return it. She accordingly filed her suit under the summary procedure. The defendant put in an application for leave to defend supported by an affidavit in which he denied the plaintiff's case and stated that the amount paid by him was not Rs. 1,000 but Rs. 950, and that that payment had been made by him and accepted by the plaintiff in full satisfaction of the promissory note amount by reason of the fact that she, together with a number of other creditors of the defendant, had agreed to accept payment of four annas in the rupee which was evidenced by a written composition. The Master was of the opinion that this defence was not *bona fide* or he had doubts as to the *bona fide* nature of it and he accordingly only gave conditional leave to defend, the condition being that the defendant should, within one week from the date of the order, pay the full amount claimed in the plaint into Court. The defendant appealed, and STONE J. upheld the learned Master's order granting only conditional leave to defend, but varied the condition altering it to one that security for the full amount claimed in the suit should be given within fourteen days from the date of his order. It would appear that at that hearing at some stage—we are told by Mr. K. S. Krishnaswami Ayyangar at the stage

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when it was recognized that a condition was going to be imposed upon the leave to defend—the defendant said that he would give security. That to my mind is not a matter of very much importance or one which should be allowed to influence us at all in the consideration of this question. He was unable to furnish security. STONE J.'s order was made on the 9th May last, i.e., two days before the closing of the Court for the summer vacation, and, according to that order, upon failure of the defendant to furnish security within the period fixed, the application for leave to defend would stand dismissed with costs. No security was furnished although leave was given to furnish security to the Vacation Officer, and at the expiration of the fourteen days the application stood dismissed. On the 24th July last a decree was passed in favour of the plaintiff for the amount claimed and no appeal has been presented against that decree. The only appeal before us is the appeal against Stone J.'s order granting conditional leave to defend. It was urged before us on behalf of the appellant that this was a case in which unconditional leave to defend should have been given. In support of that contention two English decisions were referred to. One of them was *Jacobs v. Booth's Distillery Company*(1). The head-note of that case reads as follows :—

"Judgment should only be ordered under Order XIV where, assuming all the facts in favour of the defendant, they do not amount to a defence in law.

Where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by

(1) (1901) 85 L.T. 262.

having judgment entered against him, or by being put under terms to pay money into Court as a condition of obtaining leave to defend."

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The other case was *Powszechny Bank Zwiaskowy W. Polsce v. Paros*(1), a decision of the Court of Appeal in England. The head-note is as follows :—

"In an action brought on a writ specially indorsed under Order III, rule 6, by indorsees against the maker of a promissory note, the plaintiffs in an affidavit in support of a summons for leave to sign final judgment under Order XIV, rule 1, stated that they were holders in due course of the note, having taken it in good faith for value from the payees without notice of any defect in their title. The defendant in his affidavit in answer stated facts which, if true, showed that the note had been negotiated in fraud of him. The Judge in Chambers made an order, under Order XIV, rule 6, that the defendant should have leave to defend the action if he brought a sum of money into Court within a certain time, but that, if he failed to do this, the plaintiffs should have leave to sign judgment for the amount claimed. On appeal from this order (it was) held, that a triable issue was raised between the parties; that the mere statement in the plaintiffs' affidavit that they had given value without notice of any defect in their indorsers' title was not sufficient to decide that issue in the plaintiffs' favour, but that the Court must have an opportunity of deciding it, and that therefore the defendant was entitled to leave to defend the action without the condition that he should pay money into Court."

It was further held that

"where a defendant is entitled to leave to defend, the Judge in Chambers cannot, under Order XIV, rule 6, make an order for conditional leave to defend, the effect of which is to give the plaintiff conditional leave to sign judgment."

There is also a decision of this High Court, namely, *Periya Miyana Marakayar v. Subramania Aiyar*(2), a decision of SCHWABE C.J. and RAMESAM J. The head-note reads as follows :—

"The question to be considered on applications under Order XXXVII, rule 3, Civil Procedure Code, is whether or not

(1) [1932] 2 K.B. 353.

(2) (1923) 46 M.L.J. 255.

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a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must, as a rule, bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time."

It is not necessary to refer to the judgment of SCHWABE C.J. because the head-note to which reference has been made has been taken bodily from his judgment. The position to my mind is clear although it may be one which leads to unfortunate results in some cases. With that, however, we are not concerned. If a defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and unconditional leave to defend must be granted. A triable issue in such a case has been raised by the defendant and it is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether that case is a true one. In this case it is argued by the plaintiff (respondent) that no triable issue was raised. That seems to me to be a hopeless contention. The plaintiff's contention is that the suit promissory note had only been discharged in part and that she is unable to produce it because by fraud the defendant has got possession of it. The defendant denies

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this and says that by agreement the part-payment was accepted as a complete discharge and that in consequence of this arrangement and part-payment he got possession of the promissory note. Clearly there are two issues to be tried. I am, therefore, of the opinion that the orders made by the learned Master and by STONE J. were wrong and that unconditional leave to defend ought to have been given. As it has been agreed by both the applicant and the respondent that the hearing of the application for the admission of this appeal may be treated as the hearing of the appeal, the appeal must be allowed.

A further point raised is that this Court is not competent to grant the order asked for, namely, a stay of execution by reason of the fact that no appeal has been presented against the decree which was passed on the 24th July. That is quite true. No appeal has been filed against that at all. It is pointed out that, under Order XLI, rule 5, Civil Procedure Code, where a decree has been passed and no appeal has been presented against it, the proper Court to which an application should be presented for stay of execution within the available time is the Court which passed the decree, and that it is only in cases where an appeal has been presented against a decree that the appellate Court has seisin of the case and can order or refuse stay of execution of the proceedings. At first sight this contention of the respondent would appear to be right, but it has been contended that, where as a matter of fact it is held by the appellate Court that an order consequential upon which a later decree is passed was wrong, the effect of that ruling is to render the

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final or later decree as of no force, and that has been the view taken by this Court for many years and accepted by the Allahabad High Court and recently by a Full Bench of the Calcutta High Court. The first case upon this point to which our attention was drawn was *Lakshmi v. Maru Devi*(1). There it was held that an appeal against a preliminary order in execution can be filed even after the date of the final order which merely carries out and is consequential to the preliminary order though no appeal has been filed against the final order, and that, with the reversal of the earlier order, the later order which depends for its validity upon the earlier one *ipso facto* ceases to have any force. It is argued therefore that, if in this appeal it is held that STONE J.'s order was wrong, the later order, namely, the decree which was passed in consequence of it, is of no force. There is another decision upon this point, viz., *Ramuvien v. Veerappudayan*(2), in the same volume, to the same effect, and there is also a decision of the Calcutta High Court, *Talebali v. Abdul Aziz*(3). It is quite true that those cases were cases in which a preliminary decree had been passed, but it seems to me, although I say so with some hesitation, that the same effect must be given to cases where a wrong order has resulted in a wrong decree. Clearly, if in this case the order which is under appeal and which in my opinion was a wrong order had not been made, the defendant would have been given leave to defend and the result might have been quite different to what it has been. I am, therefore, of

(1) (1911) I.L.R. 37 Mad. 29.

(2) (1912) I.L.R. 37 Mad. 455.

(3) (1929) I.L.R. 57 Cal. 1013 (F.B.).

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the opinion though, as I said before, I come to this opinion with some hesitation, that it is competent in such a case as this for the appellate Court to entertain an application for stay of proceedings under Order XLI, rule 5, Civil Procedure Code. At the same time sub-clause (3) of that rule prevents an order for stay of execution being made unless security has been given by the appellant for the due performance of such decree or order as may ultimately be binding upon him. It appears to me that that provision is mandatory and that, no security having been given, it is impossible for this Court to order stay of execution; and stay of execution must accordingly be refused.

It is most desirable that this case should be tried at the earliest possible moment in view of the fact that no stay of execution has been ordered. The order, therefore, is that this case should be tried on the Original Side by the Original Side Judge, who is hearing this class of cases, on next Friday. We are told that the parties will then be ready, and in any case there is no reason why they should not be ready. No pleadings will be necessary and the affidavits so far filed will be the pleadings in the suit and no issues need be framed.

Costs of the application for stay of execution, costs of the appeal and costs in the Courts below will be costs in the cause.

KING J.—I agree.

Attorney for appellant.—N. T. Shamanna.

G. R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Madhavan Nair.

1934,
May 4.

MALLELA VENKATARAYUDU AND SIX OTHERS
(DEFENDANTS 2 AND 4 TO 9), APPELLANTS,

v.

MALLELA SIVARAMAKRISHNAYYA AND FIVE OTHERS
(PLAINTIFFS 1 TO 3 AND DEFENDANTS 1, 3 AND 10),
RESPONDENTS.*

Hindu Law—Joint family—Partition—Severance of joint family status—Insolvency petition filed by member of family—Adjudication of that member on—Severance if effected by—Sale by Official Receiver of insolvent's share in joint family property—Purchaser at—Suit for partition by—Mesne profits in respect of share purchased—Date from which purchaser entitled to—Marriage expenses of unmarried coparceners—Provision for, in decree for partition—Principle applicable.

In a joint Hindu family consisting of a father and his sons, one of the sons was, on his own petition, adjudicated an insolvent. In the course of his administration of the insolvent's estate, the Official Receiver sold by public auction the share of the insolvent and his son in the suit properties. The share in certain specified lots was purchased by the first plaintiff, the share in the other lots being purchased by the first defendant. The first plaintiff, the second plaintiff, his son, and the third plaintiff, an alienee of a portion of first plaintiff's properties from the first plaintiff, sued for partition of the suit properties and delivery to them of the share purchased by them together with mesne profits. There was no proof that on the date of the sale by the Official Receiver possession of the properties was demanded by the purchaser and refused by the other members of the family, but the plaint allegations showed that possession might be taken to have been demanded and refused from the date of the plaint.

* Second Appeal No. 777 of 1923.

Held that neither the filing of the insolvency petition nor the adjudication of the applicant as an insolvent could sever the joint family status, that the purchaser was not, therefore, a tenant in common from the date of his purchase, and that the plaintiffs were not entitled to mesne profits from that date but that they were entitled to mesne profits from the date of the plaint.

Maharaja of Bobbili v. Venkataramanjulu Naidu, (1914) I.L.R. 39 Mad. 265, distinguished.

Venkatram v. Chokkier, (1927) I.L.R. 51 Mad. 567, relied upon.

Held further that the unmarried brothers of the insolvent were not entitled to have any provision made in the decree for the expenses of their marriage.

The correct principle to be applied to cases of this kind is that, after severance of joint family status had been effected, no obligation rests on the joint family in respect of the future marriage of a coparcener who was unmarried at the time of the severance.

Ramalinga Annavi v. Narayana Annavi, (1922) I.L.R. 45 Mad. 489 (P.C.), relied upon.

Srinivasa Iyengar v. Thiruvengadathaiyangar, (1912) I.L.R. 38 Mad. 556, and *Gopalam v. Venkataramanagavulu*, (1915) I.L.R. 40 Mad. 632, held to have been overruled on this point by *Ramalinga Annavi v. Narayana Annavi*, (1922) I.L.R. 45 Mad. 489 (P.C.).

APPEAL against the decree of the District Court of Guntur in Appeal Suits Nos. 50 and 77 of 1925, preferred against the decree of the Court of the Subordinate Judge of Guntur in Original Suit No. 55 of 1922.

Ch. Raghava Rao for appellants.—The lower appellate Court's view that the filing of an insolvency petition by a member of a joint Hindu family itself effects a severance in status is wrong. The presentation of such a petition is not an unequivocal expression of intention of the member to effect a severance in status. Further, the intention is not communicated to the other members of the family which is required to constitute a severance in status. Notice of the petition goes, under section 19 of the Provincial Insolvency Act, only to the

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creditors of the insolvent and not to the other members of the family. The filing of an insolvency petition is not analogous to the filing of a suit for partition for this purpose. Coparcenary is a creature of the Hindu Law and can only be put an end to by some transaction between the coparceners themselves *inter se*. That is why it has been held that an alienation by a member of his entire interest in the joint family property does not effect a severance in status. Alienation by a member does not work out a severance, and the alienee acquires only an equity to be worked out by a suit for partition and is not entitled to mesne profits from the date of the alienation; *Maharaja of Bobbili v. Venkataramanjulu Naidu*(1). In that case it was not necessary to decide whether he was entitled from the date of suit or from the date of the preliminary decree. But in Mayne's Hindu Law, ninth edition, pages 515 and 679-80, it is stated that he is entitled only from the date of the preliminary decree. This view is correct because *Maharaja of Bobbili v. Venkataramanjulu Naidu*(1) shows that the alienee is entitled only to an equity. He cannot therefore be entitled to mesne profits. In *Manjaya v. Shanmuga*(2) BAKERWELL J. states that the alienee's right is a right *in personam* and not a right *in rem* and that the alienor continues to be a member of the joint family; see page 688. *Srinivasa Sundara Thathachariar v. Krishnasamy Iyengar*(3) is a case to the contrary effect. The alienee is not entitled to mesne profits from the date of suit because he cannot insist upon the allotment to his alienor of the very share alienated by him and because the alienee is liable to be ejected from the property purchased by him by the other members of the family leaving the alienee to establish his rights by a suit for partition. Decisions have recognized that he is not entitled to possession until the date of the decree in his partition suit. Even if the alienee is considered to be a tenant in common, he will not be entitled to mesne profits from the date of alienation because one tenant in common is not entitled to mesne profits from another tenant in common unless he proves ouster. In that case he may be entitled to profits from the date of suit. An alienee from the Official Receiver in insolvency proceedings stands in the same position as an execution purchaser under a decree against a member; see *Nathu Mal v. Dina Nath*(4).

(1) (1914) I.L.R. 39 Mad. 265.

(3) (1912) 15 I.C. 354.

(2) (1913) I.L.R. 38 Mad. 684.

(4) A.I.R. 1933 Lah. 651.

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With regard to the question whether a provision can be made in the decree for the marriage expenses of the unmarried brothers of the insolvent, see *Srinivasa Iyengar v. Thiruvengadathaiyengar*(1), *Narayana v. Ramalinga*(2), *Gopalam v. Venkataragharulu*(3) and *Ramalinga Annavi v. Narayana Annavi*(4). None of those cases covers the present case because the suits in those cases were suits for partition by one coparcener against another. Provision for marriages taking place after date of severance in status cannot be made in view of *Ramalinga Annavi v. Narayana Annavi*(4). But there has been no such severance in the present case either by notice or by a suit for partition instituted by the insolvent. The suit for partition is only by the alienee. Therefore the family including the insolvent remains joint till the date of the decree in the suit. The expenses of marriages of coparceners are a charge on the family property and the alienee must take the property subject to that charge. [Mayne's Hindu Law, page 677, and Mulla's Hindu Law, seventh edition, page 503, section 440, referred to.] The son's share does not vest in the Official Receiver. This point is material as regards the question whether in respect of the son's share the alienee can get mesne profits from the date of suit or from the date of sale. If the son's share itself does not vest in the Official Receiver, the son will, whatever the position of his father may be, continue to be a member of the joint family till the date of the decree and the alienee will not be entitled to mesne profits in respect of the son's share till the date of the decree.

V. Govindarajachari (with him, *M. Sriramamurthi*) for respondents.—There must be held to have been a severance in status from the date of the insolvency petition because it was a debtor's petition or from the date of the order of adjudication made on that petition. The entire share of the insolvent is taken away from the insolvent and vested in the Official Receiver for the benefit of the insolvent's creditors and the Official Receiver can sell the share of the insolvent notwithstanding his death in the interval. [Mulla's Law of Insolvency, page 351, paragraph 522, and the decisions cited therein referred to.] The alienee from the Official Receiver is a tenant in common and is entitled to mesne profits from the date of sale. The Official

(1) (1912) I.L.R. 38 Mad. 556.

(3) (1915) I.L.R. 40 Mad. 632.

(2) (1915) I.L.R. 39 Mad. 587.

(4) (1922) I.L.R. 45 Mad. 489 (P.C.).

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Assignee on the insolvency of a coparcener is entitled to joint possession with other coparceners; see Mulla's Hindu Law, page 311, section 265, sub-section 3. If the other coparceners give the Official Receiver joint possession he will not be entitled to mesne profits. If they do not, he will be entitled to call for an account. The very fact that a purchaser from him has been obliged to sue for possession shows that he has been excluded. The Official Receiver is in the position not of an alienee but of a coparcener; see *Official Assignee of Madras v. Ramachandra Ayyar*(1). A purchaser from the Official Receiver is entitled to joint possession just as much as the Receiver; *Venkatram v. Chokkier*(2). It is not obligatory upon either the Official Receiver or the purchaser from him to have recourse to the summary remedy under section 4 of the Provincial Insolvency Act. It is open to him to have recourse to the remedy by suit. The purchaser from the Official Receiver may be given possession by removal of obstruction; *Ramaswami Chettiar v. Ramaswami Iyengar*(3). *Maharaja of Bobbili v. Venkataramanjulu Naidu*(4) was a case of an alienee from a coparcener. It is doubted in *Soundararajam v. Arunachalam Chetty*(5) by SADASIVA AIYAR J. [*Lakshumi Achi v. Narayanaswami Naicker*(6) referred to.]

[We think that *Maharaja of Bobbili v. Venkataramanjulu Naidu* (4) is good law at least to the extent to which it says that mesne profits can be claimed at the earliest only from the date of suit and we are not disposed to allow any argument intended to show that that view is wrong. You may argue the position that mesne profits are claimable from the date of suit and not merely from the date of the preliminary decree—The CHIEF JUSTICE.]

The passage on page 679 of Mayne's Hindu Law does not deal with the case of an alienee. [Mulla's Hindu Law, page 303, section 261, referred to; also *Trimbak Ganesh v. Pandurang Gharojee*(7).] When a suit is filed the rights of the parties are put into the hands of the Court and the alienee has nothing further to do. Further, the decree will speak from the date of the suit. [*Krishnaswami Thevan v. Pulukaruppa Thevan*(8),

- (1) (1922) I.L.R. 46 Mad. 54, 57. (2) (1927) I.L.R. 51 Mad. 567.
(3) (1921) I.L.R. 45 Mad. 434, 437. (4) (1914) I.L.R. 39 Mad. 265.
(5) (1915) 29 M.L.J. 816, 829-30. (6) (1923) 57 M.L.J. 746, 748.
(7) (1919) I.L.R. 44 Bom. 621. (8) (1924) I.L.R. 48 Mad. 465.

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Sri Ranga Thathachariar v. Srinivasa Thathachariar(1) and *Rangasayi v. Nagarathnamma*(2) referred to]. The alienee's right is not an equity in the sense that it is dependent upon the consent or goodwill of the other members of the family. *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(3) lays down that the alienee ought not to be deprived of his possession and that the decree to the other coparceners should be subject to their allowing partition in that very suit. As to the form of the suit and the form of the decree in that case, see page 981. The view taken in *Manjaya v. Shanmuga* (4) that the alienee is not entitled to possession till his rights are declared by a preliminary decree is wrong. With regard to the question of a provision for marriage expenses, *Ramalinga Annavi v. Narayana Annavi*(5) is authority for the position that there cannot be an anticipatory provision for marriage expenses after the disruption of the family. Even in the case of a suit by an alienee it is admitted that severance takes place from the date of the preliminary decree. In the present case there have been no marriages between the dates of suit and of the preliminary decree. For marriages taking place after the date of the preliminary decree no anticipatory provision can, according to *Ramalinga Annavi v. Narayana Annavi*(5), be made. [Mulla's Hindu Law, page 375, section 304, referred to.]

Ch. Raghava Rao in reply.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This second appeal by defendants 2 and 4 to 9 is against the decree of the District Judge of Guntur in Appeals Nos. 50 and 77 of 1925 directing the partition of the suit properties into seven shares and delivery of one-seventh share to the plaintiffs together with mesne profits, which modified the preliminary decree for partition passed by the Subordinate Judge of Guntur in Original Suit No. 55 of 1922.

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- (1) (1927) I.L.R. 50 Mad. 866, 869.
(2) (1933) I.L.R. 57 Mad. 95, 101, 117-8 (F.B.).
(3) (1913) I.L.R. 40 Cal. 966 (P.C.).
(4) (1913) I.L.R. 38 Mad. 684. (5) (1922) I.L.R. 45 Mad. 489 (P.C.).

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The facts necessary for the disposal of this second appeal are briefly these. The suit properties belong to a joint Hindu family consisting of defendants 2 to 9. The second defendant is the father and defendants 3 to 8 are his sons. The ninth defendant is the son of the third defendant. In Insolvency Petition No. 14 of 1915 on the file of the District Court of Guntur, the third defendant was adjudicated an insolvent and the tenth defendant was appointed the Official Receiver. In the course of his administration of the insolvent's estate, the tenth defendant sold by public auction the one-seventh share of defendants 3 and 9 in the suit properties. The first plaintiff purchased one-seventh share in certain specified lots under the sale deed executed by the Official Receiver, Exhibit A, dated 11th February 1919. The one-seventh share in the other lots was sold to the first defendant, the son-in-law of the second defendant, under the sale deed, Exhibit B, dated 12th February 1919. The second plaintiff is the son of the first plaintiff. The first plaintiff conveyed a portion of his properties to the third plaintiff by a registered sale deed dated 2nd October 1920.

The suit out of which this second appeal arises was instituted by the plaintiffs for partition of the suit properties into seven equal shares and delivery to them of the one-seventh share purchased by them together with mesne profits. Issues 3 and 5 in the suit, with the decision of which we are mainly concerned in the second appeal, are as follows:—

Issue 3 :—Whether the plaintiffs are entitled to any, and, if so, to what mesne profits against the defendants 2 and 4 to 8.

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Issue 5 :—Whether the defendants 7 and 8 are entitled to have provision made out of the joint estate for the expenses of their marriage.

With respect to the third issue the plaintiffs contended that they are entitled to get mesne profits from the date of their purchase of the share of the properties claimed by them, i.e., from 11th February 1919, while the defendants contended that they were entitled to mesne profits only from the date of the preliminary decree for partition, i.e., from 12th November 1924. In *Maharaja of Bobbili v. Venkataramanjulu Naidu*(1) it was held, disapproving some previous decisions, that a purchaser of an undivided share of a member of a joint Hindu family does not thereby become a tenant in common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition. Relying mainly on this decision the learned Subordinate Judge held that the plaintiffs were entitled to claim mesne profits from the date of the suit. It will be observed that he disallowed the contentions of both the plaintiffs and the defendants on this point.

With respect to issue 5 it was contended by the defendants that the marriage expenses of defendants 7 and 8 should be provided for before the properties are equally partitioned. The plaintiffs contended that no such provision out of the joint family funds could be made. In *Gopalam v. Venkataraghavulu*(2) it was held, following *Srinivasa Iyengar v. Thiruvengada-thaiyengar*(3) and dissenting from *Narayana v.*

(1) (1914) I.L.R. 39 Mad. 265.

(2) (1915) I.L.R. 40 Mad. 632.

(3) (1912) I.L.R. 38 Mad. 556.

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Ramalinga(1), that in partition decrees provision should be made for the marriage expenses of the unmarried members of the family. Following this decision the learned Subordinate Judge held that provision has to be made out of the joint family estate for the marriage of the defendants 7 and 8. In the result the Subordinate Judge passed a decree directing the delivery of one-seventh share to the plaintiffs together with mesne profits from the date of the plaint making a portion of the marriage expenses a charge on the properties allotted to them.

Against the above decree both the plaintiffs and the defendants preferred appeals to the District Court. On the question of mesne profits raised in issue 3 the learned District Judge held that the plaintiffs were entitled to claim mesne profits from the date when they purchased the suit properties, he being of opinion that the filing of the insolvency petition must be taken to involve a declaration of severance of the joint family status and that in consequence the vendee was a tenant in common from the date of the sale and is entitled to profits from that date. On the question of marriage expenses raised in issue 5 the learned District Judge held, relying on *Ramalinga Annavi v. Narayana Annavi*(2), that the unmarried members were not entitled to have any provision made for the expenses of their marriage. In his view this decision superseded the decisions in *Srinivasa Iyengar v. Thiruvengadathaiyangar*(3) and *Gopalam v. Venkataraghavulu*(4). In the light of the above findings the

(1) (1915) I.L.R. 39 Mad. 587.

(3) (1912) I.L.R. 38 Mad. 556.

(2) (1922) I.L.R. 45 Mad. 489 (P.C.).

(4) (1915) I.L.R. 40 Mad. 632.

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decree of the Subordinate Judge was modified by the District Judge. It will be observed that on both the questions at issue between the parties the District Judge accepted *in toto* the contention of the plaintiffs.

In second appeal Mr. Raghava Rao argues that the decision of the learned District Judge is wrong on both the questions and that he should have held that the plaintiffs are entitled to mesne profits only from the date of the preliminary decree and that their properties should be charged with the payment of the marriage expenses of defendants 7 and 8.

On the first point, namely, that relating to mesne profits, we have no doubt that the learned District Judge's decision that the filing of an insolvency petition brings about a severance of joint family status cannot be upheld. No authority in support of the position is mentioned in the lower Court's judgment, nor has any been quoted before us by the learned Counsel justifying the conclusion. On principle, we cannot see how the filing of an application for insolvency can be taken to involve a declaration of severance of the joint family status. The immediate object of a petition in insolvency by a debtor is to get exemption from arrest; and it must be obvious that a stranger cannot by any conduct of his enforce a severance of the joint family status. To hold that the filing of an insolvency application by a member of a joint Hindu family amounts to an unequivocal and unambiguous declaration to sever from the family is to state a proposition supported neither by authority nor by principle. No doubt the filing of a petition in insolvency

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followed by adjudication gives certain legal rights to the Official Receiver with respect to the share of the property belonging to the insolvent. His share vests in the Official Receiver and the disposing power of the insolvent with respect to his son's share for paying debts not contracted for an immoral purpose also vests in him. But this result does not bring about any severance in the joint family status of the insolvent. We must hold that neither the filing of an insolvency petition nor the adjudication of the applicant as an insolvent can sever the joint family status and that in consequence we cannot hold the vendee was a tenant in common from the date of the sale and is entitled to profits from that date.

In our Court it has been held that the Official Assignee is entitled on the insolvency of any coparcener to joint possession with the other coparceners; see *Official Assignee of Madras v. Ramachandra Ayyar*(1) and *Venkatram v. Chokkier*(2), and also Mulla's Hindu Law, page 311. In the latter of the two cases just mentioned, namely, *Venkatram v. Chokkier*(2), the same privilege of joint possession with respect to an insolvent's share is accorded to an alienee from the Official Receiver also. It is clear law that one coparcener entitled to joint possession with another coparcener cannot claim mesne profits unless he shows that he has been excluded from enjoyment of the properties by the other coparcener. It follows therefore that unless it is shown that on the date of the sale by the Official Receiver possession of the properties was demanded by the vendee and refused by the appellants

(1) (1922) I.L.R. 46 Mad. 54.

(2) (1927) I.L.R. 51 Mad. 567.

it cannot be held that the plaintiffs are entitled to mesne profits from the date of the sale. In this case the question of exclusion was not raised as a specific point in issue and no evidence has been adduced on it, though there is a statement in the plaint to the effect that "after the purchase of the properties in spite of repeated demands the defendants have not chosen to effect a division of the properties or to put the plaintiffs in possession, etc." But it is clear that possession may well be taken to have been demanded and refused from the date of the plaint. We would therefore hold, agreeing with the Subordinate Judge though on a different ground, that the plaintiffs are entitled to mesne profits from the contesting defendants from the date of the plaint. The present case being one of an alienation by the Official Receiver who is the representative of the insolvent, the applicability of *Maharaja of Bobbili v. Venkataramanjulu Naidu*(1) relied on by the learned Subordinate Judge, where it was held that

"a purchaser of an undivided share of a joint Hindu family does not thereby become a tenant in common with the other members and hence he is not entitled to mesne profits in respect of his share from the date of his purchase",

does not arise for consideration; and it is conceded that the argument that the purchaser is entitled to mesne profits only from the date of the preliminary decree for partition cannot be pressed, the Official Assignee and the purchaser from him of the insolvent's property being held to be entitled to joint possession along with the coparcener.

The next point relates to the question whether provision should be made in the decree

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for the marriage expenses of two of the brothers of the insolvent, namely defendants 7 and 8. In summarising the conclusions arrived at by the lower Courts, the decisions bearing on the question have already been mentioned. The decisions in *Srinivasa Iyengar v. Thiruvengadathaiyangar*(1) and *Gopalam v. Venkataraghavulu*(2) support the contention of the appellants that such provision should be made before the properties are finally partitioned. In *Narayana v. Ramalinga*(3) which refused to follow *Srinivasa Iyengar v. Thiruvengadathaiyangar*(1) SANKARAN NAIR and OLDFIELD JJ. held that an unmarried coparcener is not entitled to have an anticipatory provision made for the expenses of his future marriage at partition; but they allowed the claim for the expenses of the marriage that took place before the decree in the first Court on the ground that "joint family status was not dissevered until the decree for partition and that the joint family continued until then." This decision was taken up in appeal to the Privy Council and the judgment of their Lordships of the Judicial Committee is reported as *Ramalinga Annavi v. Narayana Annavi*(4). On the point under consideration their Lordships, following *Girja Bai v. Sadashiv Dhundiraj*(5) which did not exist when *Narayana v. Ramalinga*(3) was decided, held that the institution of a suit for partition by a member of a joint Hindu family effects a severance of the joint status of the family and a member of the family who is then unmarried is not entitled to have a provision made in the partition

(1) (1912) I.L.R. 38 Mad. 556.

(3) (1915) I.L.R. 39 Mad. 587.

(2) (1915) I.L.R. 40 Mad. 632.

(4) (1922) I.L.R. 45 Mad. 489 (P.C.).

(5) (1916) I.L.R. 43 Cal. 1031 (P.C.).

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for his marriage expenses although he marries before the decree in the suit is made. According to this decision the obligation to provide for future marriages ceases on severance of the joint family status. This decision is relied on by the plaintiffs-respondents in support of their contention. The appellants argue that the decision of the Privy Council does not supersede the decisions in *Srinivasa Iyengar v. Thiruvengadathaiyangar*(1) and *Gopalam v. Venkataraghavulu*(2) and further that the Privy Council decision is inapplicable to the present case, inasmuch as the case before the Judicial Committee dealt with the question of the expenses of marriage in a suit for partition instituted by some of the coparceners against the remaining members of the family, whereas the present suit is not one instituted by a coparcener. In our opinion both the arguments should be overruled. Though the two decisions in *Srinivasa Iyengar v. Thiruvengadathaiyangar*(1) and *Gopalam v. Venkataraghavulu*(2) are not actually referred to in the judgment of the Privy Council, it is clear from the arguments that both the decisions were brought to the notice of their Lordships and then they enunciated the correct principle to be applied to cases of this kind, that principle being this, that after severance of joint family status had been effected no obligation rests on the joint family in respect of the future marriage of a coparcener who was unmarried at the time of the severance. This being the correct principle to be applied, we think that the previous decisions of this Court in *Srinivasa Iyengar v. Thiruvengadathaiyangar*(1)

(1) (1912) I.L.R. 38 Mad. 556.

(2) (1915) I.L.R. 40 Mad. 632.

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and *Gopalam v. Venkataraghavulu*(1) should be considered to be overruled by the Privy Council decision in *Ramalinga Annavi v. Narayana Annavi*(2) with respect to the point under consideration. We are also of the opinion that the principle of the Privy Council decision would apply to the present case also, inasmuch as the Official Receiver as the representative of the insolvent coparcener occupies the position of a coparcener himself, and the alienee from him stands in his shoes and may therefore be said to be in the position of a coparcener. We must therefore hold, agreeing with the learned District Judge, that provision should not have been made in the decree for the marriages of defendants 7 and 8. In the result the lower Court's decree will be modified in the light of the above findings. The parties will pay and receive proportionate costs.

A.S.V.

(1) (1915) I.L.R. 40 Mad. 632.

(2) (1922) I.L.R. 45 Mad. 489 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice
Madhavan Nair.

MAHABOOB SIR FRAJVANTU SRI RAJA PARTHA-
SARATHY APPA RAO, SAVAYI ASWA RAO
BAHADUR ZAMINDAR GARU AND ANOTHER
(PLAINTIFF AND NIL.), APPELLANTS,

1934,
May 9.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF KISTNA, AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

Burden of proof—Service inams within the ambit of a zamindari—If included in the assets of zamindari—Burden on zamindar—Enfranchisement proceedings by Government—Suit by zamindar for declaration denying Government's right—Limitation, according as the zamindar did or did not take part in those proceedings—Indian Limitation Act (IX of 1908), arts. 14 or 120.

In a suit by a zamindar against the Government for a declaration that the latter was not entitled to enfranchise certain service inams in certain villages within the ambit of the zamindari on the ground that they were included in the assets of the zamindari and not excluded from them at the time of the permanent settlement and that the right of resumption is in him and not in the Government, held (1) that the burden of proof lay on the zamindar to show that the suit lands were included in the assets of the zamindari in spite of the fact that they were within the geographical limits of the zamindari;

Secretary of State for India v. Raja Jyoti Prashad Singh, (1926) I.L.R. 53 Calc. 533 (P.C.), followed; and *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra*, (1914) I.L.R. 42 Calc. 710 (P.C.), distinguished;

(2) that, in a case when the zamindar was a consenting party to the inam proceedings and raised no objection, article 14 of the Indian Limitation Act would apply, but that, in general, article 120 of the Indian Limitation Act would apply;

* Appeal No. 431 of 1925.

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(3) that, when he had not appeared before the Inam Commissioner and had taken no part in the proceedings and files a suit on the footing that the proceedings were *ultra vires*, the cause of action does not actually arise until he is injuriously affected by the enfranchisement, i.e., where there was a definite refusal by the inamdars to perform the services for which the inams were originally granted ;

(4) and that, even if the quit-rent was collected by the Government from the inamdars directly or indirectly through the zamindar giving a commission to him on the collection and in the meanwhile the inamdars continued to render service to the zamindar, it did not give rise to a compulsory cause of action for a declaratory suit though it might afford an optional cause of action for the same.

APPEALS against the decree of the Court of the Subordinate Judge of Kistna at Ellore, dated the 31st March 1925 in Original Suits Nos. 52, 54, 55 of 1923, 30 and 31 of 1924, 56 of 1923, 32 of 1924, 51 of 1923, 24 of 1924, 35 of 1924, 33 of 1924 and 53 of 1923.

P. Venkataramana Rao and K. Subba Rao for appellant.

Advocate-General (Sir A. Krishnasami Ayyar) for first respondent.

V. Suryanarayana for other respondents.

Cur. adv. vult.

JUDGMENT.

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RAMESAM J.—These appeals arise out of suits brought by Raja Parthasarathi Appa Rao, zamindar of one-third share of the zamindari of Nidadavolu. All the suit villages are situate in the Amberipetta purgana of the zamindari. The plaintiff files these suits for a declaration that the Government is not entitled to enfranchise certain service inams in these villages on the ground that they are included in the assets of the zamindari

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and not excluded from them at the time of the permanent settlement and that the right of resumption is in the zamindar and not in the Government. So far as the inamdars are concerned, the plaintiff alleges that he is entitled to resume the lands whenever their services are not required and that he gave notice to them to quit the suit lands. Similar questions have arisen before us in connexion with a number of zamindaris in the Kistna district. Those cases are Second Appeals Nos. 648 to 832, 974 to 1058, of 1927 and other connected second appeals and the questions of law arising in those cases were elaborately discussed by us in our judgments in those second appeals and I will have to refer in the course of this judgment to our earlier judgment. The Subordinate Judge of Ellore who tried the suits dismissed them and the plaintiff appeals.

Two important questions arise in suits of this kind : (A) On whom does the burden of proof lie ? Is it for the zamindar to prove that the suit lands were included in the assets of the zamindari at the time of the permanent settlement ; or is there a *prima facie* presumption that the lands being within the ambit of the zamindari are included in the assets of the zamindari ; or is it for the Government to prove that they were excluded from the assets of the zamindari at the time of the settlement ? On this question it is unnecessary for me to repeat what I have said in my former judgment, but, as that judgment has not been reported, it may be convenient to summarise what I have said therein. In the printed copy of that judgment I discussed this matter at pages 13 to 16. I there show that, though at first sight

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it looks as if the decision of the Judicial Committee in *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra*(1) is in favour of the zamindar and throws the burden of proof upon the Government, that case relates to Sukinda and Madhupur estates in Orissa and it somewhat resembles the decision in *Secretary of State v. Rajah of Venkatagiri*(2) which relates to Venkatagiri and connected zamindaris in this Presidency. These estates have a special history of their own, and the rule of presumption in respect of all zamindaris cannot be inferred from these cases. The general rule is laid down in the decision in *Secretary of State for India v. Raja Jyoti Prashad Singh*(3). According to that decision it is for the zamindar to show that the suit lands were included within the zamindari in spite of the fact that they are within the geographical limits of the zamindari. Accordingly I held that the burden of proof is in such cases always on the zamindar. (B) Question of limitation. This question was discussed by me at pages 21 to 27 of that judgment. There I held, (i) that in a suit by a zamindar against Government for a declaration that an enfranchisement by the Government is not valid and binding on the zamindar the period to be applied is not 12 years. In this matter I differed from an unreported judgment of WALLACE and THIRUVENKATACHARIAR JJ. in Appeal No. 355 of 1922; (ii) in general, article 120 will apply to such suits; (iii) where the zamindar was a consenting party to the inam proceedings and raised no objection, article 14 may

(1) (1914) I.L.R. 42 Calc. 710 (P.C.). (2) (1921) I.L.R. 44 Mad. 864 (P.C.).
(3) (1926) I.L.R. 53 Calc. 533 (P.C.).

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apply; but, where the zamindar had not appeared before the Inam Commissioner and had taken no part in the proceedings and files a suit on the footing that the proceedings are *ultra vires*, then, the effect of the order of the Inam Commissioner is not such as to make it necessary for the zamindar to set it aside, and therefore article 14 does not apply to such cases. A further question was discussed as to when exactly the cause of action begins, assuming that the period of limitation is six years under article 120. I held that, where the zamindar took no part in the proceedings and studiously kept himself aloof and afterwards files a suit for a declaration on the ground that the proceedings are *ultra vires*, the cause of action does not actually arise until he is injuriously affected by the enfranchisement, i.e., until there is a definite refusal by the inamdars to perform the services for which the inams were originally granted. This portion of my judgment is at pages 21 to 23. I made observations to the effect that, even if quit-rent is collected by the Government from the inamdars directly or indirectly through the zamindar giving ten per cent to the zamindar as commission and in the meanwhile the inamdars continued to render service to the zamindar, this does not necessarily compel the zamindar to sue though if he likes he may sue, i.e., it does not give rise to a compulsory cause of action for a declaratory suit though it may afford an optional cause of action for a declaratory suit. A compulsory cause of action arises when for the first time he is injuriously affected by the enfranchisement. Once such a compulsory cause of action arises, a suit brought more than six years

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from that date would be barred; *Kodoth Ambu Nayar v. Secretary of State for India*(1). In the last case it was held that one cannot evade limitation by making a second application to the Government and bringing a suit within six years from the rejection of the second application. Here I may mention that in most of the cases with which we were concerned in those second appeals the zamindar did not appear before the Inam Commissioner. The only exceptions to the statement were the Mokhasa of Kondaparva and the Gampalagudam estate. In the case of Kondaparva the mokhasadar was present and agreed to the enfranchisement. I held that he was barred even under article 14 (*see* page 27). As to Gampalagudam estate except as to one village (Anumalalanka) the zamindar agreed to the lands being enfranchised (page 27 of the former judgment) and I held that the suits were barred under article 14 also. In all the other cases I held that article 14 did not apply and article 120 applied.

Now in the suits before us it is unnecessary to discuss the question whether article 14 applies, because in the view I am taking, even if article 120 applied, except in the case of three villages all the suits would be barred by limitation. What happened in these cases is this. The notification by the Government was on 1st October 1909, and the date fixed under section 19 of Act II of 1894 was 1st July 1910. The zamindari was then the subject of a litigation. The present zamindar-appellant, Raja Parthasarathi Appa Rao, filed a suit for the recovery of one-third share of the zamindari. The matter went up to the Privy

(1) (1924) I.L.R. 47 Mad. 572.

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Council where the zamindar finally obtained a decree for one-third share; see *Narasimha v. Parthasarathy*(1). It is admitted before us that during all this litigation the estate was being managed by a receiver. The receivership terminated in 1916 and the plaintiff's share of the estate was made over to him in the same year (*vide* the deposition of plaintiff's first witness). When the enfranchisement notice was given to the receiver, the receiver actually sent his tane-dar to appear before the Inam Commissioner and make a statement. In most of the cases in which he appeared he had no objection to the enfranchisement but wanted the kattubadi on the inams to be excluded from enfranchisement. Afterwards no document was produced to make out the case for exclusion of kattubadi, with the result that even kattubadi was not excluded.

* * * *

It may be that if the zamindar himself was in charge of his own estate he would not have consented but, as the receiver represented the person who was ultimately found to be the owner of the estate and as his bona fides were not questioned, his consent binds the zamindar. At any rate if it is intended to file a suit for a declaration on the ground that the receiver committed a mistake, the cause of action must have arisen the moment the zamindar was affected by the consent. Now the zamindar files all these suits in April 1922. According to him the cause of action arose when notice was issued to the defendants on the 16th October 1921 and the defendants disregarded it. In my opinion the cause of action

(1) (1913) I.L.R. 37 Mad. 199.

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accrued to him in 1910 when the enfranchisement proceedings were made and there cannot be a new cause of action by reason of the notice issued by him in October 1921 calling upon the inamdars to render service. Some of these inamdars replied to the notice issued by the zamindar. Exhibit WWWW series are the notices issued by the zamindar calling upon the inamdars to render service. The replies given by the defendants are Exhibit YYYYY series. In these documents the inamdars say that they are willing to render service and that if the zamindar has got any complaint it is against the Government. Besides Exhibit WWWW series the zamindar sent some circulars asking the inamdars to come and render some particular services such as entering muchilikas in accounts and recovering arrears of rent. Exhibit 77 is such a circular issued to the karnam of Dondapadu ; Exhibit 88, to the karnam of Pinakadimi ; Exhibit 86 (a), to the karnam of Chodimella ; Exhibit PPPPP, to the karnam of Vanguru ; Exhibit 86 (uu), to the karnam of Chodimella ; Exhibit 76 (tt), to the karnam of Chodimella and Exhibit 88 (n), to the karnams of certain villages. Exhibit PPPPP-1 is the reply by a karnam saying that he is very busy and has no leisure. Exhibit UUUUU is the report submitted to the zamindar saying that the karnams are not promptly attending to their duties. In my opinion all these are collusive proceedings between the zamindar and the karnams for the purpose of conferring a new cause of action on the zamindar in 1921, and that the cause of action accrued to him long ago in 1910, and I think that these notices and replies should be disregarded. Except in the two or

three cases where the tanedar did not appear, in all the other cases the suits are barred by limitation and should fail on that ground ; but I will also discuss the main point on the merits in respect of each village.

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* * * * *

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The land now enfranchised is of the extent of 18.54 acres the patta being Exhibit 93. Exhibit 51 shows that according to the old accounts it ought to have been 25.52 but the difference is not accounted for. Now going to the old accounts, Exhibit LLLL of the year 1868 shows that 1 $\frac{1}{4}$ kathi was kattubadi inam and 3/8 kathi sarvadumbala. The document also shows that the kattubadi inam was pre-settlement inam and also it was wet. But it is not very clear whether it was subject to kattubadi from before the settlement though one may presume it if there is no other information available in the matter. But coming to Exhibit 45 we find under the heading "service inams" for one kathi of wet land a kattubadi of Rs. 4 per putti was imposed in the Jamabandi of fasli 1212 at the end of that fasli by Raja Venkata Narasimha Appa Rao though previously it had been sarvadumbala. Exhibit 46 practically gives the same information as Exhibit 45 and Exhibit 48 (a) supports Exhibits 45 and 46 regarding the imposition of kattubadi in 1212.

The result is we must hold that all the land belonging to the karnam was sarvadumbala originally and on a portion of it—one kathi—kattubadi was imposed on the crop after the permanent

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settlement, i.e., about May or June 1803, and the inam is pre-settlement. The inam is resumable by Government.

* * * * *

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MADHAVAN NAIR J.—On the general question of “burden of proof” and “limitation” arising in cases of this description, I have already expressed my opinion in detail in the separate but concurring judgment which I delivered in Second Appeals Nos. 648 to 832 and the connected second appeals. The arguments now addressed to us have not persuaded me in altering the views therein expressed.

In the appeals before us, I agree with my learned brother on the question of limitation regarding the applicability of article 120 of the Limitation Act to the facts of the case and also on the merits, and have nothing to add.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

SUBBALAKSHMI AMMAL AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

A. NARAYANA AYYAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Widow—Surrender by—Validity of—Motive of widow if relevant on question of.

The validity of a surrender by a Hindu widow does not depend upon her motive.

A surrender by a Hindu widow must be *bona fide* in the sense that there must be a complete relinquishment and that,

* Second Appeal No. 661 of 1930.

in the guise of a surrender, the widow ought not to enlarge her own estate in regard to a part. There is no warrant for importing the further condition that the motives operating on her mind must be of a religious or spiritual character.

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Dictum of SANKARAN NAIR J. in *Challa Subbiah Sastri v. Palury Pattabhiramayya*, (1908) I.L.R. 31 Mad. 446, relied upon.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 66 of 1929 (Appeal Suit No. 5 of 1929, District Court, Trichinopoly) preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 205 of 1927.

T. M. Krishnaswami Ayyar and *V. K. Mahadeva Sastri* for appellants.

N. Swaminatha Ayyar for respondent.

JUDGMENT.

This appeal raises the question of the validity of a surrender made by a Hindu female with a limited estate. The last male holder was one Sellamier, and the plaintiff, who as the reversioner to his estate impeaches the transaction, is his half-brother's son. After Sellamier's death, the property was taken by his widow, who in turn was succeeded by his daughters, Subbalakshmi and Alamelu, of whom the latter died in 1925, leaving a son Vaideeswara. Subbalakshmi, the surviving daughter, executed the settlement deed in question on the 28th October 1926 in favour of Vaideeswara's son Subbaratnam. On the following day, i.e., on the 29th October, Vaideeswara died. The lower Courts have found that the object of the surrender was to benefit Subbaratnam, to whom Subbalakshmi was attached and in whom she was interested, and to divert the

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succession from the plaintiff, who in the ordinary course would, as the nearest reversioner, have succeeded, Vaideeswara being then seriously ill and his death being imminent. The learned District Munsif has held that the motive that prompted the surrender does not affect its validity, but the lower appellate Court, taking a different view, has granted the plaintiff's prayer.

The point therefore to decide is whether, in regard to a surrender, the law makes the motive with which it is effected relevant. The question must, in any opinion, be answered in the negative. What the requisites of a valid surrender are, has been considered by the Judicial Committee. According to the Hindu Law, the widow can accelerate the estate of the nearest heir by conveying it to him absolutely and destroying her life estate. First, a surrender, to be valid, must be of the surrenderer's whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation; a surrender being an effacement of the widow and, it being impossible to conceive of a widow who is partly effaced and partly not so, a partial surrender, although absolute as to the part conveyed, cannot under the Hindu law be effectual. Secondly, a surrender must be *bona fide*, i.e., there must be no device to divide the property between the lady and the reversioner, it being equally fatal to the transaction whether the benefit is directly taken by the lady or by her nominees subject, however, to the proviso, that the giving of a small portion to the surrendering widow for her maintenance is unobjectionable; *Rangasami Gounden v. Nachiappa Gounden*(1), *Bhagwat Koer v.*

(1) (1918) L.R. 46 I.A. 72; I.L.R. 42 Mad. 523 (P.C.).

Dhanukhdhari Prashad Singh(1) and *Sureshwar Misser v. Mussammatt Maheshrani Misrain*(2). Their Lordships of the Judicial Committee in the first and the third of the cases mentioned above explain clearly what is meant by the expression "*bona fide*" used in this connection. The transaction must be *bona fide* in the sense that the widow retains no benefit either directly or indirectly, i.e., there must be a complete relinquishment; if, in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld. I do not think there is any warrant for importing a third and further condition, namely, that the motives operating on the mind of the widow must be of a religious or spiritual character. In regard to adoptions by widows, according to the Bombay Courts, the motive is irrelevant, but the law, as administered in this presidency, makes the motive material. There being no authority declaring that the motive of the surrendering widow has any bearing, I should, for my part, be disinclined to introduce an uncertain and puzzling element, making it incumbent upon the Courts to embark upon an enquiry, often difficult and fruitless, as regards the motive for the transaction. The lower appellate Court, in holding that the motive was material, has mainly relied upon *Siva Subramania Pillai v. Piramu Ammal*(3), to which decision I was a party. There, while delivering judgment, I observed:

"If the transaction is a device to divide the estate, the surrender is clearly not *bona fide*; but the converse is not

(1) (1919) L.R. 46 I.A. 259; I.L.R. 47 Calc. 466 (P.C.).

(2) (1920) L.R. 47 I.A. 233; I.L.R. 48 Calc. 100 (P.C.).

(3) (1925) 49 M.L.J. 128.

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SUBBALAKSHMI v. NARAYANA AYYAR. necessarily true, for want of good faith may be evidenced by other circumstances."

This passage, which has been chiefly relied on, must not be taken from its context. The argument put forward was that, there being no device to share the estate with the reversioner, the transaction should, on the authority of the Privy Council decisions, be upheld. We repelled that contention and tried to show that there was an objection equally fatal, if not more, namely, that the surrender was colourable and not intended to be operative at all. We observed accordingly :

"Subsequent to the surrender, it does not appear that the appellant exercised any act of exclusive ownership from which unequivocal enjoyment or possession can be inferred."

Then we go on to state :

"Subbammal was more anxious that her daughter should be provided for than that her son should take immediate possession of the estate . . . It was not her intention that she should forthwith divest herself of the estate or that the surrenderee should enter into possession."

We also refer to a further fact, namely, that the widow's object in making the surrender was to get immediate possession of a certain sum of compensation money that had been paid by the Government into Court. Reading the judgment as a whole, I am not prepared to regard it as laying down that the motive of the surrenderer is a material or even a relevant factor. I agree with the dictum of SANKARAN NAIR J. in *Challa Subbiah Sastri v. Palury Pattabhiramayya*(1) to the effect that the validity of a surrender does not depend upon the motive of the widow, although, in regard to the actual point that case decided, following the judgment in *Rangappa Naik v. Kamti Naik*(2), it must now be treated as over-

(1) (1908) I.L.R. 31 Mad. 446.

(2) (1908) I.L.R. 31 Mad. 366 (F.B.).

ruled ; see *Rangasami Gounden v. Nachiappa Gounden*(1), where the Judicial Committee observes :

"It follows that their Lordships cannot agree with a good deal of what was said in *Rangappa Naik v. Kamti Naik*"(2).

So far as the text books go, it remains to observe that both Mulla and Sarkar Sastri cite *Challa Subbiah Sastri v. Palury Pattabhiramayya*(3), although without discussion, as authority for the position that the motive is immaterial ; see Mulla's Hindu Law, sixth edition, page 204, and Sarkar Sastri's Hindu Law, sixth edition, page 702. In the result, the second appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Butler.

JADDU PADHI (FIRST DEFENDANT), APPELLANT,

v.

CHOKKAPU BODDU alias JAGANNADHAM
AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 7—Hindu joint family—Brothers—Mother of—Alienation by—Suit to set aside—Limitation—Elder brother barred—Younger if also barred.

Two brothers sued for a declaration that a sale executed by their mother, the second defendant, to the first defendant was not valid. It was found that the first plaintiff, the elder

(1) (1918) L.R. 46 I.A. 72, 84; I.L.R. 42 Mad. 523 (P.C.).
(2) (1908) I.L.R. 31 Mad. 366 (F.B.). (3) (1908) I.L.R. 31 Mad. 446.

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brother, had attained majority more than three years before the suit was filed.

Held that the suit was barred as regards both the brothers.

Doraisami Serumadan v. Nondisami Saluvan, (1912) I.L.R. 38 Mad. 118 (F.B.), followed.

Doraisami Serumadan v. Nondisami Saluvan, (1912) I.L.R. 38 Mad. 118 (F.B.), has not been overruled, either directly or by implication, in *Jawahir Singh v. Udai Parkash*, (1925) I.L.R. 48 All. 152 (P.C.). The Privy Council merely affirmed Counsel's concession that, as the father was still living, the elder brother had never been manager of the family so as to be able to give a discharge and that on the facts section 7 of the Limitation Act could not possibly apply to the case. The Privy Council did not lay down the law as set forth in the headnote to that report at page 152, viz., "a suit brought by a younger son is not barred although the elder son attained majority more than three years earlier and had taken no steps to question the alienation."

APPEAL against the order of the District Court of Vizagapatam dated the 18th day of September 1928 and made in Appeal Suit No. 90 of 1928 preferred against the decree of the Court of the District Munsif of Parvatipur dated the 10th day of September 1927 and made in Original Suit No. 504 of 1926.

P. Somasundaram for appellant.

V. Suryanarayana for *B. Jagannadha Das* for respondents.

Cur. adv. vult.

JACKSON J. The JUDGMENT of the Court was delivered by JACKSON J.—This appeal has been referred to a Bench by KRISHNAN PANDALAI J. The plaintiffs, two brothers, sued for a declaration that the sale executed by their mother, the second defendant, to the first defendant, was not valid. It was found that the first plaintiff had attained majority more than three years before the suit was filed, and accordingly the District Munsif dismissed the

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suit. The District Judge confirmed the finding of fact and that is not now disputed. In this Presidency it has been settled by the Full Bench decision in *Doraisami Serumadan v. Nondisami Saluvan*(1) that in circumstances like the present, if one brother comes of age and allows three years to pass before suing, time has run against the younger brother also. But the District Judge refused to follow this ruling, because of a Privy Council ruling in *Jawahir Singh v. Udai Parkash*(2). Hence the appeal.

In that case the two younger sons sued to set aside an alienation joining as defendants their father and their elder brother who had allowed three years to pass without suing. As the father was still living this elder brother had never been manager of the family so as to be able to give a discharge and on the facts, section 7, Indian Limitation Act, could not possibly apply. This was conceded by Mr. Dube who appeared for the appellant-alienee:—

"(The father) was alive when the suit was brought. Fateh Singh had not been managing member; it is conceded, therefore, that the failure of Fateh Singh to bring a suit probably did not render the present suit barred. The sale was, however, valid" (page 153).

On page 155 the High Court judgment and decree under appeal are summarized and then the judgment proceeds:—

"From this decree Jawahir Singh has appealed to His Majesty in Council. The same contentions that were urged in the High Court have been advanced before the Board."

This cannot mean that Mr. Dube urged contentions about limitation for he had conceded the point. It can only refer, as clearly shown by the

(1) (1912) I.L.R. 38 Mad. 118 (F.B.). (2) (1925) I.L.R. 48 All. 152 (P.C.).

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subsequent paragraphs, to the fact that he still contended that the sale was valid. Its validity is discussed down to the bottom of page 157 and then there is the one short sentence : " On the question of limitation their Lordships concur with the High Court." Upon this authority the reporter in the Allahabad series has stated in the headnote (page 152) that a suit brought by a younger son is not barred although the elder son attained majority more than three years earlier and had taken no steps to question the alienation. No mention is made of the vital circumstance that the father was still alive, and then the note proceeds : "*Semble*:— . . . *Vigneswara v. Bapayya*(1) and *Doraisami Serumadan v. Nondisami Saluvan*(2) disapproved." But there was no reason to suppose that it was overruled. The Madras ruling proceeds apparently upon an irrefragable line of logic, and if the Judicial Committee detected a flaw in that line it would have set it forth in terms. The fatherless Hindu son becomes manager in law and presumably manager in fact when he attains majority (*cf.* Mulla's Principles of Hindu law, seventh edition, section 519), and as such he is within the mischief of section 7, Indian Limitation Act. If the Judicial Committee held that he does not become the manager, or that as manager he cannot by himself dispute the alienation it would undoubtedly have so stated in terms. The short sentence concurring with the High Court obviously means no more than that what Mr. Dube conceded was agreed to—the suit was not barred by limitation. It is really more a question of fact than of law. In *Ganga Dayal v.*

(1) (1893) I.L.R. 16 Mad. 436. (2) (1912) I.L.R. 38 Mad. 118 (F.B.).

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Mani Ram(1), which was relied upon by the High Court in the case under appeal in *Jawahir Singh v. Udai Parkash*(2), it is found on page 160 that " there is nothing in the present case to show that the plaintiff No. 1 ever acted as manager " and that being so it is not clear that he ever came within the terms of section 7, Indian Limitation Act. Similarly, according to the facts in *Jawahir Singh v. Udai Parkash*(2) the elder son was never manager prior to his filing the suit. KRISHNAN PANDALAI J. obtained a copy of the judgment under appeal in *Jawahir Singh v. Udai Parkash*(2), but it does not carry the matter further. If the Privy Council laid down the law as set forth in the headnote, it is clear without the aid of this judgment, and if, as we hold, that it merely affirmed Mr. Dube's concession, then there is no need to go into details.

It was finally urged upon us that holding this view we should call for a finding as to whether in fact the elder son ever assumed the management. It is too late to raise that question now. In law he was entitled to be manager and there is nothing in the record to rebut the presumption that he became manager. We agree with the District Munsif, and order that his decree be restored, reversing that of the District Judge. Costs to appellant here and below.

We may add that our view follows that in *Surayya v. Subbamma*(3), *Mannarswami Ayyar v. Ramaswami Nayakkan*(4), *Luta Ram v. Shiv Ram*(5) and *Murlidhar v. Shivram*(6).

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(1) (1908) I.L.R. 31 All. 156.
(3) (1927) 53 M.L.J. 677.
(5) A.I.R. 1929 Lah. 14.

(2) (1925) I.L.R. 48 All. 152 (P.C.).
(4) (1928) 30 L.W. 361.
(6) A.I.R. 1929 Bom. 382.

APPELLATE CIVIL.

*Before Mr. Justice Curgenvven.*1934,
March 9.

VASA PANCHAKSHARI (DEAD) AND SEVEN OTHERS (PETITIONERS—PLAINTIFFS AND NIL), APPELLANTS,

v.

MANEM VENKATARATNAM (FIRST RESPONDENT—FIRST DEFENDANT), RESPONDENT.*

Practice—Costs—Trustee sued as such—Appeal by, unsuccessful—Costs of—Personal liability of trustee for—Rule as to—Applicability of, to dharmakarthas of a temple sued as such.

Dharmakarthas of a temple, who were sued as such and against whom the suit was decreed in the Courts below, filed a second appeal which was dismissed by a decree providing that “the appellants do pay to the respondents 1 to 4 Rs. 76 for their costs in opposing this second appeal.”

Held that the dharmakarthas were personally liable for the costs awarded by the decree, especially as their second appeal was against the concurrent decisions of the Courts below upon a question of fact and their conduct in filing a second appeal in such a case could not be justified as being in the interests of the institution which they represented.

APPEAL against the decree of the Court of the Subordinate Judge of Narsapur in Appeal Suit No. 17 of 1930 preferred against the order of the Court of the District Munsif of Narsapur in Execution Application No. 180 of 1929 in Original Suit No. 582 of 1927.

P. Somasundaram for appellants.

R. Rajagopala Ayyangar for *V. Govindarajachari* for respondent.

JUDGMENT.

The appellants are some of the plaintiffs in a suit filed by the weavers of Narsapur against the

* Appeal against Appellate Order No. 49 of 1931.

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two dharmakarthas of a local temple in respect of a certain right claimed with regard to the location of their weaving appliances. The plaintiffs won their cause in the trial, in the first appeal, and in the second appeal before this Court, it being held that they had a customary right to set up their looms at the places objected to by the defendants. The second appeal was accordingly dismissed, the decree providing that

“the appellants do pay to the respondents 1 to 4 Rs. 76 for their costs in opposing this second appeal.”

In order to enforce this decree the plaintiffs took out execution personally against the defendants by applying for their arrest. The learned District Munsif disallowed the application on the ground that the suit was against the defendants as dharmakarthas and that the applicants in execution could recover their costs only against them as dharmakarthas, the capacity in which they were sued, and against the properties of the temple in their hands. An appeal against this order to the Subordinate Judge of Narsapur failed, it being held there too that because the suit was against the dharmakarthas as such and not in their individual capacities they could not be made personally liable for costs, which could only be recovered from the property of the temple in their hands.

The objection made in this appeal is that the Courts below have read into the decree something which is not stated therein, namely, that the costs are to be recovered only from the estate which the dharmakarthas administer. It is argued that the direction to the defendants to pay the costs amounts to a personal decree against them to that effect, which may be enforced by the arrest of

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their persons. I have been referred to a case of this Court in which a Bench has considered a matter of this kind with reference to an Official Receiver in insolvency, *Balakrishna Menon v. Uma*(1). The learned Judges first proceed to consider the specific position of an Official Receiver and point out that under English law special rules exist governing the liability of the trustee in bankruptcy with regard to costs incurred by him in litigation and further that upon this point there are no special rules in this Presidency. The practice in this High Court and in the Calcutta High Court, even on the Insolvency Side, appears to be to hold the Official Assignee in the first instance personally liable for costs. In any case the English rules appear to relate only to proceedings in bankruptcy and in the case of an ordinary action a simple order for costs against the trustee has the usual meaning of such an order against any litigant, who may be made personally liable in the first instance though he may eventually recover the amount so expended by a claim upon the estate. One of the English cases referred to in that decision is *Pitts v. La Fontaine*(2). I think that from that decision may be clearly derived the principle that in an ordinary litigation a person in the position of a trustee in bankruptcy who has a decree passed against him for costs, such as the decree in the present suit, must ordinarily be held personally liable. After quoting a decree in similar terms in that case their Lordships observe :

" Nothing can be clearer upon the face of the order than that it is an order in the usual form against the respondent personally to pay those costs."

(1) (1928) I.L.R. 52 Mad. 263.

(2) (1880) 6 App. Cas. 482.

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And reference is made to the observations of MELLISH L.J. in *Ex parte Angerstein. In re Angerstein*(1) :

" In an action at law a trustee in bankruptcy would be liable in the same way as any other plaintiff. In a case where a trustee makes an application, the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid."

Accordingly the proper course, it is said, to be observed is that, when it is intended to qualify the ordinary liability of the trustee in bankruptcy to pay costs, such qualification should be expressly mentioned in the order. In the present case accordingly I can see no ground for holding that the decree is otherwise than an unambiguous direction to the defendants to pay costs, which means that they are personally liable for those costs.

That view is without special reference to the circumstances in which these costs of second appeal were incurred. The plaintiffs succeeded in the first Court in establishing their customary right. The defendants took the matter on appeal and were defeated. Notwithstanding the concurrent decisions of those two Courts upon a question which apparently was one of fact they persisted in filing a second appeal which met with the same inevitable fate. It seems hard to justify such conduct as being in the interests of the institution which they represented, and that appears to be an additional ground, if any be required, for the view that the learned Judges who decided the second appeal did not contemplate that the costs should come out of the temple

(1) (1874) L.R. 9 Ch. A. 479.

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funds. Here again there is authority from English cases for holding that in such circumstances a trustee would not be justified in pressing or opposing claims which have already once been decided by a Court. In *Westminster Corporation v. St. George, Hanover Square*(1) this point was specifically dealt with. The argument addressed to the Court was this, that a trustee who appeals does so at his own risk as to costs, because he is only interested so far as he wants protection and he is completely protected by the decision of the Court of first instance, and this was the view taken by the Court of Appeal. COZENS-HARDY M.R. observed :

"If a trustee appeals to the Court of Appeal against a decision in the Court below and the appeal is unsuccessful, I feel no doubt that under ordinary circumstances the trustee as appellant is in no better position than another appellant, and under ordinary circumstances if the appeal fails, it fails with what we so frequently describe as the usual consequences."

The same opinion is expressed by FLETCHER MOULTON L.J. In another case, *Ex parte Russell. In re Butterworth*(2), the principle again received recognition. That was a case where the trustees had failed in the County Court. They succeeded in appeal to the Chief Judge but failed when a further appeal was carried to the Court of Appeal. The direction was that they should pay the costs incurred in the two higher Courts, on the ground that they should have remained content with the decision of the County Court.

Against arguments thus supported the respondent has attempted to show that a temple dharmakartha is a mere manager and thus in some position different from a trustee with regard

(1) [1909] 1 Ch. 592, 614.

(2) (1882) 19 Ch. D. 588.

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to liability for costs. I am unable to appreciate upon what principle in a case of this kind any such discrimination can be made, because dharmakarthas are not the managers of an estate which is in the ownership of any person in a position to exercise control over it or them. It appears to me that the general principles discussed above must apply to dharmakarthas as much as to ordinary trustees and other persons suing or sued in a representative capacity. Accordingly the orders of the Courts below cannot I think be supported and I allow the civil miscellaneous second appeal and set them aside and direct the District Munsif to restore Execution Petition No. 180 of 1929 and dispose of it in the light of the above observations. The appellants will have their costs incurred here and in the Courts below.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Bardswell.

SARVATHADA ISWARAYYA (PETITIONER), APPELLANT,

1934,
April 19.

•.

KURUBA SUBBANNA AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 9 (1) (c)—Three months' period prescribed by—Starting point of—Sale deed by debtor—Execution of, relied upon as act of insolvency—Sale deed dealing with property over value of one hundred rupees—Transfer of Property Act (IV of 1882), sec. 54—Effect of.

Under section 54 of the Transfer of Property Act, a sale deed dealing with property over the value of one hundred rupees to be valid requires registration. When, therefore, the execution of such a sale deed is relied upon as an act of insolvency by a petitioning creditor, the three months' period prescribed by section 9 (1) (c) of the Provincial Insolvency Act (V of 1920) must be calculated from the date of the registration of the deed and not from the date of its execution.

Muthiah Chettiar v. The Official Receiver of Tinnevely District, (1932) 64 M.L.J. 382, relied upon.

APPEAL against the order of the District Court of Anantapur, dated the 18th August 1932, and made in Insolvency Petition No. 21 of 1930.

K. Srinivasa Rao for appellant.

S. Narayana Rao for respondents.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The petitioning creditor, who sought to get the first respondent adjudicated an insolvent, is the appellant before us. His petition was dismissed on the ground that the act of insolvency on which the petition was grounded

MADHAVAN
NAIR J.

* Appeal against Order No. 58 of 1933.

did not occur within three months before the presentation of the petition. The act of insolvency consisted in the execution of a sale deed by the first respondent in favour of the second respondent—Exhibit C. The document was executed on 10th January 1930 and it was registered on 13th February 1930. The petition for adjudication was filed on 23rd June 1930 on the re-opening day after the midsummer vacation. If the three months' period is calculated from 10th January 1930, it is obvious that the petition was presented more than three months after the act of insolvency and the petitioner had therefore no *locus standi* to present the petition. But if the time is calculated from 13th February 1930, he will be in time on 23rd June 1930, the three months' period from 13th February 1930 having expired during the midsummer holidays. So, the short question for determination in this case is whether the three months' period should be calculated from the date of the execution of the document, that is, on 10th January 1930, or from the date of its registration, 13th February 1930. The lower Court held that the period should be calculated from the date of execution and hence dismissed the petition.

In appeal, Mr. Srinivasa Rao argues that the period should be calculated from 13th February 1930 the date of the registration, his argument being that the document will be an effective sale deed only when it is registered and not when it is merely executed. Section 54 of the Transfer of Property Act is relied on in support of this contention. Under that section, a sale deed dealing with property over the value of one hundred rupees to be valid requires registration. No doubt,

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under section 47 of the Registration Act, once a document is registered, the effect begins to commence from the date of execution but, if the document is not registered, it can never have any legal effect as a sale deed. Therefore, Exhibit C in the present case cannot be considered to be an act of insolvency unless a valid transfer of property was made by that document and such a valid transfer could be said to have been made only when the document was registered on 13th February 1930. In our opinion, therefore, the act of insolvency can be considered to have taken place on 13th February 1930.

The above view is supported by a decision of this Court in *Muthiah Chettiar v. The Official Receiver of Tinnevely District*(1). The question there arose in different circumstances and with reference to a mortgage deed but the point decided was the same. That question was whether the three months' period under section 54 of the Provincial Insolvency Act should be said to commence from the date of the execution of the document or from the date of its registration. It was held, having regard to section 59 of the Transfer of Property Act, which made registration compulsory to give validity to a mortgage, that the period should be calculated from the date of registration. On a similar reasoning we hold in this case that the act of insolvency was committed by the first respondent on 13th February 1930. It follows therefore that the appellant has *locus standi* to present the application.

The order of the lower Court is set aside. As the lower Court has found that the sale under

(1) (1932) 64 M.L.J. 382.

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Exhibit C is fraudulent, we hold that an act of insolvency has been committed by the first respondent and he is therefore adjudicated an insolvent. The petition will be remanded to the lower Court for taking the necessary steps subsequent to adjudication and for fixing a time in which he may apply for discharge. The appellant is entitled to his costs both here and in the Court below.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Bardswell.

DURAIPANDIYAN, MINOR, BY HIS MOTHER AND GUARDIAN,
KARUPPAYEE AMMAL (RESPONDENT), PETITIONER,

1934,
March 28.

v.

SOLAIMALAI PILLAI AND TWO OTHERS (PETITIONERS),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXII—In forma pauperis—Application to sue—Character of—Death of applicant before passing of orders on—Application by his legal representatives to continue the proceedings on payment of proper court-fee—Validity of.

Pending an application for leave to sue *in forma pauperis* the applicant died. His sons applied to be joined as his legal representatives and sought to go on with the suit, which the applicant wanted to file, on payment of the necessary court-fees.

Held, that they could be joined as the legal representatives of the deceased applicant and could be allowed to pay the court-fee, upon which payment the application was to be filed as a suit.

* Civil Revision Petition No. 54 of 1934.

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PETITION under section 25 of Act IX of 1887, and section 107, Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Madura, dated 16th October 1933 and made in Interlocutory Application No. 318 of 1933 in Original Petition No. 21 of 1933.

K. V. Srinivasa Ayyar for petitioner.

K. Venguswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

A petition (Original Petition No. 21 of 1933) for leave to sue *in forma pauperis* was presented by the father of the present respondents. Before final orders could be passed on that petition the person who had presented it died. His sons, the respondents to this petition, then applied to be joined as his legal representatives. They did not want to sue *in forma pauperis* but sought to go on with the suit which their father had wanted to file, on payment of the necessary court-fees. The Additional Subordinate Judge has ordered that the petitioners are to be added as petitioners 2 to 4 in Original Petition No. 21 of 1933, and that that petition is to be registered as a suit on their paying the necessary court-fee. This petition is for the revision of that order.

The learned Advocate for the petitioner relies on *Lalit Mohan Mandal v. Satish Chandra Das*(1) in which it was pointed out that the right to apply to sue as a pauper was obviously a personal right and could not survive to the legal representative who might or might not be a pauper

(1) (1906) I.L.R. 33 Cal. 1163.

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himself. What the legal representative could do was to present a fresh application, if he was himself a pauper, for permission to sue or to institute a suit for the same relief which the deceased had sought to recover. That was a curious case in which an application for leave to sue was struck off, in what circumstances it did not appear, but apparently because the applicant had died before final orders could be passed on it, and his son upon attaining majority, some fifteen years later, prayed that he might be substituted for his deceased father and that he might proceed with the application. This decision, which was that of a Bench, has been followed by a single Judge of this Court, SRINIVASA AYYANGAR J., in *Subbiah v. Sundara Boyamma*(1), but that learned Judge does not appear to have agreed with everything that was said in the course of it. The circumstances of the case dealt with by him were not quite the same as those of the Calcutta case. A person who had applied for leave to sue *in forma pauperis* had died while the application was still pending and his mother, as his legal representative, then applied to be brought on the record in his place and to be allowed to proceed with the application. SRINIVASA AYYANGAR J. held that a petition for leave to sue *in forma pauperis* was admittedly a personal application on a personal ground, and that, as the right so to sue was a personal right, it could not survive to the legal representative of the deceased applicant. At the same time, however, the learned Judge pointed out that there was nothing in the mother's petition to the effect that she was

(1) (1927) I.L.R. 51 Mad. 697.

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prepared to continue the proceedings paying the necessary court-fee in respect of the petition, allowing it to be treated as a plaint, or anything to show that she herself was a pauper. Had there been any offer to pay court-fee he would have been prepared to consider it and have been willing to afford an opportunity, by giving time or otherwise, to continue the proceedings as a suit. It may be said that these remarks were *obiter* and not necessary for the decision, but they were made with reference to *In re Radakrishna Aiyar*(1), a case decided by JACKSON J. In that case a petition had been presented asking for leave to prefer a second appeal and there was also another petition asking that the delay which had occurred in presenting the petition for leave might be excused. Before these petitions could be disposed of, the party who had put them in died and Radhakrishna Aiyar, who claimed to be his legal representative, sought to be joined as a party to the petition for excusing the delay. He did not allege that he was himself a pauper. The finding of the learned Judge was that the assignee of the pauper must pay the necessary court-fees or else have himself, *qua* pauper, declared entitled to "sue" *in forma pauperis* before continuing the proceedings. The order was one allowing a month's time for paying court-fees. It is true that the procedure with reference to applying for leave to appeal as a pauper is somewhat different from that for applying for leave to sue as such. In the case of an appeal the memorandum of appeal has to be accompanied by an application for leave, whereas in the case of a suit the prayer

(1) (1924) 21 L.W. 550.

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for leave is contained in an application which has to be drawn up as a plaint and which itself becomes a plaint upon leave being granted, and the plaint then dates as if it had been presented at the time when it was put in as an application; but I do not think that this difference in procedure makes any difference in principle between applications for leave to sue *in forma pauperis* and applications for leave to appeal as such. There is plenty of authority for the view that, once leave has been granted to sue as a pauper, the suit can be continued by a legal representative, though there has been a difference, with which I am not now concerned, as to whether or no the legal representative, if not himself a pauper, has to pay court-fee. Of course when leave to sue has been given there is definitely a plaint before the Court and a suit has been registered (Order XXXIII, rule 8). An application for leave to sue *in forma pauperis* on the other hand is not a plaint, and the question is whether it can be treated as an inchoate plaint to which section 149 can be applied. That section cannot apply, in the case of a legal representative who is not a pauper, to the application for leave to sue as a pauper as such, but if the application is to be regarded not merely in that light but also as an inchoate plaint which will develop into a plaint on certain conditions being fulfilled, then Order XXII, rule 1, read with section 141, will apply and there can be a substitution of the legal representative for the original would-be plaintiff. In the case of a pauper suit that has been admitted, the plaintiff has two positions, that of a pauper which is his personal position, and that of an ordinary

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plaintiff. So, too, I take it, an applicant for leave to sue *in forma pauperis* occupies two positions, one of these being what may be called the general one of a would-be plaintiff, and the other the particular one of a person wishing his plaint to be entertained without a court-fee being paid on it. That his application may be considered as an inchoate or incomplete plaint is indicated by what is the practice of this High Court, though it is not that of all the High Courts, of allowing court-fee to be paid by the applicant, on his application for leave to sue as a pauper being refused, and dating the filing of the plaint on such payment from the day on which the application was filed. This practice has been allowed by this Court in a number of decisions. It has been held, too, by the Privy Council in *Stuart Skinner* alias *Nawab Mirza v. William Orde*(1) that, when a person who had at first applied for leave to sue *in forma pauperis* sought for permission, before the enquiry had been made into his pauperism, to pay the necessary court-fee, and it was found that he had acted all through in good faith, his petition could, on such payment, be allowed and his suit should be taken as instituted from the date when he filed his pauper petition. As pointed out in that decision the defendant so far from being a sufferer by the change is benefited as both parties will go on with the litigation on equal terms. It is also remarked that, though the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in Indian Courts, namely, a wrong stamp is put upon the plaint originally and the proper stamp is afterwards affixed.

(1) (1879) I.L.R. 2 All. 241 (P.C.).

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It is to be observed that in the Privy Council case, as in this case, permission to pay the court-fee was asked for before the question of pauperism had been decided. The difference between the two cases is that in the one it was the original applicant who sought permission to pay the court-fee while in the other it was his legal representatives that did so. But I take it that this makes no difference in principle. The right to pay court-fee is not a personal right and the point is that an application to sue as a pauper can be treated as an insufficiently stamped plaint.

I find then that the learned Subordinate Judge has passed a correct order in allowing the respondents here to be joined as legal representatives of the deceased applicant and to pay the court-fee, upon which payment the application is to be filed as a suit. This revision petition is therefore dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

SONNAMMAL, PLAINTIFF,

v.

COIMBATORE MAHA JANA BANK, LTD., BY SECRETARY
NANJAPPA CHETTIAR AND ANOTHER, DEFENDANTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIII—Petition
for permission to sue in forma pauperis—Vakalat—
Whether fresh vakalat required when permission granted
and petition registered as a suit.*

A person who filed a petition for permission to sue *in forma pauperis* under Order XXXIII of the Civil Procedure Code (Act V of 1908) engaged a pleader and gave him a vakalat in the usual form which did not specifically limit the appearance to the petition alone. The pauper petition was allowed and registered as a suit. On a question being raised as to whether a fresh vakalat to conduct the suit was necessary, a reference was made to the High Court.

Held, that the vakalat given in connexion with the petition must, when the petition becomes converted into a suit, be considered to have become a vakalat given for the purpose of the suit, unless the vakalat is distinctly confined to the pauper petition alone.

The "purpose" for which the vakalat was given in the first instance becomes changed when the nature of the petition gets changed by operation of law.

Parties were not represented by Counsel.
M. B. Jeddy as amicus curiae.

The JUDGMENT of the Court was delivered by
MADHAVAN NAIR J.—In this case a petitioner who
filed a petition for permission to sue as a pauper
under Order XXXIII of the Code of Civil Pro-
cedure engaged a pleader and gave him a vakalat

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in the usual form. The petition was allowed by the Court and was registered as a suit. The question arises whether the pleader should be given a fresh vakalat to conduct the suit or, in other words, whether the vakalat already given in connexion with the pauper petition would not be sufficient for the purposes of the suit also. The vakalat already given to the pleader, though it mentions "original petition", the printed word "suit" above the words having been scored out, does not specifically limit the appearance to the petition for permission to sue as a pauper only. By operation of law the petition to sue as a pauper becomes converted into a suit when it is allowed by the Court. In our opinion the vakalat given in connexion with the petition must, when the petition becomes converted into a suit, be considered to have become a vakalat given for the purpose of the suit, unless the vakalat is distinctly confined to the pauper petition alone. The "purpose" for which the vakalat was given in the first instance becomes changed when the nature of the petition gets changed by operation of law. We would answer the question referred to us accordingly.

K.W.B.

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v.
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MAHA JANA
BANK, LTD.

MADHAVAN
NAIR J.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE K. SRIRANGACHARIAR (ACCUSED),
PETITIONER.*

1934,
August 3.

Criminal Procedure Code (Act V of 1898), ss. 235 (1) and 403 (2)—Facts disclosing two distinct offences—Acquittal in respect of one offence no bar to subsequent trial for other offence.

A person was committed to the Sessions Court on two separate charges of two distinct offences, namely, offences under sections 380 and 467, Indian Penal Code (XLV of 1860). The trial in respect of the offence under section 380 ended in an acquittal, and the trial in respect of the second offence under section 467 was taken up. The accused contended that the acquittal in the earlier trial was a bar to the subsequent one. This contention was overruled.

Held, in revision, that, where the facts in a case disclose two distinct offences, section 235 (1), Criminal Procedure Code, applies, and under section 403 (2) of the Code a previous acquittal in respect of one offence is no bar to a subsequent trial for the other offence.

Section 235 (1) and section 236 of the Code are mutually exclusive and a case governed by the one cannot be governed by the other.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Chingleput Division, dated the 20th day of December 1933 and passed in Sessions Case No. 31 (a) of 1933.

K. S. Jayarama Ayyar for *M. E. Rajagopalachariar* for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.
Cur. adv. vult.

* Criminal Revision Case No. 43 of 1934.

ORDER.

SRIRANGA-
CHARIAR,
In re.

The petitioner was committed to the Chingleput Sessions Court to take his trial on two separate charges accusing him of two distinct offences, viz., the offence of theft of a blank second class railway ticket from the South Indian Railway Company's booking office at Conjeeveram, punishable under section 380 of the Indian Penal Code, and the offence of forgery in respect of certain entries alleged to have been made by him in that ticket with intent that fraud may be committed, punishable under section 467, Indian Penal Code.

The trial of the petitioner was proceeded with at first only in respect of the first offence, i.e., the offence of theft. This trial in respect of the offence of theft which was held by the Assistant Sessions Judge, Chingleput, with the aid of a jury ended in acquittal. Thereupon the trial of the petitioner in respect of the second offence, the offence of forgery, was taken up by the Sessions Judge, Chingleput. The petitioner contended that his acquittal in the earlier trial was a bar to the subsequent trial. This contention was repelled by the Sessions Judge in a reasoned order dated 20th December 1933.

The present revision petition attacks the correctness of this order of the Sessions Judge and seeks to have it reversed. The only argument is that sections 236 and 237, Criminal Procedure Code, apply to the present case and that consequently the previous acquittal is a bar under section 403 (1), Criminal Procedure Code. This argument was considered by the learned Sessions Judge and did not meet with acceptance.

SRI RANGA-
CHARIAR,
In re.

This is not a case in which there can be any doubt as to which of several offences the facts which can be proved will constitute; on the contrary the facts which can be proved clearly disclose two distinct offences and only two, viz., the offence of theft and the offence of forgery. In other words, the case is one to which section 235 (1), Criminal Procedure Code, applies; the case for the prosecution being that the petitioner first stole a blank railway ticket from the booking office to which he had access as a relative of the station master, and then committed forgery by making certain entries therein so that a fraud may be committed on the railway company. An analogous case would be one in which a person is charged with theft of a blank cheque form and subsequent forgery thereof. It is clear from section 403 (2), Criminal Procedure Code, that a previous acquittal is no bar to a trial for any distinct offence for which a separate charge might have been made in the former trial under section 235 (1), Criminal Procedure Code. Section 235 (1) and section 236, Criminal Procedure Code, are mutually exclusive, and if a case is governed by one of them it cannot be governed by the other. Section 237, Criminal Procedure Code, obviously applies only to cases governed by section 236, Criminal Procedure Code.

I am of opinion that the order of the Sessions Judge sought to be set aside in revision is right. The petition is therefore dismissed.

K.W.R.

PRIVY COUNCIL.

OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

MERCANTILE BANK OF INDIA, LIMITED,
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Pledge—Railway receipt—Document of title—Railway receipt handed to pledgor for special purpose—Insolvency—Possession, order or disposition—Equitable charge on goods—Bankers—Indian Contract Act (IX of 1872), sec. 178—Presidency-towns Insolvency Act (III of 1909), sec. 52, sub-sec. 2 (c).

A railway receipt, providing that delivery of the consigned goods is to be made upon the receipt being given up by the consignee or by a person whom he names by indorsement thereon, is a document of title within the meaning of the Indian Contract Act, 1872, section 178 (for which a new section was substituted by the amending Act IV of 1930), and a pledge of a railway receipt operated under the repealed section as a pledge of the goods. The pledgee does not release the pledge by handing the receipt to the pledgor in order that he may collect the goods from the railway company and place them in a warehouse on behalf of the pledgee.

Goods so pledged are not in the possession, order or disposition of the pledgor within the meaning of section 52, sub-section 2 (c), of the Presidency-towns Insolvency Act, 1909, even where the railway receipt has been handed to the pledgor for the purpose above stated.

Ramdas Vithaldas v. Amerchand & Co., (1916) I.L.R. 40 Bom. 630; L.R. 43 I.A. 164, and *North Western Bank v. Poynter, Son, & Macdonalds*, [1895] A.C. 56, applied. *Fakeerappa v. Thiippanna*, (1913) I.L.R. 38 Mad. 664, approved.

Further, where the owner of goods hands to a bank indorsed railway receipts relating thereto as security for an

J.C.*
1934,
October 15.

* Present: LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, SIR JOHN WALLIS and SIR LANCELOT SANDERSON.

advance (even without a formal letter of hypothecation), there is constituted, in the absence of evidence to the contrary, an equitable charge upon the goods which is binding between the owner and the bank, although no notice has been given to those having custody of the goods; upon a subsequent insolvency of the owner the assignee takes no higher rights than the owner had.

In re Ambrose Summers, (1896) I.L.R. 23 Calc. 592, approved.

In re Hamilton Young & Co. Carter, Ex parte, [1905] 2 K.B. 772, applied.

Decree of the High Court, I.L.R. 56 Mad. 177, affirmed.

APPEAL (No. 44 of 1933) from a decree of the High Court (April 18, 1932) reversing an order made by WALLER J. in the exercise of the insolvency jurisdiction of the Court.

By a notice of motion by the appellant in the insolvency of C. K. Narayana Ayyar & Sons, who were adjudged insolvents on February 11, 1929, the appellant claimed a declaration that the respondent Bank had no valid pledge of, or any right to, certain bags of groundnuts, or alternatively a declaration that the said groundnuts were in the possession, order or disposition of the insolvents at the commencement of the insolvency with the consent of the true owners within the meaning of section 52, sub-section 2 (c), of the Presidency-towns Insolvency Act, 1909; and an order directing payment to the appellant of the proceeds of the said groundnuts together with interest.

Pleadings having been directed, the respondents by their written statement stated that railway receipts for the goods were indorsed and handed to them by the insolvents to secure advances made by the respondents to the insolvents; they

denied that the goods were in the possession, order or disposition of the insolvents.

The facts of the case, and the material provisions of the Indian Legislature, appear from the judgment of the Judicial Committee.

WALLER J. heard the motion and made an order as prayed.

An appeal by the Bank was allowed and the motion dismissed. The judgment was delivered by STONE J. and concurred in by BEASLEY C.J. The appeal is reported at I.L.R. 56 Mad. 177.

Van den Berg K.C., *Moresby*, and *Hon. Quintin Hogg* for appellant.—The respondent Bank had no lien or charge upon the goods in the absence of notice to the railway company in whose custody they were. In *Ramdas Vithaldas v. Amerchand & Co.*(1) the Board held merely that a railway receipt was an "instrument of title" within section 103 of the Contract Act for the purpose of stoppage *in transitu*. Even if a railway receipt is a "document of title to goods" within section 178 of that Act, there was no pledge of the goods to the Bank. That section does not apply to a pledge effected by the owner of the goods. The section was intended to give effect to the law existing in England under which only a mercantile agent within the Factors Act could effectively pledge goods by pledging a document of title (except, by custom, a bill of lading); in the absence of notice to the person in custody of the goods, the owner could not effectively do so: *M'Ewan v. Smith*(2), *Dublin City Distillery, Limited v. Doherty*(3) and *Inglis v. Robertson*(4). The decision in the case last mentioned was notwithstanding section 3 of the (English) Factors Act, 1889, by which "a pledge of documents of title to goods shall be deemed to be a pledge of the goods". By the Indian Factors Act, 1844 (see particularly section 4), the law in India was the same as in England as to factors, and the Indian Legislature in section 178 of the Contract Act did not intend to vary principles existing in England. Sufficient effect is

(1) (1916) I.L.R. 40 Bom. 630; L.R. 43 I.A. 164.
(2) (1849) 2 H.L.C. 309; 9 E.R. 1109. (3) [1914] A.C. 823;
(4) [1898] A.C. 616.

given to the words "a person who is in possession, etc." in section 178 by treating them as referring merely to unpaid vendors, mercantile agents, etc., without bringing in owners. If section 178 has the meaning given to it below, section 103 of the Act was not needed. In any case the transaction did not amount to a pledge of the goods. Section 178 treats a pledge of documents as differing from a pledge of the goods; that distinction was recognized in *Inglis v. Robertson*(1) and other cases. If there was a pledge it was merely of the railway receipts. The terms of the letters of hypothecation were not pleaded or proved, nor were they relied upon below. [Reference was made also to the Transfer of Property Act, section 137 (explanation), and to the new section 178 of the Contract Act enacted by the amending Act IV of 1930.] The appellant contends further "that the goods were in the possession, order or disposition" of the insolvents within the meaning of section 52, sub-section 3 (c), of the Presidency-towns Insolvency Act, 1909. The evidence shows that the goods were treated by the Port Trust as belonging to the insolvents; the Trust had no notice of any lien in favour of the respondents. The language of section 52 is the same as that of section 38 of the (English) Bankruptcy Acts, and the principles laid down in *Ex parte Watkins*. In *re Couston*(2) and other cases mentioned in Williams on Bankruptcy, 14th edition, page 281, apply.

[Their Lordships did not require argument for respondents upon the question of possession, order or disposition.]

Stuart Bevan K. C. and *Sir Thomas Strangman* for respondents.—Even if the pledge was only of the railway receipts, and no constructive possession of the goods resulted, the respondents were entitled to possession of the goods as against the insolvents. It is implicit in a contract of pledge that the pledgee has the right to enforce his security: *Ex parte Official Receiver*. In *re Morritt*(3). The appellant, as assignee in the insolvency, is in no better position than the insolvents: *Ex parte Newitt*. In *re Garrud*(4) and *Sheobaran Singh v. Kulsum-un-nissa*(5). But there was also an effective pledge of the goods themselves. The words "a person who is in possession" in section 178 of the Contract Act include the owner; no sufficient reason is shown

(1) [1898] A.C. 616.

(3) (1886) 18 Q.B.D. 222.

(2) (1873) L.R. 8 Ch. 520.

(4) (1881) 16 Ch. D. 522, 531.

(5) (1927) I.L.R. 49 All. 367; L.R. 54 I.A. 204.

to construe the section as if the words were "a mercantile agent" or otherwise to limit their effect. Section 103 of the Act recognizes that goods may be pledged by pledging the instrument of title thereto, and similarly section 178 authorises a pledge of goods whether made directly or by pledging the documents. In *Ramdas's case*(1) the Board treated the expression "instrument of title" used in section 103 and "document of title" used in section 178 as being equivalent. The fourteen railway receipts were handed back to the insolvents merely as agents of the respondents for the purpose of collecting the goods; that being so, the pledge of the goods referred to therein continued: *North Western Bank v. Poynter, Son, & Macdonalds*(2). Even if a pledge of the goods under section 178 was not established, the facts gave rise to an equitable charge valid both against the insolvents and the appellant. That is so apart even from the findings as to the effect of the letters of hypothecation. In *re Ambrose Summers*(3) dealt with similar facts and was rightly decided.

Van den Berg K.C. replied.

The JUDGMENT of their Lordships was delivered by Lord WRIGHT.—The appellant is the LORD WRIGHT. Official Assignee of Madras in whom the property vested on insolvency of C. K. Narayana Ayyar & Sons (who will be referred to hereafter as the insolvents); the question in the appeal is whether the appellant or the respondents are entitled to the proceeds of certain consignments of ground-nuts; the primary issue is whether the respondents who had advanced moneys on the security of the railway receipts in respect of these ground-nuts obtained a valid pledge of the goods. Certain further or alternative questions will be dealt with subsequently.

The appellant succeeded before WALLER J.; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate

(1) (1916) I.L.R. 40 Bom. 630; L.R. 43 I.A. 164.

(2) [1895] A.C. 56.

(3) (1896) I.L.R. 23 Calc. 592.

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Jurisdiction ; the appellant now appeals to His Majesty in Council.

There is little dispute about the facts. The insolvents did a large business in groundnuts, which they purchased from the up-country growers ; the nuts were then despatched by rail and arrived in Madras by one or other of two railways, the Madras & Southern Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the insolvents, but there was on it a signboard bearing the name of the respondents. For many years the respondents had financed the consignments of nuts purchased and consigned by the insolvents ; their method was to grant loans against particular consignments. The general course of business was for the insolvents to obtain from the railway companies in respect of each consignment or wagon load a railway receipt which will later be more particularly described ; sometimes, however, the up-country seller appeared as consignor and consignee, in which event the receipt was endorsed and delivered to the insolvents ; sometimes the seller was named on the receipt as consignor, while the insolvents were consignees ; in other cases the insolvents were named on the receipt both as consignors and consignees. Each receipt gave full particulars relating to the goods, the wagon number, the

marks of the bags, the number, and so forth. It contained the following condition :—

“ That the railway receipt given by the N.G.S. Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the railway company or the railway may refuse to deliver and the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company.”

The condition recognises a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading, whereby delivery is made on an indemnity if bills of lading are not forthcoming. As in general the insolvents wanted loans against consignments their practice was to bring or send to the respondents the railway receipts, duly endorsed by them in blank, with a letter of hypothecation and a promissory note, and, if the values were satisfactory and the transaction was in order, the loan was granted, the insolvents executing a promissory note for the amount and the letter of hypothecation, which was duly completed with full particulars of the security. The railway companies were, no doubt, aware of this general course of business, but were not notified that it had been followed in respect of any particular transaction. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts ; these the respondents had retained, but in order to enable them to obtain delivery the practice was to hand them to the

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representative of the insolvents, who paid freight and unloaded the goods from the wagons into the X warehouse, where they came into the actual possession of the respondents.

The insolvents were adjudicated bankrupt on the 11th February 1929, the date of the insolvency being the 7th February 1929. At that latter date the goods, which are the subject of this appeal, consisted of 7,993 bags of groundnuts, represented by 46 railway receipts; all the goods were at the time either in transit on the railway or in the transit sheds or godowns of the Port Trust. Of the 46 receipts, 14 representing 2,975 bags had been presented on the 7th February 1929 to the Port Trust by the insolvents, who had received them from the respondents, in accordance with the method and for the purpose described above, but the Port Trust refused to give delivery and unloaded these bags into its own sheds or godowns because payment of the freight was not forthcoming; the remaining 32 receipts were presented by the respondents after the insolvency; in view, however, of the dispute which culminated in the present suit, delivery was refused by the Port Trust, and all the goods were eventually sold under orders of the Court, the proceeds being held by the respondents to abide the result of these proceedings.

The main question (putting aside for the moment any consideration of the letter of hypothecation) is whether the pledging of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents, that is, what has been called a pledge of the *ipsa corpora* of the documents. The solution of the

question depends on the true effect of section 178 of the Indian Contract Act, 1872, as then in force; that section which has since been repealed by the Indian Contract (Amendment) Act, 1930, and replaced by a new section 178, was in the following terms:—

A person who is in possession of any goods or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate or warrant or order for delivery or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

Provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them by means of an offence or fraud.

By section 172 a pledge is defined as "a bailment of goods as security for payment of a debt or performance of a promise".

The first matter to be decided is whether a railway receipt such as those in question is a document of title to the goods within the section. Their Lordships are of opinion that it is. In *Ramdas v. Amerchand & Co.*(1) this Board held that a railway receipt was an "instrument of title" within section 103 of the Contract Act; the Board said in that case that no distinction could be drawn between the term "document of title" and the term "instrument of title"; and accordingly also held that the railway receipts were documents of title to goods within section 178. Their Lordships likewise in the present case see no reason for giving a different meaning to the term in section 178 from that given to the terms in sections 102 and 103; in addition a railway

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receipt is specifically included in the definition of "mercantile document of title to goods" by section 137 of the Transfer of Property Act, 1882, which, in virtue of section 4 of the Act, is to be taken as part of the Contract Act as being a section relating to contracts. A railway receipt is now included in the definition of documents of title to goods in section 2 (4) of the Indian Sale of Goods Act, 1930.

The two questions which next arise on section 178 are (i) whether the words "a person who is in possession of any goods or of any bill of lading", etc., include the owner, and (ii) whether a pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered; both depend on the words of the section read in connection with the rest of the Act.

But the arguments advanced on behalf of the appellant have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarised. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee,

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the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realized. So things have remained in the English law: a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the *ipsa corpora* of them; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass

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possession, as for instance in 1815, in *Spear v. Travers*(1). The common law rule was stated by the House of Lords in *M'Ewan v. Smith*(2). The position of the English law has been fully explained also more recently in *Inglis v. Robertson*(3) and in *Dublin City Distillery Limited v. Doherty*(4). But there also grew up that legislation which is compendiously described as the Factors Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents : that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods ; in the case of such persons thus entrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties *bona fide* and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Section 3 of the Factors Act, 1889, provides that "a pledge of document of title to goods shall be deemed to be a pledge of the

(1) (1815) 4 Camp. 251; 171 E.R. 80.

(2) (1849) 2 H.L.C. 309; 9 E.R. 1109.

(3) [1898] A.C. 616.

(4) [1914] A.C. 823.

goods." It has been held that this section only applies to transactions within the Factors Act; *Inglis v. Robertson*(1).

Thus the curious and anomalous position was established that a mercantile agent, acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodian and obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here, that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the appellant that section 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on section 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of

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any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in section 3 of the English Act of 1889.

But section 178 of the Contract Act, 1872, has omitted the word "agent" and has without express qualification made the section apply to "a person who is in possession of any goods or of any bill of lading, etc." The appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out by this Board in *Ramdas's* case(1) that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian Legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended

(1) (1916) I.L.R. 40 Bom. 630, 636; L.R. 43 I.A. 164, 170.

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to pledge the goods, not merely the railway receipts, and the respondents have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England in the like case is no argument against their Lordships' conclusion. Nor is it an argument that section 178 as subsequently amended in 1930, and now in force, has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian Legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that "any person, etc.," includes owner; the decisions appear to have turned on the meaning of the word "possession", and on such distinctions as that between mere custody and juridical possession. An examination of sections 103 and 108 of the Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

The other question arising under section 178, viz., whether under its terms a pledge of the documents amounts to a pledge of the goods

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should also, in their Lordships' judgment, be answered, as it was by the appellate Court, in favour of the respondents. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained; the actual words of section 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of section 178 is abbreviated; but "a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by "bill of lading", the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the pledging of a bill of lading. This was the view adopted in regard to railway receipts in *Ramdas's* case(1). In that case it was held that the pledging of a railway receipt had the same effect on the right of stoppage *in transitu* under section 103 as a pledging of the goods; the railway receipt *quoad* this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under section 178 to a pledge of the documents, especially as the Board held in *Ramdas's* case(1) that documents and instruments of title had the same meaning in both sections. A "pledge" is

(1) (1916) I.L.R. 40 Bom. 630; L.R. 43 I.A. 164.

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defined as stated above to be a bailment of goods as security (section 172), hence it seems that section 178, the marginal note to which is "pledge by the possessor of goods or of documentary title to goods", can only be dealing with pledges of goods, though the section uses the words "pledge of such goods or documents". In other words it is describing a pledge of goods, either by pledging the goods *eo nomine* or by pledging the relative documents.

On this construction of section 178 the respondents were, on the facts of the case, entitled to their security in the groundnuts represented by the 46 railway receipts as being validly pledged to them.

It was contended that even on this view the goods represented by the 14 railway receipts presented on the 7th February 1929 were in a different position, because, it was said, the respondents had parted with their pledge on these goods by giving back possession of the railway receipts to the insolvents. In their Lordships' judgment this contention is based on a misuse of the word "possession". The respondents did not part with the possession of the goods or receipts in the juridical sense of that word; they merely parted with the custody, by entrusting the receipts to the insolvents as their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and unloading them from the railway wagons or transit sheds and putting them into the X godown warehouse on behalf of the respondents. Such action does not involve a parting with possession and accordingly it does not in any way affect

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rights of pledge; the redelivery by the pledgee to the pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by *North Western Bank v. Poynter, Son, & Macdonalds*(1) and the more recent case of *David Allester, Ltd., In re*(2). In both these cases the limited purpose was in order that the goods should be realized by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the respondents who were bankers, but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient for the conduct of the business in question. This point also fails the appellant.

The above conclusions are sufficient to dispose of the appeal, but a further point taken on behalf of the respondents would in itself, in the opinion of the Board, be sufficient to decide the appeal in their favour. Reference has already been made to the letter of hypothecation, which, in the case of each advance, was completed by the insolvents. The finding of the Trial Judge on this point is that "in order to finance the transaction the insolvents took the railway receipts to the bank with promissory notes and letters of hypothecation." The letter of hypothecation was in terms an acknowledgment by the insolvents that they had deposited the property documents and securities thereunder-mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter, in their Lordships' judgment, consti-

(1) [1895] A.C. 56.

(2) [1922] 2 Ch. 211.

tutes a good equitable charge which is binding between the insolvents and the respondents, and is equally binding on the appellant who, for this purpose, merely stands in the insolvents' shoes, and has as against the respondents no higher or better right than the insolvents had at the date of the insolvency. An analogous case was considered in *Ex parte North Western Bank. In re Slee*(1), where a letter of lien over wools of the bankrupt which were in his warehouse was held to create a good equitable charge in favour of bankers who had made advances; no delivery of the warrant for wools had been made; but it was held that the bankers had a good title against the trustee in bankruptcy. This authority was followed and approved in *In re Hamilton Young & Co. Ex parte Carter*(2). In that case the traders, who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. The Court of Appeal rejected the argument that the letters of lien were void under the Bills of Sale Act: such matters are not here material, because in India there is no legislation corresponding to the Bills of Sale Acts. Apart from that question VAUGHAN WILLIAMS L.J. thus summed up the general position at page 784:—

"The result of the practice detailed seems to be that, in respect of the matter and preparation and shipment of the goods, the management and direction of these goods, for the purposes of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with [the debtors], and that no property, other than by way of a lien or charge, would pass to the bank until the bills of lading were handed over, but that

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(1) (1872) L.R. 15 Eq. 69.

(2) [1905] 2 K.B. 772.

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the bank had in equity a right to an injunction restraining [the debtors] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank."

There was in that case notice by the bank of their lien to the bleachers shortly before the insolvency, but the statement of the bankers' rights in equity as against the debtors, and consequently as against the trustee in bankruptcy, is not made with reference to any question of notice. The rights between the immediate parties do not depend on notice, just as in the case of an equitable assignment of a debt notice is not necessary to complete the equitable right as between assignor and assignee. Thus in *William Brandt's Son & Co. v. Dunlop Rubber Company*(1) it is clear that there was a good equitable assignment as between the merchants as assignors and the financiers as assignees, though the assignment was not completed in the sense that the debtors to the merchants were bound by it or bound to pay the assignees, without receiving notice of it. Thus LORD MACNAGHTEN says: "As between Kramrisch & Co. [the merchants] and Brandts [the bankers] the assignment was perfect without them" (i.e., the documents giving notice to the debtors). In the same way in the present case, though it is true that no third party holding the goods or dealing with them without notice of the respondents' lien would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the respondents and the insolvents. In this case nobody's rights are concerned except the rights as between these immediate parties:

(1) [1905] A.C. 454, 462.

the appellant merely stands in the insolvents' shoes.

A similar course of reasoning has been applied in India, for instance, in the case of *In re Ambrose Summers*(1).

Some objection was raised on the hearing of the appeal that the question of the effect of the letters of hypothecation had not been an issue in the Courts below, and indeed that the letters of hypothecation had not been proved except in general terms. But both in the first Court and in the Appellate Court this issue is referred to, and the Trial Judge finds the facts. Before this Board the point was argued as an alternative, and in view of the conclusions stated above as to the application of section 178 of the Contract Act, it may be regarded as not calling for decision. But this point by itself would be enough to decide the case against the appellant even if he were right in the construction of section 178, for which he has contended.

A still further point was raised on behalf of the respondents; it was argued that if under section 178 the respondents did not get a good pledge at law by the delivery of the railway receipts, still that delivery considered on all the facts of the case was evidence of a good equitable charge at least as between the immediate parties even ignoring the accompanying letters of hypothecation. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for

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(1) (1896) I.L.R. 23 Cal. 592.

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value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts. If so, the appellant must be subject to the same equity.

There still remains for consideration a final point raised on behalf of the appellant, which is that on any view of the case the consignments of nuts in question constitute property divisible among the creditors in virtue of section 52, subsection 2 (c), of the Presidency-towns Insolvency Act, 1909, which corresponds with the similar clause in the English Bankruptcy Act, as

“ goods being at the commencement of the insolvency in the possession, order and disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof.”

This point can be shortly here disposed of. If the goods in question were validly pledged under section 178 as their Lordships have held, they were not in the possession of the insolvents, because the railway company held the goods as bailees of the respondents, the possession by the respondents of the documents of title being equivalent to the possession of the goods : hence these goods were not within the possession, order and disposition of the insolvents at all ; it is the respondents who were entitled to obtain delivery of the groundnuts from the railway company. A similar conclusion was arrived at on analogous facts in *Fakeerappa v. Thippanna*(1). It was argued that a distinction must be drawn in this

(1) (1913) I L.R. 38 Mad. 664

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connection in regard to goods represented by the 14 railway receipts that were handed over to the insolvents' representative for the special purpose explained above, of unloading the goods into the X warehouse. Their Lordships, however, do not think that these goods are in any different position from the remainder for this purpose. The pledge was not affected by the handing over of the railway receipts for the limited purpose ; it was only for that purpose that the insolvents had the temporary possession, or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession, order and disposition of the insolvents, still less that they were so with the consent of the true owners, that is the respondents, as pledgees. Nor could it be said either as to the consignments as a whole or as to the 14 consignments that the circumstances were such as to make the insolvents the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know “ those facts which are capable of being generally known to those who make enquiry on the subject”, in the sense explained by Lord SELBORNE in *Ex parte Watkins*. In *re Couston*(1) : the general course of business and the relationship of the interested parties to the consignments and in particular the purpose for which the insolvents had custody of the 14 receipts were inconsistent with any reputation of ownership in that sense. Reference may be made in this connection to the English cases of *Ex parte North Western Bank*. In *re Slee*(2) and *In re Hamilton Young & Co. Carter, Ex parte*(3).

(1) (1873) L.R. 8 Ch. 520, 528.

(2) (1872) L.R. 15 Eq. 69.

(3) [1905] 2 K.B. 772.

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The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also.

In the result the appeal should, in their Lordships' opinion, be dismissed with costs. They will humbly so advise His Majesty.

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

Solicitors for respondents: *E. F. Turner & Sons.*
A.M.T.

APPELLATE CIVIL.

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

KUNHAMUTTY (DEFENDANT), APPELLANT,

v.

THONDIKKODAN AHMAD MUSALIAR AND TWO OTHERS
(PLAINTIFFS), RESPONDENTS.*

Muhammadian law—Wakf—Dedication of property—Income to be devoted merely for reciting Koran over tomb of private person or descendant of Prophet—Validity of—Mussalman Wakf Validating Act (VI of 1913), sec. 3—"Charitable"—Meaning of.

The dedication of property, the income of which is to be devoted merely for the purpose of reciting Koran over the tomb of a private person, does not create a valid wakf under the Muhammadian law. The fact that the tomb over which the Koran is to be read is that of a descendant of the Prophet does not make any difference. The Mussalman Wakf Validating Act (VI of 1913) has not effected a change in the law with regard to the purposes, namely, "religious, pious or charitable". The words "or charitable" in the proviso to section 3

* Second Appeal No. 1143 of 1929.

of that Act cannot be said to provide an alternative to "religious and pious". To create a valid trust for religious purposes there must be, after that Act as before it, a charitable object. KUNHAMUTTY v. AHMAD MUSALIAR.

Mujib-un-nissa v. Abdur Rahim, (1900) I.L.R. 28 All. 233 (P.C.), relied upon.

Kaleloola Sahib v. Nusserudeen Sahib, (1895) I.L.R. 18 Mad. 201, considered.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 332 of 1927 preferred against the decree of the Court of the District Munsif of Parapanangadi in Original Suit No. 307 of 1925.

A. B. Nambiar for appellant.

K. Kuttikrishna Menon for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—The question in both the lower Courts was whether the two documents (Exhibits A and B) created a valid wakf. The trial Judge (the District Munsif) held on the authority of *Kaleloola Sahib v. Nusserudeen Sahib* (1), by which case he felt himself bound, that the dedication which Exhibits A and B evidence, namely, of properties the income of which is to be devoted to reading the Koran at a private tomb, is invalid under the Muhammadian law; and, unless it had been shown that the decision referred to above had been expressly or impliedly overruled or dissented from in later decisions of the Madras High Court, the learned District Munsif was perfectly correct in accepting that position as he states that his attention was not drawn to any such decision. The learned Subordinate Judge, however, has relied upon the opinion expressed by Mr. Ameer Ali in his work on Muhammadian Law, Vol. 1, page 351,

(1) (1894) I.L.R. 18 Mad. 201.

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where the correctness of *Kaleloola Sahib v. Nusserudeen Sahib*(1) is questioned. He has also referred to *Mazhar Hussain Khan v. Abdul Hadi Khan*(2) and the opinion there stated (at page 412) of BANERJI J. where, in dealing with *Kaleloola Sahib v. Nusserudeen Sahib*(1), he states :

"No authority was referred to by the learned Judges of the Madras High Court for holding a contrary opinion, and I see no reason to accept it. I hold that *fateha* expenses are a valid object of wakf."

This, it seems to us, is a most unfortunate reference since the learned Subordinate Judge omits to observe that STANLEY C.J., who with BANERJI J. formed the Bench in that case, stated in the course of his judgment on page 404 :

"But as regards the expenses of *fateha* ceremonies and the salary of Hafiz and readers of the Quran, I am disposed to think that these are not proper objects of wakf."

In support of this opinion STANLEY C.J. refers to the view expressed by KARAMAT HUSSAIN J. of the same High Court in *Fakhr-ud-din v. Kifayat-ul-lah*(3). We do not propose to refer to those views which are quite sufficiently set out in the judgment of STANLEY C.J. on pages 404 and 405. It is difficult to understand why the learned Subordinate Judge omitted all reference to the views of STANLEY C.J., having regard to the fact that the head-note clearly shows that he had, to say the least, doubts about the matter. It must be observed also that the facts were a good deal stronger there than in the present case. He then refers to *Ramanandan Chettiar v. Vava Levvai Marakayar*(4). There it was held that the test, whether a deed was or was not valid as a wakf in the cases decided before Act VI of 1913

(1) (1894) I.L.R. 18 Mad. 201.

(3) (1910) 7 A.L.J.R. 1095.

(2) (1911) I.L.R. 33 All. 400.

(4) (1916) I.L.R. 40 Mad. 116 (P.C.).

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(Mussalman Wakf Validating Act), was that, if the effect of the deed was to give the property substantially to charitable uses, it would be valid, but, if the effect of it was to give the property in substance to the settlor's family, it would be invalid under Muhammadan law. In that case the charitable objects were classified under four heads : (i) Cash doles to the poor on the 28th and 29th of the Ramzan month, which among Muhammadans is regarded as a holy month, in which giving alms to the poor is enjoined as a duty, (ii) distribution of clothes to the poor on those days, (iii) distribution of *conjee* to the poor on a *misjed* during the thirty days of that month (Ramzan) and (iv) performance of *fatehas* on three days of ancestors and feeding of friends and the poor. Their Lordships further point out on page 121 that Act VI of 1913 by section 3 expressly enacted that it shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of the Mussalman law "for the maintenance and support, wholly or partially, of his family, children or descendants". They add :

"It was not contended that this statute affects the present appeal, and the following decisions of this Board, which their Lordships think they are bound to follow, clearly establish that the Muhammadan Law, as interpreted by the Board, does not treat such a gift *per se* as a good and valid wakf", and, amongst other cases, *Mujib-un-nissa v. Abdur Rahim*(1) and the observations of Lord ROBERTSON in that case at page 242 are set out. They are as follows :—

"Their Lordships have, however, considered the question whether, even assuming it to have been registered, the deed is,

(1) (1900) I.L.R. 23 All. 233, 242 (P.C.).

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BEASLEY C.J. according to its terms, a valid deed of wakf. It will be so if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family."

It is to be observed that the accuracy of the test laid down by Lord ROBERTSON was not questioned in that appeal. The effect of the decision in *Ramanandan Chettiar v. Vava Levvai Marakayar*(1) is that, whereas before the Mussalman Wakf Validating Act (VI of 1913) provision for the maintenance and support wholly or partially of the family, children or descendants of a person professing the Mussalman faith would not be a valid object of wakf, that Act validated such a provision and their Lordships were clearly of the opinion that the test laid down by Lord ROBERTSON in the case referred to was the correct one, namely, the charitable purpose or purposes of the endowment. In view of this decision it must be conceded that *Kaleloola Sahib v. Nusserudeen Sahib*(2) is no longer good law because there the performance of *fateha* ceremonies was one of the purposes of the dedication. This, however, by no means disposes of the matter, as the learned Subordinate Judge certainly ought to have recognized, because there is an all important distinction between the purposes of the dedication in *Kaleloola Sahib v. Nusserudeen Sahib*(2) and the purpose in this case. Here the object of the wakf is to read the Koran over a tomb. The test laid down by Lord ROBERTSON in *Mujib-un-nissa v. Abdur Rahim*(3) when applied to this case clearly makes this dedication invalid because it is not in substance a dedication to charitable use. There is no provision for any-

(1) (1916) I.L.R. 40 Mad. 116 (P.C.). (2) (1894) I.L.R. 18 Mad. 201.
(3) (1900) I.L.R. 23 All. 233, 242 (P.C.).

thing more than reading the Koran at the tomb and no distribution of food or alms among the poor which the *fateha* ceremony consists of. In *Mazhar Hussain Khan v. Abdul Hadi Khan*(1) there were *fateha* expenses provided for; similarly in *Ramanandan Chettiar v. Vava Levvai Marakayar*(2). This important distinction has been overlooked by the learned Subordinate Judge who thinks also that the fact that the tomb over which the Koran is to be read is that of a descendant of the Prophet, and not that of the donor, makes some difference. He says :

"Atta Beevi in whose favour these two documents were executed was the daughter of Syed Hussan Jafri Syed Alavai Koya Thangal of Kotinhi mosque. A Thangal is supposed to be a direct descendant of the Prophet."

The District Munsif on the other hand says :

"Though Atta Beevi is described as the daughter of a Thangal, there is no evidence on record to show that she was a saintly or even a pious woman."

Unless it is to be held that reciting the Koran over the tomb of a Thangal is different from reciting the Koran over the tomb of any other Mussalman, and in support of this view there is no evidence whatsoever, we are quite unable to regard this as a distinguishing feature. But it was contended by Mr. Kuttikrishna Menon that the Mussalman Wakf Validating Act (VI of 1913) has effected a change in the law because of section 3 and the proviso thereto, which read as follows :—

"It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law for the following among other purposes :—(a) for the maintenance and support wholly or partially of his family, children or descendants,

(1) (1911) I.L.R. 33 All. 400. (2) (1916) I.L.R. 40 Mad. 116 (P.C.).

KUNHAMUTTY v. AHMAD MUSALIAR. BEASLEY C.J. and (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated: Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

By reason of the proviso he argues that a wakf will be valid if it is religious and pious only and that it need not be charitable as well, because of the words "or charitable" in the proviso. We are unable to agree with this contention. The object of the Act was to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants and to remove any doubts previously existing regarding the validity of wakfs so created and to include such objects as the latter. In our view, no change in the law was brought about with regard to the purposes, namely, "religious, pious or charitable". Those purposes had always previously been recognised and this is perfectly clear from the Privy Council decision in *Ramanandan Chettiar v. Vava Levvai Marakayar*(1) and other cases and it is not right to say that the words "or charitable" really provide an alternative to "religious and pious". On page 124 of *Ramanandan Chettiar v. Vava Levvai Marakayar*(1) Lord BUCKMASTER says:

"The trustees are, in their Lordships' view, at the least bound, so far as the funds under their control will permit, to make such provisions for the other charities as in the circumstances of the case a pious and charitable Muhammadan would consider reasonable and proper."

(1) (1916) I.L.R. 40 Mad. 116 (P.C.).

According to Lord ROBERTSON the test must be the charitable use or uses; and even before Act VI of 1913 the purpose according to the decisions had to be religious or charitable. The words then were exactly the same as they are now; and it appears to us that in all cases upon this point the charitable purposes of the gift have always been stressed as the important ones. This question has been considered by myself and BARDSWELL J. in Original Side Appeal No. 71 of 1932* in a judgment delivered on the 19th December 1933, at present unreported. We there held, after an examination

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* Original Side Appeal No. 71 of 1932:—

The JUDGMENT of the Court was delivered by BEASLEY C.J.—This is an appeal from the judgment of MADHAVAN NAIR J. in Civil Suit No. 552 of 1927. It was a partition suit brought by the plaintiff against his elder brother, the first defendant. The plaintiff and the first defendant are the sons of one Nyniappa Mudaliar who died in 1911. Their mother died in 1918. The plaintiff and the first defendant are the only two sons who are now entitled to the partition of the joint family properties. Each is entitled to a half share. The second defendant is a mortgagee of item No. 1 of the plaint schedule properties under a registered deed of mortgage dated 7th October 1927 for Rs. 5,000. MADHAVAN NAIR J. found that item No. 1 of the plaint schedule and the other property mentioned in paragraph 5 of the written statement were trust properties subject to a family trust and, being so, were inalienable. At the same time he found that, although inalienable, they were liable to be partitioned between the members of the family provided that provision was made for the conduct of the charity. The income required for the conduct of the charity he found not to exceed Rs. 110 per annum which is a very small amount compared with the income derived from the property.

The main contest in this appeal is with regard to the finding that item No. 1 is trust property and is inalienable though liable to be partitioned. Here a very important question was raised which was not raised in the trial Court, namely, whether the dedication in question was a valid trust and also

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of a number of cases—some of them relating to wakfs and one of them being *Mazhar Hussain Khan v. Abdul Hadi Khan*(1) before-mentioned—that to create a valid trust for religious purposes there must be now, as there was then, a charitable object, and we see no reason whatever for coming to any different conclusion. In our view, it is quite clear that the dedication in question being merely for the purpose of reciting the Koran over a tomb of a private person did not create a valid wakf and that the District Munsif was correct in so holding. It follows that this second appeal must be allowed with costs here and in the lower appellate Court and the order of the District Munsif restored.

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(1) (1911) I.L.R. 33 All. 400.

whether it was a dedication of the whole property to the trust or only a partial dedication. It is conceded by Mr. Venkatesa Aiyar on behalf of the respondents that, if it is the latter, then the property in question is alienable, it being merely subject to a charge in respect of the trust. In view of the importance of this question, we have allowed it to be argued here and have given the respondents a reasonable time in which to prepare themselves with arguments *contra*.

Mr. K. S. Krishnaswami Ayyangar for the appellant contends that this trust is invalid as against public policy. It has, first of all, to be seen for what purpose the property was dedicated. The first defendant's case was that the income of the property was to be devoted to the performance of certain ceremonies at the tomb of Thangammal, the wife of one Poondi Muthiah Mudaliar, and that *gurupuja* should be performed every year in the tomb and that later on, disputes having arisen about the division of the property left by Poondi Muthiah Mudaliar, a *faricut* was drawn up and signed by the claimants to the property and an additional object was added, namely, the keeping of a water pandal for weary travellers and the feeding of weary passengers during the festival at Tiruvattiyur

which was closeby. In the original gift it is said that there was a provision that no one should enjoy the income or have the power of either mortgaging or selling the property. Unfortunately the original gift is not produced, but it seems to have been taken in Original Suit No. 206 of 1874, which was a suit between the father of the present plaintiff and the first defendant as plaintiffs and their grandfather as the first defendant, that the trust was for the objects already stated. The suit resulted in a finding that the property was trust property. The learned trial Judge had some difficulty in identifying the property here with the property mentioned in that suit. He held that the second defendant, the appellant here, as he or any of his predecessors were not parties to the decisions in Original Suit No. 206 of 1874 and another suit (Original Suit No. 115 of 1908), was not bound by those decisions, but he treated them as being evidence showing that the suit property was trust property. It is contended by Mr. K. S. Krishnaswami Ayyangar that those decisions are neither binding nor admissible even in evidence.

I now turn to the appellant's main contention here which is, as I have already stated, that such a trust as this is invalid as against public policy though he conceded that in India dedication to idols or mutts is recognised. But he contends that there is no case of a private trust such as this having been recognized in this country and contends that it cannot be recognized unless justified by Indian Law. He refers to *Yeap Cheah Neo v. Ong Cheng Neo*(1) which was an appeal from a decree of the Supreme Court of Straits Settlements. There it was held that a devise of two plantations in which the graves of the family were placed to be reserved as the family burying-place and not to be mortgaged or sold was void as a devise in perpetuity, and that a direction "that a house for performing religious ceremonies to my late husband and myself be erected" was void as being in perpetuity and not for a charitable use, and further, that the rule which prevails in England against perpetuities which exists independently of statutes and is founded upon public policy is part of the law of the Colony and so also the exception to that rule which exists in favour of charitable uses. At page 396 in the judgment it is observed: "Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which

(1) (1875) L.R. 6 P.C. 381.

does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this *Sow Chang House* bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own was held in *West v. Shuttleworth*(1) not to be a charitable use, and, although not coming within the statute relating to superstitious uses, to be void." Following *West v. Shuttleworth*(1) their Lordships held that the devise being in perpetuity was not protected, it not being for a charitable use. He next relied on *Kaleloola Sahib v. Nusserudeen Sahib*(2). That was a case of a wakf and by an instrument in writing certain movable and immovable properties were dedicated for the upkeep of the donor's husband's tomb and "for the daily, monthly and annual expenses of the aforesaid mausoleum, such as lighting, frankincense, flowers and the salaries of repeaters of Koran and readers of benedictions, etc., as well as for the annual fateha ceremonies of the deceased and after my death for my annual fateha ceremony." DAVIES J. held that this was a valid wakf but on appeal COLLINS C.J. and PARKER J. held that it was not and was void as contravening the rule against perpetuities. They state in the judgment at page 213: "In the absence of any express authority showing that a dedication for ceremonies at a private tomb—and for that purpose only—is valid under Muhammadan Law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description which would certainly be invalid under English law."

Reliance is placed in this judgment on *Yeap Cheah Neo v. Ong Cheng Neo*(3) already referred to. The correctness of this decision has been questioned in certain other decisions. In *Ramanadham Chettiar v. Vada Levvai Marakayar*(4), *Kaleloola Sahib v. Nusserudeen Sahib*(2) was discussed and distinguished and certainly the correctness of that decision appears to have been doubted. It being, however, unnecessary to express any decided opinion upon that case, none was given. But it is observed that for a very long time in India the custom of erecting tombs over the remains of men and endowing property

for their upkeep and for the performance of religious ceremonies has been recognised by the Courts as valid. On the other side, it was contended by Mr. Venkatesa Aiyar in the course of an exceedingly able argument that *Yeap Cheah Neo v. Ong Cheng Neo*(1) is no longer good law because the judgment in that case was mainly based upon *West v. Shuttleworth*(2) which was overruled in *Bourne v. Keane*(3), a decision of the House of Lords. There, an Irish Roman Catholic teacher domiciled in England bequeathed £200 to Westminster Cathedral for masses and £200 and his residuary personal estate to "The Jesuit Fathers, Farm Street" for masses. It was held (Lord WRENBURY dissenting) that the bequests were not void as superstitious. In this case *West v. Shuttleworth*(2) which for 84 years has been considered good law was overruled on this point together with other cases founded upon it. LORD WRENBURY, however, was not prepared to overrule it because it had so long stood the test of time and in his opinion ought not to be disturbed. It is not necessary to refer to the very learned and illuminating judgments of Lord BIRKENHEAD L.C., and of Lord BUCKMASTER, Lord ATKINSON and Lord PARMOOR who agreed with him upon this point. This case, however, does not decide that such a bequest is for a charitable use nor that it does not offend against the law of perpetuities. Tudor on Charities, fifth edition, page 21, makes this clear, because it is there stated: "It is established by *Bourne v. Keane*(3) that absolute gifts for saying prayers for the repose of the souls of the dead are valid; but that case did not decide that such gifts are charitable." It is there observed that in Ireland gifts for masses have also been held to be charitable and the opinion is there expressed that possibly an English Court would now take the same view. In England, therefore, the position is that such bequests are not illegal but it has still to be shown that they are charitable in object as well, because this and this alone would except them from the rule against perpetuities; and amongst those bequests which in England have been held not to be charitable are those for building, maintaining or keeping in repair the vaults or tombs of the testator or his family not being within a Church and not being for the benefit of the inhabitants of the parish generally. Mr. Venkatesa Ayyar argues (i) that in India Courts are not bound by any definite notion of charity such

(1) (1835) 2 My. & K. 684; 39 E.R. 1106.
(3) (1875) L.R. 6 P.C. 381.

(2) (1894) I.L.R. 18 Mad. 201.
(4) (1909) I.L.R. 34 Mad. 12.

(1) (1875) L.R. 6 P.C. 381. (2) (1835) 2 My. & K. 684; 39 E.R. 1106.
(3) [1919] A.C. 815.

as exists in England, (ii) that the rule as regards superstitious uses does not prevail in India and (iii) that the rule of perpetuities does not apply to Hindus and Muhammadans who have their own personal law which has been preserved to them. He refers to a number of Indian decisions commencing with *Ashutosh Dutt v. Doorga Churn Chatterjee*(1), a decision of the Privy Council. There, a Hindu lady left lands to her sons to support the daily worship of an idol and defray the expenses of certain other religious ceremonies and the question there was whether this was a valid disposition of the property and, if valid, whether its effect was to dedicate the property wholly to religious use or partly so. It was held that a charge was created on the property for the expenses of the daily worship of the idol and the religious ceremonies. It seems to have been admitted that such a charge as that was a valid one, the main question being whether it was a complete dedication or a partial dedication. For that reason, in my opinion, this decision can hardly be accepted as an authority in favour of the contention that such a bequest is a valid one. Another case is *Lakshmi Shankar v. Vajinath*(2). There it was held that a bequest by a Hindu for the performance of ceremonies and giving feasts to Brahmins was valid. The distinguishing feature of that case, however, is that feasts were to be given to Brahmins and the gift being for the benefit of the public, though of a particular caste, was a charitable one. Another case is *The Most Reverend Joseph Colgan v. Administrator-General of Madras*(3). There, there was a bequest of a sum of money the income of which was to be given for perpetual masses for the benefit of the testatrix's soul and for the souls in purgatory and it was held that the bequest for masses was void as infringing the rule against perpetuities. This case is relied upon by Mr. Venkatesa Ayyar as showing that the rule of perpetuities is of no application to Hindus and Muhammadans though it does apply to others. In that case the testatrix was an Armenian. It certainly appears from the judgment to be accepted that the rule of perpetuities does not apply to Hindus and Muhammadans because Hindus and Muhammadans have had their respective personal laws preserved to them by the Charters of the High Courts and by the Regulations. At page 446, in the judgment it is observed:

(1) (1879) I.L.R. 5 Calc. 438 (P.C.). (2) (1881) I.L.R. 6 Bom. 24.
(3) (1892) I.L.R. 15 Mad. 424.

"The personal law of the Hindus is intimately connected with their religion, and therefore allows of gifts in perpetuity to religious objects to a much greater extent than the English law. Thus absolute gifts of land or money in perpetuity to an idol and for other religious purposes have been recognized by many decisions."

In *Jamshedji C. Tarachand v. Soonabai*(1) it was held that trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktaḍ, Baj, Yejushni and other like ceremonies were valid charitable bequests and as such exempt from the application of the rule of law forbidding perpetuities. This case can be distinguished upon the ground that, in spite of the argument that the performance of the Muktaḍ ceremonies resulted in no public benefit, it was held that according to the Zoroastrian religion the performance of the Muktaḍ ceremonies is enjoined, that it is the duty of all Zoroastrians to have these ceremonies performed, and that it is believed by the community "to bring down to the world temporal and spiritual benefits—not only on those that perform the ceremony—but on the whole community—on their country and their sovereign—on all mankind—on the universe". In *Biba Jan v. Kalb Husain*(2) a Muhammadan lady belonging to the Sunni sect purported to make wakf of all her property and provided that a sum amounting to decidedly the larger portion of the income of the dedicated property should be applied annually towards the following purposes, namely, the celebration of the birth of Ali Murthūza, the expense of keeping tazias in the month of Muhurram, the anniversaries of the deaths of members of the wakif's family and the expenses for repairs of an imambara which the wakif had built and declared that the property had been dedicated to God and charitable and religious purposes; and it was held that the dedication was not illusory, that there was an intention of creating a substantial wakf for pious and charitable purposes and that the objects for which the wakf was created were valid. Here, with regard to some of the objects at any rate they were not private but were such as benefited others besides the members of the donor's family, although certainly one of the objects was the celebration of the death anniversaries of the members of that family. *Mashar Hussain*

(1) (1907) I.L.R. 33 Bom. 122.

(2) (1908) I.L.R. 31 All. 136.

Khan v. Abdul Hadi Khan(1) is also a case of a wakf, it being held by BANERJI J. in that case that there was a substantial dedication of property to religious and charitable purposes. From this opinion STANLEY C.J. dissented, and in my opinion gave strong reasons for doing so. *Dwarkanath Bysack v. Burroda Persaud Bysack*(2) is a case where the dedications for the purpose of annual ceremonies were held to be valid without any discussion to the contrary. In *Sathappayyar v. Periasami*(3) a Zamindar granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity and provided that the head of the mutt should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. It was assumed in this case that this was a charitable trust. That was not a matter in dispute in the suit at all. Mr. K. S. Krishnaswami Ayyangar argues that the test in India still remains as to whether the bequest is a charitable one and whether it offends against perpetuities. He contests the proposition that the rule of perpetuities does not apply to Hindus. He argues on the contrary that the Hindu law is even stricter in this respect than it is in England and relies upon *Kolathu Ayyar v. Ranga Vadhyar*(4). In that case it was held that a contract of pre-emption (with reference to lands) which fixes no time within which the agreement to convey is to be performed cannot be enforced against the heirs of the person who entered into the contract as it infringes the rule against perpetuities and that the rule of perpetuities is applicable to Hindus also. SUNDARA AYYAR J. at page 117 says: "There is no reason for supposing that the Hindu law encourages the perpetual tying up of landed property any more than the English law does. Possibly as pointed out by BHASHYAM AYYANGAR J. in *Ramasami Pattar v. Chinnan Asari*(5) the Indian law is even stricter than the English law, as it does not, according to the decided cases, recognize transfers in favour of unborn persons as valid."

This decision, it is true, is in conflict with the observations of COLLINS C.J. and HANDLEY J. in *The Most Reverend Joseph Colgan v. Administrator-General of Madras*(6). But that case dealt with the case of an Armenian and it was not necessary to decide the question as to whether or not the rule of per-

petuities applied to Hindus and Muhammadans, it being held that it did apply to Armenians which was all that was necessary to be decided. With great respect to the observations in *The Most Reverend Joseph Colgan v. Administrator-General of Madras*(1), I think that they are not correct and, as they were merely obiter, I do not feel myself bound by them. On the contrary I think that the decision in *Kolathu Ayyar v. Ranga Vadhyar*(2) was correct on this point. Clearly, the rule of perpetuities applies in India and I have not been shown any authority in support of the argument that the rule does not apply to Hindus. The question, therefore, is, can this trust be excepted from the rule by reason of its objects being charitable? I agree with the appellant's contention upon this point that *Bourne v. Keane*(3) is of no assistance nor do I find any decision of this High Court where a bequest of such a nature as this which is purely private has been held to be for a charitable use. It is not a question of its invalidity on account of its superstitious nature, because in view of *Bourne v. Keane*(3) such a bequest is not invalid; and I derive no assistance from cases of mutts which are well-established trusts in this country; and, in the absence of any case in this High Court in which a bequest for ceremonies at a private tomb has been recognized as valid, I am bound to say that I must uphold the appellant's contention that this bequest was invalid.

[The rest of the judgment is omitted as not necessary for this report.]

(1) (1892) I.L.R. 15 Mad. 424, 446 and 447.

(2) (1912) I.L.R. 38 Mad. 114.

(3) [1919] A.C. 815.

(1) (1911) I.L.R. 33 All. 400.

(3) (1890) I.L.R. 14 Mad. 1.

(5) (1901) I.L.R. 24 Mad. 449.

(2) (1878) I.L.R. 4 Calc. 443.

(4) (1912) I.L.R. 38 Mad. 114.

(6) (1892) I.L.R. 15 Mad. 424, 446 and 447.

APPELLATE CIVIL.

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

1934,
August 30.

ALAPATI NAGAMMA (RESPONDENT, PLAINTIFF), APPELLANT,

v.

ALAPATI VENKATRAMAYYA AND TWO OTHERS
(APPELLANTS, DEFENDANTS), RESPONDENTS.*

Transfer of Property (Amendment) Act (XXVII of 1926), sec. 3
—“Sign”—*Meaning of—Attesting witness unable to write*
his name—“Sign” if includes “mark” in case of—
Sub-Registrar—Valid attester if and when.

The word “sign” used in section 3 of the Transfer of Property Act (XXVII of 1926) with reference to an attesting witness must be taken to be governed by the definition of that word in section 3 (52) of the General Clauses Act of 1897 and to include, with reference to a person who is unable to write his name, “mark”. A marksman can therefore validly attest a gift deed. The Sub-Registrar who registered the deed cannot be held to be a valid attester in the absence of evidence to show that he signed the document in the presence of the executant.

Ram Charan v. Bhairon, (1930) I.L.R. 53 All. 1, referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment of CURGENVEN J., dated 28th of August 1931 and passed in Second Appeal No. 773 of 1930, preferred to the High Court against the decree of the District Court of Guntur in Appeal Suit No. 265 of 1928 preferred against the decree of the Court of the District Munsif of Guntur in Original Suit No. 364 of 1924.

*Letters Patent Appeal No. 98 of 1931.

P. Satyanarayana Rao for *V. Pattabirama Sastri* for appellant.

B. T. M. Raghavachari for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by BEASLEY C.J.—The plaintiff filed the suit under appeal to recover possession of a house to which she claimed to be entitled under a gift deed executed by the second defendant, the mother of the plaintiff's late husband Subbayya, in favour of Subbayya and the plaintiff jointly. The suit was contested upon various grounds, the only one with which we are here concerned being that the gift deed was not validly attested. The gift deed purports to have been attested by five persons, two of whom have signed their names and three have made their marks. On behalf of the plaintiff it was contended that the writer of the document and the Sub-Registrar who registered it were attestors also. Only one of the two signatories could be traced and he was P.W. 7. The District Judge found that he attested the document and it must therefore be accepted that the gift deed was attested by at least one attester. The District Judge has further found that one of the marksmen (P.W. 8) did attest as a marksman but it was contended in the District Court that a marksman cannot in law validly attest a document of this kind. The learned District Judge ruled against that contention but CURGENVEN J. in second appeal took the contrary view and held therefore that P.W. 8 did not validly attest the gift deed. It was conceded in argument here and by CURGENVEN J. that, before the Transfer of Property Act (XXVII of 1926)

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definition clause 3, it was beyond doubt that a marksman could be accepted as an attestor but it was argued by the respondents that the Act of 1926 in introducing a definition has altered the law in this respect. Section 3 of the Transfer of Property (Amendment) Act defines "attested" as follows :

" 'Attested', in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant "

On behalf of the respondents it is contended that the word "sign" which is the act to be performed by the attesting witness means "actually sign", that is to say, by the writing of the attestor's signature. Stress is laid upon the acts to be done by the executant which are stated in the earlier portion of this definition. The executant may sign the instrument or affix his mark to it or may direct some other person to sign the instrument in his presence or may give a personal acknowledgment of his signature or mark or the signature of the person who has signed at his direction to the attestors. It is argued that none of the before-mentioned alternatives are given to the attesting witness whose only act is to affix his signature to the instrument in the presence of the executant and that the distinction between the acts of the executant and the attesting witness is clearly shown by the use of the one word "sign" in relation to the act of the latter. It is conceded that the Act of 1926 is retrospective ;

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and if the respondents' contention is sound, the result is that all such instruments as have been previously attested by marksmen have become invalidly attested although clearly they were validly attested previous to the Act of 1926—a very startling result which the appellant argues cannot have been intended by the Legislature. As CURGENVEN J. points out in his judgment there is no case law directly in point although a decision cited to us, namely, *Ram Charan v. Bhairon*(1) which is the only reported decision since the passing of the Act of 1926 on the point of attestation, does bear upon this question because it was there held that a signature made by some other person at the request of an attesting witness and on his behalf is a valid attestation by the attesting witness. This case was not, however, referred to in the second appellate Court. The definition of attestation in section 3 of the Transfer of Property Act of 1926 is the same as that in the Indian Succession Act (X of 1865) and it has been held in *Fernandez v. Alves*(2) and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*(3) that a marksman cannot validly attest a will. In both these cases rule 3 in section 50 of the Indian Succession Act (X of 1865) was considered although in the latter case it was conceded in the judgment that this view may certainly lead in some cases in India to a good deal of inconvenience and in some instances the due execution of a will may be impracticable. From these decisions it is contended by the respondents that by taking rule 3 in section 50 of the Succession

(1) (1930) I.L.R. 53 All. 1.

(2) (1879) I.L.R. 3 Bom. 382.

(3) (1885) I.L.R. 11 Calc. 429, 431.

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Act and introducing that rule word for word into section 3 of the Transfer of Property Act of 1926 non-testamentary documents have now been put on the same footing as wills. There is no doubt much force in this contention but a good deal of its force is lost because the two before-mentioned decisions have not been followed by the Madras High Court and on the contrary their correctness is doubted in *Ammayee v. Yalumalai*(1) where it was held that, if the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is sufficient compliance with the terms of section 50 of the Indian Succession Act. *Fernandez v. Alves*(2) and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*(3) are dealt with in the judgment at page 263 where it is stated :

“According to the English law, it is sufficient if the attesting witnesses affix either their marks or their initials But it is contended that the Indian Succession Act, section 50, by providing that the testator ‘shall sign or shall affix his mark to the will’ and that the attesting witnesses ‘must sign the will’ makes a distinction between the testator and attesting witnesses and precludes the latter from merely putting marks or initials in attesting the will. In support of this contention, *Fernandez v. Alves*(2) and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*(3) are quoted. In these cases it was held that it was not sufficient for the attesting witnesses to put their marks to the will. We wish not to be understood as agreeing with these decisions. It seems to us open to argument that the principle of the English decisions as to what is a sufficient ‘subscribing’ within the meaning of the English Act applies equally as to what is a sufficient ‘signing’ by an attesting witness within the meaning of the Indian Act.” This of course was not a decision upon the point, the observations being merely *obiter*, but nevertheless it cannot be said that the Madras view is in

(1) (1892) I.L.R. 15 Mad. 261.

(2) (1879) I.L.R. 3 Bom. 382.

(3) (1885) I.L.R. 11 Calc. 429, 431.

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agreement with that of Bombay and Calcutta. The English law is quite clear upon this point. In Halsbury's Laws of England, Vol. 28, page 553, article 1098, it is stated :

“To make a valid subscription a witness must either write his name or make some mark intended to represent his name. A will may be subscribed by marks even though the witnesses are capable of writing” ;

and *Harrison v. Harrison*(1) is referred to as an authority for this statement. In Jarman on Wills (7th Edition), Vol. 1, at page 103, it is stated that

“a mark has been decided to be a sufficient subscription but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary) to employ marksmen as witnesses.”

In England, therefore, where people are far more literate than in India, the mark of a marksman is a sufficient attestation to a will. It is difficult to see any sufficient reason for the application of a stricter rule in India where the large majority of people are illiterate. It has further to be observed that both *Fernandez v. Alves*(2) and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*(3) were decided before the General Clauses Act of 1897 was enacted. That provides in section 3 (52) that

“‘sign’ with its grammatical variations and cognate expressions shall, with reference to a person who is unable to write his name, include ‘mark’ with its grammatical variations and cognate expressions.”

and section 4 (2) makes the definition applicable to all Acts passed after the 14th January 1887 unless there is anything repugnant in the subject or context. Section 3 (52) could not apply to the Succession Act of 1865 which was of very restricted

(1) (1803) 8 Ves. Jun. 184 ; 32 E.R. 324.

(2) (1879) I.L.R. 3 Bom. 382.

(3) (1885) I.L.R. 11 Calc. 429.

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applicability but does in our view apply to the Transfer of Property Act of 1926. What we have now to consider, therefore, is whether there is anything repugnant in the context of the Transfer of Property Act of 1926 to the definition in section 3 (52) of the General Clauses Act of 1897. At first sight it might appear that such repugnancy exists as it might well be argued that, if the Legislature had in view the definition of "sign" in the General Clauses Act, it was unnecessary to mention any affixing of his mark by the executant. But in our view the act of execution by the executant is so important and the physical acts to which the attestors may have to testify are so important that the Legislature deemed it necessary to set out all the four alternatives in precise language. On the other hand, no such importance appears to us to be attached to the act of the attestors provided only it is done in the presence of the executant. Whether they sign the document themselves or affix their mark to it the mere presence of their names on the document will be sufficient *prima facie* evidence to show who the attestors are. The really essential part of the definition is that the attestors should be present and be assured by what they themselves see or by what the executant acknowledges before them that the executant has actually executed the document. On a careful analysis we accordingly see nothing in the context which would prevent the words "signed the instrument" being taken to be governed by the definition of "sign" in the General Clauses Act. As we have stated earlier, the construction put upon section 3 of the Transfer of Property Act of 1926, if correct, makes all

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instruments which it is beyond question were validly attested by marksmen now invalid and, unless it is certain that the section intended to draw this marked distinction and bring about such an unfortunate result, it seems to us that it would be unreasonable to place that construction upon it.

The second point raised in the appeal is concerned with the signature of the Sub-Registrar on the back of the document. In view of the conclusion which we have just stated which establishes the validity of the gift deed, it is unnecessary to consider this at any length. We need only say that we agree with CURGENVEN J. when he says that evidence is certainly necessary to establish the fact that the Sub-Registrar signed the document in the presence of the executant. It is impossible to presume that he did this as he is under no legal obligation to do it. All he has to do is to certify that the executant was properly identified and acknowledged execution before him and this he may quite properly do at a time when the executant has left his office. In the present case admittedly there is no evidence that the Sub-Registrar signed in the presence of the executant. He therefore cannot be held to be a valid attestor. But as we have now found that both P.W. 7 and P.W. 8 are valid attestors this appeal must be allowed with costs here and in second appeal and the decree of the District Judge restored.

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APPELLATE CIVIL.

Before Mr. Justice Ramesam.

KOMMURA VENKATA RAO (PLAINTIFF), PETITIONER,

v.

KORELLA SESHARATTAMMA (FIRST DEFENDANT),
RESPONDENT.**Court Fees Act (VII of 1870), sec. 7 (iii) and (iv) (a)—Suit for recovery of specified promissory notes only—Court-fee payable in respect of.*

A suit for a declaration that the person really interested in certain promissory notes is the plaintiff and not the defendant in whose name they stood and for recovery of the notes but not for the recovery of the money due thereunder falls under section 7 (iv) (a) and not under section 7 (iii) of the Court Fees Act (VII of 1870), and court-fee is payable on the amount at which the plaintiff values the relief sought.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tenali, dated 26th January 1934 in Ordinary Suit No. 30 of 1932.

V. Subrahmanyam for petitioner.

B. Satyanarayana for respondent.

JUDGMENT.

I do not agree with the view taken by the Subordinate Judge and the court-fee examiner. This suit is for a declaration that the person really interested in the promissory notes is the plaintiff and not the defendant though they stand in the defendant's name and for recovery of the notes but not for the recovery of the money due on the

notes. The makers of the notes are parties so that the finding may be binding on them also.

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Section 7, clause iv (a) of the Court Fees Act is the clause applicable and not clause iii as the Subordinate Judge seems to think.

Under section 7, clause iv (a), Court Fees Act, the plaintiff has not got to pay court-fees on the value of the notes. The value of the notes is not the money due on the notes. Their value is only evidentiary. The plaintiff has got to state the value at which he values the relief sought. He has stated it to be Rs. 500.

I set aside the order of the Subordinate Judge and find that the plaintiff has not to pay additional court-fees.

I do not see that I should make the respondent liable for the costs. I am not able to see that I can make any other person liable for costs.

There will be no order as to costs in this petition.

K.W.B.

* Civil Revision Petition No. 196 of 1934.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

1934,
July 25.

P. C. THIRUMALAI GOUNDER (PETITIONER—FIRST
DEFENDANT), APPELLANT,

v.

THE TOWN BANK, LIMITED, POLLACHI, BY ITS
SECRETARY, T. K. MUTHUSAMI CHETTIAR (RESPONDENT—
DECREE-HOLDER), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XLI, r. 6 (2)—
Stay of sale under—Condition of grant of—Deposit of
decree amount by judgment-debtor if may be a.*

A Court to which an application for stay of sale is made under Order XLI, rule 6, clause (2), of the Code of Civil Procedure has jurisdiction to make it a condition of the grant of stay that the judgment-debtor should deposit the decree amount into Court. The expression "be stayed on such terms as to giving security or otherwise" in the clause means that the term may be giving security or any other term, such as the deposit of the decree amount.

Ram Nath Singh v. Kamleshwar Prasad Singh, (1911) 9 I.C. 323, approved.

Shankar Das v. Kasturi Lal, A.I.R. 1925 Lah. 69, dissented from.

APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 16th December 1933 and made in Execution Application No. 1077 of 1933 in Execution Petition No. 359 of 1932 in Original Suit No. 107 of 1930.

K. Bhashyam Ayyangar and *V. C. Veeraghavan* for appellant.

T. M. Krishnaswami Ayyar and *M. Krishna Bharati* for respondent.

* Appeal against Order No. 53 of 1934.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The judgment-debtor is the appellant. In a suit brought against him a money decree for Rs. 6,000 was passed. In execution of that decree properties had been brought to sale. Then he filed an application under Order XLI, rule 6, clause 2, to stay the sale in execution. The learned Judge ordered that the sale can be stopped only on the petitioner depositing into Court the decree amount, i.e., the amount that would be due on the date the amount is deposited, on or before 15th January 1934, failing which, he ordered, the petition will stand dismissed with costs.

Mr. Bhashyam Ayyangar on behalf of the appellant argued that under Order XLI, rule 6, clause 2, the lower Court had no jurisdiction to pass an order staying execution making it a condition that the decree amount should be deposited. According to him the only term which the learned Judge can impose under the Order is that security should be given and that he can impose no other condition. Whether this argument can be accepted or not will depend on the construction of the terms of the Order. Order XLI, rule 6, clause 2, runs as follows :

"Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise."

It is argued that the expression "be stayed on such terms as to giving security or otherwise" means that the execution can be stayed either on giving security or without security and that the word "otherwise" should be understood as having

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reference to security and nothing else. It is difficult to accept this plea having regard to the ordinary meaning of the expression used in the rule. The expression "terms as to giving security or otherwise" would mean that the term may be either giving security or any other term, such as the deposit ordered by the Court in this case. In *Ram Nath Singh v. Kamleshwar Prasad Singh*(1) it was observed by the learned Judges of the Calcutta High Court that under the terms of this Order the Court could make it a condition of the order for stay of sale that the money decreed should be deposited in Court in cash. We respectfully agree with this view of the meaning of the expression used in the Order. A decision of the Lahore High Court has been brought to our notice by the learned Advocate for the appellant which seems to support his contention. The learned Judges say in *Shankar Das v. Kasturi Lal*(2) that an order like the one in question is clearly against the spirit of the rule as it is tantamount to an order refusing to stay the sale. This view does not commend itself to us having regard to the ordinary meaning of the language used in Order XLI, rule 6, clause 2. We therefore hold that the lower Court has jurisdiction to make it a condition that the stay would be given only on the judgment-debtor depositing the money as ordered by the lower Court.

Then it was argued that on the merits the lower Court's order is not justified. We see no reason to interfere with the order on the merits. In the view which we take of the case it is unnecessary to decide the two other questions propounded for

(1) (1911) 9 I.C. 323.

(2) A.I.R. 1925 Lah. 69.

decision, namely, whether an appeal lies against the order in question and whether the previous order passed by the learned Judge in this case would be a bar to the passing of this order. The appeal is dismissed with costs.

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APPELLATE CIVIL.

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

RAMASAMI IYER AND ANOTHER (RESPONDENTS),
PETITIONERS,

1934,
May 4.

v.

VEDAMBAL AMMAL (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 73—Mesne profits—Decree for—Holder of, who has obtained attachment under O. XXI, r. 42, of Code before ascertainment of amount of profits—Right to rateable distribution of—Execution application by him after ascertainment of profits—Necessity.

The holder of a decree for mesne profits who has obtained an attachment under Order XXI, rule 42, of the Code of Civil Procedure before the amount of mesne profits has been ascertained is entitled to a rateable distribution with other decree-holders under section 73 of the Code. An application for execution by him after the ascertainment of profits is not necessary to entitle him to the benefit of that section.

Viraragava v. Varada (1882) I.L.R. 5 Mad. 123, relied upon.

PETITION under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur

* Civil Revision Petition No. 1716 of 1930.

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dated 29th January 1930 and made in Miscellaneous Application No. 48 of 1930 in Original Suit No. 8 of 1921 on the file of the Court of the Additional Subordinate Judge of Mayavaram.

K. Venguswami Ayyar for petitioners.

K. S. Rajagopalachariar for *K. Rajah Ayyar* for respondent.

Cur. adv. vult.

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NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The petitioners are the decree-holders in Small Cause Suits Nos. 747 of 1928 and 1021 of 1927, Sub-Court, Tuticorin, who obtained decrees in those suits against the same judgment-debtor. The respondent obtained a preliminary decree in Original Suit No. 8 of 1921, Sub-Court, Mayavaram, for possession and mesne profits against the same judgment-debtor under Order XX, rule 12, Civil Procedure Code, declaring her right to the properties and ordering an enquiry into mesne profits. In execution of his decree in Small Cause Suit No. 1021 of 1927, money in the hands of the garnishee was attached and deposited in Court to the credit of the decree-holder in Small Cause suit No. 1021 of 1927 on 2nd December 1929. In Execution Petition Register No. 19 of 1925 the respondent had applied for the attachment of the very amount under Order XXI, rule 42, Civil Procedure Code, and the attachment had been ordered on 18th March 1925. On 14th December 1929 she filed Miscellaneous Application No. 435 of 1929 for the ascertainment of mesne profits. On 25th January 1930, she filed the application out of which this appeal arises, Miscellaneous Application No. 48 of 1930, for rateable distribution, under sections 73 and 151,

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Civil Procedure Code, of the amount attached in respect of future profits which have to be ascertained hereafter and for which she had already filed Miscellaneous Application No. 435 of 1929.

The petitioners who had also applied for rateable distribution opposed the respondent's application on the ground that section 73, Civil Procedure Code, is inapplicable inasmuch as she had not made her application to the Court before the receipt of assets and there was no application from her "for the execution of a decree for the payment of money" as required under the section. The latter objection is based on the ground that an enquiry into mesne profits being a proceeding in the suit itself under Order XX, rule 12, even though under Order XXI, rule 42, a decree-holder for mesne profits may obtain an attachment before the amount is ascertained, still to enable him to claim the benefit under section 73 he must have filed a petition for execution after the amount is ascertained. These objections were overruled by the lower Court and rateable distribution was ordered in favour of the respondent.

The above objections have again been pressed before us. It is clear that, if Execution Petition Register No. 19 of 1925, the application for attachment under Order XXI, rule 42, can be considered to be an application for execution, then both the objections of the petitioners are answered. Order XXI, rule 42, says that

"where a decree directs an enquiry as to mesne profits . . . the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money."

The attachment in the present case was obtained by the respondent under this rule. In *Viraragava*

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v. *Varada*(1) it was held under the old Code that the holder of a decree for unascertained mesne profits who has applied to the Court to ascertain the amount thereof and to attach immovable property under section 255 (corresponding to Order XXI, rule 42, of the present Code) comes within the purview of section 295 (corresponding to the present section 73, Civil Procedure Code), and is entitled to share rateably with the attaching creditor in the assets realised. In the course of the judgment the learned Judges pointed out :

“The decree held by the petitioner for mesne profits was a decree for money. Although the amount was still uncertain, the petitioner had applied to the Court to execute that decree.”

It is argued for the petitioners that, as under the old Code the ascertainment of mesne profits was a proceeding in execution, the application in that behalf was sufficient to satisfy the requirements of section 73 ; while under the present Code the ascertainment of mesne profits is a proceeding in the suit itself (Order XX, rule 12, Civil Procedure Code) and therefore, unless a petition for execution after the amount of mesne profits has been ascertained is filed, the respondent cannot apply under section 73. For the purpose of section 73 the difference in procedure between the two Codes with regard to the ascertainment of mesne profits does not necessarily lead to the conclusion that without an application for execution after the ascertainment of profits rateable distribution cannot be claimed by the respondent. The Code allows under Order XXI, rule 42, an

(1) (1882) I.L.R. 5 Mad. 123.

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attachment to be made to realise the amount to be ascertained in future “as in the case of an ordinary decree for the payment of money”. This provision, in our opinion, treats the attachment as a proceeding in execution of the decree and the application for attachment may well therefore be treated as one for execution. It is not unreasonable therefore to hold that as soon as the amount is ascertained the application made for obtaining the attachment becomes one for the execution of the decree for the realisation of the ascertained money. In this connection it may be observed that rule 42 finds a place under Order XXI, the Order relating to the execution of decrees. If the view expressed above is not accepted, it would mean that under the old Code the decree-holder would under circumstances similar to those appearing in the present case be entitled to obtain rateable distribution, while he cannot do so under the present Code. In our opinion there is no justification for such a conclusion. In Mulla's Commentaries on the Code of Civil Procedure, under section 73, the following statement of law appears :

“A decree for the payment of mesne profits is a ‘decree for the payment of money’ within the meaning of this section, notwithstanding that the amount of mesne profits has not yet been ascertained. The holder of such a decree, who has applied for attachment under Order XXI, rule 42 (Code of 1882, section 255), is entitled to a rateable distribution with other decree-holders under this section” ;

and the authority referred to for this proposition is *Viraragava v. Varada*(1)—the decision under the old Code we have already quoted. For the above reasons we hold that under the present

(1) (1882) I.L.R. 5 Mad. 123.

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Code the respondent can claim rateable distribution under section 73, Civil Procedure Code.

It cannot be doubted that in equity the distribution of the assets in this case should abide the passing of the final decree. The respondent was the first to attach the amount in question and the delay in passing the final decree should not in our opinion be allowed to stand in the way of her obtaining rateable distribution. She has made the application under section 151, Civil Procedure Code, also. We think this is pre-eminently a case for the application of that section. In our opinion, both under section 73 and under section 151 of the Civil Procedure Code the respondent's claim for rateable distribution should be recognised. We confirm the lower Court's order and dismiss this civil revision petition with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Curguenven.

KALIMUTHU PILLAI, MINOR BY HIS MOTHER AND NEXT
FRIEND THIRUPILLAI AMMAL, (PLAINTIFF),
APPELLANT,

v.

AMMAMUTHU PILLAI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Inheritance—Bandhus—Atmabandhus—Preference among—Principle applicable—Daughter's daughter's son—Sister's son—Preference as between—Order of succession among Bandhus—Rules as to.

According to Hindu Law as between the daughter's daughter's son of the propositus and the sister's son of the propositus

* Second Appeal No. 272 of 1930.

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the former is the preferential heir. Both are Atmabandhus of the propositus but the daughter's daughter's son is a descendant of the propositus himself while the sister's son is a descendant of the father of the propositus and the former is to be preferred to the latter on the great principle pervading the law of inheritance under the Mitakshara system, namely, that the nearer line excludes the more remote. Though the principle of spiritual benefit may be resorted to even under the Mitakshara, it should not be so resorted to as to defeat the rule that the nearer line should exclude the more remote.

Balusami Pandithar v. Narayana Rau, (1897) I.L.R. 20 Mad. 342, followed.

Rules as to the order of succession among Bandhus summed up.

APPEAL against the decree of the District Court of Tinnevely in Appeal Suit No. 57 of 1929 preferred against the decree of the Court of the District Munsif of Palamcottah in Original Suit No. 37 of 1928.

M. Balasubramania Mudaliar for appellant.—The appellant is the daughter's daughter's son, and the first defendant the sister's son, of the propositus. Both of them are Atmabandhus. Among Atmabandhus one's own descendants must be preferred to one's father's descendants because the Mitakshara scheme of succession is based on the principle that the nearer line excludes the more remote. [*Tirumalachariar v. Andal Ammal*(1), *Ajudhia v. Ram Sumer Misir*(2) and *Ram Phal Thakur v. Pan Mati Padain*(3) referred to for the position that a daughter's daughter's son is an Atmabandhu.] In the table given in Mayne's Hindu Law, 9th edition, page 852, the daughter's daughter's son comes third, while the sister's son comes eighth. Rule 1 of the rules of preference given on page 849 of Mayne's Hindu Law is correct and ought to be applied first; and it is only if that fails that recourse can be had to the other rules. [*Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(4) referred to.] In *Krishna Ayyangar v. Venkatarama Ayyangar*(5) and *Balusami Pandithar v. Narayana Rau*(6) the descendant of a nearer ancestor was preferred

(1) (1907) I.L.R. 30 Mad. 406.

(3) (1910) I.L.R. 32 All. 640.

(5) (1905) I.L.R. 29 Mad. 115.

(2) (1909) I.L.R. 31 All. 454.

(4) (1896) I.L.R. 19 Mad. 405 (P.C.).

(6) (1897) I.L.R. 20 Mad. 342.

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to that of a remoter ancestor. In the former case two females intervened in the case of the descendant of the nearer ancestor. Nevertheless he was preferred on the ground that the nearer line excludes the more remote. In the latter case it is stated at page 348 that the first principle of the Mitakshara scheme of succession is that the nearer line excludes the more remote and that the doctrine of spiritual benefit ought not to be resorted to in supersession of that first principle. In *Vedachela Mudaliar v. Subramania Mudaliar*(1) it was held that the distinction between Bandhus *ex parte paterna* and *ex parte materna* ought not to be used to defeat the cardinal rule of the Mitakshara scheme of succession that nearness in degree excludes the more remote. At page 764 of that case, *Balusami Pandithar v. Narayana Rau*(2) is noticed and discussed at length. In *Adit Narayan Singh v. Mahabir Prasad Tiwari*(3) the principle is stated and *Krishna Ayyangar v. Venkatarama Ayyangar*(4) is applied. In *Rami Reddi v. Gangi Reddi*(5) the ascending ancestor was the same but the descent in the case of one claimant was more remote than in the case of the other. According to the theory of spiritual benefit the claimant whose claim was not recognized in that case ought to have been preferred. But it was held that that theory ought not to be applied so as to defeat the rule in favour of the nearer line. *Buddha Singh v. Laltu Singh*(6) was not a case of Bandhu succession but it is authority for the position that the descendants of a nearer ancestor should be exhausted before recourse is had to the descendants of a remoter ancestor. [*Muttusami v. Muttukumarasami*(7) referred to.] Among Bandhus equally removed from the propositus one in the direct line of descent is to be preferred to one in the collateral line; *Bhimrao v. Gangabai*(8). In Trevelyan's Hindu Law, third edition, pages 436-7, the rules of succession among Bandhus are laid down and *Vedachela Mudaliar v. Subramania Mudaliar*(1) is referred to but its effect is overstated there. As to when the spiritual benefit rule comes into play, see page 852 of Mayne. The principal ground of decision in *Vedachela Mudaliar v. Subramania Mudaliar*(1) is propinquity or near-

(1) (1921) I.L.R. 44 Mad. 753 (P.C.). (2) (1897) I.L.R. 20 Mad. 342.
(3) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.
(4) (1905) I.L.R. 29 Mad. 115. (5) (1924) I.L.R. 48 Mad. 722.
(6) (1915) I.L.R. 37 All. 604 (P.C.). (7) (1892) I.L.R. 16 Mad. 23.
(8) (1921) I.L.R. 46 Bom. 541, 546.

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ness and spiritual efficacy is a subsidiary ground. This is how that case is understood in *Rami Reddi v. Gangi Reddi*(1). See also *Jatindranath Ray v. Nagendranath Ray*(2).

R. Krishnaswami Ayyangar (with him, *T. K. Sarangapani Ayyangar*) for respondents.—Assuming that propinquity is the governing rule according to the Mitakshara scheme of succession, the question is what is propinquity. The whole law of inheritance is based on Manu's text which is translated as: "The inheritance of a near sapinda is that of a near sapinda." Nearness must be tested both from the point of view of the claimant and of the propositus. The test of nearness has been stated to be spiritual benefit. The limitation to three degrees can only be justified on the theory of spiritual benefit. In *Buddha Singh v. Laltu Singh*(3) the limitation and the basis thereof are given. The rule applies alike to cases of male descendants and to cases of cognate succession. The cardinal principle is the spiritual benefit theory. From that is evolved the nearer line theory. The nearer line theory is inapplicable to cases of Bandhus. Nearer line does not necessarily mean nearer in blood. Nearness of sapindaship is counted by counting degrees from the common ancestor. Where one claimant is a descendant of the propositus himself and the other is a descendant of his ancestor, to test nearness degrees are counted from the propositus in the former case and from the common ancestor in the latter case. Judged by that test a sister's son is nearer than a daughter's daughter's son, because the former is removed by three degrees while the latter by four.

[Is this method of counting from the common ancestor confined to sapinda relationship or does it also extend to the ascertainment of propinquity?—*Curgenvin J.*]

Nearness also has to be tested by the test of mutuality. The rule that the nearer line excludes the more remote is not a rule of the Mitakshara but is deduced from the rule as to spiritual benefit. It can properly apply only to the case of gotrajas and cannot be applied to cases of Bandhu succession. The test of nearness of affinity is to be applied to ascertain the class, but the test of nearness among Bandhus of the same class

(1) (1924) I.L.R. 48 Mad. 722.
(2) (1931) I.L.R. 59 Cal. 578, 583-4; L.R. 58 I.A. 372.
(3) (1915) I.L.R. 37 All. 604, 617 (P.C.).

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is spiritual benefit. As to spiritual benefit being the test of propinquity, see *Buddha Singh v. Lattu Singh*(1).

M. Balasubramania Mudaliar in reply.

Cur. adv. vult.

JUDGMENT.

RAMESAM J. RAMESAM J.—The question arising in this second appeal is one of Hindu Law, the facts not being disputed. The plaintiff is the daughter's daughter's son of the last male owner, Kalimuthu Pillai, who died in 1883. Kalimuthu had four wives of whom two survived him. The last of these died in January 1923. According to the plaintiff the property has devolved under the Hindu Law on him as the nearest Bandhu. The first defendant is the sister's son of Kalimuthu. He had previously obtained a decree for possession of the properties of Kalimuthu on the ground that he is the reversioner but the present plaintiff was not a party to that suit. The plaintiff in this suit now seeks to recover the properties from him. The present suit was filed on the 24th January 1928 and there is no question of limitation in the case.

The only question for decision therefore is who according to Hindu Law is the preferential heir—the plaintiff (the daughter's daughter's son) or the first defendant (the sister's son)? As the succession opened in 1923 this case is not governed by the Hindu Law of Inheritance (Amendment) Act II of 1929. Both parties are Bandhus, i.e., cognates or Bhinna Gotra Sapindas. The nature of the Bandhu relationship and to some extent the order of succession among the Bandhus was discussed by me and our brother VENKATASUBBA

(1) (1915) I.L.R. 37 All. 604, 623 (P.C.).

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RAO J. in *Rami Reddi v. Gangi Reddi*(1). A further question of order of succession has now arisen. It is unnecessary for me to repeat my observations made in that judgment. It is enough for the present purpose to start from the principles of succession for Bandhus laid down by the Privy Council. One of such principles was laid down so early as in *Muttusami v. Muttukumarasami*(2) affirmed by the Privy Council in *Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(3). That principle is that the nearest Bandhus of a person may be divided into three classes, viz., the Atmabandhus, the Pitrubandhus and the Matrubandhus. There may be Bandhus other than these three classes, but we are not concerned with them in this case, and it is unnecessary to discuss the order of succession among them. So far as these three classes are concerned, they take in the order enumerated, i.e., the Atmabandhus take first, then the Pitrubandhus and then the Matrubandhus; *Muttusami v. Muttukumarasami*(2) (at page 30), *Muthusami Mudaliyar v. Simambedu Muttukumaraswami Mudaliyar*(3) (at page 409) also approved in *Vedachela Mudaliar v. Subramania Mudaliyar*(4). Now the question at once arises who are Atmabandhus, who are Pitrubandhus and who are Matrubandhus? The Mitakshara, section 6, enumerates one's own first cousins as one's own Bandhus, the father's first cousins as Pitrubandhus and the mother's first cousins as Matrubandhus. But it has now been repeatedly held in all the Courts that this enumeration

(1) (1924) I.L.R. 48 Mad. 722.

(3) (1896) I.L.R. 19 Mad. 405 (P.C.).

(2) (1892) I.L.R. 16 Mad. 23.

(4) (1921) I.L.R. 44 Mad. 753, 763 (P.C.).

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is not exhaustive and other persons fall within these headings or classes. Now the Atmabandhus of a person as enumerated by the Mitakshara are the descendants of his paternal or maternal grandfather. If these are Atmabandhus, it is an *a fortiori* case that the descendants of one's father and of himself should also be regarded as Atmabandhus and this is indeed the view taken by the Courts. For instance, in *Balusami Pandithar v. Narayana Rau*(1) a sister's son was held to be an Atmabandhu. At page 346 the learned Judges observed :

"As to the third defendant, the learned Vakil for the plaintiff urges that he is not Vasudeva's Atmabandhu. But that he is such a Bandhu seems to be necessarily implied by the passage of the Mitakshara cited above. For it lays down that the father's sister's son, that is, a descendant of even the paternal grandfather, is an Atmabandhu. How then can a Bandhu, like the third defendant, who is able to trace his relationship to the deceased owner through a nearer ancestor, viz., the father, be held to be other than an Atmabandhu? The plaintiff's objection on this point is, consequently, untenable."

In *Krishna Ayyangar v. Venkatarama Ayyangar*(2) it was held that a father's sister's daughter's son is an Atmabandhu. In *Sham Dei v. Birbhadra Prasad*(3) it was held that a sister's daughter's son and also a father's sister's son's son are Atmabandhus. In *Umashankar Prasad Parasari v. Mussammatt Nageswari Koer*(4) the maternal uncle was described as an Atmabandhu. In *Adit Narayan Singh v. Mahabir Prasad Tiwari*(5) the Privy Council in an appeal from Patna held that a mother's sister's grandson was

(1) (1897) I.L.R. 20 Mad. 342.

(2) (1905) I.L.R. 29 Mad. 115.

(3) (1921) I.L.R. 43 All. 463.

(4) (1918) 3 Pat. L.J. 663 (F.B.).

(5) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.

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an Atmabandhu. In all these decisions the descendants of the father of the propositus and the descendants of the grandfathers other than those enumerated in the Mitakshara were held to be Atmabandhus. For the same reason it is obvious that the descendants of the propositus himself should be held to be Atmabandhus. Thus the term Atmabandhus has a wider scope than the terms Pitrubandhus or Matrubandhus. Whereas Atmabandhus include the descendants of a man's paternal and maternal grandfathers, just as one's Pitrubandhus denote the descendants of one's father's paternal and maternal grandfathers, and the term Matrubandhus denotes the descendants of one's mother's paternal and maternal grandfathers, the term Atmabandhus also includes the descendants of the propositus's father and descendants of the propositus himself. Accordingly a man's Atmabandhus may be divided into three sub-classes :

A.—His own cognate descendants.

B.—His father's cognate descendants and

C.—The cognate descendants of his paternal grandfather and the descendants of his maternal grandfather.

Group A is Group I at page 725 of my judgment in *Rami Reddi v. Gangi Reddi*(1). Group B is Group II on the same page. Group C is Group III on the same page.

The question now arises, how is the succession to be regulated as between the members of the different sub-classes of Atmabandhus? The answer to this question is to be sought from the

(1) (1924) I.L.R. 48 Mad. 722.

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basis of the classification in the Mitakshara into the Atmabandhus, the Pitrubandhus and the Matrubandhus. The reason mentioned in the Mitakshara itself is "by reason of nearer affinity". The Atmabandhus enumerated in the Mitakshara are preferred to the Pitrubandhus and the Matrubandhus because they are the descendants of nearer ancestors, viz., the paternal and maternal grandfathers of the propositus, than the ancestors from whom the Pitrubandhus and the Matrubandhus are descended. Applying the same principle we arrive at the conclusion that among Atmabandhus one's own descendants should be preferred to the father's descendants and the father's descendants to the descendants of the grandfathers. This is the principle applied in *Balusami Pandithar v. Narayana Rau*(1). There it was observed :

" But . . . granting that the plaintiff's capacity is superior, does that give him a better title? Now, though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognised that Vignaneswara as well as most of his followers put their system on a radically different basis . . .

But, be this as it may, there need be no hesitation in saying that the doctrine ought not to be resorted to in derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote."

Accordingly in that case it was held that a man's sister's son was entitled to preference over his maternal uncle's son. The former was a descendant of the father of the propositus. The latter was a descendant of the maternal grandfather of the propositus. On the same principle a man's

(1) (1897) I.L.R. 20 Mad. 342, 347, 348.

own descendants ought to be preferred to the descendants of his father. One's own line is certainly a nearer line than the line of descendants from one's father. This is also the principle adopted in Mayne's Hindu Law where the descendants of the propositus are enumerated as Nos. 1 to 7 whereas the descendants of the father of the propositus are enumerated as Nos. 8 to 15.

The learned Advocate for the respondents contended that the principle of spiritual benefit ought to be applied and that one's daughter's daughter's son makes no offerings to the propositus whereas the sister's son offers oblations to the father of the propositus in which he participates. To this it is enough to reply that, though the principle of spiritual benefit may be resorted to even under the Mitakshara, it should not be so resorted to as to defeat the rule that the nearer line should exclude the more remote. This is exactly what the learned Judges have held in *Balusami Pandithar v. Narayana Rau*(1). In fact, if the learned Advocate's contention is accepted, we have to hold that the decision in *Balusami Pandithar v. Narayana Rau*(1) is erroneous. That decision has stood in the books for thirty-seven years and has been repeatedly cited before the Privy Council and its correctness has not been questioned and we do not see why we should unsettle the law by doubting its correctness. The learned Advocate relied on three decisions for his contention, viz., that the principle of spiritual benefit should be given preferential recognition under the Mitakshara Law. Those decisions are *Chinnasami Pillai v.*

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Kunju Pillai(1), *Buddha Singh v. Lattu Singh*(2) and the judgment of our learned brother KUMARASWAMI SASTRI J. in *Subramiah Chetty v. Nataraja Pillai*(3). All the above three cases relate to succession among Sagotra Sapindas and not Bandhus, and the decision of the Privy Council expressly rests on various texts laying down that among Gotraja Sapindas the principle of spiritual benefit should be specially looked to. One of these tests is the Viramitrodaya which was also quoted in *Balusami Pandithar v. Narayana Rau*(4) but was not applied to Bandhus. In my opinion we are not called upon to discuss these three decisions in this case and it is enough to observe that whatever the stage at which the principle of spiritual benefit may be applied among Gotraja Sapindas, it should not be applied to Bandhus so as to defeat the rule of "nearer affinity". Even among Bandhus, when the above principles fail, the principle of spiritual benefit will have to be resorted to; *Jatindranath Ray v. Nagendranath Ray*(5). In Mayne's Hindu Law, section 597 (a), at page 849, it is suggested that the first rule should be that a nearer ancestor and his descendants should exclude a more remote ancestor and his descendants. This is in accordance with the decisions in *Balusami Pandithar v. Narayana Rau*(4) and *Adit Narayan Singh v. Mahabir Prasad Tiwari*(6).

The result is that in our opinion the plaintiff is entitled to the properties in preference to the first defendant.

(1) (1911) I.L.R. 35 Mad. 152.

(3) (1928) 58 M.L.J. 468.

(5) (1931) I.L.R. 59 Calc. 576; L.R. 58 I.A. 372.

(6) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.

(2) (1915) I.L.R. 37 All 604 (P.C.).

(4) (1897) I.L.R. 20 Mad. 342.

I may now sum up for convenience of reference the rules as to the order of succession among Bandhus. Atmabandhus get in preference to Pitrubandhus and Matrubandhus. Atmabandhus are divided into three sub-classes. (i) Descendants of the propositus. Excluding unlikely descendants, these will generally include son's daughter's son, daughter's son's son and daughter's daughter's son. All these three are entitled to come in before the descendants of the father. As to the order between these three I do not wish to discuss the question as between the first two as the point does not arise. That the second is entitled to preference over the third has been decided in *Tirumalachariar v. Andal Ammal*(1). It is only after this sub-class of descendants of the propositus are exhausted that we go to the next sub-class, viz., (ii) the father's descendants. It is only after these are exhausted that we go to the next sub-class, viz., (iii) the descendants of the grandfathers. It is only after this third sub-class of Atmabandhus are exhausted that we go to the Pitrubandhus or the Matrubandhus as the case may be. For instance, in *Krishna Ayyangar v. Venkatarama Ayyangar*(2), a father's sister's daughter's son who is in the third sub-class of Atmabandhus was given preference over the paternal grandfather's sister's son who is a Pitrubandhu. In *Adit Narayan Singh v. Mahabir Prasad Tiwari*(3) a mother's sister's grandson who is in the third sub-class of Atmabandhus was given preference over the mother's paternal aunt's son who is a Matrubandhu. And the next rule

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(1) (1907) I.L.R. 30 Mad. 406.

(2) (1905) I.L.R. 29 Mad. 115.

(3) (1921) L.R. 48 I.A. 86; 40 M.L.J. 270.

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would be that when the Pitrubandhus are exhausted, we go to the Matrubandhus. Another rule would be that in each sub-class of Atmabandhus or among the Pitrubandhus or Matrubandhus the nearer descendant from the common ancestor or from the ancestor of equal degree is entitled to preference over a remoter descendant. In other words, the nearer excludes the more remote. This last rule is illustrated by the decision in *Nucherla Chengiah v. Subbaroya Aiyar*(1), where the mother's father's sister's son's son is preferred to the mother's father's brother's grandson's son the latter being a lower descendant from the common ancestor than the former. If these rules fail, we have to resort to other rules: (i) Preference is given to Bandhus who confer greater spiritual benefit, *Jatindranath Ray v. Nagendranath Ray*(2); (ii) Bandhus *ex parte paterna* are entitled to preference to those *ex parte materna*; and (iii) A claimant in whose relationship two females intervene would be postponed to another in whose relationship there is only one female; this is illustrated by the judgment of myself and VENKATASUBBA RAO J. in *Rami Reddi v. Gangi Reddi*(3). I may suggest another illustration of the first rule but, as the case has not arisen and as I do not wish to prejudge it, I abstain from giving the illustration.

The result is that the second appeal must be allowed and the decision of the District Judge is reversed and that of the District Munsif restored with costs here and in the lower appellate Court.

(1) (1929) 58 M.L.J. 562.
(2) (1931) I.L.R. 59 Cal. 576; L.R. 58 I.A. 372.
(3) (1924) I.L.R. 48 Mad. 722.

I may add that it is so much in accordance with the sentiments of Hindus that a man's descendants should be preferred to his collaterals that the Hindu Law of Inheritance (Amendment) Act II of 1929, while it followed a right policy in elevating a son's daughter, daughter's daughter, sister and sister's son above Sagotra Sapindas, is faulty in that it does not provide for the man's cognate descendants, viz., son's daughter's son, daughter's son's son and daughter's daughter's son, being given preference over the sister and the sisters's son who are only collaterals, and it would be in accordance with the sentiments of Hindus if the Act is amended on such lines. Even on the principle of spiritual benefit, one's son's daughter's son should be preferred to a sister's son; and, even on any non-Hindu mode of computation of the steps between the propositus and the claimants, the three bandhu-descendants abovementioned cannot be inferior to the sister's son and ought to precede him, if not the sister.

CURGENVEN J.—I agree.

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APPELLATE CIVIL.

*Before Mr. Justice Curgenven and Mr. Justice Bardwell.*1934,
May 1.KRISHNA AYYAR (PETITIONER, FIRST RESPONDENT),
APPELLANT,

v.

SUBBALAKSHMI AMMAL (RESPONDENT, PETITIONER),
RESPONDENT.**Indian Lunacy Act (IV of 1912), Chap. V—Custody of lunatic—
Power of Court to give to guardian appointed—Sec. 83—
Appeal—Order dismissing guardian's application for
custody—Whether appealable.*

Although Chapter V of the Lunacy Act (IV of 1912) makes no express provision for giving custody of the person of a lunatic to the guardian appointed, the Court which passed the order appointing the guardian has power to give custody of the lunatic to the guardian so appointed. This power lies by implication in that part of the Act which confers the primary power of appointing the guardian, viz., Chapter V. And section 83 of the Act which allows an appeal from all orders passed under that chapter, makes an order dismissing the guardian's application for custody appealable.

APPEAL against the order of the District Court of Trichinopoly, dated 16th February, 1934, and made in Interlocutory Application No. 479 of 1933 in Original Petition No. 38 of 1933.

T. R. Ramachandra Ayyar and L. A. Gopala-krishna Ayyar for appellant.

T. R. Venkatarama Sastri and K. V. Sesha Ayyangar for respondent.

The JUDGMENT of the Court was delivered by CURGENVEN J. CURGENVEN J.—This is an appeal against an order of the District Judge of Trichinopoly dismissing

* Appeal against Order No. 152 of 1934.

an application by the appellant for the custody of a lunatic, who is his natural son. The proceedings arose in a petition by the lunatic's wife to have him declared a lunatic and herself appointed guardian of the person and property. This application was closed by an order passed by agreement between the parties according to which the wife was to be the guardian of the property and the father, the present appellant, guardian of the person. It appears that a difficulty arose in carrying out the terms of this order, so that the appellant had to institute this application for getting custody of the lunatic.

The first question that has been raised before us is whether the order dismissing his application for custody is an appealable order. Orders passed by a Court in lunacy outside the Presidency-towns are provided for by Chapter V of the Lunacy Act, and section 83, the last section in that chapter, provides that an appeal shall lie to the High Court from any order made by any District Court under the chapter. Section 71 empowers the District Court to appoint a guardian of the person of a lunatic, and that is the section under which the original order in this case, appointing the appellant guardian of the person of his lunatic son, was passed. There is no express provision in the chapter for giving custody of the person of the lunatic to the guardian thus appointed, but it is not questioned before us that such power must reside in the Court which passed the order appointing a guardian. This is a well known principle of the interpretation of statutes; we need only refer to Craies on Statute Law, 3rd edition, page 227, and the English case,

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Scott v. Legg(1). We do not think we need discuss that point further, as it is not disputed. Assuming then that the Court has power to pass an order for the custody of a lunatic, the only question is whence that power is derived. It seems clear from the authorities which we have cited that it lies by implication within the four corners of the Act which grants the primary power and, extending the same principle, it can scarcely be questioned that it lies in that part of the Act which confers that power, and in the present case within Chapter V of the Lunacy Act. If this reasoning be correct, section 83, which allows an appeal from all orders passed under that chapter, will make this particular order appealable.

Coming to the merits of the case, the first order of the District Judge appointed the appellant guardian of the person of the lunatic, and, unless anything exceptional appears to the contrary, it appears to us that the right so conferred upon the appellant implies the right to the custody of the lunatic's person. The learned Judge in the order now under appeal considers that it does not necessarily permit him to have "exclusive" or "separate" custody of the lunatic. He scarcely conceals his disagreement with the order of his predecessor and we think that, in the observations which he has made on it, it was incumbent upon him to say—what he has omitted to say—that the order was passed by consent of the parties. The main ground upon which he appears to have proceeded is that it is not possible to separate the lunatic from his wife. The position apparently is

(1) (1876) 2 Ex. D. 39, 42; 10 Q.B.D. 236.

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that all the parties lived together in the house occupied by the lunatic and his wife from 1929, when the lunatic's adopted mother died, until 1933, when there was a quarrel over some question relating to the estate. It was said that the father (appellant) had mismanaged the property. It became then impossible for the appellant and his wife to remain in the house and he withdrew to his own village of Allur, which is only two miles away from Kambarasanpettai, where the lunatic at present resides. The argument that the husband cannot be separated from his wife appears to us to be somewhat of an inversion of the normal state of affairs which requires that the wife should follow the fortunes or misfortunes of her husband rather than *vice versa*. We have no ground at present to suppose that giving the custody of the lunatic to the appellant will necessarily involve separation between husband and wife, but at any rate that in itself cannot on general grounds be made a reason for not implementing the order appointing the appellant as guardian. Virtually what the order of the Court below seems to us to say is: "You have, it is true, been appointed guardian of the person but you shall not have any custody or control of it." It seems quite clear that unless an order for custody is made, the virtual guardian of the lunatic will be the wife herself who will have no compunction, it appears, in shutting the door in the face of the natural father. In these circumstances we think that the only course compatible with enforcing the order of appointment is to pass an order giving the appellant custody of the lunatic and, allowing the appeal, we pass such an order.

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There is a further application for a monthly allowance for the maintenance of the lunatic. We are not in a position to deal with that finally now and we direct the learned District Judge to dispose of it. The appellant will get his costs throughout, including the cost of privately printing the records, from the estate, and the respondent will bear her own costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

1934,
 August 28.

NARAYANASWAMI VANNIAR (FIRST ACCUSED),
 PETITIONER,

v.

KARUMBAYIRAM PERIYARI (COMPLAINANT),
 RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 403—Re-trial on same charge after acquittal owing to want of jurisdiction in trying Magistrate—Previous trial no bar to re-trial—Madras Village Courts Act (I of 1889), sec. 76 (8).

When the conviction and sentence passed upon an accused are set aside on the ground that the trying Magistrate had no jurisdiction, the order of the appellate Court setting aside the conviction is no obstacle to the accused being re-tried on the same charge.

The petitioner and others were accused before a Village Panchayat Court and convicted of an offence. A revision petition was filed under section 76 (8) of the Madras Village Courts Act (I of 1889), and the conviction and sentence were set aside on the ground that the Bench had no legal existence at the time, and hence no jurisdiction. Subsequently an identical complaint on the same facts was filed before the same

* Criminal Revision Case No. 97 of 1934.

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Panchayat Court, and the accused contended that, under section 403 of the Criminal Procedure Code (Act V of 1898), a new trial on the same facts was barred. The Court held there was no bar, and against this a revision petition was filed.

Held, that the original trial was a nullity having been held by persons who had no power to try the case; and that there was nothing in law to prevent the institution of fresh proceedings against the accused in a Court of competent jurisdiction.

Abdul Ghani v. Emperor, (1902) I.L.R. 29 Cal. 412, and *Liakat Hossein v. The Emperor*, (1907) 12 C.W.N. 246, 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 the Second-class Magistrate of Kodavasal, dated 23rd January 1934, and made in Calendar Case No. 8 of 1934.

M. S. Venkatarama Ayyar for *R. Srinivasa Ayyar* for the petitioner.

P. Krishnamachari for the complainant.

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

Cur. adv. vult.

ORDER.

The petitioner and others were accused before the Village Panchayat Court, Narayanamangalam, Tanjore District, and convicted of an offence. A revision petition was filed in the Court of the Joint Magistrate, Negapatam, in Criminal Miscellaneous Petition No. 43 of 1932 under section 76 (8) of the Madras Village Courts Act. The Court found that the Bench had no legal existence at the time and hence no jurisdiction. It set aside the conviction and directed the fines paid to be refunded. On the same facts an identical complaint was filed before the same Panchayat Court in Calendar Case No. 2 of 1932. The petitioner put in a petition to the Sub-Magistrate, Kodavasal, to stop further proceedings

and discharge the accused on the ground that section 403, Criminal Procedure Code, barred a new trial on the same facts with regard to the same occurrence.

The Court held there was no bar and against this order the present revision petition is filed. The argument for the petitioner is that under section 423 (b), Criminal Procedure Code, if a Court does not order a re-trial it amounts to an acquittal. The learned Advocate for the petitioner admits that the appellate sections of the Code are not applicable to proceedings under the Panchayat Courts Act—the only section of the Criminal Procedure Code that is made applicable being section 403—and that the order of the Joint Magistrate must be held to have been under the powers of revision conferred by section 76 (8) of the Village Courts Act. But he argues that a revisional jurisdiction is in its essence appellate, and quotes *Chappan v. Moidin Kutti*(1), (this case was with reference to section 622 of the Civil Procedure Code of 1882 corresponding to section 115 of the Civil Procedure Code of 1908). He also quotes *In the matter of the Petition of Dijahur Dutt*(2), where it was held that a Magistrate had no power to remand a criminal case to a subordinate Magistrate for re-trial after the case had once been dismissed. He also quotes a recent decision by BURN J. in *Chinna Similan v. Peria Similan*(3), that in the case of an appeal from an order other than an order of acquittal or conviction the appellate Court has no jurisdiction to order a *de novo* trial but can only alter or reverse such order and direct the trial Magistrate to write a proper

judgment. That case appears to me to have no relevancy whatsoever because the present is a case of setting aside a conviction, and the petitioner's own argument is that, though the appellate sections of the Code are not applicable, the revisional power is the same as the appellate power, and if so, clearly the Joint Magistrate had power on petitioner's own argument to order a re-trial if he had wished to do so.

For the Crown it is argued that the original trial was a nullity having been held by persons who had no power to do so and fell under section 530 (p), Criminal Procedure Code. Therefore the Joint Magistrate had no power to order a re-trial, there having been no trial. For this position there is the direct authority of *Abdul Ghani v. Emperor* (1) and *Liakat Hossein v. The Emperor*(2). In the first of these cases it was held that where a Magistrate who had no jurisdiction had convicted for an offence triable exclusively by a Court of Session, and where the Sessions Judge on appeal had merely discharged the accused, there was nothing in law to prevent a Court of competent jurisdiction from instituting fresh proceedings against the accused and committing him. It was further held that inasmuch as section 423, Criminal Procedure Code, contemplates an order for a re-trial by a Court of competent jurisdiction, and the trial had been set aside owing to the Magistrate having had no jurisdiction to hold it, no trial had in fact taken place, so that the Sessions Judge could not possibly have ordered a re-trial.

In the second case it was held that it is not necessarily the duty of the High Court to order a

(1) (1898) I.L.R. 22 Mad. 68 (F.B.). (2) (1879) I.L.R. 4 Calc. 647.
(3) 1933 M.W.N. 224.

(1) (1902) I.L.R. 29 Calc. 412.

(2) (1907) 12 C.W.N. 246.

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re-trial of a person whose conviction is set aside on account of an illegality in his trial and that when the conviction and sentence passed upon an accused is set aside by the High Court on the ground that the Magistrate who tried the accused had no jurisdiction to do so, the order of the High Court setting aside the conviction and sentence is no obstacle to the accused being re-tried on the same charge at the instance of the prosecution. These cases are exactly in point and no authority *contra* has been quoted to me.

As the petition must fail on this ground I will only just mention two other arguments raised for the Crown.

The first was that in any case the revisional jurisdiction given to the Joint Magistrate under section 76 (8) of the Act is no greater than that which he has under section 439, Criminal Procedure Code, and that as the latter section does not empower him to order re-trial he could not in any case have done so. But section 76 (8) clearly gives him a power of setting aside an order of conviction which he has not got under section 439 of the Criminal Procedure Code, so that it cannot be argued that he has not got the further power, incidental to that, of ordering a re-trial. The other argument was that he had not even the power to set aside the conviction because want of jurisdiction does not fall among the reasons mentioned in section 76 (8) of the Act justifying his interference. "Want of jurisdiction" is certainly, in my opinion, legal "misconduct" within the meaning of the section.

The petition must be dismissed.

K.W.B.

APPELLATE CIVIL

Before Mr. Justice Varadachariar and Mr. Justice Burn.

AT. N. AT. CHOCKALINGAM CHETTIAR (PLAINTIFF),
APPELLANT,

1934,
July 23

v.

RAMA MU RAMA PALANIAPPA CHETTIAR,
(DEFENDANT), RESPONDENT.*

Thavanai document—Nattukottai Chetties—Usage among, in respect of—Character of such document—One-anna stamp affixed to same—Insufficiency of stamp—Cause of action—Amendment of, basing claim on original cause of action—Principles underlying the grant of.

A thavanai (period) document among Nattukottai Chetties bearing one-anna stamp was in the following terms: "30th Panguni Sitharthi (date), Kallal (place), A.T.N.A.T. credit, the same place, R.M.M.R.M. debit, for two hundies taken by me on 13th idem, Rs. 9,500 at Rs. 95 (exchange rate), three months thavanai, 11 annas interest, rings (dollars) 10,000, for these 10,000 rings adding from thavanai, thavanai interest and principal will be paid and this letter taken back by me."

Held, (1) that it was a promissory note inasmuch as the promisor and the promisee were clearly indicated and there was a definite promise to pay though it was expressed in the participial form and (2) that the same was a promissory note not payable on demand, since there was a well-established usage amongst Nattukottai Chetties that during the first thavanai the money was not repayable.

APPEAL against the decree of the Court of the Temporary Subordinate Judge of Devakottai in Original Suit No. 138 of 1928.

Advocate-General (Sir A. Krishnaswami Ayyar) and *A. Nagaswami Ayyar* for appellant.

K. Rajah Ayyar for respondent.

* Appeal No. 280 of 1929.

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CHETTIARv.
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CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—Plaintiff-appellant sued to recover a sum of money on the basis of what is referred to in the plaint as a “signed letter” given by the defendant on 12th April 1920. That letter bears only a one-anna stamp and the lower Court has held that it is a promissory note “not payable on demand” and is therefore insufficiently stamped. It dismissed the suit, holding that the suit is based only on that inadmissible letter and not on any original debt as an independent cause of action. In the appeal the learned Advocate-General has contended that that letter is not a promissory note at all or, if it is a promissory note, it is payable on demand and is therefore duly stamped. The appellant has also taken the precaution of applying to this Court for permission to amend the plaint by basing the claim, alternatively, on the “debt” independently of the said letter.

In support of the first contention urged on behalf of the appellant, viz., that the document in question is not a promissory note, reliance is placed upon the fact that the document does not in terms contain a promise to pay *to a specified person*. The terms of the document are set out in the judgment of the lower Court. It is in these terms :—

“30th Panguni Sitharthi—Kallal A.T.N.A.T. ஷரவு (credit), the same place R.M.M.R.M. பத்தி (debit) for the two hundies taken by me and sent for our Penang firm as on 13th idem Rs. 9,500 at Rs. 95 (exchange rate) 3 months thavanai 11 annas interest, rings 10,000 for these 10,000 rings adding from thavanai, thavanai interest and principal will be paid and this letter taken back by me.”

The document begins in the way in which similar documents in vogue among Chetties run, mentioning the fact of the money having been lent by A.T.N.A.T. and having been received by R.M.M.R.M. The English translation puts the concluding words in the passive voice. Perhaps it will be a more accurate rendering of the original to have these words in the active voice, i.e., “paying the principal and interest as per above terms I shall take back this letter”. The point of the argument on behalf of the appellant is that the document does not say “paying *to you*”; and in support of that contention reliance was placed upon a decision of this Court in *Kadir Moithin Pulavar v. Panduranga Naidu*(1). No exception can be taken to the principle laid down in that case that, in considering whether a document is a promissory note or not, it is material to see whether the payee is named there. But neither that case nor any other decision lays down in which part of the document the payee is to be named, or by what kind of language. On the other hand, illustration (b) to section 4 of the Negotiable Instruments Act clearly shows that the reference to the payee need not be found in the words of promise. The illustration runs thus:

“I acknowledge myself to be indebted to B in Rs. 10,000 to be paid on demand for value received.”

This is declared to be a promissory note within the meaning of the definition. In the document now in question the promisor and the promisee are clearly indicated in the opening portion of the document and there is a definite promise to pay

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though it is worded in the participial form. There is therefore no force in the first contention.

The second contention is that the reference to three months thavanai is only a provision for calculation of compound interest with three-monthly rests and does not make the document payable otherwise than on demand. There was at one time some difference of opinion in the reported decisions in this Court as to whether, in the case of these thavanai documents among Nattukottai Chetties, the money becomes due immediately on the expiry of the first thavanai or only upon an express demand after the expiry of the thavanai, but there was at no time any doubt whatever that during the first thavanai the money was not repayable. That this is the well-established usage amongst Chetties in the case of these thavanai documents is shown by the plaintiff's admission as his own witness in the case that the amount is not repayable within three months as it is given on three months thavanai. This contention therefore also fails.

As regards the application to amend the plaint by inserting a prayer based upon the original cause of action, it is difficult to read the plaint as containing any basis for such a prayer and it is therefore very doubtful if the appellant will be justified in asking for it at this stage. But even apart from that consideration, it will, in the circumstances of this case, serve no purpose to the appellant to allow such an amendment. The note as well as the loan were contemporaneous and there is really no question of a definite anterior liability apart from the note. Further, considerable amounts have admittedly been repaid

to the plaintiff and unless the plaintiff could enforce the particular terms as to interest, exchange, etc., contained in the letter, and that, in the particular way in which he wishes to interpret those terms, he will get nothing in the suit. It will therefore be no good to him merely to fall back upon the theory of an implied debt from the mere fact of a loan ; he must be permitted to prove the very terms contained in the suit letter under the guise of an original debt. To permit him to do so will be in the very teeth of section 91 of the Evidence Act. The learned Advocate-General admitted that the cases in this Court are opposed to this contention of his where the debt and the note are simultaneous ; but he relied upon certain passages in *Shanmuganatha Chettiar v. Srinivasa Ayyar*(1) as recognizing that a claim on a debt may exist alongside of and independently of a claim on a promissory note. In that case there was no difficulty or obstacle in the way of legally proving the note itself. The executants were held liable under the note and the only question that was considered by the learned Judges was whether the partners of the executants could be held liable for the debt as a partnership debt. That is very different from the present case. No question of section 91 was involved there and the learned Judges themselves referred to the cases under the Stamp Act and distinguished them on that ground. For these reasons the application for amendment must be disallowed with costs.

The appeal fails and is dismissed with costs.

G.R.

(1) (1916) I.L.R. 40 Mad. 727.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934,
August 7.

VEPA SURAMMA AND ANOTHER (DEFENDANTS 1 AND 3),
APPELLANTS,

v.

CHAKKA VENKAYYA AND EIGHT OTHERS (PLAINTIFFS 1 AND
2 AND DEFENDANTS 2 AND 4 AND NIL),
RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 74—Mortgage—Provision for interest on interest at an enhanced rate from date of default—Reduction of interest on the ground that it amounted to penalty—Character of such rate of interest—Whether mortgage security enures for the reduced rate.

A mortgage bond provided for payment of interest on interest at an enhanced rate from the date of default and the lower Court in the exercise of its powers under section 74 of the Indian Contract Act reduced the enhanced rate of interest. On objection taken to the enforceability by way of charge on the mortgaged properties of the compensation allowed by the Court in place of the provision in the bond for enhanced interest,

held, that the interest upon interest is part of the contract, and the fact that under section 74 of the Contract Act the Court is given power to reduce that rate under certain contingencies does not make the interest at the reduced rate any the less a claim under the contract. Though the word "penalty" is used in section 74 of the Contract Act when speaking of the "enhanced interest", yet it is not used in the sense of a claim *dehors* the contract.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam, dated 8th March 1926 and passed in Original Suit No. 38 of 1924.

G. Lakshmanna for appellants.

P. Somasundaram for respondents.

* Appeal No. 185 of 1927.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit on a mortgage (Exhibit A in the case) dated 16th October 1908. Only two questions were raised in the memorandum of appeal; one relating to limitation in respect of interest accruing due between the years 1908 and 1912, and the other relating to the enforceability by way of charge on the property of the compensation allowed by the Court in place of the provision in the bond for enhanced interest.

As regards the first point, Mr. Lakshmanna's argument is that an independent suit for the amount of interest accruing due each year, between the years 1908 and 1912, could have been brought, that these claims for interest furnished separate causes of action, and therefore this suit brought in 1924 is to that extent barred by limitation. We are unable to agree with this contention. The language of the document shows that interest is payable till the principal amount is paid and ordinarily there is only a single cause of action for both principal and interest as from the date when the principal becomes payable. There is no doubt a further provision in the document fixing a date for payment of interest annually, but it is not reasonable to construe this as giving an independent cause of action for the claim for interest at the end of each year. This has obviously been put in only for the purpose of entitling the mortgagee to claim interest upon interest, if the interest is not paid on the due dates. This argument therefore fails.

The other argument on behalf of the appellants was put as follows:—Under the explanation to section 74 of the Contract Act the stipulation for

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increased interest from the date of default may be a stipulation by way of "penalty", and the lower Court has in this case in exercise of its powers under section 74 reduced the enhanced rate of interest payable upon interest to twelve annas per annum from the agreed rate of thirteen annas; the amount thus allowed by the Court is not really a claim for interest under the bond but one by way of "damages", and in respect of this amount no security created by the document can be available. In support of this proposition Mr. Lakshmanan referred to the case of *Motan Mal v. Muhammad Bakhsh*(1). The Full Bench there took care to point out that neither by the most liberal interpretation of the contract nor even by any kind of implication therefrom would it be possible to say in that case that interest was payable *under the contract*. Therefore they treated it as a claim for damages pure and simple. In that sense, it would not really form part of what is spoken of in the Transfer of Property Act as "mortgage money" and therefore it cannot be enforced by way of charge on the property. But that is not the position here. The interest upon interest is clearly part of the contract; the fact that under section 74 of the Contract Act the Court is given power to reduce that rate under certain contingencies does not make the interest at the reduced rate any the less a claim under the Contract Act. No doubt, the word "penalty" is used in section 74 of the Contract Act when speaking of "enhanced interest", but it is not in the sense of a claim *dehors* the contract, because the correlative

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and
Mr. Justice Cornish.

SINGANAMALA VENKATASWAMI (PETITIONER),
APPELLANT,

1934,
August 8.

v.

PESE VENKATARAMANA RAO AND FOUR OTHERS
(RESPONDENTS AND SECOND RESPONDENT'S LEGAL REPRESENTATIVES),
RESPONDENTS.*

Execution of decree—Sale in, of a decree in favour of the judgment-debtor against a third party—Permissibility—Law in Madras—Madras Civil Rules of Practice, r. 178—Effect of—R. 178, ultra vires if—Ss. 122, 51, 2 (16) and 60 of Code of Civil Procedure (Act V of 1908)—Applicability and effect of—Objection to such sale by judgment-debtor in decree sought to be sold—Maintainability—No objection taken by holder of that decree.

In view of rule 178 of the Madras Civil Rules of Practice, in Madras a preliminary decree for partition attached in execution of a money decree cannot be sold in execution of the latter decree. Sections 122, 51 and 2(16) of the Code of Civil Procedure read together show that the High Court can prescribe by rules, conditions and limitations subject to which the Court may order execution of the decree in the way specified in section 51. The result is that, though "decrees" as coming within the expression "all other saleable property" in section 60 of the Code can be sold, the High Court has power to make a rule, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree; and that is what has been done by the Madras High Court in rule 178. That rule cannot be held to be *ultra vires* as being inconsistent with the provisions of the Code of Civil Procedure in so far as it is applicable to decrees other than those falling under clause 1 of rule 53.

* Appeal against Order No. 456 of 1931.

(1) (1922) I.L.R. 3 Lah. 200 (F.B.).

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Obiter dictum of THIRUVENKATACHARIAR J. to the contrary in *Immidiseti Dhanaraju v. Motilal Daga*, (1929) 29 L. W. 823, dissented from.

The objection to the saleability of an attached decree in view of rule 178 of the Madras Civil Rules of Practice can before the sale be taken by the judgment-debtor in that decree although such an objection is not taken by the decree-holder of that decree.

Subbaraya Rowthu v. Kuppusawmy Aiyangar, (1909) I.L.R. 34 Mad. 442, distinguished.

APPEAL against the order of the District Court of Anantapur, dated the 5th day of February 1931 and made in Execution Petition No. 36 of 1930 (Original Suit No. 20 of 1925 on the file of the Court of the Subordinate Judge of Anantapur).

K. Srinivasa Rao for appellant.

B. Somayya for respondents.

Cur. adv. vult.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The petitioner in Execution Petition No. 36 of 1930 on the file of the District Judge of Anantapur is the appellant. The appeal raises an important question of law, namely, whether, in execution of a money decree, a preliminary decree for partition obtained by the judgment-debtor can be validly sold.

The facts are simple and may be briefly stated. The appellant obtained a money decree in Original Suit No. 357 of 1918 on the file of the District Munsif's Court, Bellary, against the first respondent herein. The latter had obtained a preliminary decree for partition against the other respondents in Original Suit No. 14 of 1923 (that is, Original Suit No. 20 of 1925 of the Sub-Court, Anantapur). In execution of the

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appellant's money decree this preliminary decree for partition was attached and thereafter his decree was transmitted to the District Court of Anantapur to enable him to execute the preliminary decree for partition. The first respondent, that is the decree-holder in the partition suit, does not raise any objection ; but respondents 4 and 5, who are the contesting respondents, object to the execution on the ground that according to the law of procedure followed in Madras a preliminary decree attached in execution of a money decree cannot be sold in execution of the latter decree. The appellant contends that even if this be the state of the law, which he says is not correct, inasmuch as the first respondent, the decree-holder in the partition suit, has no objection to the execution of the decree, it is not open to the judgment-debtors in the suit, namely, the fourth and fifth respondents, to raise any objection.

In support of his first contention that the preliminary decree can be sold, the appellant relies on Order XXI, rule 53, clause 4, Order XXI, rule 64, and section 60 of the Code of Civil Procedure. Order XXI, rule 53, provides two ways of executing decrees, by attachment of other decrees passed in favour of the judgment-debtor by other Courts or by the same Court. If the attached decree is a money decree—which is not the case here—then by the combined operation of Order XXI, rule 53, clauses 1 and 2, the decree may be executed by realising the net proceeds in satisfaction of the execution creditor's decree ; if the attached decree is not one for money, then Order XXI, rule 53, clause 4, applies. This sub-clause

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provides for the attachment of the decree. Order XXI, rule 64, says :

“Any Court executing a decree may order that any property attached by it and liable to sale . . . shall be sold.”

Section 60, dealing with attachment, mentioning certain specific kinds of property liable to attachment and sale in execution of a decree, includes in the list “all other saleable property, movable or immovable, belonging to the judgment-debtor, etc.” and ends with the proviso that certain properties mentioned in the various clauses to the proviso shall not be sold. A decree of a Court is not one of the properties which is exempted in the proviso. The appellant contends that reading these provisions of law together a preliminary decree for partition can be attached under Order XXI, rule 53, and that, though “decrees” are not expressly mentioned in section 60 as property liable to attachment and sale, they nevertheless fall within the expression “all other saleable property” which occurs in that section and can therefore be sold by force of that section and Order XXI, rule 64, which deals with sale generally of attached decrees. This argument is supported by the decisions in *Sudarsan Poddar v. Manindrachandra Pal*(1) and *Gopal Nanashet v. Joharimal*; and *Dada Balshet v. Joharimal*(2). This statement of the law is not seriously contested by the respondents’ learned Counsel; but what he argues is this, that, having regard to rule 178 of the Madras Civil Rules of Practice, in Madras a decree cannot be brought within the expression “all other saleable property”

occurring in section 60, Civil Procedure Code, and cannot therefore be sold. Rule 178 says: “No decree shall be ordered to be sold in execution of another decree.” The respondents’ argument is that, though the provisions of the Civil Procedure Code do not prohibit the sale of an attached decree like the partition decree in this case, rule 178 specifically provides that such decrees shall not be sold and that effect should be given to that provision contained in the rule. The appellant’s learned Counsel argues that, since the provisions contained in the Civil Procedure Code do not prohibit the sale of attached decrees, rule 178 of the Civil Rules of Practice which prohibits their sale is *ultra vires* if it is to be applied to decrees other than those falling under clause 1 of rule 53 and should not be given effect to. On this part of the case the question therefore reduces itself to this: “Is rule 178 of the Civil Rules of Practice *ultra vires* and inconsistent with the provisions of the Code of Civil Procedure as argued by the appellant’s learned Counsel?”

This rule has been in existence for a long time and was apparently enacted under one of the Codes which were in force before the present Code was enacted. However, under section 157 of the present Code :

“Rules made under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed, shall, so far as they are consistent with this Code, have the same force and effect as if they had been made under this Code and by the authority empowered thereby in such behalf.”

So if the rule is consistent with the present Code it will have the same force and effect as if it had been made under the present Code. Power

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(1) (1930) I.L.R. 58 Calc. 934.

(2) (1891) I.L.R. 16 Bom. 522.

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of the High Courts to make rules is contained in section 122, Civil Procedure Code, which says:—

“High Courts established under the Indian High Courts Act, 1861, (or the Government of India Act, 1915), . . . may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule.”

These rules, according to section 128, Civil Procedure Code, must not be inconsistent with the provisions in the body of the Code. The rule in question relates to procedure in execution. Section 51 of the present Code, which is new, specifies the various methods of executing a decree. So far as it is relevant for our purpose it says:

“*Subject to such conditions and limitations as may be prescribed*, the Court may, on the application of the decree-holder, order execution of the decree . . . (b) by attachment and sale or by sale without attachment of any property.” (The italics are ours). Under clause 16 of section 2, Civil Procedure Code, “prescribed” means “prescribed by rules”. It follows from sections 122, 51 and 2 (16) read together, that the High Court can prescribe by rules, conditions and limitations subject to which the Court may order execution of the decree in the way specified in section 51. The result in our opinion is that, though “decrees” as coming within the expression “all other saleable property” in section 60, Civil Procedure Code, can be sold, the High Court has power to make a rule, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree; and that is what has been done by the Madras High Court in rule 178. In our opinion, but for section 51, Civil Procedure Code, rule 178 would be *ultra vires* if it is to be

applied to decrees other than those falling under clause 1 of rule 53. The decision in *Immidisetti Dhanaraju v. Motilal Daga*(1), relied on by the appellant in this connection, contains an *obiter dictum* of THIRUVENKATACHARIAR J. that the rule in question is *ultra vires*. In discussing the question the learned Judge does not refer to section 51 of the Civil Procedure Code which, as we have already stated, is a new section. Before leaving this point we may also mention that our attention was drawn by the respondents' Counsel to a decision by REILLY J., sitting on the Original Side, in Civil Suit No. 510 of 1926 in which he held that, having regard to Order 19, rule 34, of the Original Side Rules which also contains a provision similar to that contained in rule 174 of the Mofussil Rules of Practice, a preliminary decree in a partition suit cannot be sold in execution of a money decree. This decision, though very relevant, may be held inapplicable on the ground that, while rules made under section 122, Civil Procedure Code, must not be inconsistent with the provisions in the body of the Code, section 129, which confers power on a Chartered High Court to make rules to regulate its own procedure in the exercise of its Original Civil Jurisdiction, does not contain any such qualification, but only says that the rules must not be inconsistent with the Letters Patent establishing it. Even so, we have no doubt, for the reasons already mentioned, that rule 178 of the Civil Rules of Practice cannot be held to be *ultra vires* as being inconsistent with the provisions of the Code of Civil Procedure, in so far as it

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(1) (1929) 29 L.W. 823.

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is applicable to decrees other than those falling under clause 1 of rule 53.

The next argument of the appellant is that, in view of the fact that the first respondent (decree-holder of the preliminary decree for partition) did not object to the sale of the decree, it is not open to the judgment-debtors in that decree to take the objection. This argument is based on *Subbaraya Rowthu v. Kuppusawmy Aiyangar*(1). In that case ABDUR RAHIM J., while dealing with the question whether the sale of a mortgage decree which was treated as a money decree under section 273 of the old Civil Procedure Code corresponding to Order XXI, rule 53, of the present Code, would make the sale of the decree altogether invalid and without jurisdiction, observed as follows :—

“ I think that it would be extending the application of section 273 beyond all reasonable limits if we were to hold that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. On the other hand it seems to be unreasonable that where no objection is raised to such a sale by the holder of the decree or his creditor, who in this case has in fact brought about the sale, *it should be open to the judgment-debtor under that decree to raise any objection.*”

It is the latter observation which we have italicised that is relied upon by the appellant; but it is clear from the circumstances of the case that the objection which was held to be unreasonable was taken by the judgment-debtor after the sale was over and not before the sale, as in the present case. In the context the question that was considered by the learned Judge was not whether the attached decree could be sold but whether, the sale having taken place, the irregularity of the

(1) (1909) I.L.R. 34 Mad. 442.

procedure made the sale altogether invalid and without jurisdiction. In the present case the sale of the attached decree has not taken place and we see no reason why before the sale the judgment-debtor should not be allowed to take objection to its saleability in view of rule 178 of the Civil Rules of Practice. Apparently such a rule does not seem to exist in Calcutta or in Bombay.

For the above reasons we confirm the lower Court's order and dismiss this appeal with costs of the fourth and fifth respondents.

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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Pandrang Row.

RAJAGOPAL DOSS AND ANOTHER (RESPONDENTS),
APPELLANTS,

v.

A. KUPPUSWAMI MUDALIAR (PETITIONER),
RESPONDENT.*

1934,
August 21.

Madras City Tenants' Protection Act (III of 1922), sec. 9—Sale contemplated in—Tenants-defendants in different suits—Order making them jointly liable for payment of value of entire land and making them liable to forfeit their right to purchase in default of payment by any one of them of his portion—Valid order under sec. 9 if.

The sale contemplated in section 9 of the Madras City Tenants' Protection Act (III of 1922) is of the land in the occupation of the tenant from which he is sought to be ejected. An order making the tenants—defendants in different suits jointly liable for the payment of the value of the entire land

* Appeals against Orders Nos. 273 to 283 of 1933.

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and making them also liable to forfeit their right to purchase the land in default of payment by any one of his portion is not contemplated by section 9 of the Act, and the Court has no jurisdiction to pass such an order under that section.

APPEALS against the orders of the Court of the City Civil Judge, Madras, dated 1st August 1933 and made in Civil Miscellaneous Petitions Nos. 1109, 1102, 1104, 1105, 1106, 1107, 1108, 1110, 1112, 1113 and 1114 of 1933 in Original Suits Nos. 463 of 1930, 622, 633 and 635 of 1929, 460, 461, 462, 464, 466, 467 and 468 of 1930 respectively.

K. Bhashyam Ayyangar, R. Desikan and P. K. Pushparaj for appellants.

Subramanyam and Rajagopal for respondent.

Cur. adv. vult.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—These appeals arise out of fourteen applications made by the plaintiff-respondent for the issue of commission to value the improvements effected by the defendants on their holdings. The applications were made under section 4 of the Madras City Tenants' Protection Act III of 1922.

The plaintiff-respondent who is the owner of re-survey No. 1065-2 had leased out portions of this land to the Adi-Dravidas for house-sites. In 1929 and 1930 he filed fourteen suits in ejectment against them. Then each of them applied to the Court under section 9 of the Act for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. In addition to the sites held by the tenants, there were, on the land, pathways, a temple, common latrine, etc., erected by the Adi-Dravidas for their common use and enjoyment. The sale of these sites not being

in their occupation could not be asked by the tenants. As they wanted these also sold to them, they arrived at an understanding with the plaintiff under which it was agreed that they should buy up all the sites for a certain sum. This was advantageous to the plaintiff as well. Eventually the back portion of the plot which contains 100 cocoanut trees was left out by consent and a commissioner was asked to value the rest of the land leaving out the aforesaid portion. The defendants presented a petition to the Court praying for an order directing them to pay jointly a certain sum to the plaintiff for the entire land leaving out the aforesaid portion. The commissioner valued the land at a sum of Rs. 650 per ground. The amount payable by each of the defendants for their sites was estimated at this rate. The so-called roads were valued at Rs. 250 per ground, and each tenant was asked to pay 1/14th of the total amount. Thus, according to this calculation, each tenant had to pay for his share Rs. 690-7-2 in addition to his own site value. The Court passed an order directing all the defendants in the suits to pay jointly a certain sum to the plaintiff as the market-value of the sites and a decree was passed in accordance with these terms. Payments were not made in due time and accordingly, though the petitions stood dismissed under the law for non-payment, applications for extension of time were made by the defendants. Under Exhibit E, dated 20th January 1932, time was extended till 15th July 1932 and again on the latter date time was extended until 20th September 1932. As no amount was paid by the defendants the applications out of

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which these appeals arise were filed by the plaintiff under section 4 for the valuation of the improvements.

The tenants opposed the applications stating that the order passed by the Court calling on the parties to pay the value of the entire site was not an order under section 9 of the City Tenants' Protection Act and that it is still open to them to avail themselves of that section and that they must be allowed to have their sites bought separately. The learned Judge overruled this contention saying that the order under section 9 already passed was final; and, as the tenants have failed to comply with the provisions of the decree, he held that the respondent is entitled to eject them on payment of the value of the improvements.

In appeal Mr. Bashyam on behalf of the defendants-appellants, in addition to the above grounds urged in the lower Court, urged also another ground, viz., that subsequent to the adjustment the parties entered into another arrangement under which the appellants had to pay only for a portion of the suit land giving up the remaining portions in favour of the plaintiff and that this arrangement should be given effect to. This arrangement was referred to in the affidavit Exhibit F-1 in support of the application for extension of time filed on 15th July 1932 (Exhibit E). The request in the application was only to grant some time for payment and nothing was said about the enforcement of the agreement. The agreement, having regard to its details, see paragraph 5 of the counter-affidavit of the second respondent in Civil Miscellaneous Petition No. 1109

of 1933, is one which the Court will find it difficult to enforce. The argument that the agreement should be given effect to was not raised in the lower Court. For these reasons we cannot allow the question to be raised here for the first time.

The question for consideration is whether the applications under section 9 made by the defendants still remain undisposed of as contended for by them. If they have been disposed of as held by the lower Court, then the petitions of the respondent under section 4 should be allowed and the appeal should be dismissed.

The order passed by the Court was :

"All the defendants will pay the whole amount as fixed by the commissioner. In default of payment of any portion thereof, all the defendants will forfeit their right to purchase the plaintiff's property."

Later on a portion of the entire plot was left out. The order is no doubt a consent order but the question is whether such an order falls within section 9 of the City Tenants' Protection Act. That section says that the applicant may ask the Court for an order that the landlord should be directed to sell the land for a price to be fixed by the Court. Obviously the sale contemplated in the section is of the land in the occupation of the tenant from which he is sought to be ejected. The order making the defendants in different suits jointly liable for the payment of the value of the *entire* land and making them also liable to forfeit their right to purchase the land in default of payment by any one of his portion is, in our opinion, not contemplated by section 9 of the Act. We would therefore hold that the Court had no jurisdiction to pass the order which it passed under section 9. It must therefore be taken that

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applications under section 9 have not yet been finally disposed of. The lower Court will therefore pass fresh orders on those applications in the light of our observations. If the orders that will be passed on those applications are not complied with, then the plaintiff-respondent will be entitled to revive his applications under section 4 of the Act and ask the Court to pass orders on them.

For the above reasons, we would set aside the order of the lower Court and ask the Court to pass the necessary orders in the circumstances of the case. Each party will bear his own costs here.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934,
August 17.

IN RE JANA YELLAMRAJU AND THREE OTHERS, PETITIONERS.*

Agency Rules of 1924, r. 2—*Pauper appeal*—Admission of—Provision of O. XLIV of Code of Civil Procedure as to decree appealed from being contrary to law, etc.—Applicability of.

Under rule 2 of the Agency Rules of 1924, an appeal *in forma pauperis* is not bound to be admitted, whatever the merits of the case may be, if once pauperism is established. The High Court is entitled to take into consideration the merits of the case and to be guided by the provision in Order XLIV of the Code of Civil Procedure, which enables the High Court to refuse leave to appeal *in forma pauperis*, unless upon a perusal of the judgment and decree appealed from it has reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

* Civil Miscellaneous Petition No. 2419 of 1934.

APPLICATION under Order XLIV of Act V of 1908 to be allowed to appeal *in forma pauperis* against the decree of the Agency Subordinate Judge's Court of Vizagapatam in Original Suit No. 111 of 1931.

YELLAMRAJU,
In re.

C. Rama Rao and K. V. Gopalaswami for petitioners.

The ORDER of the Court was delivered by VARADACHARIAR J.—The question of the effect of rule 2 of the Agency Rules of 1924 has been argued before us. Mr. Rama Rao lays stress upon the fact that this rule reproduces only some of the provisions of Order XXXIII and Order XLIV, Civil Procedure Code, while other provisions are not reproduced and contends that, as the Civil Procedure Code is not applicable to the Agency Tracts, we ought not, in dealing with this case, to be guided by the provision in Order XLIV of the Code, which enables the High Court to refuse to leave to appeal *in forma pauperis*, unless upon a perusal of the judgment and decree appealed from it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. He also draws our attention to the fact that in the case of appeals from the Agent, there is no provision corresponding to Order XLI, rule 11, Civil Procedure Code. As regards the use of the word "may" in rule 2 of the Agency Rules he invokes the well-established doctrine that, in particular contexts, the word "may" must be understood as importing an obligation and contends that the Court is bound to exercise in favour of paupers the privilege intended to be conferred upon them by rule 2. He maintains that, under the rules, the appeal must

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be admitted as a matter of course and no leave of Court is necessary at all.

We are unable to accede to his contention that this Court ought not to take into consideration the merits of the case at all, in dealing with the question of admitting an appeal without payment of court-fee. It is true that many of the provisions of Order XXXIII and Order XLIV of the Code have not been reproduced in the Agency Rules and it may also be conceded that in particular contexts the word "may" imports an obligatory signification. But it will be noticed that in rule 2 both suits and appeals are dealt with on the same footing and by the same language, and we are unable to persuade ourselves that, in the case of suits, considerations of the kind specified in clauses (c), (d) and (e) of Order XXXIII, rule 5, of the Code have no place at all. It ought not to be forgotten that the privilege of suing or appealing *in forma pauperis* is only an indulgence and it is not strange that the rule-making authority has left the matter, in general language, to the discretion of the Court by the use of the word "may" so that its discretion may be properly exercised with due regard to all the circumstances of the case. While on the one hand it is an indulgence to the alleged pauper, it has also to be borne in mind that the insistence on payment of court-fee is some safeguard against the other party to the litigation being harassed [see per JENKINS C.J. in *Sakubai v. Ganpat*(1)]. The question therefore is not one of public revenue alone but also of making sure that frivolous litigation is not started or continued by

(1) (1904) I.L.R. 28 Bom. 451.

a person who has nothing to lose, while the other party will be put to expense in defending himself. These considerations prevent us from holding that the Court is helpless in the matter of admitting suits or appeals *in forma pauperis*, whatever the merits of the case may be, if once pauperism is established. A person coming to Court as a pauper has the less reason to complain against this construction of the rule so far at any rate as appeals are concerned, because he has had one chance of litigating his claim in the Court of first instance, and, unless we are satisfied beyond doubt that the rule-making authority intended to give him a second chance, without any expenditure on court-fees, we are not disposed to extend the indulgence unconditionally.

A.S.V.

APPELLATE CIVIL.

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

1934,
August 21.

CHIKKA VEERAPPA SETTI (RESPONDENT), APPELLANT,

v.

SARKARU MUNISAMI ACHARI AND FOUR OTHERS
(APPELLANTS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 182 (5)—Step in aid of execution—Batta application filed under O. XVI, r. 1, Code of Civil Procedure (Act V of 1908), for summoning witnesses to disprove plea of satisfaction of decree by judgment-debtor if.

A decree-holder put in an execution application for the transfer of the decree to another Court for execution. The

* Letters Patent Appeal No. 27 of 1933.

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judgment-debtors contested the application saying that the decree had been fully satisfied. The decree-holder filed a batta application under Order XVI, rule 1, of the Code of Civil Procedure asking the Court to summon witnesses for the purpose of showing that the judgment-debtors' objection that the decree had been satisfied was untrue.

Held that the batta application was a step in aid of execution within the meaning of article 182 (5) of the Indian Limitation Act.

To summon witnesses with the object of removing the judgment-debtors' objection clearly aids execution.

Abdul Quddus v. Sayed Ahmad Hussain, A.I.R. 1923 All. 415, *Sheo Sahay v. Jamuna Prasad Singh*, (1924) I.L.R. 4 Pat. 202, and *Ram Chand v. Dyal Singh*, A.I.R. 1929 Lah. 335, followed.

APPEAL preferred under Clause 15 of the Letters Patent to the High Court against the judgment and order of PAKENHAM WALSH J., dated 13th December 1932 and made in Appeal against Appellate Order No. 114 of 1929 preferred to the High Court against the order dated 8th October 1928 and made in Appeal Suit No. 35 of 1928 on the file of the Sub-Court, Chittoor (Register Execution Petition No. 787 of 1926 in Original Suit No. 434 of 1919, District Munsif's Court, Madanapalli).

A. C. Sampath Ayyangar for appellant.

M. S. Ramachandra Rao for *B. Somayya* for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—The question for consideration in this appeal is whether an execution petition filed on 22nd November 1926 was barred by limitation. The executing Court found it barred; the lower appellate Court found it not barred and

PAKENHAM WALSH J. in second appeal found that it was barred.

Briefly the facts are as follows. The decree-holder in Original Suit No. 434 of 1919 in the District Munsif's Court, Madanapalle, put in an execution application on 20th August 1923 for the transfer of the decree to the District Munsif's Court of Chittoor for execution. The third and sixth defendants contested the application saying that the decree was fully satisfied. Transfer of the decree for execution was eventually ordered on 7th December 1923. The execution petition of the 22nd November 1926 was admittedly barred unless something had been done subsequent to the date of the application of 20th August 1923 which saved limitation. The article of the Limitation Act in question is article 182, clause 5, and the appellant in the lower appellate Court and the second appellate Court contended that he had taken a step in aid of execution of the decree within three years before the filing of the execution petition on the 22nd November 1926. Three steps were relied upon. The first was a batta application, Exhibit B, put in on 27th November 1923, the second was a vakalath put in in the appeal preferred by the judgment-debtors against the transmission of the decree, and the third was an affidavit (Exhibit C). The plaintiff had been ordered to produce his accounts and in Exhibit C stated that he had not those accounts in his possession and in the third paragraph of Exhibit C stated "as prayed for in the petition, orders are necessary for taking out execution." PAKENHAM WALSH J. took the view that none of these steps were steps in aid of execution of the decree.

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I will proceed to consider the first step relied upon which is also the first in order of date. The batta application (Exhibit B) was one made under Order XVI, rule 1, Civil Procedure Code, asking the Court to summon persons to attend and give evidence. It is common ground that these witnesses were required by the appellant for the purpose of showing that the judgment-debtors' objection that the decree had been satisfied was untrue. The appellant's contention is that this objection or obstruction to execution by the judgment-debtors had to be removed before the decree could be executed and that, by presenting the batta application to the Court, he was asking the Court to do something which would help to remove the obstruction to execution and allow execution to go on and that the batta application therefore was a step in aid of execution. It is admitted by the respondents that there are no decisions of the Madras High Court in which an exactly similar state of facts has been considered. On the other hand, there are nine decisions of other High Courts, all of them directly bearing on this point, and in all of which it has been held that this and similar steps were steps in aid of execution of the decree within the terms of article 182 (5) of the Indian Limitation Act. I propose, first of all, to deal with these decisions. The first of these is *Kedar v. Lakhi*(1). There, an application for execution of a decree for possession of certain property had been made and the judgment-debtor filed an objection which rendered it necessary to ascertain the standard of measurement and for that purpose the decree-holder applied for

(1) (1917) 26 C.L.J. 115.

summons upon his witnesses. It was held that the application made by the decree-holder for summoning witnesses was an act in furtherance of his application for execution and was, therefore, a step in aid of execution within the meaning of article 182 (5) of Schedule I of the Indian Limitation Act. The next is *Brojendra Kishore Roy Choudhury v. Dil Mahmud Sarkar*(1). There, in execution proceedings the judgment-debtor put in an objection and the Court ordered the parties to adduce evidence in support of their respective cases. The decree-holder filed a list of witnesses and stated that he was ready to proceed with his case and it was held that this implied an application to the Court to take the evidence which he was prepared to adduce to repel the objection taken by the judgment-debtor and was an application to the Court to take some step in aid of execution. In *Hatimulla v. Sukhamoy Chaudhari*(2) it was held that, where a judgment-debtor presented a petition saying that there was an adjustment of the decree and the decree-holder attended Court with witnesses to contest that case, this act on the part of the decree-holder should be taken to be an application to the Court to take a step in aid of execution. In *Ram Lakhan Singh v. Lala Mewa Lal*(3) the facts were slightly different. There, execution proceedings were consigned to the record-room by an order passed behind the back of the decree-holder without any default on his part and without any decision; and it was held that a further application made by the

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(1) (1918) 22 C.W.N. 1027.

(2) A.I.R. 1930 Cal. 304.

(3) A.I.R. 1922 All. 433.

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decree-holder was really a continuance of the older application and came within article 182 (5). In *Abdul Quddus v. Sayed Ahmad Hussain*(1) which is directly in point it was held that, where in execution of a simple money decree a certain property was attached and objection was preferred by the judgment-debtor and the decree-holder put in his application to summon witnesses in reply to the objection, this application for summoning witnesses was a step in aid. In *Umar Din v. Ghulam Muhammad*(2) it was held that an application by the decree-holder to summon witnesses to resist an objection by the judgment-debtor was a step in aid. In *Ram Chand v. Dyal Singh*(3) there was an application by the decree-holder to get rid of the objections raised by the judgment-debtor and an application for extension of time in complying with the orders of the Court and it was held that these were steps in aid of execution. In *Sheo Sahay v. Jamuna Prasad Singh*(4), where the facts were similar to those here, in the judgment of the Court it is stated :

"There can hardly be any doubt that the decree-holders are entitled to regard any step taken by them to remove the obstacle thrown by the judgment-debtor in their way to the realization of their decree as a step in aid of execution."

In *Jagdeo Narain Singh v. Rani Bhubaneshwari Kuer*(5) it was held that the filing of a list of witnesses in order to contest an application made by the judgment-debtor to set aside an execution sale was a step in aid of execution within the meaning of article 182 (5) of the Limitation Act. These decisions bear directly upon this point and express

(1) A.I.R. 1923 All 415.

(2) A.I.R. 1927 Lah. 653.

(3) A.I.R. 1929 Lah. 335.

(4) (1924) I.L.R. 4 Pat. 202.

(5) (1928) I.L.R. 7 Pat. 708.

with no uncertain voice the opinion of four of the Indian High Courts.

On the respondents' side reliance was placed upon two decisions of this High Court. The first was *Kuppusawmi Chettiar v. Rajagopala Aiyar*(1). There, a decree-holder filed an objection to the judgment-debtor's application to enter up satisfaction of the decree. No application for execution was pending then and it was held that the decree-holder's statement in objection was not a step in aid of execution especially when no application for execution was pending. At page 471, AYLING J. says :—

"But whatever case may be made out for an application made in connection with a pending execution petition as one for taking a step in aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing. A man cannot be said to take some step in aid of a petition which has not been initiated."

It was unnecessary there to express any opinion upon the point whether a statement filed in opposition to a judgment-debtor's objection in execution proceedings can be a step in aid of execution. This case is clearly distinguishable from the present case for the reason that there was no execution petition pending and further in this case we are not dealing with the mere filing of a statement but with an application made to the Court to summon witnesses. In my opinion, this case is of no assistance to the respondents. The other case is *Krishna Patter v. Seetharama Patter*(2). There, it was held that the filing of a statement by a decree-holder objecting to the judgment-debtor's application to record satisfaction of the

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(1) (1921) I.L.R. 45 Mad. 466.

(2) (1926) I.L.R. 50 Mad. 49.

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decree is not a step in aid of execution of a decree; and *Kuppusawmi Chettiar v. Rajagopala Aiyar*(1) (already referred to) was followed. Here again, no application to the Court had been made to summon witnesses. There had been merely the filing of a statement. In the course of the judgment, PHILLIPS and MADHAVAN NAIR JJ. refer to a passage from the judgment of SESHAGIRI AYYAR J. in *Rangachariar v. Subramania Chetty*(2) where he says:

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

Reliance is also placed by him on a passage from the judgment in *Raghunundun Misser v. Kallydut Misser*(3). What was being considered in that case was whether an application by a decree-holder for leave to bid at a sale in execution of the decree is a step in aid of execution. The passage relied on is as follows:—

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

PHILLIPS and MADHAVAN NAIR JJ. then say:

“This case has been followed in *Kuppusawmi Chettiar v. Rajagopala Aiyar*(1). If this distinction is borne in mind, it is obvious that a statement of objections filed by the decree-holder objecting to the recording of satisfaction cannot in any way be considered to be a step in aid of execution.”

(1) (1921) I.L.R. 45 Mad. 466.

(2) (1920) 12 L.W. 9, 10.

(3) (1896) I.L.R. 23 Cal. 690, 692.

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The learned Judges therefore emphasise the very important distinction that there is between cases such as the one under appeal and cases similar to *Krishna Patter v. Seetharama Patter*(1). The judgment-creditor must show that he asks the Court to take some steps in aid of execution. Merely filing a statement is not asking the Court to take a step in aid of execution. In the present case, the judgment-creditor has asked the Court to take some step. The question is, would that step aid execution? To summon witnesses with the object of removing the judgment-debtor's objection, in my view, clearly aids execution. I do not think that I can put the point better than BHIDE J. does in *Ram Chand v. Dyal Singh*(2). He there says:

“The expression step in aid has not been defined in the Limitation Act but I am unable to see any good reason why an application by the decree-holder to get rid of the objections raised by a judgment-debtor which stand in the way of execution of his decree should not be looked upon as a step in aid. When objections are raised to execution by a judgment-debtor a decree-holder has first to get rid of them for the further progress of the proceedings. In fact he will not be able to take any positive action for attachment, sale, etc., until and unless the objections are removed. An application for resisting or removing the objection, therefore, does aid execution in this manner and I do not see why it should be excluded from the scope of article 182 (5), Limitation Act.”

PAKENHAM WALSH J. in his judgment says:—

“I entirely agree with the reasoning of the learned Subordinate Judge that if the counter itself, the most important document without which none of the subsequent proceedings in execution could take place, is not a step in execution none of the subsequent steps in removing the obstruction can be steps in aid.”

(1) (1926) I.L.R. 50 Mad. 49.

(2) A.I.R. 1929 Lah. 335, 336.

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With respect I am unable to follow this line of reasoning, namely, that, because something earlier is not a step in aid, something later which follows it therefore cannot be. It may be that the counter-affidavit without anything more leaves the execution proceedings where they are, but the summoning of witnesses carries the case well beyond that stage and leaves the Court in a position to decide upon the evidence of the witnesses summoned whether the execution should proceed or not which a mere affidavit may not do. An application to the Court with this object in view is a different thing altogether from the mere filing of an affidavit. As I have stated before, there are no decisions of this High Court directly bearing on this point and, in the absence of any, I am content to follow the decisions of the four other High Courts which do bear directly on the point and to which reference has already been made. I think that it is most desirable that upon such a question as this the High Courts in India should be in agreement and, furthermore, those decisions, in my opinion, are founded on obvious common-sense. Both the second appellate Court and the first Court were in error here. In view of my opinion on this first point, it is unnecessary to discuss the other points relied upon by the appellant as limitation has been saved by the presentation of the batta application. The result is that this Letters Patent Appeal must be allowed with costs here and in second appeal and the order of the Subordinate Judge restored and the petition remanded to the execution Court for disposal according to law.

KING J.—I agree.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and Mr. Justice
Pandrang Row.*

M. R. M. A. S. P. RAMANATHAN CHETTIAR
(RESPONDENT-SECOND DEFENDANT), APPELLANT,

1934,
August 27.

v.

MINOR MAHALINGAM CHETTI, THROUGH HIS NEXT FRIEND
LAKSHMI ACHI (DIED) RAO SAHIB R. KRISHNA AYYAR, OFFICIAL
RECEIVER OF RAMNAD APPOINTED NEXT FRIEND (PETITIONER-
SECOND PLAINTIFF), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), sec. 48 (2) (a)—
Exemption under—Fraud of judgment-debtor giving right
to—Actual prevention of execution of decree by reason of
fraud—Proof of—Necessity—Fraud of judgment-debtor—
Available against his legal representative if and when.*

The mere fact of a fraud having been committed by the judgment-debtor can be availed of by the decree-holder for claiming exemption under section 48 (2) (a) of the Code of Civil Procedure, and in order to succeed it is not necessary for him to show by evidence that on account of that fraud he was actually prevented from executing his decree. In many cases it will no doubt be easy to establish the connection between the fraud perpetrated by the judgment-debtor and the failure of the decree-holder to execute the decree on account of the fraud. Cases of that description should not, however, be used to restrict the meaning of the expression "where the judgment-debtor has, by force or fraud, prevented the execution of the decree".

Visalatchi Ammal v. Sivasankara Taker, (1881) I.L.R. 4 Mad. 292, *Abdul Khadir v. Ahammad Shaiwa Ravuthar*, (1911) I.L.R. 35 Mad. 670, *Mydeen Rowther v. Meera Rowther*, (1919) 10 L.W. 566, *Syed Muhamad Rowther v. Soma Sundaram Chettiar*, (1920) 12 L.W. 710, and *Ramanathan Chettiar v. Mohideen Saheb*, (1924) 47 M.L.J. 428, followed.

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Seshachalam Chetti v. Rajam Chetti, (1898) 8 M.L.J. 203, dissented from.

The fraud of a deceased judgment-debtor can be availed of against a person brought on record as his legal representative where the property sought to be attached is part of the assets of the deceased which has come into the hands of the legal representative.

APPEAL against the order of the Court of the Subordinate Judge of Ramnad at Madura dated the 23rd day of December 1931 and made in Execution Petition No. 109 of 1928 (in Original Suit No. 77 of 1911, Additional Sub-Court, Ramnad).

R. Gopalaswami Ayyangar for appellant.

T. M. Krishnaswami Ayyar and *T. M. Ramaswami Ayyar* for respondent.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This civil miscellaneous appeal arises out of a petition for execution of the decree in Original Suit No. 77 of 1911 (on the file of the Additional Sub-Court, Ramnad) by attachment of the decree in Original Suit No. 153 of 1910 (Additional Sub-Court, Ramnad) obtained by the deceased first defendant-judgment-debtor in Original Suit No. 77 of 1911.

The appellant before us is the son of the deceased first defendant. He was a party to the suit as the second defendant when the decree was passed and has been since recorded as his legal representative in Execution Application No. 228 of 1928.

The decree sought to be executed was passed on 27th November 1911. The execution application was presented on 27th July 1928. Obviously the petition for execution will be barred under the twelve years' rule contained in section 48 (1),

Civil Procedure Code, but the petitioner claimed exemption from the bar of limitation under clause 2 (a) of the same section which says :

"Nothing in this section shall be deemed to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at sometime within twelve years immediately before the date of the application."—his case being that the judgment-debtor, the first defendant, by his fraud, prevented the execution of the decree within twelve years immediately before the date of the application. He also contended that the plea raised by the second defendant is *res judicata* by reason of the decision of the Madura Sub-Court in Execution Petition No. 109 of 1928. This latter point, which was decided by the lower Court in favour of the appellant, was not pressed by the respondent in his arguments and need not therefore be considered in this appeal.

The claim for exemption under section 48 (2) (a) is based on the following facts, which are admitted. On 25th October 1918 the deceased first defendant executed a sale deed with respect to his "Vegaikulam" properties in favour of his friend and relation, one Ramaswami Chettiar of Devakottah. This was attached by the decree-holder in Original Suit No. 65 of 1906 in execution of his decree, and, on Ramaswami Chettiar filing a claim petition, he, on behalf of all the creditors of the deceased first defendant, filed Original Suit No. 208 of 1919 (Sub-Court of Ramnad at Madura) for a declaration that the sale deed executed in favour of Ramaswami Chettiar was nominal and was executed with the intention of defrauding

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his creditors. The suit was decreed in favour of the creditors in February 1922. The claimant's appeal against the decree was dismissed by the High Court in September 1927. The decree-holder, relying upon the fraudulent alienation of property by the deceased first defendant, which was definitely established by the High Court's decree on 23rd September 1927, claimed exemption under section 48 (2) (a), Civil Procedure Code, on the ground that the first defendant's fraud prevented the execution of his decree within twelve years before the date of the application and contended that therefore the application is not barred by limitation.

The second point raised for determination in the lower Court, which runs as follows, relates to the above contention :

"Whether this petition is not barred by section 48 of the Civil Procedure Code as the deceased first defendant executed the sale deed mentioned in the petition and the decree-holder in Original Suit No. 65 of 1906 filing Original Suit No. 208 of 1919 for a declaration that the sale deed was executed by the deceased first defendant with the intention of defrauding his creditors and it was decided finally in it on 23rd September 1927 that it was so executed."

This point was decided in the lower Court in favour of the respondent-decree-holder and execution was allowed to proceed.

The appellant contends that in order to succeed in his plea under section 48 (2) (a), the decree-holder must show that the judgment-debtor has by fraud prevented the execution of the decree and this he cannot be considered to have shown unless there is evidence that he actually attempted to execute his decree against the property which formed the subject-matter of the fraudulent alienation and was defeated in getting execution.

This argument was presented in another aspect also, namely, that the decree-holder, in order to succeed, will have also to show that he took steps to proceed against all the other properties of the judgment-debtor before proceeding against the alienated properties in execution. It is only if these conditions are fulfilled that the Court can say, according to the appellant's contention, that the judgment-debtor has by "fraud . . . prevented the execution of the decree . . ." In other words, the mere fact of a fraud having been committed by the judgment-debtor cannot be availed of by the decree-holder for claiming exemption under section 48 (2) (a), Civil Procedure Code, unless he is *able to show by evidence that on account of that fraud he was prevented from executing his decree* in the manner indicated above.

We will now examine the decisions which have a bearing on this question. The earliest decision brought to our notice is *Visalatchi Ammal v. Sivasankara Taker*(1). This supports the respondent's contention completely. The facts, as stated in the headnote, are these : the respondent, as plaintiff in a small cause suit in 1867, obtained a decree against the husband of the petitioner, since deceased. The decree was kept alive till 13th December 1876, when the decree-holder brought a suit to set aside certain alienations made by the judgment-debtor and alleged to be fictitious and fraudulent. Having succeeded in the suit and in rendering the property alienated available for attachment under his decree, the respondent again applied for execution in 1879, but not against the property fictitiously

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alienated. Lastly, the respondent applied on 28th September 1880, more than twelve years after decree, for execution against certain immovable property of the judgment-debtor, other than the property fictitiously alienated, in the petitioner's possession. It was held that the application was not barred by section 230 of the Code of Civil Procedure of 1882 (corresponding to section 48 of the present Code). This decision shows that fraudulent alienation of property constitutes "fraud" within the meaning of section 48, Civil Procedure Code. It also shows—and this is more important—that, in order to establish that he was prevented from executing the decree by fraud, a decree-holder need not have attached the property comprised in the fraudulent alienation. The following observations of the learned Judges make this point clear :

"The decree-holder, as the result of Suit 211 showed, had a right to execute against all the properties comprised in it, and if he was obstructed, as the institution of Suit 211 shows he must have been, in obtaining execution against those properties, he was prevented within the meaning of the section." Further on the learned Judges say :

"The question is not affected by the fact of the application being made in respect of property other than that comprised in the Suit 211 of 1877."

The last observation disposes of the argument of the appellant that it is necessary, for the decree-holder to succeed, to show that he proceeded against the alienated properties and failed in obtaining execution. In the course of the judgment the learned Judges observed

"that there was the house in possession of the widow against which execution could have been had . . . But there is nothing to show that this house is sufficient to satisfy the decree."

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Upon this observation is built up the argument that the decree-holder must show that he has proceeded against all the other properties of the judgment-debtor available for execution before resorting to the alienated properties, and, unless he does this, he cannot say that he was prevented by fraud from executing his decree. This observation only states a fact in approval of the conduct of the decree-holder and does not in our opinion purport to lay down any principle of law. The decision, read as a whole, leads to the conclusion that the mere fact of a fraud having been committed by the judgment-debtor can be availed of by the decree-holder for claiming exemption under section 48 (2) (a), Civil Procedure Code.

The next decision referred to is *Seshachalam Chetti v. Rajam Chetti*(1). This decision is by a single Judge and it supports the contentions of the appellant. It is stated in the judgment :

"In order to bring the case within the proviso to section 230, two things have to be proved. It has to be proved that the judgment-debtor used stratagems designed to prevent the execution of the decree, and that the execution of the decree was by such means prevented."

As regards the second point which is the argument urged strenuously by the appellant, it must be said that the statement is a mere *obiter dictum*, for the learned Judge himself pointed out :

"There being no evidence of fraud, it is hardly necessary to discuss the second point, viz., whether by reason of the debtor's conduct the execution of the decree has been prevented."

Still the learned Judge proceeded to discuss the point in the next paragraph thus :

"It is obviously not enough to prove fraud at some time during the twelve years' period, because it is quite consistent with

(1) (1898) 8 M.L.J. 203.

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such fraud that the decree-holder may at a later period have had full facility for executing his decree. It must be proved that the non-execution of the decree was brought about by the fraud complained of. Apparently, there was property which could be attached, and the attachment of which was in no way impeded by the debtor. The Judge does not find that execution of the decree was, in fact, prevented, and no evidence was indicated which could have led him to such a finding."

This paragraph apparently supports both the aspects of the appellant's contention, that, if there was property which the respondent-decree-holder could have attached before resorting to the alienated properties, then it could not be said that he was prevented by fraud from executing his decree, and that in order to prove that he was prevented from executing the decree he must show that the non-execution of the decree was brought about by the fraud complained of.

The next case of importance is the decision in *Abdul Khadir v. Ahammad Shaiwa Ravuthar*(1). In that case the second argument for the appellant was that, even if the finding of fraud was upheld, it had not been proved in the case that the plaintiff exercised due diligence in the execution of his decree and that he was prevented by the first defendant's fraud from realizing the amount due to him. With reference to this argument the learned Judge, SUNDARA AYYAR J., made some observations which are relevant to the question under consideration. After quoting section 48, Civil Procedure Code, the learned Judge says :

"Fraud at some time within twelve years prior to the application for execution being sufficient to entitle the decree-holder to ask for execution, it is clear that it is not incumbent on him to show continuous diligence during all the time prior to the

(1) (1911) I.L.R. 35 Mad. 670.

application. The language of the section also shows clearly that the decree-holder is not bound to show that, but for the fraud or force complained of, he would have realized the fruits of his decree. All that has to be proved is that the judgment-debtor, by fraud or force, at some time prevented the execution, that is, in my opinion, made the decree-holder's attempts to execute at the time to which the fraud relates, unsuccessful."

The first two observations dispose of the argument of the appellant that it is necessary for the decree-holder to prove that he had been taking steps to execute the decree against other properties of the judgment-debtor. The last observation "all that has to be proved, etc." is relied on by the appellant to show that there must be some evidence to prove that the decree-holder made attempts to execute the decree but the execution was prevented by the fraud of the judgment-debtor ; that is, he proceeded against the alienated properties but failed in obtaining execution. It cannot be said that the language is not susceptible of this interpretation ; but the learned Judge distinctly dissents from the judgment of SHEPARD J. in *Seshachalam Chetti v. Rajam Chetti*(1) which is the decision strongly relied upon by the appellant in support of the argument that the decree-holder should show that he proceeded against the alienated properties and failed to get execution. Having regard to this fact, we are not inclined to accept the interpretation put upon it by the appellant's Counsel. Mr. Krishnaswami Ayyar for the respondent says that in the circumstances the passage only means that the decree-holder should show that he had taken some steps to execute the decree before he

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made the application in question, and that, it is not disputed, he has done in this case.

In *Mydeen Rowther v. Meera Rowther*(1) the learned Judges, holding that the decree-holder is not disentitled to the benefit of section 48 (2), Civil Procedure Code, by reason of the fraud being long anterior to the date of the last execution, did not accept the view of SHEPHARD J. in *Seshachalam Chetti v. Rajam Chetti*(2) though they held on the facts that in the case before them the application satisfied the rigid test insisted upon by the learned Judge in *Seshachalam Chetti v. Rajam Chetti*(2). In *Syed Muhamad Rowther v. Soma Sundaram Chettiar*(3) ABDUR RAHIM J. pointed out that it is not necessary for the judgment-creditor to prove by positive evidence that but for the conduct of the judgment-debtor he would have realised the decree, or, in other words, that he was actually prevented from executing the decree by the fraud complained of. Discussing the law on the subject the learned Judge referred to the dictum of SHEPHARD J. in *Seshachalam Chetti v. Rajam Chetti*(2) and said with reference to it that "it does not appear that the authorities on the point were brought to the notice of the learned Judge." ODGERS J., the other learned Judge, pointed out that the decision in *Seshachalam Chetti v. Rajam Chetti*(2) turned on the finding that there was no evidence of fraud in that case, that is, that the observation relied on in that judgment had only the value of a mere *obiter dictum*. The decision in *Seshachalam*

(1) (1919) 10 L.W. 566.

(2) (1898) 8 M.L.J. 203.

(3) (1920) 12 L.W. 710.

Chetti v. Rajam Chetti(1) was also dissented from in *Ramanathan Chettiar v. Mohideen Saheb*(2).

Thus, according to the decisions of our Courts, the result is this. The decision in *Visalatchi Ammal v. Sivasankara Taker*(3) has stood as good law all these years. That decision, as stated at the commencement, completely supports the contentions of the respondent. According to that decision, the mere fact of a fraud having been committed by the judgment-debtor can be availed of by the decree-holder for claiming exemption under section 48 (2), Civil Procedure Code, and in order to succeed it is not necessary for him to show by evidence that on account of that fraud he was actually prevented from executing his decree. The decision to the contrary in *Seshachalam Chetti v. Rajam Chetti*(1) relied on by the appellant has been dissented from in the various subsequent rulings of this Court referred to above and should not therefore be followed. It is true that in many cases there will be proof forthcoming to show that as a direct result of the fraud the decree-holder was actually prevented from executing his decree; it will be so in a case where, when proceedings are taken against the judgment-debtor, by wilful evasion of arrest or by frauds of a similar nature the judgment-debtor is able to prevent the decree-holder from executing the decree. It is easy in such cases to establish the connection between the fraud perpetrated by the judgment-debtor and the failure of the decree-holder to execute the decree on account of the fraud. Cases of this description

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(1) (1898) 8 M.L.J. 203.

(2) (1924) 47 M.L.J. 428.

(3) (1881) I.L.R. 4 Mad. 292.

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should not be used to restrict the meaning of the expression "where the judgment-debtor has, by force or fraud, prevented the execution of the decree".

The next question is whether the fraud of the first defendant can be availed of as against the second defendant. It was decided in *Abdul Khadir v. Ahammad Shaiwa Ravuthar*(1) that the fraud committed by one of several judgment-debtors cannot be relied on by the decree-holder as against the other judgment-debtor or judgment-debtors; but this decision cannot be applied to the facts of the present case. The second defendant, as mentioned at the commencement of the judgment, has been recorded as the legal representative of the deceased first defendant in the prior execution proceedings of the decree. It is true that the second defendant cannot be affected by the fraud of the first defendant in his individual capacity as a judgment-debtor in the decree in Original Suit No. 77 of 1911; but the decree sought to be attached is part of the assets of the deceased first defendant available for the execution of the decree in Original Suit No. 77 of 1911 and since this has come into the hands of the second defendant as his legal representative we think the fraud proved against the first defendant can be availed of against his legal representative, the second defendant.

For the above reasons we hold that execution of the decree in Original Suit No. 77 of 1911 is not barred by limitation. We dismiss this appeal with costs.

A.S.V.

(1) (1913) I.L.R. 38 Mad. 419 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

GURAZADA VENKATESWARA RAO AND ANOTHER
(DEFENDANTS 1 AND 2), APPELLANTS,

1934,
August 7.

v.

GURAZADA ADINARAYANA (PLAINTIFF), RESPONDENT.*

Hindu Law—Inheritance—Father's brother's grandson nearer heir than brother's great-grandson—Descendants of a nearer line should be preferred to descendants of a remoter line and bandhus ex parte paterna take in preference to bandhus ex parte materna—Limits of the rules pointed out.

Under the Mitakshara Law the father's brother's grandson succeeds in preference to the brother's great-grandson.

The limits of the rules, viz., that "the descendants of a nearer line should be preferred to the descendants of a remoter line" and "bandhus *ex parte paterna* take in preference to bandhus *ex parte materna*", pointed out.

APPEAL against the decree of the Additional Subordinate Judge of the Court of the Subordinate Judge of Bezwada in Original Suit No. 42 of 1928.

P. Satyanarayana Rao for appellants.

B. Somayya for *V. Ramadoss* and *K. Subba Rao* for respondents.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—Both parties to this suit are agnatic kinsmen of one Sarabharaju and they claim, against each other, the properties which his widow enjoyed till her death in 1926. A genealogical table is appended to the plaint showing the relationship of the various parties. It is not necessary to refer to it here in more detail than to

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say that the plaintiff is the father's brother's grandson of Sarabharaju and that the defendants are the brother's great-grandsons of Sarabharaju. The only other portion of the pedigree to be borne in mind in dealing with the evidence is that Sarabharaju had two step brothers, Lakshmikantham and Naghabushanam, that Naghabushanam left only a widow surviving him, and that Lakshmikantham had a son Papahari who predeceased him, leaving a son Naghabushanam, the father of defendants 1 and 2. The plaintiff claimed that the properties in the possession of the widow were held by her as a widow's estate, she having succeeded to the same on Sarabharaju's death somewhere between 1860 and 1865. The defendants on the other hand contended that Sarabharaju and Naghabushanam (their father) were undivided and that Naghabushanam succeeded to all the family properties on Sarabharaju's death, but put Sarabharaju's widow, Lakshmayamma, in possession of certain properties for the purpose of her maintenance. Alternatively, the defendants contended that, even if the properties enjoyed by the widow should be found to have been held by her for a widow's estate, they were the preferable heirs as being descended from a nearer line.

The learned Subordinate Judge held in favour of the plaintiff on both the points and gave him a decree as regards some of the items claimed and disallowed his claim in respect of certain items on the ground that they have not been shown to have ever been in the possession of the widow.

The plaintiff has preferred a memorandum of objections in respect of the items disallowed to him; but the memorandum of objections can

hardly be seriously pressed, because there is very little evidence to show that the widow was in possession of those items. The memorandum of objections therefore fails and is dismissed with costs.

In the appeal by the defendants, both the points raised by them in the Court below have been pressed. First, as to the question of fact, it is not easy on the evidence to decide when and between whom the division, if any, actually took place. Mr. Satyanarayana Rao lays some stress on the fact that the plaintiff set up a division between Sarabharaju and his brothers, whereas the learned Subordinate Judge holds that the division must have taken place between Sarabharaju and Naghabushanam, i.e., his grandnephew. Seeing that all the parties are speaking of events which must have happened long ago and undoubtedly even before the plaintiff (who is the oldest man now alive amongst the parties) came of age, we are not disposed to attach undue importance to this particular statement in the pleadings. Nor does it seem to us necessary to come to any definite conclusion as to the division or its exact date. In view of the decisions of the Privy Council in *Satgur Prasad v. Raj Kishore Lal*(1) and *Lajwanti v. Safa Chand*(2), the plaintiff will be entitled to claim rights of inheritance to Sarabharaju's widow if the evidence clearly establishes that for more than the prescriptive period the widow had been enjoying these properties claiming to hold them in her own right, whether absolutely or for a widow's estate, and not merely as a maintenance holder. If the defendants could make out that

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(1) (1919) I.L.R. 42 All. 152 (P.C.). (2) (1924) I.L.R. 5 Lah. 192 (P.C.).

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Naghabushanam put the widow in possession of certain properties under a maintenance arrangement, the widow may not, by a mere claim of a larger right in those properties, convert her possession into adverse possession for a widow's estate. But the onus of proving that the widow was thus let into possession will undoubtedly be upon the defendants and we agree with the Court below that the defendants have not discharged that onus.

Mr. Satyanarayana Rao admitted before us that, at any rate after 1884, the widow had been in possession of the properties found to be in her possession, in assertion of a claim as heir to her husband. In that view, it is not necessary to make more than a brief reference to some of the documents in the case.

[His Lordship discussed the evidence and continued :]

The result of the evidence therefore is to leave the undisputed possession of Lakshmayamma unexplained on the maintenance hypothesis put forward by the defendants. In this view, as already indicated, either on the finding of a division inferred from this course of enjoyment or on the footing of prescriptive title acquired by the widow whether for an absolute estate or for a widow's estate, the plaintiff will be entitled to claim a right of inheritance as heir.

The next question relates to the preferential right of succession as between the plaintiff and the defendants. The learned Subordinate Judge decided this question in favour of the plaintiff mainly on the authority of the decision of KUMARASWAMI SASTRI J. in *Soobramiah Chetty*

v. *Nataraja Pillai*(1). That decision covers only one aspect of the question argued before us. Mr. Satyanarayana Rao has put forward certain other arguments which were either not available in that case or at any rate were not placed before the learned Judge. As the matter has been argued before us at some length, it is better that we deal with the contentions put forward on behalf of the appellants.

At the outset we must point out that the genealogical table printed on page 62 of the report in *Soobramiah Chetty v. Nataraja Pillai*(1) is somewhat misleading, because, as it appears in the print, the question need not have been discussed by the learned Judge at all. The printed genealogical table does not bring out the finding of the learned Judge on the question of Sadasiva Chetti's adoption by Chinnappa Chetti. The result of that adoption was that the fourth plaintiff in that suit stood in the position of the grandfather's great-great-grandson of the propositus while the third defendant became the great-grandfather's great-grandson. That decision is relevant to the present case in so far as the learned Judge held that, for the purpose of determining which of two Gotraja Sapindas is the preferential heir, only three and not seven degrees in each branch have to be reckoned, and, after the third degree in one branch, three degrees in the next collateral branch must be considered. Mr. Satyanarayana Rao has attacked that conclusion. But, before dealing with that, we may as well deal with another point raised by him which arises out of the facts of this case.

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The defendants are the brother's great-grandsons of the propositus. Mr. Satyanarayana Rao therefore wishes to invoke the rule that those who are included in what is generally referred to as the compact set of heirs must first be exhausted before those who are mentioned in the Sanskrit texts only by way of a generic description, viz., Gotrajas, can come in. Taking Yajnavalkya's text, the compact heirs go up to brother's son of the propositus, and it is common ground that it is only after the brother's son that all persons who come under the category of Gotrajas can be considered. If the word "son" in that expression "brother's son" (*Tatsuta* in Sanskrit) is taken literally, it would not help Mr. Satyanarayana Rao's present argument; but if, by the analogy of the reasoning of the Privy Council in the case of *Buddha Singh v. Laltu Singh*(1), the word "son" even in the expression "brother's son" could be taken to stand for a son, grandson and *great-grandson*, the result would be that "brother's great-grandson" would be brought within the category of compact heirs. Mr. Satyanarayana Rao urges that we ought not to think of the rule of calculating three degrees *from the common ancestor* but merely take the word "son" in the expression "brother's son" and carry the calculation three degrees down from the brother himself. He recognizes that this will put the brother's line in a better position than the descendants of the propositus himself, because, as regards the propositus, it is well established that only descendants up to three degrees can succeed. But he urges that, whatever may be the reason with reference to which the descendants of the

(1) (1915) I.L.R. 37 All. 604 (P.C.).

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propositus are limited to three degrees, the reasoning of the Privy Council in *Buddha Singh v. Laltu Singh*(1) will justify him in claiming that in the case of the brother's line the word "son" (in the expression "brother's son") should be taken to extend to three degrees from the brother.

We are unable to accede to the above argument. The Privy Council in *Buddha Singh v. Laltu Singh*(1) were dealing, not with that portion of Yajnavalkya's text which refers to the brother's son, but, with the commentary of Mitakshara relating to the next group of heirs, viz., Gotrajas. In indicating the order of succession among Gotrajas, the Mitakshara deals with the grandfather's line and then with the great-grandfather's line. There is nothing whatever in their Lordships' judgment to show that as regards those lines they intended to go down more than three degrees from the common ancestor. What they lay down is that in those passages where the Mitakshara uses the word "son" it is used not in the "literal" sense but in what is spoken of as the "extended" or "generic" sense. Once we reach the conclusion that a word is used in a generic or extended sense, the question immediately arises, how to fix the limits of that generic or extended sense. It is not by any etymological significance that it has to be fixed but only with reference to other principles of law; and, if, as clearly indicated in their Lordships' judgment, the limiting principle is to be gathered from the text of Manu which refers to the offering of oblations by three degrees of descendants, it will follow that the proper interpretation of their Lordships' pronouncement

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is not that the three degrees ought to be calculated even after allowing for a further link from the common ancestor but only from the common ancestor. In this view the analogy of the pronouncement of the Privy Council in *Buddha Singh v. Laltu Singh*(1) will not really help Mr. Satyanarayana Rao's argument. That this must really have been their Lordships' opinion is made clear by the way in which they refer to the passage from Nanda Pandita and also to the passage from Vyavastha Chandrika including the footnote. In both of them the passages quoted by their Lordships specifically refer to the brother's son's case as well and to the fact that the calculation should be taken only to the brother's grandson and not to the brother's great-grandson. It is therefore not possible to hold that the defendants will come within the compact series of heirs as enumerated by Yajnavalkya.

Mr. Satyanarayana Rao's next point is that, even if the defendants do not come within the set of compact heirs, there is no reason why, as amongst Gotrajas, the principle of the nearer line being preferred to the more remote ought not to be followed, or the opinion indicated by Mr. Harrington in the passage cited in *Rutcheputty Dutt Iha, Bho Launauth Iha, and others, v. Rajunder Narain Rae and Coower Mohainder Narain Rae*(2)—viz., of carrying each line down to the seventh descent before going to the ascending line—ought not to be followed. As regards Mr. Harrington's opinion, it is sufficient to say that he was not there dealing with the question of preferential right of succession at all but merely pointing out who are all the

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Sapindas that ought to be exhausted before the inheritance can go to cognates. There is no doubt that descendants up to the seventh degree will be comprehended within the term Sagotrajas or Sapindas. This is all that Mr. Harrington was laying down and that passage has so far not been understood as indicating the order of succession. No doubt in *Buddha Singh v. Laltu Singh*(1) that passage was brought to their Lordships' notice and they leave its bearing open because in their opinion it was not necessary for the purpose of the case before them to decide whether succession in each line should be carried down to the seventh degree or not. But, if Mr. Harrington's statement is to be understood as laying down a rule of preferential right of succession amongst agnates, it will be difficult to reconcile it with the whole reasoning on which the judgment in *Buddha Singh v. Laltu Singh*(1) rests. There can be no doubt whatever that, so far as the propositus is concerned, inheritance descends only to his three descendants and on failure of the third it ascends. There is absolutely no justification whatever for holding that in respect of collateral inheritance the matter should stand on a different footing. In *Buddha Singh v. Laltu Singh*(1) itself the Privy Council took pains to point out that the scheme of the Hindu Law of Inheritance is quite logical and capable of logical application; surely no one need go out of the way and make it illogical.

As for the theory that the descendants of a nearer line should be preferred to the descendants of a remoter line, this is not a complete or accurate statement of the law. The true rule is

(1) (1915) I.L.R. 37 All. 604 (P.C.).

(2) (1839) 2 M.I.A. 133.

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that the nearer heir excludes the more remote. It may no doubt often happen that the nearer heir will be found in the nearer line but it would not be safe to paraphrase the one into the other. The nearer heir is to be determined with reference to a number of considerations, one of which no doubt may happen to be his being born in the nearer line. This rule about the "nearer line" is very much like another rule frequently assumed as the basis of decision in several Madras cases, viz., that Bandhus *ex parte paterna* take in preference to Bandhus *ex parte materna*. The language used by the Judicial Committee in a recent case, *Jatindra-nath Ray v. Nagendranath Ray*(1), when the latter rule was brought to their Lordships' notice, may usefully be recalled here.

The rule as to the preference of the nearer line is no doubt stated in the judgment of this Court in *Chinnasami Pillai v. Kunju Pillai*(2), but much of the reasoning in that judgment has been set aside by the judgment of the Privy Council in *Buddha Singh v. Lattu Singh*(3). Differing from the opinion of the learned Judges of this Court, the Privy Council specifically approved of the view of Messrs. Sarvadhikari, Jolly and Shama Charan Sarkar and they also approved of the authority of the commentary of Apararka. What is even more important is that their Lordships in the concluding portion of the judgment specifically accept the applicability of the spiritual benefit theory which the learned Judges in *Chinnasami Pillai v. Kunju Pillai*(2) expressly repudiated. There can be no doubt in the present case

(1) (1931) I.L.R. 59 Calc. 576 (P.C.). (2) (1911) I.L.R. 35 Mad. 152.
(3) (1915) I.L.R. 37 All. 604 (P.C.).

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that on the application of the spiritual benefit theory the plaintiff will be the nearer heir. Whatever the position might have been at the time when the judgment in *Chinnasami Pillai v. Kunju Pillai*(1) was pronounced, several pronouncements of the Privy Council have since laid down that, even in determining succession under the Mitakshara, the doctrine of spiritual benefit has got a place, though only a subordinate place. Both in *Buddha Singh v. Lattu Singh*(2) and in *Masit Ullah v. Damodar Prasad*(3) the Privy Council have referred with approval to the passage in the *Veeramitrodaya* dealing with the position of son, grandson and great-grandson, their right of inheritance, and their liability to pay debts and also the conferring of spiritual benefit. It is not therefore right to say that the *Veeramitrodaya* cannot be relied on as an authority in dealing with this question even under the Mitakshara. The matter is put beyond further question by the judgment in *Jatindranath Ray v. Nagendranath Ray*(4), where the doctrine of spiritual benefit is affirmed and applied by their Lordships as "a test of the measure of propinquity" in certain circumstances. In their Lordships' opinion it is

"a mistake to suppose that the doctrine of spiritual benefit does not enter into the scheme of inheritance propounded in the Mitakshara."

For these reasons we hold that the plaintiff is entitled to succeed to Sarabharaju's estate in preference to the defendants.

As regards the direction in the decree of the lower Court in respect of mesne profits both

(1) (1911) I.L.R. 35 Mad. 152. (2) (1915) I.L.R. 37 All. 604 (P.C.).
(3) (1926) I.L.R. 48 All. 518 (P.C.). (4) (1931) I.L.R. 59 Calc. 576 (P.C.).

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parties agree that the following order may be substituted therefor, viz., "and do pay the plaintiff mesne profits from fasli 1344, until delivery of possession or the expiry of three years, whichever event first occurs, at the rate of Rs. 371 per year, less any cist and water tax that may be paid by the defendants and that the plaintiff do pay Rs. 54 being the excess recovered by him from the defendants in respect of profits up to the end of fasli 1343." Subject to this variation, the decree of the Court below is confirmed and the appeal dismissed with costs.

G.R.

APPELLATE CIVIL.

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

ACHAYI AND ANOTHER (PETITIONERS), APPELLANTS,

v.

PARAMESWARAN NAMBOODRIPAD AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

*Malabar Tenancy Act (XIV of 1930), secs. 3 (l) and (v) and
17 (a)—Kanamdar—Kanam evidenced by written instru-
ment—Kanamdar under—Transferee named in document—
Persons jointly entitled to kanam amount with—Kanam-
dars within meaning of Act if.*

Under the Malabar Tenancy Act, where a kanam is evidenced by a written instrument, the kanamdar can be no other person than the transferee mentioned in the document or his legal representative or his assignee. The two contracting parties are the landlord on the one hand and the kanamdar on the other. The landlord cannot recognize any person other than the person to whom the kanam has been transferred and

* Second Appeal No. 215 of 1933.

cannot grant a renewal of the kanam to any person other than the kanamdar.

Held, accordingly, that the sisters of the kanamdar, that is the transferee mentioned in the document, could not claim to be kanamdars within the meaning of the Act and to be entitled to a renewal of the kanam on the ground that they were jointly entitled with their brother to the kanam amount as heirs of their father and were therefore entitled to a renewal of the kanam as persons jointly interested in it and that their brother was merely a kanamdar for himself and on their behalf.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 25 of 1932 (Appeal Suit No. 567 of 1931, District Court), preferred against the order of the Court of the District Munsif of Choughat in Register Interlocutory Application No. 2012 of 1931 on Original Suit No. 424 of 1929.

T. R. Ramachandra Ayyar and C. T. Verghese for appellants.

*K. P. Ramakrishna Ayyar and D. H. Nam-
budripad* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—The point to be decided in this second appeal is one which arises under the Malabar Tenancy Act. The appellants who are two sisters applied for the renewal of a kanam claiming to be kanamdars within the meaning of the Malabar Tenancy Act. The facts are that the elder brother of the appellants got a renewal of the kanam in 1917 in his name. The first respondent filed a suit against him and evicted him and the Malabar Tenancy Act does not apply to his case as the suit against him was filed on 17th July 1929. The appellants then claimed to be kanamdars, their case being that they were jointly entitled with their brother to the kanam amount.

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The District Munsif took no evidence upon this point, being of the opinion that upon an interpretation of the Act the appellants were not kanamdars; and the lower appellate Court took the same view. The appellants' contention is that evidence should have been taken which would show that they were jointly entitled with their brother to the kanam amount as heirs of their father and are therefore entitled to a renewal of the kanam as persons jointly interested in it and that their brother was merely a kanamdar for himself and on their behalf. The question is whether the Malabar Tenancy Act recognizes such a position. The point to be considered is: what does "kanamdar" mean under the Act? By section 3 (l) "kanam" means a transfer by a landlord to a tenant, i.e., kanamdar, of an interest in specific immovable property. "Tenant" is defined in section 3 (v) as meaning any person who has paid or agreed to pay rent or other consideration for his being allowed by another (the landlord) to enjoy the land of the latter (the landlord) and includes a kanamdar. "Landlord" is defined in section 3 (o) as meaning a person under whom a tenant holds and to whom he is liable to pay rent or *michavaram* and includes a jenmi. Now if the "kanam" which is a transfer is evidenced by a written instrument, the kanamdar who is the transferee by reason of the definition in section 3 (l) can, it seems to us, be no other person than the transferee mentioned in the document or his legal representative or his assignee. It is he too who alone can be said to have agreed to pay rent or other consideration to be allowed by the landlord to enjoy his land. The two contracting parties are the landlord on the one hand

and the kanamdar on the other. It seems plain that the only person whom the landlord can sue is the other contracting party, the kanamdar. He cannot sue any other person for rent and, in our view, cannot recognize any person other than the person to whom the kanam has been transferred. Further assistance is obtained from section 17 (a) which entitles a kanamdar on the expiry of the kanam under which he holds, on payment of the renewal fee therein specified, to claim a renewal of the kanam for a period of twelve years and the landlord is bound to grant a renewal. What would happen if, for example, at the expiry of the kanam, A to whom it had been granted claims a renewal of it on payment of the renewal fee and at the same time B, a stranger, claims a renewal to himself stating that A has been in possession of the kanam on his behalf. It is quite clear from section 17 (a) that the landlord would be bound to renew the kanam to A and could not grant a renewal to B. The only person whom he would be entitled to recognize would be A. The right claimed by B would be a matter to be settled between A and B—a matter with which the landlord is not concerned. The scope of the Act, in our view, is to provide for proceedings between the two contracting parties alone and an analysis of all the relevant sections leaves us in no doubt that the Courts below were right in holding that in this case only the appellants' brother (and not the appellants themselves) was the kanamdar who alone, had the date of the institution of the suit permitted it, could have applied for a renewal. This appeal must, therefore, be dismissed with costs of the first respondent.

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APPELLATE CIVIL.

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

1934,
September 27.

S. M. N. R. M. LAKSHMANAN CHETTIAR (FIRST
DEFENDANT), PETITIONER,

v.

S. RM. AB. RAMANATHAN CHETTIAR AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

*Court Fees Act (VII of 1870), Sch. I, art. 1 (as amended)—
"Set-off" in—Equitable set-off if included in.*

The expression "set-off" used in article 1 of Schedule I of the Court Fees Act as amended includes an equitable set-off and, under that article, a court-fee is payable on an equitable set-off claimed by a defendant in a suit.

Sitarama Ayyar v. Ramanuja Mudaliar, (1931) 142 I.C. 719, approved.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai dated 28th July 1933 and made in Original Suit No. 135 of 1932 (In Interlocutory Application No. 990 of 1933).

M. Patanjali Sastri for petitioner.

P. V. Rajamannar for the Government Pleader (*P. Venkatarmana Rao*) on behalf of the Government.

V. Ramaswami Ayyar and *T. Krishna Rao* for respondents.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—The question raised in this civil revision petition is whether under article 1 of Schedule I of the Court Fees Act as amended a court-fee is payable on the equitable set-off claimed

by the defendant in the suit. The Principal Subordinate Judge of Devakottai held that a court-fee was payable tentatively. The matter thus comes before us. We are quite unable to see why in reason a written statement or a defence pleading a legal set-off should have to bear a court-fee and one pleading an equitable set-off not be liable to do so also. In the former case the set-off pleaded may be of a very small amount and in the latter case of a very large amount. It is conceded by Mr. Patanjali Sastri that beyond what he suggests as a technicality no reason can possibly be advanced for this distinction between the two classes of set-off. An equitable set-off is a legally recognised one and we fail to see why any distinction should be drawn between that and a legal set-off. The matter is somewhat bare of authority. So far as this High Court is concerned, the only decision, since the amendment of the Court Fees Act, is the decision of SUNDARAM CHETTI J. in *Sitarama Ayyar v. Ramanuja Mudaliar*(1). In that case he expresses the opinion, although possibly it may be *obiter*, that there is nothing to show that the set-off mentioned in this article, namely, article 1, Schedule I, of the Court Fees Act, is confined only to legal set-off coming under Order VIII, rule 6, Civil Procedure Code, and that *prima facie* the expression set-off used in this article might include an equitable set-off also. With that opinion we entirely agree and we must, therefore, hold that the set-off pleaded in this suit must bear the appropriate court-fee. This civil revision petition must, therefore, be dismissed with costs.

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(1) (1931) 142 I.C. 719.

* Civil Revision Petition No. 985 of 1933.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

KONDHO RAYAGARU (PETITIONER), PETITIONER,

v.

THE DISTRICT COLLECTOR OF GANJAM
(RESPONDENT), RESPONDENT.**Madras Local Boards Act (XIV of 1920), ss. 199, 227—
Surcharge Rules, r. 5—Limitation—Rule 5 not inconsistent
with sec. 227 and not ultra vires.*

Rule 5 of the Surcharge Rules framed by the Local Government under the authority conferred by section 199 of the Madras Local Boards Act (XIV of 1920), which does not prescribe limitation, is not inconsistent with section 227 of the Act which provides that certain suits shall be commenced within three years, and is not *ultra vires* the Local Government. Section 227 provides merely that the suits referred to therein shall be commenced within three years, whereas the Surcharge Rules do not deal with suits at all, the machinery provided by them being altogether different. The laws of limitation are creatures of statute. What the section of the Act contemplates is the filing of a suit and it is for such a suit that the limitation is prescribed; a rule that does not provide limit of time in regard to certificates granted under the special procedure laid down is not inconsistent with the section.

Section 214 of the Indian Companies Act, 1882, *Connell v. The Himalaya Bank, Ltd.*, (1895) I.L.R. 18 All. 12, and *Ramasami v. Streeramulu Chetti*, (1896) I.L.R. 19 Mad. 149, referred to.

Further, section 227 of the Act and rule 5 of the Surcharge Rules are not co-extensive. The suits referred to in that section are against members of the Board, whereas under rule 5 of the Surcharge Rules the loss may be recovered even from an employee or servant.

The words "surcharge," "disallowance" and "charge," as used in the Surcharge Rules, explained.

* Civil Revision Petition No. 1549 of 1931.

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 Ganjam, dated the 16th day of March 1931 and passed in Original Petition No. 54 of 1929.

D. Ramaswami Ayyangar for *C. S. Venkatachariar* for petitioner.

P. V. Rajamannar for *The Government Pleader* (*P. Venkataramana Rao*) for respondent.

JUDGMENT.

This case raises the question of the validity of a surcharge certificate granted in pursuance of the rules made under the Madras Local Boards Act (Madras Act XIV of 1920). Section 120 of that Act provides for the appointment of auditors of the accounts of Local Funds. Section 199 enacts that the Local Government may make rules to carry out all or any of the purposes of the Act not inconsistent therewith and goes on to say that, in particular and without prejudice to the generality of the foregoing power, they shall have power to make rules

"as to the powers of auditors to disallow and surcharge items and as to the recovery of sums disallowed or surcharged" (clause o).

Under the authority conferred by this section, the Local Government made certain rules, known shortly as Surcharge Rules, with which we are now concerned. Rule 3 says that the auditors appointed under section 120 of the Act shall report to the Board (to quote only the relevant part) any loss of money caused by the neglect or misconduct of any person responsible for such loss. Then rule 4 follows, which provides that the

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President shall forthwith remedy the defect that has been pointed out by the auditor. Then, we come to the most important rule, which is rule 5. It must first be noted that this rule refers to a different auditor, different from the auditor already referred to. The powers and duties of this auditor are not strictly confined to auditing, but as quasi-judicial functions are to be performed by him, the auditor referred to is one "empowered by the Local Government". So much of that rule as is material may be quoted in full :—

Rule 5 (1) Any auditor empowered by the Local Government may disallow every item contrary to law and surcharge the same on the person making or authorizing the making of the illegal payments, and may charge against any person responsible therefor the amount of any deficiency or loss incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought to account by that person and shall, in every such case, certify the amount due from such person.

(2) The auditor shall state in writing the reasons for his decision in respect of every disallowance, surcharge or charge and furnish by registered post a copy thereof to the person against whom it is made.

In the present case what happened was this. Some amounts of house-tax collected by the bill-collector had not been brought into account. This fact was pointed out in the audit reports both for 1924-25 and 1926-27. Under rule 4 already mentioned, the President ought to have remedied the defect, but that was not done. Thereupon the auditor empowered by the Local Government under rule 5, i.e., the Examiner of Local Fund Accounts, issued a certificate dated 12th June 1929 charging the President of the Board with the amount of the loss on the ground that it was incurred by his negligence. Under rule 6 any

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person aggrieved by the decision of the auditor has a right to apply to the principal civil Court of original jurisdiction to set aside or vary that decision. The President applied under that rule to the District Judge of Ganjām, who in part modified the auditor's decision but, as regards the major portion of the claim, confirmed it. In this revision petition the District Judge's order is attacked.

It is first contended that rule 5 in question is *ultra vires* the Local Government. The argument is put thus : Section 227 of the Act provides for a suit for compensation against a member of the Local Board for any loss due to his neglect or misconduct, and clause 2 of that section enacts :

"Every such suit shall be commenced within three years after the date on which the cause of action arose."

It is argued that if the Surcharge Rules have the effect of abrogating this rule of limitation, they are *ultra vires*, being inconsistent with section 227 of the Act. Section 199 says that rules may be made

"to carry out all or any of the purposes of the Act not inconsistent therewith".

That the Surcharge Rules have the effect of carrying out the purposes of the Act cannot be gainsaid. But the question then is, are these rules inconsistent with the Act or any provision thereof? Section 227 provides merely that the suits shall be commenced within three years, whereas the rules do not deal with suits at all. The machinery provided by them is altogether different, prescribing as they do a summary mode of recovery. The laws of limitation, as has been said, are creatures of statute; under the common law there was no limit of time prescribed for the enforcing of rights. What the section of the

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Act contemplates is the filing of a suit and it is for such a suit that the limitation is prescribed; a rule that does not provide limit of time in regard to certificates granted under the special procedure laid down is, in my opinion, not inconsistent with the section.

I may point out in this connection that it was held that, under the Indian Companies Act of 1882, the special proceeding provided for by section 214 was not subject to any rule of limitation; *Connell v. The Himalaya Bank, Ltd.*(1). [See also *Ramasami v. Streeramulu Chetti*(2).] But under the present Companies Act, section 235 expressly enacts that applications in respect of misfeasance or breach of trust are in the nature of suits governed by the provisions of the Indian Limitation Act. The Legislature may, if it chooses, enact a provision on the lines of section 235 (3) of the Indian Companies Act, but the Courts cannot import a rule of limitation where the Legislature has either by design or accident failed to prescribe a period.

It may also be observed that section 227 and rule 5 are not co-extensive. The suits referred to in that section are against members of the Board only, but under the rule the loss may be recovered even from an employee or servant. The contention therefore that the rules are *ultra vires* fails.

There was some argument in regard to the words "surcharge", "disallowance" and "charge"; but nothing material turns upon the use of those words. Rule 5 is modelled on section 247, clause 7, of the Public Health Act of 1875; with certain

slight alterations that section has been reproduced. COZENS-HARDY M.R. points out in *Rex v. Roberts*(1) that the word "surcharge" is not used in the English Act just mentioned in its strict technical sense. The expression "surcharge and falsify" refers to the mode of taking accounts in Chancery: if any of the parties can show an omission for which credit ought to be given, that is surcharge; if anything is inserted that is wrong, he is at liberty to show it, and that is falsification (Wharton's Law Lexicon). But "surcharge" is used in another sense—an overcharge of what is just and right; a declaration by an auditor that a person is personally liable to refund a particular part of public money illegally expended by him (*Ibid*). According to Murray's Oxford Dictionary, "surcharge" means (i) the act of showing an omission in an account or statement showing this; (ii) a charge made by an auditor upon a public official in respect of an amount improperly paid by him. The first has to do with a wrong omission, the second with a wrong insertion, and the two meanings are thus contradictory. It is therefore clear that the three words in question have no special legal significance attached to them.

It is next argued that it has not been shown that the President has been negligent. I am not prepared to interfere in revision with the lower Court's finding on this point, which is a finding of fact.

In the result, the civil revision petition fails and is dismissed with costs.

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(1) (1895) I.L.R. 18 All. 12.

(2) (1896) I.L.R. 19 Mad. 149.

(1) [1908] 1 K.B. 407, 418.

APPELLATE CRIMINAL.

*Before Mr. Justice Curgenvven and Mr. Justice Cornish.*1934,
September 21.IN RE CHINNAPPAYYA MUDALI (ACCUSED),
PETITIONER.**Madras Abkari Act (I of 1886), sec. 64—"Actual offender"—
Liability of licensee for acts of servant.*

To justify the conviction of a licensee under paragraph 2 of section 64 of the Madras Abkari Act (I of 1886), it is enough if the prosecution proves that the "actual offender" was employed by the licensee to perform the duties in the course of which the offence was committed. It is not necessary to prove also that the actual offender committed the offence as the agent of the licensee and with his knowledge and approval. The section is clearly designed to allow presumptions to be made in excess of those permitted by the ordinary criminal law, and the intention of the provision is to place a heavier responsibility for the act of his servant upon a licensee, as such, than lies upon an employer under the ordinary criminal law.

Venkayya, In re, (1928) 55 M.L.J. 712, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tirupattur (North Arcot District) in Criminal Appeal No. 83 of 1933 (Calendar Case No. 417 of 1933 on the file of the Court of the Sub-Magistrate of Gudiyattam).

V. A. Nageswara Ayyar for petitioner.*Public Prosecutor (L. H. Bewes)* for the Crown.*Cur. adv. vult.*

The Order of the Court was delivered by
CURGENVEN J. CURGENVEN J.—The petitioner is the renter of an arrack shop at Tirumani. It is supplied with

* Criminal Revision Case No. 149 of 1934 (Criminal Revision Petition No. 138 of 1934).

arrack from the depot at Vellore, and on the occasion which gave rise to this case a permit was issued for the transport of three gallons of arrack from depot to shop. Only one gallon reached the shop; the other two were diverted elsewhere, it is alleged, to be made the subject of illicit sale. There is no question that the breach of the law thus committed was committed by the petitioner's servants, employed by him for transporting the arrack. He has also himself been convicted under section 56 (b) (doing or omitting to do something in breach of the conditions of his licence or permit) read with section 64 of the Madras Abkari Act, and sentenced to pay a fine of Rs. 150. At the trial an attempt was made to show that the failure to carry all the arrack to its destination was due to circumstances beyond the control of the employee, so that there was no wilful breach of the terms of the permit. This was disbelieved by the trial and the appellate Courts. The further point is now taken that the conviction is not justified by the terms of the Abkari Act.

The correctness of the petitioner's conviction turns upon the construction to be given to the second paragraph of section 64. It runs as follows:—

"The holder of a licence or permit under this Act shall be punishable, as well as the actual offender, for any offence committed by any person in his employ and acting on his behalf under section 55 or section 56 or section 57 or section 58 as if he had himself committed the same, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

The argument addressed to us is that the prosecution must prove not only that the "actual offender" was employed by the licensee to perform

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the duties in the course of which the offence was committed but further that, in committing the act or acts constituting the offence, he was "acting on his behalf", i.e., he was not only acting on his behalf in the discharge of his duties but that he committed the offence as the agent of the licensee and with his knowledge and approval; as, e.g., where a man arranges for his servants to commit an act of criminal trespass. The objection to this construction is that the section is clearly designed to allow presumptions to be made in excess of those permitted by the ordinary criminal law. A perusal of paragraph 1 of the section will show that it throws the burden of disproving guilt on a person unable to account satisfactorily for the possession of apparatus or materials. Paragraph 2 makes the licensee constructively guilty of acts committed by his employees, subject to a certain reservation. The nature of that reservation appears to us to place the meaning beyond doubt. The licensee has to establish "that all due and reasonable precautions were exercised by him to prevent the commission of such offence". If a licensee is to be exonerated from criminal liability only if he takes all due and reasonable precautions to prevent the commission of such offence, he is clearly not to be exonerated merely because he may not have been consciously a party to the offence. If this were so, the obligation cast upon him to take precautions need never come into question because an acquittal could be secured, as in the circumstances of the present case, without proof that such precautions had been taken. The intention of the provision is, we think, to place a heavier responsibility for the act of his servant

upon a licensee, as such, than lies upon an employer under the ordinary criminal law.

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There is a judgment of DEVADOSS J. in *Venkayya, In re*(1) which embodies a different view. In a similar case the learned Judge acquitted a licensee.

"for he could not have presumed or have known that they (his servants) were going to carry the toddy to No. 3 shop instead of No. 1 shop."

The tests applied were whether the act was done in the course of business, and whether therefore the licensee could be presumed to have given authority. It is difficult to understand how an offence can be said to have been committed in the course of business, unless the meaning merely is that it was committed instead of pursuing the ordinary course of business. If it has to be found that the licensee authorized the commission of the offence, no special rule of responsibility need have been enacted. The judgment contains no discussion of the terms of section 64, and we must respectfully express our dissent from it.

We consider that the petitioner has been rightly convicted. We do not think that the fine imposed is excessive. The criminal revision petition is dismissed.

K.W.R.

(1) (1928) 55 M.L.J. 712.

PRIVY COUNCIL.

NAGAPPA CHETTIAR (RESPONDENT), APPELLANT,

v.

BRAHADAMBAL AMMANI AND ANOTHER (APPELLANTS),
RESPONDENTS.

[AND CROSS-APPEAL.]

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Hindu Law—Madras Impartible Estate—Sale of villages—
Price applied in part to discharge incumbrances created
before 1904—Suit to set aside sale—Decree making new
bargain—Equitable decree—Madras Impartible Estates Act
(II of 1904), sec. 4, sub-sec. 1.*

In 1913 a zamindar, who died in 1914, sold fourteen out of his seventeen zamindari villages; his adopted son sued in 1917 to set aside the sale. The zamindari was included in the schedule to the Madras Impartible Estates Act, 1904, and under section 4, sub-section 1, the sale was not valid beyond the lifetime of the zamindar unless it was made in circumstances which would have entitled the managing member of a joint Hindu family to alienate part of the joint family property. The purchase price named in the sale deed was Rs. 84,257, the amount of incumbrances mentioned in the deed, which were valid incumbrances made before 1904, but the purchaser paid to the zamindar, really as part of the price, a further Rs. 25,000, knowing that he was dissipated and extravagant, and without inquiry as to how that sum would be applied. The fourteen villages were worth at least Rs. 1,10,000. The trial Judge set aside the sale conditionally on the plaintiff paying Rs. 85,000, the sum found to have been applied to the discharge of the incumbrances, with nine per cent simple interest. The High Court, without the consent of the parties, ordered an inquiry by the trial Judge, and, on his finding that the sale of nine villages would have realised the Rs. 85,000, made a decree setting aside the sale as to five villages only.

Held, that the High Court had not power to make the decree, as it made a new bargain between the parties; that the

*Present: Lord BLANESBURGH, Lord THANKERTON and Sir LANCELOT SANDERSON.

sale was invalid both under the Act and apart from it, and that the decree of the trial Judge was the fair and equitable decree to make.

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APPEAL and Cross-appeal (No. 7 of 1932) from a decree of the High Court (April 10, 1928) modifying the decree of the District Judge of West Tanjore (September 17, 1923).

The abovenamed respondents (appellants in the cross-appeal) instituted a suit against the abovenamed appellant (respondent in the cross-appeal) for a declaration that a sale in 1913 of fourteen villages, part of a zamindari in the Tanjore District, was invalid. The sale was by the late zamindar who died in 1914. The first plaintiff was his widow and the second, his adopted son. The zamindari was included in the schedule to the Madras Impartible Estates Act, 1904.

The District Judge set aside the sale subject to the payment of Rs. 85,000, which he found had been applied out of the purchase price to discharge valid incumbrances made before the above Act, with interest at nine per cent per annum.

Upon appeal the High Court (after an inquiry by the District Judge directed by the High Court) modified the decree by setting aside the sale as to five villages only, it having been found upon the inquiry that the sale of nine villages would have realised sufficient to discharge the incumbrances.

The facts and the material provisions of the abovementioned Act appear from the judgment of the Judicial Committee.

Sidney Smith for appellant.

Dunne K. C. and *Narasimham* for respondents.

The arguments were directed principally to the evidence. Reference was made to *Sri Krishan*

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Das v. Nathu Ram(1), *Niamat Rai v. Din Dayal*(2),
Suraj Bhan Singh v. Sah Chain Sukh(3) and *Ram*
Sunder Lal v. Lachhmi Narain(4).

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The JUDGMENT of their Lordships was delivered by LORD BLANESBURGH.—This is an appeal and a cross-appeal from a final judgment and decree dated the 10th April 1928, of the High Court of Judicature at Madras, modifying a judgment and a decree dated the 17th September 1923, of the District Judge of West Tanjore.

The appeals, like the suit out of which they proceed, are concerned with the validity of a sale to the appellant by the late Zamindar of Kollakottai of fourteen out of a total of seventeen villages comprising that zamindari. The facts, in detail somewhat complicated, can be summarised with comparative brevity.

The late Zamindar, Vija Ragunatha Tirumalai Dorai Raja, succeeded his father in the zamindari in 1891. He was then scarcely eighteen years of age. He was brought up and educated in Pudukkottai in the house of his maternal grandmother, the senior Rani. He died in 1914, leaving his widow, the first respondent, surviving him with authority to adopt a son.

By deed of adoption, dated the 31st May 1922, while the present suit was pending the widow adopted the second respondent as the son of her late husband.

This adoption deed was, in these proceedings, challenged by the appellant, both in the District Court and in the High Court, but it was upheld

by both the Courts, and its validity has not been further questioned before the Board. The right of the second respondent—co-plaintiff by amendment in the District Court—to question the validity of the impeached sale deed is now fully acknowledged.

Before going further, it is convenient to refer to the quality and character of the zamindari in question.

It is amongst the estates included in the schedule to the Madras Impartible Estates Act II of 1904, and, certainly since the commencement of that Act, the zamindari has been an impartible estate. Whether it had not always been such and inalienable by the custom of the family, the learned District Judge expressed himself unable, on the evidence before him, to decide. Their Lordships are in like case. The subject was not canvassed before them. They proceed, accordingly, upon the footing that it has not in this suit been established that the quality of impartibility attached to the estate prior to the commencement of the Act, sections 4 and 7 of which may not inconveniently be here detailed :

“ 4.(1) The proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent.”

This section is subject to section 7, which enacts that

“ this Act shall not affect alienations made or debts incurred before the coming into force of this Act.”

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(1) (1926) I.L.R. 49 All. 149; L.R. 54 I.A. 79.

(2) (1927) I.L.R. 8 Lah. 597; L.R. 54 I.A. 211.

(3) (1927) 53 M.L.J. 300 (P.C.). (4) (1929) I.L.R. 51 All. 430 (P.C.).

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In other words, these debts remain in a favoured position. The relevance of this fact in the present case will presently appear.

The history of the late Zamindar in relation to his estate was unfortunate. Very early in his career, two Nattukottai Chetties, S. A. Sellappa, and C. A. Nagappa, turned his extravagance and weakness to their own ends. On the 13th February 1896, in consideration of an advance of Rs. 80,000, the Zamindar executed in favour of these Chetties a usufructuary mortgage comprising his entire zamindari, with a trifling reservation. Under that deed, the mortgagees were empowered to take and remain in possession of the mortgaged property for a term of twenty-eight years, that is, until the 30th June 1924, paying to the Zamindar during that term a monthly allowance of Rs. 450 and no more. On the expiration of the term, but not before, the loan with all interest thereon, was to be deemed to be extinguished.

In January 1898, S. A. Nagappa Chetty assigned his interest in the usufructuary mortgage to Sellappa, who thereafter, on his own account, entered into further mortgage transactions with the Zamindar. On the 6th June 1898, he lent him a sum of Rs. 20,000 at twelve per cent per annum compound interest with annual rests secured by hypothecation as well of the land excluded from the usufructuary mortgage, as of the mortgagor's reversionary rights thereunder. On the 29th November 1900, he advanced to the Zamindar a further sum of Rs. 16,000 carrying the same rate of interest. The purpose of this advance by Sellappa was to enable the late Zamindar to discharge the interest to that date due to Sellappa

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himself on the hypothecation of the 6th June 1898, and some other debts of his. This advance was secured by the hypothecation of some property still possessed by the Zamindar, who, on the same day, executed another deed in favour of Sellappa, whereby he agreed to the deduction by him every month of Rs. 200 from the monthly allowance payable to the Zamindar under the usufructuary mortgage as already mentioned, and on the 26th February 1908, a further Rs. 100 of that monthly allowance was commuted for a payment of Rs. 6,600 by Sellappa's son.

The late Zamindar was still in early manhood when the latest of these incumbrances was created, and they may or may not tell their own tale. It is well to note, however, that in these proceedings their validity as against the estate is not in question, and all of them were created, as will have been seen, long prior to the passing of the Impartible Estates Act. They are therefore made the foundation and justification of the sale deed now sought to be impeached, and in these proceedings any question as to its validity must be determined on the footing, whether well-founded or not, that at its date these remained subsisting charges for the amounts still unpaid in respect of them. In these circumstances, it is doubtful whether the recklessness, extravagance and immorality of the late Zamindar, of which so much was made below, are directly relevant to any issue in this suit except that of the appellant's *bona fides* in carrying out as he did the purchase here in question. In that regard, the record of the Zamindar may have some bearing, because of the appellant's sworn statement that the weaknesses

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of the Zamindar were unknown to him, a statement which the learned District Judge did not believe. The appellant, he says,

"pretends ignorance of the ways of the late Zamindar. But it is idle to believe his statement because he lives in the Pudukottai State and the late Zamindar was a permanent resident in Pudukottai."

By 1913, the year of the transaction now impeached, the financial difficulties of the Zamindar had become grave; indeed, they had doubtless been becoming increasingly serious year by year. Practically his entire zamindari was the subject of the usufructuary mortgage with, in 1913, eleven and a half years of the mortgagee's possession still unexpired. His monthly allowance thereunder—always probably inadequate for his needs—had been greatly reduced, while the advances secured by the hypothecation of 1900 had by the accumulation of interest reached an amount almost portentous. It was with full knowledge of the position—their Lordships accept the finding of the learned District Judge on this point—that the appellant, "a shrewd, calculating money-lender", as the learned Judge describes him, became the purchaser under the sale deed now in question.

It is a cunningly phrased document, containing a record of the Zamindar's life in relation to his estates which is little better than a travesty of the real facts. The deed, too, is drawn so as, in the well authenticated opinion of the learned District Judge, to bring it within section 7 of the Impartible Estates Act already quoted. It is dated the 22nd January 1913. It recites the usufructuary mortgage, the hypothecation of the 6th June 1898, and the hypothecation of the 29th November 1900.

"These debts",
the Zamindar narrates,

"are old debts contracted by me and my ancestors for the benefit of the zamin."

It then recites that on the hypothecation of the 6th June 1898, the principal of Rs. 20,000 is still due; that the sum of Rs. 63,457-12-0, inclusive of principal and interest to date, remains owing on the hypothecation of the 29th November 1900; that the villages are in possession of the usufructuary mortgagee; that Rs. 300 of the monthly allowance of Rs. 450 is being credited towards interest on the hypothecation of the 6th June 1898; that on account of these, the narrative goes on:

"I feel difficulty in maintaining myself, and although I have been making great endeavours at great pains for the last two or three years to discharge the said debts and to redeem the said zamin or any portion thereof I have not found it possible, but the debts are increasing more and more. . . I am anxious to save at least a portion of the zamin without allowing it to be swallowed in its entirety by way of prudent management in respect of the said zamin."

And the operative clause, with omissions presently immaterial, is as follows:—

"9. Under these circumstances considering the interest, the present condition, future gain, prospects, etc., I having pressed you [the appellant] for the same . . . execute an absolute sale deed of the 14 villages out of the 17 villages of the said zamin . . . and the consideration received is Rs. 84,257-12-0. . . Rs. 29,000 by way of assignment to discharge the said Rs. 20,000 hypothecation bond . . . Rs. 63,457-12-0 by way of your being assigned to pay the principal and interest . . . of the aforesaid Rs. 16,000 hypothecation bond . . . Rs. 800 by way of your being assigned to pay to Sellappa towards the usufructuary mortgage deed for Rs. 1,400 executed solely by me . . . on the security of the Jeevitham lands of the said villages. As the sum of Rs. 84,257-12-0 has been received by me according

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to the three items above you may possess and enjoy the properties mentioned . . . from son to son . . . as long as the sun and moon last and according to the usual recitals in a sale deed."

The purchase price, it will be noted, was to the last pie needed to discharge the three debts unaffected by the Impartible Estates Act. Could it be that the value of the villages sold corresponded to the purchase price with the same meticulous exactness? A very natural scepticism on this point is, on inquiry, justified by the fact, to which no reference whatever is made in the sale deed, that on the same day the appellant paid to the Zamindar a further sum of Rs. 25,000. This payment was alleged and sworn by the appellant to be an independent transaction of loan to the Zamindar, but it has been held by both Courts in this suit, as well as in a previous suit in India against the appellant, to have been part of the purchase price. All reference to it, their Lordships cannot doubt, was deliberately and for interested reasons omitted from the sale deed.

There was a great conflict at the hearing as to the actual value of the properties sold; the learned District Judge being of opinion that, in possession, they were worth at least three and a half lakhs. It was enough for him, however, to hold, as he did, that in reversion, accepting for that purpose the opinion of the appellant himself, who paid that price for them, they were worth at least Rs. 1,10,000.

In these circumstances the learned Judge found that the sale was not valid beyond the lifetime of the late Zamindar, but, inasmuch as a sum which he fixed at Rs. 85,000 went to discharge incumbrances made prior to the passing of Act II

of 1904, held that the appellant ought to have paid to him Rs. 85,000 with simple interest at the rate of nine per cent per annum. And he passed a decree accordingly.

From that decree the appellant appealed to the High Court. Except that the learned Judges there were more impressed than had been the learned District Judge with the necessity for some sale of the property in 1913 by reason of the critical situation at that date, their findings of fact did not materially differ from those of the learned District Judge. With him they were satisfied that the Rs. 25,000 was not a loan to the Zamindar, but a part of the purchase price: the appellant's case that it was a loan was manifestly false. But on the question of value, being of opinion that Rs. 1,10,000 was as near the price as it was possible to get, and being impressed, as they obviously were, by the fact that in 1913 some sale of the estates was essential if all was not to be soon lost, the learned Judges on the 16th November 1926 remanded the case to the District Court for a finding as to how many of the fourteen villages, if sold, would have properly fetched the price of Rs. 85,000 in 1913, taking their total value to be Rs. 1,10,000 and bearing in mind that the price to be taken was the price of the property burdened by the usufructuary mortgage with over eleven years still to run. The District Judge was also to find what villages ought to be included to make up the Rs. 85,000 paid by the appellant. A decree would then be given by the High Court, declaring the sale of these villages to the appellant to be valid and binding on the estate.

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This remand by the learned Judges was made without consent asked for or given by the parties or either of them—the valuation of the properties at Rs. 1,10,000 being specially objected to by the respondents as inadequate. Both parties now repudiate its order of remand as one beyond the power of the Court. On the remand, the learned District Judge appointed a commissioner to inspect and take evidence of the value of the villages and report thereon. After forty sittings and the examination of twenty witnesses, the commissioner on the 15th July 1927 made a return reporting that the sale of nine villages would be sufficient, and giving alternative lists of five villages which in his opinion might be excluded from the sale. On the 1st of August 1927 the District Judge accepted the finding of the commissioner and found that the villages to be sold ought to be determined by giving the respondents the choice between the alternative lists of villages which the commissioner had suggested might be excluded.

The High Court, on this return, delivered their final judgment on the 10th April 1928, awarding to the respondents the first group of five villages, and a formal decree to that effect was made from which both parties now appeal: the appellant claiming that the suit against him be dismissed; the respondents asking that the order and decree of the District Judge be restored.

Their Lordships, accepting on this point the views of both sides, are of opinion that the remand made by the High Court and the order following upon the report of the District Judge were beyond the competence of the High Court. That Court had no jurisdiction to make a new

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bargain between the parties to the sale, to split the parcels, and to compel the appellant to accept nine villages arbitrarily assigned to him for Rs. 85,000 or any other sum. In their Lordships' judgment the order of the High Court cannot stand. The very limited powers of the Court in such matters are defined in the decision of the Board in *Ram Sunder Lal v. Lachhmi Narain*(1).

On the final question thus brought into issue, interesting points were raised with reference to the true effect of the Act of 1904, but with these their Lordships do not deem it necessary to deal in this case. In the view which they take of its facts, they think it clear that, whether under or apart from the Act, the deed of sale is one which, as against the respondents, cannot be allowed to stand. If the appellant is held bound to the assertion of the deed that the purchase price thereunder was Rs. 84,000 odd and no more, then the fourteen villages were sold at a gross under-value: if, on the other hand, the sale was for a price of approximately Rs. 1,10,000, then properties of a value of at the very least Rs. 25,000 in excess of the limit required by necessity were included in the sale. But beyond and above these considerations, the deed was not one to which, upon the facts, any judicial favour can be extended. It was tricky and misleading: craftily framed so as by a mis-statement of the purchase price actually paid to make it appear to be regular and warranted by the Act. It was so expressed as to enable the late Zamindar, without disclosure of the fact, to receive and squander, if so minded, a sum of Rs. 25,000 in excess of his legitimate necessities.

(1) (1929) I.L.R. 51 All. 430 (P.C.).

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The appellant either knew, or was careful not to inquire, how that sum was to be applied, and their Lordships cannot doubt that he was fully aware of, to say the least, the possibility that, in whole or in part, it would be squandered in dissipation, or some other non-family purpose, as in fact it appears to have been. In such circumstances, the sale deed cannot stand, and the only remaining point to be settled is the adjustment of the equities resulting from its cancellation.

These must not, in this case, exceed the limits set by law; they would cease to be equities if they did. The learned District Judge, in making it a condition of his order setting aside the sale that the respondents should pay to the appellant his Rs. 85,000, with simple interest at the rate of nine per cent per annum, has, their Lordships think, done justice between the parties. They will go no further.

Accordingly, in their judgment, the appeal should be dismissed: and the cross-appeal allowed, the judgment and decree of the High Court being discharged and the judgment and decree of the District Judge restored. And their Lordships will humbly advise His Majesty accordingly.

The main appellant must pay to the respondents their costs of the appeal to the High Court and of these appeals, with the exception of the costs of the order of remand of the High Court of the 16th November 1926 and of the proceedings thereon. These costs were incurred by the parties under a common misfortune. It seems just that they should each bear their own, any payment made in respect of them by one party to the other being refunded.

Solicitors for defendant—appellant: *Douglas Grant and Dold.*

Solicitors for plaintiffs—respondents: *Hy. S. L. Polak & Co.*

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INCOME-TAX REFERENCE.

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

RAO BAHADUR MOTHAY GANGARAJU GARU,
PETITIONER,

1934,
December 4.

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

*Indian Income-tax Act (XI of 1922), sec. 10—Trade or business
—Legacies subject of litigation—Purchase of interest in—
Trade or business if.*

By itself the purchase of an interest in legacies, the subject of litigation, cannot be described as a trade or business.

Where the purchase in Court auction by an assessee of an interest in legacies, the subject of litigation, was an isolated transaction in no way connected with any other trade or business activities of the assessee,

held that the purchase could not be said to be an adventure or concern in the nature of trade and that the profit made by the assessee out of the purchase was not assessable to income-tax.

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

Government Pleader (P. Venkataramana Rao)
for V. S. Narasimhachari for petitioner.

* Original Petition No. 159 of 1932.

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M. Patanjali Sastri for Commissioner of
Income-tax.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—The question referred to us is :

“Whether the sum of Rs. 1,50,399 is assessable to tax.”

The facts of the case are that the assessee, who is a landowner and a money-lender and has an interest in certain cotton mills, purchased on 22nd March 1926 in Court auction in Original Suit No. 24 of 1925 on the file of the Sub-Judge, Bezwada, the right, title and interest of one Parthasarathi Appa Rao in the legacies left by one Venkayamma. The suit in which these legacies figured had been up to the Privy Council and the position at the time of the purchase was that the decision upholding Venkayamma's disposing power over the income of the estate and the dispositions made by her in her will had been upheld. The petitioner gave as purchase-money Rs. 39,800. He was not able to realise his interest until 1929. There was somewhat protracted litigation in between the date of the purchase and the date when he was able to get his money ; and he had to take steps both by way of defending his position and of executing the decree which he had got in his favour and incurred a certain amount of law costs in doing so. However, eventually, during the year of account he actually realised a sum of Rs. 1,97,025 from the reversioners of the estate in question towards the amount due to him under the decree. He had also spent Rs. 46,625-15-0, Rs. 39,800 in respect of the purchase and Rs. 6,825-15-0 in respect of the further litigation to which reference has been made. Deducting that sum of Rs. 46,625-15-0 from the

amount realised by him, there was left a sum of Rs. 1,50,399 which was treated as an excess receipt ; and it was this sum which the Income-tax Officer held to be assessable to income-tax ; and the assessment has been upheld by the Commissioner of Income-tax. In this way the matter comes before us.

It is contended by Mr. Patanjali Sastri that although this was an isolated transaction—as indeed it was and there is certainly no evidence of the assessee ever having entered into a transaction of a similar nature either before the date of this or after it—nevertheless this was an adventure or concern in the nature of trade. He argues that it was a speculation, that a very low price was given in comparison to the amount subsequently realised and that in that speculation the capital of the assessee was embarked. In our view, this cannot be described as an adventure or concern in the nature of trade. The trading activities of the assessee were limited to lending money, owning land, if that can be called a trade, and having an interest in cotton mills ; and this is in no sense a transaction related to any of those activities. In this case the interest in the legacies was not even purchased from anybody who was indebted to the assessee in his money-lending business. It was an isolated transaction, although probably entered into by him as a speculation, as he happened to make a good profit out of it. We are quite unable to see that it has any connection whatever with any other trades or businesses carried on by the assessee. By itself the purchase of an interest in legacies, the subject of litigation, cannot certainly be described as a trade or business. Reference

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has been made to the case of *Rutledge v. The Commissioners of Inland Revenue*(1) by Mr. Patanjali Sastri in support of his argument. In that case the appellant was a money-lender who was also in 1920 interested in a cinema company. He had since that time been interested in various businesses. Being in Berlin in 1920 on business connected with the cinema company he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and within a short time after his return to England sold the whole consignment to one person at a considerable profit, and it was held that the profits in question were liable to assessment to income-tax and to excess profits duty as being profits of an adventure in the nature of trade. The facts of that case are quite dissimilar to those here. There, what was purchased was a quantity of toilet paper and it was a very large quantity, not a quantity which an ordinary person would buy for private use. It was of such a large quantity as clearly to make it a business transaction; and obviously the intention with which this large quantity was bought at an exceedingly low price was with the object of selling it later on at a favourable opportunity at an enhanced price and getting the benefit of the profit therefrom. This is quite clear, I think, from the judgment of Lord SANDS who says on page 497 :

"The nature and quantity of the subject dealt with exclude the suggestion that it would have been disposed of otherwise than as a trade transaction. Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use."

(1) (1929) 14 T.C. 490.

The view we take of the matter is that that case is certainly of no assistance to us and that, with regard to this case, this was an isolated transaction in no way connected with any other trade or business activities of the assessee. That being so, we are unable to hold that it was an adventure in the nature of trade and, if that is so, then the sum in question clearly was not assessable to income-tax. The question referred to us must, therefore, be answered in the negative. Costs Rs. 250 to the assessee.

RAMESAM J.—I agree.

KING J.—I agree.

A.S.V

INCOME-TAX REFERENCE.

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

N. A. S. V. VENKATACHALAM CHETTIAR,
PETITIONER,

1934,
December 4.

v.

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

Indian Income-tax Act (XI of 1922), sec. 48—Refund of income-tax under—Order of Income-tax Officer refusing—Order of Commissioner under sec. 33 refusing to interfere with—Application under sec. 66 (2) in case of—Competency of—Specific Relief Act (I of 1877), sec. 45—Remedy under—Availability of.

An application by the petitioner to the Income-tax Officer for a refund of income-tax under section 48 of the Indian

* Original Petition No. 128 of 1934.

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Income-tax Act was refused and in review the Commissioner of Income-tax, by an order made under section 33 of the Act, refused to interfere with the order of the Income-tax Officer.

Held that, as the order of the Commissioner was not one enhancing the assessment or otherwise prejudicial to the petitioner, an application by him to the Commissioner under section 66 (2) of the Act was incompetent.

Held further that the remedy under section 45 of the Specific Relief Act was not open to the petitioner because a remedy was provided by section 50 (a) (1) of the Amended Act.

R. Kesava Ayyangar for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

PETITION under section 66 (3) of the Indian Income-tax Act (XI of 1922) and section 45 of the Specific Relief Act (I of 1877).

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This is a petition under section 66 (3) of the Indian Income-tax Act as amended. The petitioner applied to the Income-tax Officer for a refund of income-tax under section 48 of the Act. This application was refused. The petitioner then got the Commissioner of Income-tax to take the matter up in review under section 33, and in review the Commissioner refused to interfere with the order of refusal of the Income-tax Officer. It is common ground that the order made by the Commissioner was one under section 33. The petitioner then required the Commissioner of Income-tax to refer the matter which he suggested was a question of law to the High Court under section 66 (2) of the Income-tax Act. The Commissioner took the view that that

application to him under section 66 (2) was incompetent because his order under section 33 was not one enhancing the assessment or otherwise prejudicial to the applicant (the assessee). Section 66 (2) which contains an amendment affecting this question reads as follows:—

“Within sixty days of the date on which he is served with notice of an order under section 31 or section 32 or of an order under section 33 enhancing an assessment or otherwise prejudicial to him . . . the assessee in respect of whom the order or decision was passed may by application . . . require the Commissioner to refer to the High Court any question of law arising out of such order”

The view taken by the Commissioner is that his order is not one which comes within the words “otherwise prejudicial to him (the assessee)”. With that view we entirely agree. What section 33 clearly contemplates is an order made by the Commissioner which alters the position of an assessee or an applicant to that person's prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income-tax Officer to grant him the refund which he required. The Commissioner's order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is, the date of the Commissioner's order, was altered by that order to one of prejudice to him. That being so, he could not apply under section 66 (2) to the Income-tax Commissioner, no order to his prejudice having been passed. He, however, alternatively now asks that the matter may be dealt with under section 45 of the Specific Relief Act. This remedy is clearly not open to

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him because a remedy is provided by section 50A (1) of the amended Act (XVIII of 1933). That provides that

“any person objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48 or 48A or 49 or to the amount of the refund made in any such case, may appeal to the Assistant Commissioner.”

That provision was in force at the time when the order of the Income-tax Officer in this case refusing a refund was made and that was the assessee's remedy and, having that remedy open to him, he did not avail himself of it. Section 45 of the Specific Relief Act cannot, therefore, be invoked to the relief of the petitioner here.

For these reasons, the petition must be dismissed with costs Rs. 150 to the Commissioner of Income-tax.

RAMESAM J.—I agree.

KING J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Stone.

MINOR MUNUSWAMI MUDALIAR AND TWO OTHERS
(PLAINTIFFS), APPELLANTS,

1934,
September 13.

v.

GOVINDARAJA CHETTIAR AND ANOTHER (DEFENDANTS
4 AND 5), RESPONDENTS.*

Release—Oral—Part of mortgaged property by mortgagee in favour of intending purchaser who is a stranger to the mortgage—Validity of—Admissibility in evidence of such oral release—Indian Evidence Act (I of 1872), sec. 92 (4)—Indian Registration Act (XVI of 1908), sec. 17 (2) (xi).

An oral release of a part of the mortgaged property by a mortgagee in favour of an intending purchaser, who is a stranger to the mortgage, is valid.

Semle: It may be that this result cannot be arrived at if the agreement of release is after the purchase, for, in such a case, the purchaser would be a representative of the mortgagor.

APPEAL against the decree of the Court of the Subordinate Judge of Chingleput, dated 4th February 1928, in Original Suit No. 46 of 1925.

N. Muthuswami Ayyar and *N. S. Sundaram* for first appellant.

P. S. Ramaswami Ayyar for *P. S. Ramaswami Ayyangar* for second and third appellants.

T. M. Krishnaswami Ayyar for respondents.

The JUDGMENT of the Court was delivered by RAMESAM J.—The facts out of which this appeal arises are as follows:—The first defendant executed a deed of mortgage (Exhibit A), dated 30th October 1913, for Rs. 3,515 and odd in favour of

* Appeal No. 89 of 1929.

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Subbaraya Mudaliar and Ekambara Mudaliar. The two mortgagees afterwards died, each leaving a minor son. The mortgagor afterwards sold half of the mortgaged property to the fourth defendant under Exhibit I, dated 27th March 1916. The amount of consideration for sale was paid to the mortgagees. The suit is now brought for the balance due on the mortgage. But the property sold under Exhibit I is also sought to be sold along with the other property. The fourth defendant in his statement pleaded that some time before the sale he and the first defendant went to the sons of the original mortgagees, who were at that time minors represented by mothers as their guardians, and offered to pay them half the mortgage amount then due to them in consideration of their accepting it in full satisfaction of their claim against the properties intended to be purchased by him. The mortgagees agreed not to proceed against the property sold if the consideration was duly paid to them. Accordingly, the property was purchased under Exhibit I and the consideration amount was paid to the mortgagees. A receipt was also taken which is Exhibit II, dated 7th November 1916. The fourth defendant therefore contended that the property purchased by him under Exhibit I had been released from the mortgage.

In the Court below a question arose as to whether Exhibit II was admissible in evidence. The learned Subordinate Judge who tried the case held that it was admissible under section 17(2) (xi) of the Registration Act and therefore dismissed the plaintiff's suit so far as the property purchased under Exhibit I is concerned. He gave a decree against the rest of the property. The

plaintiff appeals seeking to make the property purchased by the fourth defendant also liable.

In so far as Exhibit II is a receipt, no doubt it is admissible in evidence. But there are certain parts of the document which show that it is something more than a mere receipt. It says :

“ Rs. 1,900 has been received by us, we have released only the lands purchased by you from our mortgage deed.”

In so far as this portion of it is concerned, it is also a release and, from this point of view, the document is not admissible in evidence. But apart from Exhibit II we have got the oral evidence of defendants' first and second witnesses. According to defendants' second witness, some time before the sale deed the purchaser and the first defendant, with the help of an intermediary, Thangavelu, went to the mortgagees and the mortgagees promised them to release half of the property if the purchaser paid the price into the hands of the mortgagees. The payment was to be made partly in discharge of the mortgage amount and Rs. 625 in discharge of another unsecured debt due by the mortgagor to the mortgagees. We think this evidence shows that there was a binding contract between the parties, the effect of the contract being that, if the purchaser paid down the amount to the mortgagees, they should give him a release. Afterwards, when the amount was paid, the mortgagees accepted the amount and at the time of the acceptance they did not show by their conduct that they wished to resile or go behind the contract already made. The only meaning that could be attributed to the acceptance of the amount is that they thereby released the property from the mortgage. If

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according to law the release of a part of the mortgaged property from the mortgage requires to be in writing and registered, then this will not be enough. But if this is enough to amount to a complete release, we do not see any reason why the conduct of the mortgagees does not amount to a complete release. It has been held by KRISHNAN J in Second Appeal No. 797 of 1921 that there is no law in India whereby a release of mortgage should be in writing and registered. If there is a contract of release between a mortgagor and a mortgagee, it may be that under section 92 (4) of the Evidence Act it should be in writing, and then it should also be registered under the Registration Act. But where the contract to release is not between a mortgagor and a mortgagee but between a mortgagee and a stranger as in this case, neither the Transfer of Property Act nor the Evidence Act applies, but the decision of KRISHNAN J. applies; that is, there may be an oral release of the property purchased from the mortgagee. It may be that this result cannot be arrived at if the agreement of release is after the purchase, for, in such a case, the purchaser would be a representative of the mortgagor. But in the present case the contract to release half of the property was prior to Exhibit I. In such a case there is no legal difficulty in the way of holding that there can be an oral release of part of the mortgaged property. Accordingly, we hold that in this case with the acceptance of the purchase-money there is a complete release under Exhibit I and the plaintiff is not entitled to seek a decree for sale as against the property sold. The appeal is therefore dismissed with costs. As the first appellant is a

minor, he will not be personally liable but only his estate will be liable.

The lower Court disallowed costs to defendants 4 and 5. In the view we have taken we do not see any reason why they should be deprived of their costs. The memorandum of objections is allowed but there will be no order as to costs on the memorandum of objections.

G.R.

APPELLATE CIVIL.

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

KOTTAPALLI LAKSHMINARAYANA, MINOR BY MOTHER
AND GUARDIAN RAJALAKSHMAMMA (SECOND RESPONDENT),
APPELLANT,

1934,
September 20.

v.

KANUPARTI HANUMANTHA RAO (SECOND PETITIONER),
RESPONDENT.*

Hindu Law—Joint family—Father—Surety debt of—Son's liability for—Guarantee "for confidence" or "for honesty"—Guarantee that a judgment-debtor will file an insolvency petition, if a—Son's liability in case of.

A Hindu father executed a surety bond undertaking that a judgment-debtor would file an insolvency petition within a specified period. The insolvency petition was not filed and the father died. On a question arising whether his sons were liable on that bond,

held that the guarantee that the judgment-debtor would file an insolvency petition was a guarantee "for confidence" or "for honesty" and that the sons were not liable on the bond.

APPEAL under Clause 15 of the Letters Patent against the judgment and order of PAKENHAM WALSH J., dated 31st March 1933 and made in

* Letters Patent Appeal No. 72 of 1933.

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LAKSHMI-
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Appeal against Appellate Order No. 127 of 1929 preferred to the High Court against the order of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 19 of 1928 (Execution Petition No. 480 of 1926 in Original Suit No. 86 of 1916, District Munsif's Court, Bapatla).

K. Bhimasankaran for appellant.

K. Kameswara Rao for respondent.

Cur. adv. vult.

KING J. The JUDGMENT of the Court was delivered by KING J.—The question in this appeal is a simple one, viz., whether the sons of one Kothapalli Venkata Subbayya who executed a security bond in 1919 and is now dead are liable on that bond. By the terms of the bond the surety undertook that a judgment-debtor would file an insolvency petition within one month, and the insolvency petition was not filed. The District Munsif of Bapatla held that the sons were liable. The Additional Sub-Judge of Bapatla held that they were not, and in second appeal PAKENHAM WALSH J. restored the decree of the District Munsif.

It is common ground at the hearing before us and was fully recognised in the judgment of PAKENHAM WALSH J. that the question of the sons' liability must first be determined with reference to the classification of suretyship debts in the ancient texts. Four kinds of such debts are distinguished—(i) for appearance, (ii) for confidence or for honesty, (iii) for payment of money and (iv) for delivery of assets. PAKENHAM WALSH J. holds that the guarantee that the judgment-debtor will file an insolvency petition falls under none of

these four heads, and then proceeds to conclude that the sons are liable on the principle of pious obligation since this debt is neither illegal nor immoral.

With all respect to the judgment of the learned Judge, we find it very difficult to appreciate his reasons for differing from the Sub-Judge. They are contained in one simple sentence :

"It seems to me that it is stretching language very widely to say that 'this man will file an insolvency petition' is the same as saying he is a respectable man."

On the other hand it seems to us beyond all argument that what the surety says in his bond in effect is this :

"The judgment-debtor says he will file an insolvency petition. I know him. He is an honest man who will carry out his promise, and the Court can have confidence in his doing so."

If this is not a guarantee "for confidence" or "for honesty", then those words can have no intelligible meaning. The learned Judge relies on no reported case nor is any authority cited before us to confine the meaning of these words to a guarantee that a man is a man of wealth and standing ; and the phrase "he is a respectable man", which is taken from Max Muller's Sacred Books of the East, is obviously not meant to be restrictive or exhaustive but is clearly only a paraphrase of the statement : "He is an honest man in whom so far as the matter guaranteed is concerned you may have confidence."

We are accordingly of opinion that this appeal must be allowed with costs here and in second appeal, and the decree of the Sub-Judge be restored.

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APPELLATE CIVIL.

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

K. P. RAMAN MENON (PLAINTIFF), APPELLANT,

v.

THE MALABAR FOREST AND RUBBER COMPANY,
LIMITED, IN LIQUIDATION NOW REPRESENTED BY H. H.
WADIA, ESQ., AND ANOTHER (DEPENDANTS), RESPONDENTS.*

Lease—Forfeiture and re-entry—Insolvency of lessee—Forfeiture and re-entry on—Clause providing for—Construction of—Lessee benamidar for another—Insolvency of benamidar lessee or of real lessee for whom he is benamidar intended, in case of.

The material part of the forfeiture clause in a lease deed was as follows:—

“Or if the lessee becomes bankrupt the lessee’s rights shall *ipso facto* cease and this shall be void and the lessor shall have the right to re-enter and take possession of the said premises as if this lease were non-existent and without the lessee being entitled to claim damages or compensation of any kind from the lessor.”

The person named in the deed as lessee was only a benamidar for a registered company. On a petition presented by the managing agents of the company to whom the lessee named in the lease deed had assigned his rights under the lease the company was ordered to be compulsorily wound up. The question was whether there had been a forfeiture of the lease giving the lessor the right of re-entry.

Held that the proviso as to forfeiture and re-entry was intended to apply to the insolvency of the benamidar, that is the person named in the deed as lessee, and not to the contingency of the company going into liquidation and that there had therefore been no forfeiture of the lease giving the lessor the right of re-entry.

* Second Appeal No. 689 of 1930.

APPEAL against the decree of the District Court of South Malabar at Calicut in Appeal No. 443 of 1928 preferred against the decree of the Court of the District Munsif of Calicut in Original Suit No. 220 of 1927.

T. R. Venkatarama Sastri for Advocate-General (Sir A. Krishnaswami Ayyar) and *N. Rajagopala Ayyangar* for appellant.

V. K. John for second respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The plaintiff is the appellant. His suit was dismissed in the trial Court and his appeal to the District Court was also dismissed.

The appellant by Exhibit E, a lease deed, dated 4th February 1924, leased the suit properties to one Nilkanath Narayan Khale for a term of seventy-five years. It was admitted during the trial and in the lower appellate Court and here that Khale was a benamidar for the Malabar Forest and Rubber Company, Limited. The High Court of Bombay on 8th July 1926 made an order for the compulsory winding up of that company on a petition, dated 12th May 1926, presented by Messrs. Sabnis & Co., the managing agents of the company to whom Khale had assigned his rights under the lease, and a Mr. Moos was appointed the Official Liquidator of the company and represents them here as the first respondent.

The point for consideration is whether there has been a forfeiture of the lease giving the appellant the right of re-entry as claimed by him. Both the lower Courts, upon a consideration of

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Exhibit E, have negated the appellant's claim. The material part of the forfeiture clause in Exhibit E reads as follows :—

“Or if the lessee becomes bankrupt the lessee's rights shall *ipso facto* cease and this shall be void and the lessor shall have the right to re-enter and take possession of the said premises as if this lease were non-existent and without the lessee being entitled to claim damages or compensation of any kind from the lessor.”

The appellant claims that by reason of this clause the company by going into liquidation has forfeited the lease. The appellant contends that the words “lessee becomes bankrupt” mean and are intended to mean, as regards the word “lessee”, the company and, as regards the word “bankrupt”, its being ordered to be wound up by the Court. It is argued that the parties to Exhibit E regarded the company as the lessee and not Khale who admittedly was merely the benamidar for the company, that the contract really was with the company and not with Khale, and that it was the company's going into liquidation and not the insolvency of Khale that was to incur the forfeiture and give the appellant the right of re-entry.

It is the admittedly *benami* character of the transaction which enables the appellant to set up the first position, namely, that the company is the lessee. If that position should be established, it is contended next that the word “bankrupt” there must be given an artificial and extended meaning which embraces the compulsory or even voluntary winding up of the company, and English decisions have been cited in support of this contention. In the Conveyancing and Law of Property

Act, 1881, in section 2 (xv) “Bankruptcy” is defined as follows :—

“Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy.”

Section 14 deals with provisos for re-entry or forfeiture and relief against forfeiture of leases but sub-section (6) of that section expressly does not extend the provision as to relief to a condition for forfeiture on the bankruptcy of the lessee. The Act therefore grants no relief where there is a condition for forfeiture on bankruptcy as defined in section 2 (xv). According to Lord HALSBURY L.C. in *Fryer v. Ewart*(1), “Bankruptcy” as defined in section 2 (xv) of the Conveyancing and Law of Property Act, 1881, has an artificial and extended meaning and includes the winding up of companies. In that case there was a proviso in the lease for re-entry if the lessees being a company should enter into liquidation either compulsory or voluntary and it was held that such a proviso applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only, and is “a condition for forfeiture on the bankruptcy of the lessee” within the Conveyancing and Law of Property Act, 1881, section 14 (6). On page 190, there are Lord HALSBURY'S conclusions upon this point and I set them out at length because the appellant has adopted them here in support of his argument. They are as follows :—

“The other point to my mind is equally plain. It is, speaking broadly, whether the Code concerning forfeiture

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contained in section 14 of 44 and 45 Vict. c. 41 has any application at all to the forfeiture which, as I have said, was very plainly incurred by the liquidation. That depends on what interpretation is to be given to the words of sub-section 6 of the Code in question. By that sub-section it is expressly enacted that the section, which, as I have said, embraces a Code for relief against forfeiture, is not to extend to a condition of forfeiture upon the 'bankruptcy' of the lessee. Of course, but for the artificial and extended meaning given to the word 'bankruptcy' this would not be such a condition; but it seems to me, when one reads that extended meaning given to the word 'bankruptcy', I cannot doubt that liquidation by a company comes within it."

"The words in section 2 sub-section (xv) are these: 'Bankruptcy includes liquidation by arrangement' (which I think does not refer to the liquidation by a company in this sense). But then come the words, 'and any other act or proceeding in law, having, under any Act for the time being in force, effects or results similar to those of bankruptcy'. What could be more apt to describe the *cessio bonorum*, which in effect takes place, and the payment by some constituted authority of the creditors of the trading concern and the distribution of its surplus property to its members, so that, but for the purpose of winding up, it ceases to exist as a trading concern at all? This was decided in 1899 by the Court of Appeal and I think rightly decided; and, if so, we are remitted to the first point whether a forfeiture has been incurred."

Lord MACNAGHTEN on page 192 arrives at the same result. Clearly therefore the English Companies Act provides for proceedings having "effects or results similar to those of bankruptcy" and the Indian Companies Act has also the same result. In *Horsey Estate, Limited v. Steiger*(1) it was held that the causes of the liquidation, whether induced by insolvency or not, are wholly immaterial. This latter decision is relied upon by the appellant because from the record it is uncertain which of the reasons in the Indian

(1) (1899) 2 Q.B. 79.

Companies Act for asking for a winding up brought about the company's liquidation. It is contended, therefore, that since the word "bankruptcy" which is the one used in the forfeiture clause in Exhibit E is not an apt one to use in connection with a company, as petitions in insolvency cannot be presented against registered companies, the extended meaning given to the definition of "bankruptcy" in section 2(xv) of the Conveyancing and Law of Property Act, 1881, by Lord HALSBURY L.C. in *Fryer v. Ewart* (1) must be applied to this word here and with it all the legal consequences which result therefrom by reason of that Act. There is much force in this argument presented to us, but it will not be necessary for us to express any opinion with regard to it unless we are satisfied that the lessor had in mind at the date of Exhibit E the possibility of the company going into liquidation and intended to guard himself against such a contingency. It is true that this was a *benami* lease but it does not necessarily follow from that that the proviso as to forfeiture and re-entry was not intended to apply to the insolvency of the benamidar. On the contrary, there is one good reason why it should have been intended to apply to him and that is that, in the event of his insolvency, in the absence of such a proviso, the rights of the insolvent under the lease would vest in the Official Receiver who would not be entitled to disclaim that interest without the leave of the Court and who could, if he so desired, affirm the lease and attempt to take all the benefits following from it. I do not suggest that it would not be open to the lessor to

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claim in the Insolvency Court that the insolvent was only the benamidar for the real lessee and that the Court would not then enquire into the matter. All this trouble, however, is avoided by a proviso for forfeiture and re-entry in the event of an insolvency. It is certainly quite reasonable to suppose that such may have been the appellant's intention and, where, in a lease even admittedly *benami*, there are in the lease deed such words as there are here in the clause in question, in my view, we are not justified in giving to those words any other meaning than on the face of them they have, without some strong indication in the document to the contrary and this I am quite unable to discover. The principle governing the construction of a clause for forfeiture is that it must always be construed strictly as against the person who is trying to take advantage of it and effect should be given to it only so far as it is rendered absolutely necessary to do so by the wording of the clause; [vide *Venkataramana Bhatta v. Krishna Bhatta*(1) and *David Cutinha v. Salvadora Minazes*(2), the latter of which cases relies on the English case of *Church v. Brown*(3) and the observations of Lord ELDON L.C. at page 265]. Applying that principle here I am clearly of the opinion that this appeal must fail and be dismissed with costs.

KING J.—I agree.

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(1) (1924) 47 M.L.J. 307.

(2) (1926) 51 M.L.J. 552.

(3) (1808) 15 Ves. Jun. 258; 33 E.R. 752.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

ANNAMALAI MUDALIAR (PLAINTIFF), PETITIONER,

v.

KRISTAPPA MUDALIAR AND SIX OTHERS (DEFENDANTS),
RESPONDENTS.*

1934,
September 28.

Court Fees Act (VII of 1870), sec. 7 (iv) (b)—Partition suit by coparcener in possession of joint family property governed by—Prayer for declaration that sales in discharge of father's debts are not binding—Art. 17-A (i) of Schedule II (Madras Act V of 1922)—Whether governs such a prayer.

Section 7 (iv) (b) of the Court Fees Act (VII of 1870) applies to a suit for partition of joint family property by a coparcener in possession and under that section the valuation of the relief rests with the plaintiff.

Where, in such a suit, the plaintiff prayed also for a declaration that certain sales made by the Official Receiver for discharging debts of the plaintiff's father, who had become an insolvent, were not binding upon the plaintiff and that they should be set aside,

Held, that, in regard to that relief, court-fee was payable on the basis that it was governed by article 17-A (i) of Schedule II to the Court Fees Act.

The sales attacked being virtually those by an undivided father, it was not obligatory upon the plaintiff to get them set aside, and it would be sufficient to obtain a mere declaration that they were invalid. Section 7 (iv-A) of the Court Fees Act was therefore inapplicable.

The Secretary of State for India in Council v. Lakhanna, (1932) 64 M.L.J. 24, followed.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of North Arcot, dated 22nd December 1930 and made in Appeal Suit No. Nil

* Civil Revision Petition No. 696 of 1931.

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KRISTAPPA. of 1930 (Receipt No. 2315 dated 25th November 1930).

M. Patanjali Sastri for petitioner.

P. V. Rajamannar for *Government Pleader*
(*P. Venkataramana Rao*) on behalf of Government.

JUDGMENT.

The suit as framed is one for partition of the joint family property by a coparcener in possession and, that being so, the provision of the Court Fees Act that applies is section 7 (iv) (b), which reads thus :

“To enforce the right to share in any property on the ground that it is joint family property.”

Rangiah Chetty v. Subramania Chetty(1). The valuation of the relief under that section rests with the plaintiff, who has valued it at Rs. 10, and I must hold that the proper court-fee has been paid in respect of this relief. There is no allegation in the plaint that the plaintiff became divided in status, and there is nothing to show in what circumstances he was allowed to put forward such a case at the trial. It is suggested that probably at the framing of the issues, on the statements made by the party or his Counsel, an issue was raised as to whether there was a division in status. With this I am not concerned and I do not propose to consider whether the plaintiff should have been allowed to put forward a different case without amending his plaint. If the claim is to be treated as by a divided member, Mr. Rajamannar contends that not only would the court-fee payable be different (he argues that article 17-B of Schedule II would then apply) but that even a question of

jurisdiction would arise. As I have said, all that I am now concerned with is, what is the proper court-fee payable on the plaint as it stands? I wish to make it quite clear that that is the only question with which I can now deal.

There is a further relief prayed for in the plaint, namely, that certain alienations made by the Official Receiver should be set aside. The plaintiff alleges that his father, the first defendant, became insolvent, that the latter's debts are not binding upon his share and that therefore he is not bound by the sales made by the Official Receiver, the seventh defendant. On that ground he prays for a declaration that the sales are not binding, and further that they may be set aside. Mr. Rajamannar contends that it is obligatory upon the plaintiff to get the sales set aside and, that being so, section 7 (iv-A) applies. It reads thus :—

“In a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value, according to the value of the subject-matter of the suit.”

The case on which he relies, *Doraisami v. Thangavelu*(1), decided by me, relates to a transaction by a guardian of a minor, whereas the present suit is altogether of a different kind, the sale attacked being virtually that by an undivided Hindu father. It has been held by a Bench of this Court, of which I was a member, in *The Secretary of State for India in Council v. Lakshanna*(2) that, in the case of an alienation by the father, it is sufficient to obtain a mere declaration that it is not binding and the article that was held applicable in respect of such a relief is 17-A (i) of

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(1) (1910) 21 M.L.J. 21 (F.B.).

(1) A.I.R. 1929 Mad. 668.

(2) (1932) 64 M.L.J. 24.

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Schedule II, the one relating to the obtaining of a declaratory decree where no consequential relief is prayed. By that decision of the Bench I am bound, but a distinction, it is urged, exists between that case and the present one. There, all that appears from the report is that the mortgage was effected by the father ; in such a case it is for the creditor to make out that the alienation is binding upon the son. In the present case, however, the sale was made for paying off the father's antecedent debts and such a sale is binding upon the son, unless he affirmatively proves that the debts are either illegal or immoral. It is contended that on that ground the sale in the case in hand is *prima facie* good and therefore it is the son's duty to have it set aside. I do not think it would be right to import such a distinction in deciding a question of court fee—a distinction based upon the onus of proof. I therefore hold that, in regard to this relief, the plaintiff should be called upon to pay a court fee on the basis that it is governed by article 17-A (i) of Schedule II as already stated.

The case will go back to the lower appellate Court for being dealt with according to law. I make no order as to costs.

K.W.R.

APPELLATE CIVIL.

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

SOORA RAMAKRISHNAMMA (FIRST PLAINTIFF),
APPELLANT,

1934,
September 28.

v.

PASUMARTHI VENKATASUBBIAH AND SEVENTEEN
OTHERS (DEFENDANTS 1 TO 17 AND SECOND PLAINTIFF),
RESPONDENTS.*

*Service inam—Dasabandham service inam—Execution sale of—
Validity of.*

Lands burdened with a dasabandham service, which is a service of a public nature, are inalienable as being against public policy and, being inalienable, cannot be sold in execution of a decree against the inamdar.

The observations of SCHWABE C.J. in *Anjaneyalu v. Sri Venugopala Rice Mill, Ltd.*, (1922) I.L.R. 45 Mad. 620, 623, 624 (F.B.), must be taken to be of general applicability and to cover the cases of all public service inams.

APPEAL against the decree of the District Court of Nellore in Appeal Suit No. 96 of 1928, preferred against the decree of the Court of the District Munsif of Kanigiri in Original Suit No. 645 of 1925.

B. Somayya and M. S. Ramachandra Rao for appellant.

Ch. Raghava Rao and A. Sundaram for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—In this appeal the question for BEASLEY C.J. consideration is whether a dasabandham inam is

* Second Appeal No. 442 of 1930.

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capable of alienation. According to the footnote to Standing Order 56 of the Standing Orders of the Board of Revenue :

"A dasabandham inam is a grant of land or of revenue as compensation for the construction of a tank, well or channel; the grant generally, though not invariably, carries with it the condition of keeping the work in repair. If the inam consists of land, it is called Khandam dasabandham; if it is an assignment of revenue, it is called Shamilat dasabandham."

In the present case the dasabandham inam was sold in execution of a decree against the inamdar and the question was whether the sale was invalid and also whether the inamdar was estopped from questioning that Court sale which he had allowed to be held without protest. Both lower Courts held that the Court sale was invalid because land burdened with the performance of a service of a public nature is inalienable being opposed to public policy. This ruling was based upon the decision in *Anjaneyalu v. Sri Venugopala Rice Mill, Ltd.*(1). The question here is whether the principle has not been too generally stated in that judgment, because it is contended for the appellant that this decision must only be taken as one on the particular facts of the case. There, the lands were burdened with *swastivachakam* service and it was held that this was a public service and not restricted in its enjoyment to the owner personally and the sale of such lands was opposed to public policy and the nature of the interest affected. In dealing with this matter, SCHWABE C.J., on pages 623 and 624, says :

"In my judgment the sale of such property is opposed to the nature of the interest affected and also is contrary to public policy. The right to enjoy the property is as long as the

inamdar renders services in the performance of which the public have an interest. If the inamdar sold the property it is obvious that he would in all probability no longer perform the services; and further, it is quite opposed to the nature of his interest and duty (namely, that he should enjoy the produce of the land as salary for the public services he has to render) that he should sell it or alienate it, leaving himself without the means of subsistence and without further interest in the place or in the performance of the services. It is also to be observed that, if the property were sold, the purchaser would get no title of any value, for at any moment the property might revert to the Zamindar or the Government, as the case may be, when the inamdar ceases to render such services."

Those words seem to us to be sufficiently wide to cover all service inams of a public nature; and whilst Standing Order 54 (2) of the Standing Orders of the Board of Revenue gives the Government the power to resume possession, on alienation, of religious or charitable inams—and this is not a religious or charitable inam—we see nothing in the Board's Standing Orders which would prevent a resumption of any inam of a public service nature where the inamdar alienates the lands which are burdened with those public services. Standing Order 56 gives the power to resume in default of service in the case of dasabandham inams; and we are quite unable to see why there should not be a power of resumption of the inam in the case of an alienation which may make the further performance of the service impossible. The service here, in spite of a strenuous argument to the contrary by the appellant, was clearly a public one, namely, the keeping in repair of a tank the water from which benefits the lands of the surrounding ryots. In our view, the observations of SCHWABE C.J. must be taken to be of general applicability and to cover the

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(1) (1912) I.L.R. 45 Mad. 620 (F.B.).

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cases of all public service inams. We must hold that lands burdened with a dasabandham service, which is a service of a public nature, are inalienable as being against public policy and, being inalienable, cannot be sold in execution of a decree against an inamdar. The lower appellate Court also found that estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. No argument to the contrary was addressed to us by the appellant upon this point and that question therefore does not arise in this appeal. The second appeal must fail and be dismissed with costs.

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APPELLATE CIVIL.

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

NARAYANA GOUNDAN (PLAINTIFF), APPELLANT,

v.

APPAVU GOUNDAN, MINOR BY HEAD CLERK, DISTRICT
MUNSIFF'S COURT, UDUMALPET, AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 83—
Certificate to judgment-debtor under, authorising private
alienation—Grant of—Alienation pursuant to—Attachment
of same property between dates of, in execution of another
decree—Purchaser at sale under—Invalidity of alienation
made pursuant to certificate as against—Sec. 64—Appli-
cability and effect of.*

Certain property having been attached in execution of a
decree, the judgment-debtor sought for permission under

* Second Appeal No. 598 of 1929.

Order XXI, rule 83, of the Code of Civil Procedure to mortgage the property in order to satisfy the decree. Permission was granted by the Court, the mortgage was effected in pursuance of it, and the mortgage-money was paid into Court by the mortgagee and the decree was discharged. Meanwhile, that is, subsequent to the grant of the permission and before the execution of the mortgage, the same property had been attached in execution of another decree against the judgment-debtor and the property was in due course proclaimed and sold in pursuance of the attachment.

Held that the mortgage having been executed during the pendency of the attachment ordered in the execution of the other decree was by virtue of the provisions of section 64 of the Code not binding upon the purchaser at the sale under that other decree.

Sub-section (2) of rule 83 of Order XXI of the Code contemplates the situation as it exists at the time of the issue of the certificate and cannot possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 132 of 1927, preferred against the decree of the Court of the District Munsif of Udumalpet in Original Suit No. 75 of 1925.

A. C. Sampath Ayyangar for M. Krishna Bharathi for appellant.

L. A. Gopalakrishna Ayyar and C. D. Venkataramanan for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—Two decrees were obtained against one Appavu Goundan, a minor with his mother Konammal as his guardian in Original Suits Nos. 1114 and 835 respectively of 1922 on the file of the District Munsif of Udumalpet. In execution of the first (Original Suit No. 1114) certain

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property was attached on 2nd May 1923. On 4th July 1923, Konammal on behalf of her son sought for permission under Order XXI, rule 83, Civil Procedure Code, to mortgage the property in order to satisfy the decree. Permission was granted by the Court on 5th July, and the mortgage was actually effected in pursuance of it on 19th August by Exhibit A. Next day (20th August) the mortgagee (Narayana Goundan) and the decree in Original Suit No. 1114 was discharged. Meanwhile however, on 19th July, the decree-holder in Original Suit No. 835 had also attached the same property and the property was in due course proclaimed and sold in pursuance of the attachment, one Kandasami Chetti becoming the auction-purchaser on 8th February 1924. In 1925 the mortgagee under Exhibit A brought a suit (Original Suit No. 75 of 1925) to enforce his mortgage, impleading Kandasami Chetti as the second defendant. The second defendant pleaded that the mortgage, having been executed during the pendency of the attachment ordered in the execution of his decree, was, by virtue of the provisions of section 64, Civil Procedure Code, not binding on him. Both the District Munsif of Udumalpet and the Subordinate Judge of Coimbatore on appeal have upheld this contention and dismissed the mortgagee's suit. The mortgagee has accordingly filed this second appeal.

On a mere comparison of dates it is of course obvious that the appellant cannot succeed, his mortgage having been effected one month later than the attachment in favour of the second

defendant. But the appellant takes his stand upon the language of sub-section 2 of Order XXI, rule 83, which contains the phrase "notwithstanding anything contained in section 64", and it is argued that what this sub-section means is that once a Court has granted a certificate to the judgment-debtor authorising private alienation *no one* can make use of section 64 to attack the title of the alienee when the alienation has been effected, or, in other words, that the mere issue of the certificate was enough to render the title of the alienee unassailable.

It seems to us that this interpretation of the sub-section cannot be accepted. The whole of the first portion of that sub-section runs as follows:—

"In such case the Court shall grant a certificate to the judgment-debtor authorising him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale."

It is clear from this that what is contemplated is the situation as it exists at the time of the issue of the certificate, and the sub-section must mean that, in spite of the fact that the property in question *has been* attached, which would ordinarily invalidate any alienation according to the provisions of section 64, yet in these particular circumstances that attachment shall not invalidate the alienation made in pursuance of the Court's certificate. We entirely fail to see how the sub-section can possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment. That the issue of the certificate is itself enough to render the alienee's title unassailable is a position which cannot be maintained in

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view of the proviso with which sub-section 2 ends :

"Provided that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court."

In the present case there is nothing at all to show that the mortgage has been confirmed, and, though there is no positive finding on this point by either of the Courts below, it seems highly probable that there was in fact no confirmation as no order of confirmation was produced by the plaintiff.

It was argued for the appellant that a liberal construction ought to be put upon the phrase "notwithstanding anything contained in section 64" as otherwise great hardship would be done to the appellant. Why, it was argued, should a mortgagee lend his money in perfect good faith and on the strength of a certificate from the Court, and then run the risk of losing his security because of the existence of some second attachment of which he had no knowledge? No doubt a mortgagee so circumstanced might fairly complain of his ill-fortune but we fail to see how this equitable argument can successfully be raised in favour of the present appellant. The findings of fact are that, though the Court passed an order allowing the application of the 4th July, no certificate was actually issued and the use of the word "shall" in sub-section 2 shows that the issue of such a certificate is an essential step in the procedure and further, as we have already stated, there is nothing to show that the mortgage was ever confirmed. In these circumstances the appellant, apart altogether from the meaning of the disputed clause, cannot plead that he has obtained from

the Court an indefeasible title. The act of confirmation by the Court is as essential as the issue of a certificate and it is here, it seems to us, where the unfortunate hypothetical mortgagee who has relied upon the Court's certificate would receive his protection, for, in an application for confirmation, the Court would certainly consider the question of a subsequent attachment and could refund to the mortgagee the money which he had deposited into Court.

It remains to consider various rulings which have been cited before us by the appellant's learned Advocate. The first is a decision of the Calcutta High Court reported as *Miajan Ali v. Rup Chandra Sarma*(1). In that case there was a certificate granted by the Court on 15th January, a second attachment on 24th January and a representation to the Court by the judgment-debtor, decree-holder and purchaser on 31st January that a sale had actually been effected. It was held that this sale, even though not then formally confirmed, could be confirmed at any time the purchaser cared to apply for confirmation and that it was not invalidated by the attachment. The crucial date, viz., the date when the sale was actually effected, is nowhere given in this ruling. If this were between the 15th and 24th January, as is very likely, the sale could of course not be invalidated by the attachment, but it is impossible to cite this ruling, as appellant's learned Advocate wishes to do, as authority for the position that because the certificate was prior to the attachment the sale effected in pursuance of the certificate (whatever may be its date) cannot be assailed.

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(1) (1913) 21 I.C. 210.

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Next comes *Qurban Ali v. Ashraf Ali*(1). In that case some arbitrators made an award that L should sell certain property to Q. Later a decree was passed in accordance with the terms of this award, and, in compliance with the decree, L executed a conveyance of the property to Q. Between the date of the award and the date of the decree the property was attached. It was held that the conveyance was not invalidated by the attachment as the conveyance, being made in pursuance of a decree of the Court, could not be held to be a private alienation. Now in the present case there was no decree directing an alienation but only an order permitting an alienation under certain terms. It was attempted to be argued by appellant's learned Advocate that alienations under Order XXI, rule 83, stood in a class by themselves as quasi-public or quasi-private alienations, but it is clear from *Dattaram v. Gangaram*(2), which is cited in the judgment of the learned District Munsif, that such alienations are the "acts of the judgment-debtor alone" and clearly therefore fall under the terms "private transfer" in section 64. The Allahabad ruling is therefore of no assistance to the appellant.

The ruling in *Lakshman v. Ramchandra*(3) can also be distinguished in the same way, for it was there held that a mortgage executed by the Court in pursuance of a decree for specific performance by A against B was not a private alienation by B. *Sunkari Sitayya v. Mudaragaddi Sanyasi*(4) is another case of an alienation following upon a decree for specific performance.

(1) (1882) I.L.R. 4 All. 219.
(3) A.I.R. 1932 Bom. 301.

(2) (1898) I.L.R. 23 Bom. 287.
(4) (1924) 46 M.L.J. 361.

Finally was quoted the ruling in *Madan v. Rebati*(1). It was there held that

"a conveyance of a property executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail, inasmuch as it was merely carrying out an obligation which was incurred prior to the attachment."

Now it is true that in this case there was no actual *decree* but emphasis must be laid upon the word "obligation" and in the present case, as already pointed out, the judgment-debtor was under no obligation to do anything.

The appellant can therefore in our opinion derive no assistance from the various rulings on which he seeks to rely, and, as we have already indicated, the reasonable and natural interpretation of the words in sub-section 2 of Order XXI, rule 83, is not the interpretation which he asks us to adopt. The appeal accordingly fails and must be dismissed with costs.

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(1) (1915) 23 C.L.J. 115.

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*Before Mr. Justice Cornish.*1934,
August 30.MUTHIA CHETTIAR (FIRST DEFENDANT-PETITIONER),
PETITIONER,

v.

S. R. M. A. R. RAMANATHAN CHETTIAR AND ANOTHER
(PLAINTIFFS-RESPONDENTS), RESPONDENTS.**Madras Civil Rules of Practice, rr. 57 and 59—Commission—
Issue of—Proper time for making application for—Applica-
tion made later—Effect of—Prayer for adjournment of trial
consequent on such application—Principles governing the
grant or refusal of.*

Under rule 57 of the Civil Rules of Practice the proper time for making an application for the issue of a commission is the date of the first hearing of the suit. Inasmuch as there is no rule preventing an application from being made subsequently, an application for the said purpose, made long after the said date but a few days before the date fixed for final hearing, should not be refused, though the party runs the risk of the commission not being completed and returned in time. But the Court should refuse the prayer for adjournment of the trial under rule 59 unless it is satisfied that the application could not or ought not to have been made at the first hearing.

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 Devakottai, dated the 16th day of August 1933 and made in Interlocutory Application No. 1162 of 1933 in Original Suit No. 144 of 1933.

M. Patanjali Sastri for petitioner.

V. Ramaswami Ayyar and *N. G. Krishna Ayyangar* for respondents.

* Civil Revision Petition No. 1199 of 1933.

JUDGMENT.

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The petitioner was defendant in a suit in the Devakkottai Sub-Court. His petition is for the revision of an order of the Additional Subordinate Judge dismissing his application for the issue of a commission for the examination of a witness in Burma. The suit was instituted on 19th August 1932. The date of first hearing was 24th February 1933, and on that occasion issues were framed. The case was posted for trial on 29th August 1933. On 11th August 1933, that is to say, eighteen days before the day fixed for trial, the petitioner applied to the Court to issue a commission. The learned Subordinate Judge said that the issue of a commission at that stage would mean a further adjournment of the suit indefinitely for some months. He was also of opinion that the excuse offered by the petitioner for not having made his application earlier could not be accepted.

Now it is clear under rule 57 of the Civil Rules of Practice that the proper time for making an application for a commission is the date of the first hearing of the suit. There is nothing in the rules to prevent the application from being made subsequently. But the applicant who delays his application until after the date of first hearing is liable to the risk of being refused an adjournment of the trial to enable him to have the commission returned in time for the trial.

Rule 59 says that, if an application for the issue of a commission to examine a witness is made subsequently to the first hearing and an adjournment of the final hearing is prayed, the adjournment shall not be allowed, unless it is made to appear to the Court that the application

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could not or ought not to have been made at the first hearing.

The rule means this—that, if a prayer for adjournment of the trial is coupled with an application for a commission, the Court shall refuse the adjournment unless it is satisfied that the application could not or ought not to have been made at the first hearing. The rule does not say that the application for a commission must be refused in such circumstances. If an applicant thinks that the commission will be completed before the trial, there is no reason why he should ask for an adjournment.

The learned Subordinate Judge seems to have thought that, because the issue of the commission might entail an adjournment of the trial (which had not been asked for), he must refuse the commission. In so thinking he misdirected himself.

The defendant was entitled to have his commission subject to the risk of its not being completed and returned in time for the trial. The civil revision petition is allowed, and a commission will issue from the lower Court and a fresh date will be fixed for the final hearing. A reasonable time for the issue and return of the commission must be allowed. Petitioner will get costs of the civil revision petition in this Court.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

THE OFFICIAL RECEIVER OF KISTNA (PETITIONER),
APPELLANT,

v.

THE IMPERIAL BANK OF INDIA AT BEZWADA AND
THREE OTHERS (RESPONDENTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 47—"Representative"—Official Receiver, if and when a.

1934,
September 18.

The question whether an Official Receiver is a "representative" within section 47 of the Code of Civil Procedure depends upon the true character of his proceedings. If his application is to stay an execution sale of property or to release it from an attachment on the footing that the property in question is property of the insolvent which has become vested in him, he is not to be regarded as acting in a representative capacity. Section 47 of the Code has in such a case no application, because the Official Receiver is exercising his right as Receiver to recover property vested in him and is not pursuing a claim as a representative of a party to the suit in which the decree was made.

APPEAL against the order of the Court of the Subordinate Judge of Bezwada, dated 26th April 1932 and made in Execution Application No. 334 of 1932 in Execution Petition No. 120 of 1931 in Original Suit No. 28 of 1931.

P. Satyanarayana Rao for appellant.

O. T. G. Nambiar for first respondent.

Cur. adv. vult.

JUDGMENT.

The JUDGMENT of the Court was delivered by
CORNISH J.—The appellant is the Official Receiver

CORNISH J.

* Appeal against Order No. 319 of 1932.

of Kistna, and as such the Receiver in the insolvency of the second and third respondents to this appeal. The first respondent, the Imperial Bank of India, obtained a money decree against the two other respondents and against the fourth respondent, a son of the third respondent, in respect of his share in the joint family property. This decree was obtained in March 1931.

The second and third respondents were respectively adjudicated insolvents on 12th September 1931 and 11th January 1932.

The Bank had attached the property of the two insolvents and the share of the fourth respondent before judgment. This attachment could not, of course, operate to prevent the vesting of the insolvents' property in the Official Receiver on their later insolvency; *Raghunath Das v. Sundar Das Khetri*(1).

The Bank subsequently took steps to bring the fourth respondent's share in the property to sale. Objection was made by the Official Receiver in a petition dated 19th April 1932. In this petition he alleged that on 4th March 1932 he had come to know from information given by some of the creditors that the property which the Bank was going to sell was the self-acquired property of the second and third respondents and another man, and, consequently, property in which the fourth respondent had no right or share. The petition prayed that the property should be released from the attachment and that the Bank's sale should be stayed, or, in the alternative, that the sale proceeds should be deposited in Court pending

(1) (1914) I.L.R. 42 Cal. 72 (P.C.).

the determination of the question of who was entitled to them.

The Court dismissed the petition. The Judge seems to have thought that there had been some undue delay in bringing the petition. But the ground of his decision was that no reason had been shown why the Bank should suffer further expense by having the sale postponed. It is from this order that the Official Receiver has appealed.

Mr. Nambiar on behalf of the Bank has taken the point that the Official Receiver's petition is not maintainable as an application under section 47, Civil Procedure Code, inasmuch as the Official Receiver is not a "representative" within that section. He contends that the only footing on which the petition can stand is as a claim or objection under Order XXI, rule 58; and an order made under this last-mentioned rule is undoubtedly not appealable.

The Receiver or assignee in insolvency may be for some purposes the representative of the insolvent. In *Raghunath Das v. Sundar Das Khetri*(1) their Lordships of the Judicial Committee held that the failure of the judgment-creditors to serve a notice under section 248 of the 1882 Code (now represented by Order XXI, rule 22, of the 1908 Code) on the Official Assignee as the legal representative of the insolvent judgment-debtor rendered the sale in execution of the decree inoperative. That was a decision that the Official Assignee was the legal representative of the insolvent for the purpose of proceedings in execution under section 248. There was, however, no definition of "legal representative" in the 1882

(1) (1914) I.L.R. 42 Cal. 72 (P.C.).

Code. Now, by section 2, clause 11, of the 1908 Code, a "legal representative" is defined as meaning a person who in law represents the estate of a deceased person. By virtue of the new definition, therefore, the Official Assignee or Receiver of an insolvent would not be his legal representative for the purpose of Order XXI, rule 22; though a rule of this High Court requires that a notice under Order XXI, rule 22, shall be given to the Official Assignee or Receiver.

The principle to be derived from the cases [See *Kashi Prasad v. Miller*(1), *C. E. Grey, Official Assignee v. Hazari Lal*(2), *Sardarmal v. Aranvayal Sabhapathy*(3), *The Official Assignee at Madras v. Aiyu Dikshithar*(4) and *Mohitosh Dutta v. Rai Satish Chandra Chundhuri Bahadur*(5)] appears to be that the question whether an Official Assignee or Receiver is a "representative" depends on the true character of his proceedings. If his application is to stay an execution sale of property or to release property from an attachment on the ground that the property in question is property of the insolvent which has become vested in him, the authorities above cited show that he is not to be regarded as acting in a representative capacity. Section 47 has then no application, because the Official Receiver is exercising his right as Receiver to recover property which is vested in him and is not pursuing a claim as a representative of a party to the suit in which the decree was made.

In the present case the Official Receiver's petition is headed as brought under section 47 and

(1) (1885) I.L.R. 7 All. 752.

(2) (1908) I.L.R. 30 All. 486.

(3) (1896) I.L.R. 21 Bom. 205.

(4) (1925) 48 M.L.J. 530.

(5) (1931) 35 C.W.N. 971.

Order XXI, rule 58, of the Civil Procedure Code, and sections 4, 5, and 52 of the Provincial Insolvency Act. But it is necessary to look at the substance of the petition. It is clear from paragraph 4 of the petition that in reality he is making a claim or objection under Order XXI, rule 58. In these circumstances, we must hold that the order made on the petition is not appealable and that this appeal must be dismissed with costs.

Solicitors for first respondent: *Moresby and Thomas.*

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

MUTHURAMAN CHETTIAR MINOR BY NEXT FRIEND
A.R.A. RAMAN CHETTY (PLAINTIFF), APPELLANT,

v.

ADAIKAPPA CHETTY AND FIVE OTHERS (DEFENDANTS
1 TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXII, rr. 4 and 11—Appeal—Legal representatives of deceased defendant impleaded as respondents in—Death of one of, and his legal representative not brought on record—Decree in appeal against respondents—Null and void against legal representative not so brought on record, when not—Dead man—Decision against—Binding nature of, on his legal representative—Death of a party to an action—Jurisdiction of Court to give judgment, whether in his favour or against him, if put an end to by—O. XLIV, r. 4, of the Code—Applicability to case of respondents—Decree against a dead man—Validity of—Question as to—Applicability of rule to case of.

During the pendency of a suit brought for the recovery of a share in certain properties against two defendants, one of

* Second Appeal No. 468 of 1930.

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them died and his sons, the plaintiff's father and another, were brought on record as his legal representatives. The suit was dismissed by the District Munsif and, during the pendency of an appeal preferred by the plaintiff against his decree, the plaintiff's father died. No legal representative was brought on record in his place and the appellate Court reversed the decree of the District Munsif.

Held that the case was not one of such non-representation as would entitle the plaintiff to treat the decree of the appellate Court as null and void.

Quaere whether the case was one of such a complete representation as to preclude the plaintiff even from seeking to re-open the decree by appropriate proceedings in the Court which passed it.

A distinction ought to be made between cases in which the original party to the action dies and his legal representative is not brought on record, though there may be others having common interest with him, and cases in which only one of several legal representatives brought in *as such* during the pendency of an action dies and the estate continues to be represented by the remaining legal representatives. Whatever the position may be as regards the first group of cases, as regards the second group the preponderance of authority is in favour of the view that there will be no abatement if at least some representatives are on record and that, in the absence of fraud or collusion, the representation by some of the heirs will be sufficient representation.

A decision against a dead man is not binding on his representatives unless they have been made parties to the suit in which it is pronounced. Such a case is distinguishable from one in which the decision is in favour of a dead man. The rule stated in *Black on Judgments* that the decision would *prima facie* be valid in both cases cannot, in view of a long line of authority to the contrary, be applied in all its generality in this country.

Quaere whether the death of any party does not wholly put an end to the jurisdiction of the Court to give judgment, so far as he is concerned, whether in his favour or against him.

Order XLI, rule 4, of the Code of Civil Procedure can be invoked only in the case of appellants with a common defence in the lower Court and not in the case of respondents. Further, the rule provides only for some of the appellants getting a

decision in favour of all persons having a common interest and has no application to or bearing on a case where the question is whether a decree can be passed against a dead man, though there is another person on record with the same defence as that of the dead man.

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APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 136 of 1928 preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 281 of 1917.

T. M. Krishnaswami Ayyar and *K. S. Venkatarama Ayyar* for appellant.

V. Ramaswami Ayyar for respondents.

JUDGMENT.

This second appeal raises a point of processual law, namely, whether the plaintiff can maintain this suit for a declaration that the judgment in Appeal Suit No. 85 of 1924 on the file of the Ramnad Sub-Court and the proceedings subsequently taken on the basis thereof are null and void as against him or whether his only remedy is to apply to the Court which passed that decree to vacate it. That appeal arose out of a suit, Original Suit No. 766 of 1918 on the file of the District Munsif's Court of Sivaganga, which at later stages, by reason of transfers to different Courts, came to be numbered as Original Suit No. 348 of 1922 and Original Suit No. 412 of 1925, the last being the stage after the remand consequent upon the appellate decision in Appeal Suit No. 85 of 1924. That suit had been instituted by the present first defendant claiming a half share in certain properties as against the second defendant and one Muthuraman Chetti, the grandfather of

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the present plaintiff. The District Munsif dismissed that suit but on appeal that decree was reversed and the suit was remanded to the Munsif's Court for passing a final decree in plaintiff's favour. Even while the suit was pending before the Munsif in the first instance, Muthuraman Chetti, the then first defendant, died and his two sons, viz., this plaintiff's father and another, were brought on record as his legal representatives, as defendants 4 and 3. When the matter was pending before the appellate Court, the present plaintiff's father died in or about 1924. No legal representative was brought on record in his place and the appellate Court reversed the lower Court's decree, perhaps in ignorance of the death. The plaintiff now contends that the decree passed by the appellate Court in reversal of the lower Court's decree, after the death of his father and without his legal representative on record, is null and void as against him.

The first Court dismissed this suit on the ground that the other son, i.e., the third defendant in that suit, who still continued on the record of Appeal Suit No. 85 of 1924, had the same defence as the plaintiff's father, that both of them had been represented by the same Vakil when the matter was before the Court of first instance, that this common defence was also urged before the Court of appeal, and that the case is governed by Order XLI, rule 4, of the Code of Civil Procedure, according to which one of several plaintiffs or defendants may obtain a reversal of the whole decree where it proceeds on a ground common to all. In the opinion of the learned District

Munsif, Appeal Suit No. 85 of 1924 did not abate by reason of the plaintiff's father's death. The lower appellate Court has confirmed his decree but on somewhat different grounds. In the opinion of the learned Subordinate Judge, the judgment passed by a Court even without a legal representative of a deceased party is not a nullity and hence cannot be set aside by a suit, but the legal representative who has not had a hearing can claim a re-hearing on the ground that he has been prejudiced. Reliance has been placed by the learned Subordinate Judge on *Vellayan Chetty v. Mahalinga Aiyar*(1) in support of this view and also on a passage from Black on Judgments cited in *Goda Coopooramier v. Soondarammall*(2).

I may say at once that cases like *Vellayan Chetty v. Mahalinga Aiyar*(1) have really no bearing upon the question now in dispute, because, where the decision is *in favour of* a dead man the position is different from a case where the decision is *against* the dead man. [See *Subramania Aiyar v. Vaithinatha Aiyar*(3)]. As explained in *Surya Narayana v. Joga Rao*(4), the principle underlying that class of cases is that a party who is alive and has been heard cannot take advantage of the death of his opponent and claim a re-hearing. Whether the death of any party does not wholly put an end to the jurisdiction of the Court to give judgment, so far as he is concerned, whether in his favour or against him, is a larger question that need not be considered here. Some cases seem to go that length. [Cf. *Vishvanath Dnyanoba v. Lallu Kabla*(5)].

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(1) (1914) I.L.R. 39 Mad. 386, 388. (2) (1909) I.L.R. 33 Mad. 167, 169.
(3) (1913) I.L.R. 36 Mad. 682. (4) A.I.R. 1930 Mad. 719.
(5) (1909) 4 I.C. 137.

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The passage from Black on Judgments is no doubt of very wide import and putting both cases on the same footing goes to the other extreme of holding the decision *prima facie* valid in both cases. The tenor of the discussion in *Goda Coopooramier v. Soondarammall*(1) would however show that the learned Judges were not prepared to go so far. They rest their conclusion upon the distinction between a case where the decision is *in favour of* a dead person and a case where it is *against* a dead person. Though the passage from *Goda Coopooramier v. Soondarammall*(1) has been cited without comment in a decision of the Lahore High Court in *Tota Ram v. Kundan*(2), it seems to me impossible, in view of a long line of authority to the contrary, to apply the rule stated by Black in all its generality in this country.

As early as in *Radha Prasad Singh v. Lal Sahab Rai*(3), the Privy Council observed that a decree obtained after the death of a defendant cannot bind the representatives of the deceased, unless they had been made parties to the suit in which it was pronounced; and the same principle is re-affirmed by their Lordships in *Wajid Ali Khan v. Puran Singh*(4). Their Lordships observe, at page 273, that

"where the appeal is heard in the absence of the legal representatives of the deceased respondent and the decree of the first Court is reversed, . . . it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree."

Much stronger and clearer language has been used in several judgments of the High Courts

(1) (1909) I.L.R. 33 Mad. 167.

(2) A.I.R. 1928 Lah. 784.

(3) (1890) I.L.R. 13 All. 53 (P.C.).

(4) (1928) I.L.R. 51 All. 267 (P.C.).

in India, among which it is sufficient to refer to *Subramania Aiyar v. Vaithinatha Aiyar*(1), *American Baptist Foreign Mission Society v. Ammalanadhuni Pattabhiramayya*(2) and *Narendra Bahadur Chand v. Gopal Sah*(3). In some of these cases the question arose in the course of proceedings in execution of the decree and it was held that the decree is so far void as even to entitle the executing Court to refuse to execute it. That this is the true import of the Privy Council decision in *Radha Prasad Singh v. Lal Sahab Rai*(4) is also the view taken in the case of *Imdad Ali v. Jagan Lal*(5) which is referred to and followed in many of the later cases. [See also *Sripat Narain Rai v. Tirbeni Misra*(6)].

The other reason, stated in paragraph 2 of the lower appellate Court's judgment, that proceedings taken by a Court even after the death of a party are not void so long as no application is made to bring the legal representatives on record is unintelligible. If the learned Judge meant by that, so long as there is time to bring them on record, the statement may be intelligible even though it would not be correct. Anyhow that was not the fact in the present instance.

Turning now to the reasons given by the District Munsif, I must observe that his reasoning based upon Order XLI, rule 4, Civil Procedure Code, is not correct. There has been a difference of opinion as to whether this rule can be relied on by legal representatives when their predecessors in title had actually been parties to an appeal but

(1) (1913) I.L.R. 38 Mad. 682.

(2) (1918) 48 I.C. 859.

(3) (1912) 20 I.C. 506.

(4) (1890) I.L.R. 13 All. 53 (P.C.).

(5) (1895) I.L.R. 17 All. 478.

(6) (1918) I.L.R. 40 All. 423.

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on whose death the legal representatives have not chosen to come on the record [Cf. *Chenchuramayya v. Venkatasubbayya*(1) with *Amin Chand v. Baldeo Sahai*(2)]. But it is unnecessary to consider that point here, for Order XLI, rule 4, can be invoked only in the case of *appellants* with a common defence in the lower Court and not in the case of *respondents*. Further, Order XLI, rule 4, provides only for some of the appellants getting a decision *in favour* of all persons having a common interest and has no application to or bearing on a case like the present, where the question is whether a decree can be passed *against* a dead man, though there is another person on record with the same defence as that of the dead man.

I am however of opinion that, apart from the reference to Order XLI, rule 4, the conclusion of the District Munsif is correct. The position in the present case was that the suit had been originally instituted against the plaintiff's grandfather as one of the defendants, and all that was required for the purpose of upholding the jurisdiction of the Court to deal with the matter to the end was that the estate of the grandfather should continue to be duly represented. As stated already, on the death of the grandfather, his two sons were brought on record, that is, the estate was represented by two persons, as legal representatives. The question for consideration is, when one of them dies and his legal representative is not brought on record, does the original estate that was at first represented by two persons as legal representatives and is later on represented by one

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of them only cease to be represented, for the purpose of that litigation. If the answer is in the negative, the Court will undoubtedly continue to have *jurisdiction* to deal with the matter in controversy, whatever other remedies any person may have, on the ground that he was interested in the controversy but was not brought before the Court. Argument has accordingly been directed to this aspect of the matter and a number of cases have been brought to my notice. In dealing with these cases it seems to me—though Mr. Krishnaswami Ayyar for the appellant maintains the contrary—that a difference has to be kept in view between cases in which the original party to the action dies and his legal representative is not brought on record, though there may be others having common interest with him, and cases in which only one of several legal representatives brought in *as such* during the pendency of an action dies and the estate continues to be represented by the remaining legal representatives. Whatever the position may be as regards the first group of cases, I am of opinion that in the second group there is no lack of representation of the estate, that the remaining representatives can as well represent the estate as the original group did and that the principle applicable to this class of cases is to be gathered from those decisions which uphold the doctrine of representation of an estate *by some* of the heirs of a deceased person when such heirs are sued as defendants in the first instance.

Some of the steps in the arguments bearing upon the above question are rendered doubtful by conflict of authority. Some decisions put a very strict construction upon the rules in Order XXII

(1) A.I.R. 1933 Mad. 655.

(2) A.I.R. 1934 Lah. 206.

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and go the length of holding that, unless *all* the legal representatives are actually on record, there can be no representation at all and the whole decree is void. [See, for instance, *Chuni Lal v. Amin Chand*(1), *Haidar Husain v. Abdul Ahad*(2) and *Muhammad Hassan v. Inayat Hussain*(3)]. The preponderance of authority is however in favour of the view that there will be no abatement if at least some representatives are on record. [See, for instance, *Shib Dutta Singh v. Sheikh Karim Bakhsh*(4) and *Mussammatt Begam Jan v. Mst. Jannat Bibi*(5). See also *Ramanathan Chettiar v. Ramanathan Chettiar*(6)]. Apart from the provisions of Order XXII, the question whether, in any suit, an estate can in the first instance be represented by some of the heirs entitled thereto in the absence of other heirs has often come up for consideration and the preponderance of authority is in favour of the view that, in the absence of fraud or collusion, the representation by some of the heirs will be sufficient representation. [See *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar*(7), *Govindaswami v. Annamalai*(8), *Abdulla Sahib v. Vageer Beevi Ammal*(9) and *Jehrabi v. Bismillabi*(10)]. Much the same reasoning has been imported even in the construction of provisions of the old Code corresponding to Order XXII in the judgment of this Court in *Musala Reddi v. Ramayya*(11).

In *Sripat Narain Rai v. Tirbeni Misra*(12) the Court left the question open as to what the effect

of representation of the estate by other persons might be. It contented itself with saying that, for the purpose of execution against the legal representatives of the deceased person, there was no executable decree, because the predecessor had died before the decree was passed.

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I am unable to agree with Mr. Krishnaswami Ayyar's contention that the omission to bring on record the legal representative of the fourth defendant in Appeal Suit No. 85 of 1924 made the estate of the deceased Muthuraman Chetti (first defendant) *unrepresented*. It is not necessary for the purpose of this case to say whether it is such a complete representation as to preclude the plaintiff even from seeking to re-open the decree in Appeal Suit No. 85 of 1924 by appropriate proceedings in the Court which passed that decree. It is sufficient to say that it is not a case of such non-representation as would entitle the present plaintiff to treat that decree as null and void. In this view the second appeal fails and is dismissed with costs.

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(1) A.I.R. 1933 Lah. 356.

(3) (1926) 100 I.C. 418.

(5) (1926) I.L.R. 7 Lah. 438.

(7) (1902) I.L.R. 26 Mad. 230.

(9) A.I.R. 1928 Mad. 1199.

(11) (1899) I.L.R. 23 Mad. 125.

(2) (1907) I.L.R. 30 All. 117.

(4) (1924) I.L.R. 4 Pat. 320.

(6) (1928) 30 L.W. 995, 1007.

(8) A.I.R. 1927 Mad. 1071.

(10) (1924) 26 Bom. L.R. 375.

(12) (1918) I.L.R. 40 All. 423.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1934,
August 31.

PACHIPENTA LAKSHMI NAIDU (NINTH DEFENDANT),
APPELLANT,

v.

SOMAHANTI GUNNAMMA *alias* CHINNAMMI
AND THIRTY-TWO OTHERS (PLAINTIFFS 2 TO 5 AND DEFENDANTS
1 TO 8 AND 10 TO 31), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), sec. 20—Hindu Law—
Joint family—Mortgage executed by all the members—Part
payment by manager—No mention that it was made by him
as such—Availability of part payment to save bar of limi-
tation—If and when—Plurality of persons liable on a debt
—One of them making part payment—Effect of, to save
limitation as against others—Part payment of debt signed by
person making same—No mention whether it is for principal
or interest—Effect of.*

C was the managing member of a joint Hindu family composed of himself and his brother B. A mortgage was executed by C and B. Later on, a part payment was made towards the mortgage by C alone and the endorsement relating thereto was signed only by him. A suit was filed by the mortgagee impleading C and B and several others. The question for determination, *inter alia*, was whether the part payment by C was available to save limitation as against B also.

Held, that it was so available on the principle of implied agency, since it could be inferred from the circumstances of the case that the part payment was made by him as the managing member on behalf of the other members also.

Held further, (1) that section 20 of the Limitation Act does not contemplate that, when there is a plurality of persons liable in respect of a debt, all of them should join in making a part payment, and as such a part payment by one of the persons liable can avail not merely against the person making the same or those deriving title under him subsequent to such

* Appeal No. 184 of 1929.

payment but also against other persons liable in respect of the debt, and

(2) that, when a part payment is evidenced by a writing which is signed by the person making the same, it makes no difference whether the payment is held to be for interest or for principal or for both.

APPEAL against the decree of the Court of the Agency Subordinate Judge of Vizagapatam in Original Suit No. 61 of 1926.

Advocate-General (Sir A. Krishnaswami Ayyar)
and *Y. Suryanarayana* for appellant.

P. Somasundaram for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal by the ninth defendant, a puisne mortgagee, against the decree for sale passed in a prior mortgagee's suit. The prior mortgagee had two mortgages in his favour, viz., Exhibit A, a usufructuary mortgage of 1st September 1891, and Exhibit B, a simple mortgage of 4th September 1897. In respect of Exhibit A the appellant contends that, on its true construction, the mortgagee is bound to account for all the income from the properties of which he was put in possession, subject to a deduction of interest at nine per cent per annum on the mortgage amount and one or two other items of charges mentioned in the document. He insists that, if accounts are taken on this footing, it would be found that the mortgagee has realized the whole amount due to him under the mortgages. With reference to Exhibit B the appellant raises a plea of limitation. Incidentally, his learned Counsel also suggested the possibility of a claim for subrogation in respect of a fraction of the amount included in the

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mortgage in favour of the appellant, but he realized that in view of certain circumstances this claim could not be usefully pressed. It is therefore unnecessary to say anything further about this. The only other matter raised in the appeal relates to the direction of the lower Court for payment of costs by the ninth defendant and the other members of his family.

On the first point we are unable to accede to the contention of the appellant. Though incidentally there is a reference to interest at nine per cent per annum in Exhibit A, the scheme of Exhibit A is not to make the mortgagee accountable for the realizations from the mortgaged property except to a very limited extent. The mortgage was effected in the year *Khara*, but, as the parties were not sure as to the data then available for fixing the probable income from the mortgaged property, which would be available to the mortgagee in satisfaction of his claim for interest, they provided that the necessary *dowle* should be prepared in the course of the succeeding year, *Nandana*; and the document then goes on to provide as follows :—

“ If the *dowle* amount for the year *Nandana* be found insufficient for the interest of Rs. 405 due for each year and the *kattubadi* of Rs. 12-8-0 payable to the Zamindar of Pachipenta, making up in all Rs. 417-8-0, we shall make good the said deficiency by means of other immovable properties belonging to us. If that *dowle* amount be in excess of the said amount of Rs. 417-8-0, you shall pay to us the excess amount every year within the end of the year . . . From *Vijaya* year you shall have control over the properties according to the above-mentioned conditions without having anything to do with us and you yourself shall enjoy the profit and loss (sic) occurring thereby.”

The last clause would become meaningless if the appellant's construction should be accepted. The document belongs to the class of cases in which the mortgagee is permitted to enjoy the income in lieu of interest; but, as the parties were not quite sure at the time of the execution of the document as to what the probable income might be, they made provision for its being definitely fixed with reference to the next year's *dowle*. It is only in respect of the difference between Rs. 417-8-0 and the figure to be fixed in the *dowle* for *Nandana* that the mortgagee would be accountable to the mortgagor.

That this is the true construction of the document is made clear by the subsequent conduct of the parties and by the recitals in Exhibit P, a document executed by the mortgagors themselves in 1900. Referring to this mortgage, they say in that document that the *dowle* fixed for *Nandana* as per stipulations contained in Exhibit A is Rs. 445-6-0 and that out of that amount, deducting Rs. 417-8-0, the balance has been accounted for to them by the mortgagee. After this statement by the mortgagors themselves, it is unnecessary to labour the point. This contention therefore fails.

With regard to the plea of limitation in regard to Exhibit B, the question depends upon the extent to which a part payment made on 25th April 1912 is available to save limitation. The mortgage bond had been executed by two brothers Chinnayadora and Bhimandora, but this part payment was made by the former alone and the endorsement relating thereto is signed only by him. The appellant contends that, on a proper construction of sections 20 and 21 clause 2 of the Limitation

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Act, this part payment can avail to save from the bar of limitation only the liability of Chinnayya-dora's share and not that of Bhimandora's share. The argument was put on two grounds; one, that section 20 contemplates that, where there is a plurality of persons liable in respect of a debt, all of them should join in making a part payment; alternatively, it was contended that, where they are liable as joint promisors, a payment by one of them alone will not avail against the others because of the express provisions of section 21 (2). The first contention is scarcely sustainable; see *Velayudam Pillai v. Vaithialingam Pillai*(1). In view of numerous cases decided in recent years in the various High Courts in India, the learned Advocate-General also admitted that, as held in the English decisions [Cf. *Bolding v. Lane*(2), *Chinnery v. Evans*(3) and *Lewin v. Wilson*(4)], there is a difference between the effect of an acknowledgment and that of a part payment, and that a part payment can avail not merely against the person making the payment or those deriving title under him *subsequent* to such payment but even against other persons liable in respect of the same debt. Even in respect of *acknowledgments*, this Court has recently held in *Muthu Chettiar v. Muthuswami Ayyangar*(5) that an acknowledgment will also avail to save limitation as against a person to whom the mortgagor making the acknowledgment has transferred the mortgaged property *prior* to the date of the acknowledgment. The learned Advocate-General therefore pressed his contention

(1) (1912) 24 M.L.J. 66.

(3) (1864) 11 H.L.C. 115.

(2) (1863) 1 De G.J. & S. 122; 46 E.R. 47.

(4) (1886) 11 A.C. 639.

(5) (1932) I.L.R. 55 Mad. 758.

mainly with reference to section 21 (2). As to the effect of this provision, there is considerable conflict amongst the several High Courts in this country; what is the exact relation between the restrictive provision in this clause and the general provision in sections 19 and 20? The contention of the learned Advocate-General that, in the case of joint mortgagors, payment by one cannot save limitation as against the other co-mortgagors or their interest in the mortgaged property is supported by a dictum in *Velayudam Pillai v. Vaithialingam Pillai*(1) and by two decisions of this Court in *Muthu Chettiar v. Muhammad Hus-sain*(2) and *Thayammal v. Muthukumaraswami Chettiar*(3). But there are decisions of other Courts to the contrary. Reference may be made particularly to *Parmeshri Kunwar v. Dhuman Kunwar*(4), *Jagwanti v. Bachan Singh*(5) and *Ibrahim v. Jagdish Prasad*(6). A further point has sometimes been raised whether the restriction in clause 2 of section 21 applies only to the *personal* liability of the joint contractors or even to the liability of the mortgaged property. Difference of opinion is also traceable as to the effect of the word "only" in that provision; [Cf. *Rajtilak Narayan Sur v. Mufizuddi Topadar*(7), *Veeranna v. Veerabhadraswami*(8) and *Rangasami Aiyangar v. Somasundaram Chettiar*(9)]. If it were necessary to base our decision in the case on this point, we should be bound to follow the decisions

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(1) (1912) 24 M.L.J. 66.

(3) (1929) 57 M.L.J. 588.

(5) (1926) 95 I.C. 774.

(7) (1926) 98 I.C. 381.

(2) (1919) 55 I.C. 763.

(4) (1929) 119 I.C. 434.

(6) (1926) 99 I.C. 424.

(8) (1918) I.L.R. 41 Mad. 427 (F.B.).

(9) (1927) 54 M.L.J. 150.

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of this Court, namely, *Muthu Chettiar v. Muham-mad Hussain*(1) and *Thayammal v. Muthukumara-swami Chettiar*(2), or refer the matter to a Full Bench. But, as the plea of limitation can be disposed of on another ground, it seems to us unnecessary to do so.

The plaintiffs relied upon this part payment as saving limitation against both the mortgagors, on the ground that in making that part payment Chinnayyadora acted as managing member of the family and as such was authorized to make the payment on behalf of Bhimandora as well. In the Court below reliance was placed for this purpose upon evidence showing that they were members of an undivided family of which Chinnayyadora was the manager; and reliance was also placed upon a letter, Exhibit N, which, it was contended, expressly authorized Chinnayyadora to make the said payment. The learned Subordinate Judge refused to accept Exhibit N as a genuine letter, but he however came to the conclusion that the two brothers were undivided and that Chinnayyadora was the manager of the joint Hindu family and that therefore the payment was sufficient to save limitation as against both. The learned Advocate-General however contends that, if Exhibit N is excluded, the mere fact that Chinnayyadora was managing member of the family will not suffice to save limitation against Bhimandora, because in the present case the contract was entered into not by Chinnayyadora alone as managing member of the family but by both the brothers and therefore the case is in terms governed by the provisions of section 21 (2). In support of this

(1) (1919) 55 I.C. 763.

(2) (1929) 57 M.L.J. 588.

argument he relies upon certain observations of the Division Bench in *Narayana Ayyar v. Venkataramana Ayyar*(1). The facts of that case show that those observations were *obiter*, because the Court came to the conclusion that the payments relied on were not true and that the entries were merely collusive. These observations have been dissented from in *Bajrangi Prasad Singh v. Kesho Singh*(2) and the learned Judges suggest that, at any rate, they must be confined to the facts of that case. But, even in *Narayana Ayyar v. Venkataramana Ayyar*(1), the learned Judges recognize that it may be possible to *infer* from the circumstances that the payment was made by the managing member on behalf of the other members as well and that in that connection the very fact of his being a managing member would itself be a factor of importance. This view receives corroboration from the way in which section 21 (2) has been interpreted by the Full Bench in *Veeranna v. Veerabhadraswami*(3) and in *Rangasami Aiyangar v. Somasundaram Chettiar*(4). The extent to which this theory of *implied* agency could be carried under similar circumstances is illustrated by a recent judgment of the Privy Council; see *National Bank of Upper India v. Bansidhar*(5). Besides the fact that Chinnayyadora was the managing member, we have also an important document in this case, namely, Exhibit T1, dated 8th March 1912. Its genuineness is proved by the writer himself who was examined as plaintiff's fourth witness and he has not been cross-examined

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(1) (1902) I.L.R. 25 Mad. 220 (F.B.). (2) (1927) I.L.R. 6 Pat. 811.

(3) (1918) I.L.R. 41 Mad. 427 (F.B.).

(4) (1927) 54 M.L.J. 150.

(5) (1929) L.R. 57 I.A. 1.

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about it. That letter clearly shows that the mortgagee was pressing both the debtors for payment, and Bhimandora says that Chinnayyadora was going about making collections for the purpose of making payment to the mortgagee. When, following upon this, after a short interval, we find Chinnayyadora actually making the payment, it seems reasonable to infer that Chinnayyadora, who was undoubtedly the family manager, must have been acting on behalf of both and that, therefore, this is clearly a case of implied agency within the meaning of the decisions.

A further point has been raised by the learned Advocate-General that, because the entry of payment on Exhibit B does not purport to say whether it is for interest or principal, it is not sufficient to save limitation. This question may be material if the matter rested on oral evidence as to payment of interest; but where the payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both; see *Hem Chandra Biswas v. Purna Chandra Mukherji*(1) and *Soumia Narayana Iyengar v. Alagirisami Iyengar*(2). In these circumstances we agree with the lower Court that the suit is not, to any extent, barred by limitation.

As regards the direction for costs in the lower Court's decree, it is no doubt true that in mortgage suits the amount of costs is usually directed to form part of the mortgage money to be realized by sale of the mortgaged property; but, when one of the defendants disputes the right of the

(1) (1916) I.L.R. 44 Calc. 567.

(2) 1912 M.W.N. 754.

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mortgagee or raises other contentions calculated to negative his right to maintain the suit, this rule cannot be insisted on. In this case the ninth defendant pleaded that the suit must fail in whole or in part for various reasons; and when these pleas have failed, the lower Court was right in directing that he and those who sided with him must pay the costs of the plaintiffs.

The appeal fails and is dismissed with costs of the plaintiffs-respondents.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

MARUDAMUTHU PADAYACHI (ACCUSED), PETITIONER,

1934,
September 5.

v.

C. S. RAGHAVA SASTRI (PROSECUTION WITNESS No. 1),
RESPONDENT.*

*Criminal Procedure Code (Act V of 1898), ss. 342 and 537—
De novo trial—Omission to examine accused afresh under
sec. 342 not an illegality vitiating trial.*

Omission to examine the accused under section 342, Criminal Procedure Code (Act V of 1898), afresh at a *de novo* trial is not an illegality which vitiates the trial, but is at the most an irregularity to which section 537 applies. Where there had been no prejudice to the accused and no miscarriage of justice in consequence of such omission,

held, that there was no ground for interference in revision.

Varisai Rowther v. King-Emperor, (1922) I.L.R. 46 Mad. 449 (F.B.), referred to.

*Criminal Revision Case No. 324 of 1934 (Criminal Revision Petition No. 302 of 1934).

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PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Kumbakonam in Criminal Appeal No. 45 of 1933 preferred against the judgment in Calendar Case No. 381 of 1933 on the file of the Court of the Sub-Magistrate of Tiruvadammaruthur.

A. Ganesa Ayyar for petitioner.

S. Nagaraja Ayyar for respondent.

Public Prosecutor (L. H. Bewes) for the Crown.
Cur. adv. vult.

ORDER.

The only point pressed in this case is that the omission of the Sub-Magistrate to examine the petitioner (accused in the case before him) under section 342, Criminal Procedure Code, afresh at the *de novo* trial is an illegality which has vitiated the trial. It has not been contended that new matter was introduced into the evidence during the *de novo* trial for the first time or that there was anything in the evidence at that trial about which the accused had not already given his explanation. In other words, there has been no prejudice to the accused in consequence of the omission to examine him a second time under section 342, Criminal Procedure Code, and it is not alleged that there has been any miscarriage of justice in consequence of the omission. The Full Bench ruling in *Varisai Rowther v. King-Emperor*(1) relied upon by the petitioner's Advocate does not go to the length of laying down that the omission to examine the accused for a second time during

a *de novo* trial is an illegality which vitiates the trial, and my attention has not been drawn to any case in which it was decided that in every *de novo* trial there must be a fresh examination of the accused under section 342, Criminal Procedure Code. The object of section 342, Criminal Procedure Code, is to provide the accused with an opportunity of being told by the Court of the matters appearing in the evidence against him and of explaining the same. This object has been fully achieved in the present case and there has been no real failure to comply with the provisions of section 342, Criminal Procedure Code.

I am therefore of opinion that the omission complained of in this case is not an illegality which vitiates the trial; at the most, it is only an irregularity to which section 537, Criminal Procedure Code, applies.

The petition is therefore dismissed.

K.W.R.

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(1) (1922) I.L.R. 46 Mad. 449 (F.B.).

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

1934,
September 18.

KATIKINENI VENKATA GOPALA NARASIMHA
RAMA RAO (ACCUSED), PETITIONER,

v.

CHITLURI VENKATARAMAYYA (COMPLAINANT),
RESPONDENT.*

Criminal Procedure Code (Act V of 1898), Ch. XVIII—Preliminary enquiry under—Question of admissibility of evidence admitted in—High Court—Interference in revision by, pending such enquiry.

Where a case is in the stage of a preliminary enquiry, and, if committed, would eventually be heard by the Sessions Court, it is very unusual for the High Court to entertain a revision petition raising the question of the admissibility of certain evidence admitted by the Magistrate in the preliminary enquiry. The fact that the revision petition has been admitted is no bar to its being thrown out when it comes on for final hearing.

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

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the Subdivisional Magistrate of Kovvur, dated 12th August 1934 on petitions, dated 5th August 1934 and 26th July 1934 respectively in Preliminary Register No. 1 of 1934.

S. Srinivasa Ayyangar for *K. S. Jayarama Ayyar* and *B. T. M. Raghavachari* for petitioner in both cases.

Advocate-General (Sir A. Krishnaswami Ayyar) for *V. Suryanarayana* for respondent.

* Criminal Revision Cases Nos. 647 and 648 of 1934 (Criminal Revision Petitions Nos. 601 and 602 of 1934).

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

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The ORDER of the Court was delivered by CURGENVEN J.—The question which these criminal revision petitions raise is as to the admissibility of certain statements made by the complainant in an income-tax return. The case is in the stage of a preliminary enquiry, and, if committed, will eventually be heard by the Sessions Court. In these circumstances it has been urged upon us by the complainant that we should not interfere with the order of the learned Subdivisional Magistrate admitting the evidence. We believe it to be very unusual for this Court to hold up a preliminary enquiry while it adjudicates upon an order of this kind. Indeed, only one reported case, a recent one decided by BURN J., *Ponnusami Chetty, In re* (1), has been brought to our notice in which a question of the admissibility of evidence at this stage has been entertained; and it does not appear that any objection, such as is raised now, was preferred. We are influenced by the consideration that, if the case is committed for trial, it will rest upon the trial Court independently to decide upon the admissibility of this evidence, and it seems undesirable that, by a decision at this stage, we should in any way interfere with that Court's discretion. If the case is not committed, our intervention will have been unnecessary. Mr. S. Srinivasa Ayyangar objects that this petition has passed the admission stage, when it was open to the Court to throw it out on these

(1) (1933) I.L.R. 56 Mad. 475.

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grounds. We do not think that our hands are thereby tied, as on the previous hearing there was no occasion for the objection to be raised.

For these reasons we decline at this stage to interfere with the decision to admit the evidence, and dismiss the petitions.

K.W.R.

INCOME-TAX REFERENCE.

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

THE SOUTH INDIAN INDUSTRIALS, LTD., MADRAS,
BY ITS MANAGING DIRECTOR MOHAMED HASHIM SAIT,
PETITIONERS,

1934,
December 12.

v.

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

*Indian Income-tax Act (XI of 1922), ss. 10 (1) and (2) and 24
—Company—Businesses carried on by—Single business or
distinct and separate businesses—Test—Several distinct
businesses owned by company—Loss sustained in some of—
Setting off of, against profits of other businesses—Right of
company—Businesses in former not carried on.*

The assessee company, a limited company registered under the Indian Companies Act, acquired and carried on five separate businesses, one of them being the purchase of shares in a Jute Mills Company. In the year of account the assessee company received a large sum in the shape of dividends from the Jute Mills Company and it claimed to set off against that sum a sum alleged to have been the total loss sustained in the other four concerns. The assessee company had, previous to the year of account, ceased to carry on the business of those concerns; and the sum sought to be set off was made up of interest on moneys borrowed, depreciation on the machinery and buildings, bad debts written off, loss in revaluation of closing stock due to deterioration, and establishment and miscellaneous charges of the various concerns.

Held that the assessee company was not entitled to set off the losses as claimed by it which were of a capital nature against the income from dividends.

A company can cease any one or more of its activities without stopping the others.

* Original Petition No. 128 of 1933.

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Section 10 of the Indian Income-tax Act only deals with businesses which are being carried on and not businesses which have ceased to be carried on.

Several concerns which a company carries on are not necessarily all one business, namely, the company's business. It is a question of fact in each case whether the several businesses carried on by a company are separate businesses or whether they are so interlocked with the main chief business of the company as to be really one business.

Arunachalam Chetty v. Commissioner of Income-tax, (1928) I.L.R. 52 Mad. 296 (S.B.), held to be erroneous in deciding that the piecergoods business of the assessee in that case was only a branch of his banking business and not a separate and distinct business.

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

K. V. Krishnaswami Iyer, V. Rajagopala Iyer and T. V. Ramiah for assessees.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The question referred to us is :

“Whether there was sufficient legal evidence to justify the Income-tax Officer's finding that during the year of account the company carried on no business within the meaning of section 2 (4) of the Income-tax Act, XI of 1922, and that the losses claimed by the company were of a capital nature and could not be set off against the income from dividends.”

The assessee company is a limited company registered in 1904 under the Indian Companies Act. The main objects of the company as set out in its Memorandum of Association are (i) to acquire and carry on the business then carried on by the Chittivalsah Spinning and Weaving Company, Limited, at Chittivalsah, (ii) to acquire and carry on the business then carried on by the

Madras Portland Cement and Tile Works, Limited, at Madras and Bangalore and (iii) to acquire and carry on the business then carried on by Messrs. Arbuthnot & Company, Madras, including (a) Cement Works in Calcutta, (b) Rice Mills at Nidamangalam and Tiruvalur and (c) Reliance Foundry at Madras. There is also another object set out in its Memorandum of Association, namely, to take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly to benefit the company. In pursuance of this last-mentioned provision the company purchased a large number of shares in the Chittivalsah Jute Mills Company, Limited, receiving in the shape of dividends during the year of account Rs. 1,40,000. Against that sum the assessees claimed to set off Rs. 1,59,489-1-5 being the total loss alleged to have been sustained on the Vellore Rice Mills, Cement Works, City Brick and Tile Works, Reliance Rice Mills and Reliance Engineering Works and including an amount of Rs. 37,015-0-2 as depreciation. A net loss of Rs. 19,470-15-5 was thus arrived at from which a sum of Rs. 14,482-12-0 was deducted being income-tax on dividends, the loss returned being Rs. 4,988-1-5. In pursuance of its objects the company acquired and carried on various businesses until the year 1923. In that year, the Imperial Bank of India to which the company owed large sums of money applied to the High Court for the winding up of the company and as a result the several businesses were, under the orders of the High Court, taken over and conducted by the

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Official Liquidator till 1925. Then, by consent, the liquidation proceedings were withdrawn and the company tried to resume its activities with an increase of its share capital but apparently without success. From that year onwards, the Income-tax Commissioner finds that the company was existing merely to dispose of its various concerns to their best advantage before closing down finally, and the letters referred to by him clearly support such a finding. It is clear that, with regard to the businesses in respect of which the assessee claimed to set off the respective losses, no trade was done in them since November 1925 except sales of old stock during the year of account amounting to Rs. 260 in the Madras Cement Works and Rs. 1,806 in the City Brick and Tile Works, Bangalore. No purchase was made or anything manufactured during this year. On the contrary, it is admitted that no business whatsoever was carried on except the sale of the old stock already referred to. The loss of Rs. 1,59,489-1-5 was made up of payment of interest on moneys borrowed, depreciation on the machinery and buildings, bad debts written off, loss in revaluation of closing stock due to deterioration and establishment and miscellaneous charges of the various concerns. The company, however, continued to retain its holding of shares in the Chittivalsah Jute Mills Company, Limited, and to that extent the company was undoubtedly carrying on business; and this is not disputed by the Commissioner of Income-tax. What, however, is contested by him is the contention that the assessee is entitled to set off against dividends received from the Chittivalsah Jute Mills

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Company, Limited, the loss in the other concerns already referred to, as in his opinion the assessee had ceased to carry on the business of those concerns and had sustained no "loss of profits or gains" which could be set off under section 24 or otherwise against the other income. The assessee both before the Commissioner and before us relied upon the Full Bench decision of this High Court in *Arunachalam Chetty v. Commissioner of Income-tax*(1). There, the trader having two branches in his trade, viz., a cloth business and a banking business, carried on both, each with borrowed capital, and, as the cloth business ended in a loss, he had to close it in 1924 and all that portion of the borrowed capital which was sunk in the cloth business was lost before 1924; and the trader, having had to pay interest on that lost capital in 1924-25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924-25. It was held that, though the branches were distinct, the trade was one and though the lost capital was not available for use in the trade, namely, the banking business, in the year of assessment, the interest paid on it should be deducted under section 10 (2) (iii) of the Indian Income-tax Act. The facts were that the assessee was a Nattukottai Chetty firm trading under the vilasam of A.L.A.R., their primary business being the usual Nattukottai Chetty business of banking and money-lending. Under the style of Ramaswami & Co., they also traded in piecegoods in Madras. That business was unsuccessful and when closed down in 1924 had sustained a loss of Rs. 11,00,000 odd. It was

(1) (1928) I.L.R. 52 Mad. 296 (S.B.).

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found by the Commissioner of Income-tax that the business of Ramaswami & Co. was quite separate and distinct from that of A.L.A.R. The Full Bench of which I was a member, however, did not agree with this finding and held that it was not a separate business but only a branch of the same business and the finding of principle arrived at is upon that basis and that basis alone. As I was a member of that Bench, I am free to express my opinion, which is, that the finding of fact of the Income-tax Commissioner ought to have been accepted and that the view of COURTS TROTTER C.J. on this question of fact, with which of course I agreed, was erroneous. I now think that we were mistaken in holding that the piece-goods business which was carried on under a different name and in a different place was only a branch of the banking business because I am now satisfied that those two businesses were separate and distinct. I think that the examples given by COURTS TROTTER C.J. on page 299 are not quite happy ones. This decision can only be taken as applying the principle to cases where the businesses are not separate. What is the position in the present case? The fallacy underlying the assessee's argument is that because a company carries on several concerns those concerns are all one business, namely, the company's business. That is not so. A company can carry on several distinct and separate businesses and it must always be a question of fact whether these businesses are separate businesses or whether they are so interlocked with the main chief business of the company as to be really one

business; for example, a railway company carrying on a steam-boat business in connection with its railway. This distinction has been recognized in cases under the Income-tax Acts in England. One of these is *Scales v. George Thompson & Co., Ltd.*(1). There, the respondent company was incorporated in 1905 to take over as a going concern the business of George Thompson & Co., shipowners, ship and insurance brokers, underwriters and merchants. As regards their underwriting business the firm had been represented by two of their partners who acted on behalf of the partnership as "names" or members of a syndicate whose credit was used by an underwriting agent in underwriting risks at Lloyd's. The monetary deposit made at Lloyd's in respect of these two partners was transferred to the company, but since Lloyd's will not recognize a company as a name these two partners continued to act as nominees and agents of the company to which all underwriting profits were handed over, the company being responsible for any losses. These profits were brought into the company's accounts with those of the rest of their business. In 1919 one of these nominees retired and in 1920 the other died, whereupon the underwriting business ceased. The company claimed that the underwriting business was a business separate from their other activities and that it should be treated as a separate business in computing their liability. The Special Commissioners allowed their appeal. It was held by the High Court that the question was one of fact and

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(1) (1927) 13 T.C. 83.

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that there was evidence on which the Commissioners could come to their decision. ROWLATT J. in his judgment says :

" This company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two. . . . One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting."

The same observations can be applied to the present case equally well. The company could cease any one or more of its activities without stopping the others and without getting rid of their share-holding in the Chittivalsah Jute Mills Company, Limited. Similarly, they could get rid of their Chittivalsah Jute Mills shares without stopping any of the other concerns. Cases like the present are dealt with in the *Commissioner of Income-tax, Madras v. Siddha Gowder and Sons*(1) and *Commissioner of Income-tax, Madras v. Best & Co., Madras*(2). The five concerns in question here were separate businesses and, if those businesses had been carried on during the year of account, the profits and gains of each of them separately would have been arrived at under section 10 (1) and (2) of the Act after making the allowances given in sub-section (2); and the loss, if any, in any one or more of the businesses thus arrived at would, under section 24 of the Act, be set off against the profits and gains of the more

successful businesses arrived at in the same way and the aggregate income computed. But the assesseees are not entitled to adopt this course in the present case because section 10 only deals with businesses which are being carried on and not businesses which have ceased to be carried on as is the case here. For these reasons, the assesseees are not entitled to set off the losses as claimed by them which were of a capital nature against the income from dividends. The question propounded must, therefore, be answered accordingly. Costs to the Commissioner of Income-tax, Rs. 250. The question in Original Petition No. 144 of 1933 is answered in the same way. Costs Rs. 125.

RAMESAM J.—I agree.

KING J.—I agree.

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(1) (1932) I.L.R. 55 Mad. 818 (S.B.). (2) (1932) I.L.R. 55 Mad. 832 (S.B.).

APPELLATE CIVIL.

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

1934,
October 3.

THE SPECIAL DEPUTY COLLECTOR OF RAMNAD
(PETITIONER), APPELLANT,

v.

THE RAJAH OF RAMNAD (CLAIMANT), RESPONDENT.*

Land Acquisition Act (I of 1894), ss. 31 and 32—Lands included in an Impartible Estate acquired under the Act—Compensation money payable—Proprietor of Impartible Estate—If, a person incompetent to alienate within the meaning of ss. 31 and 32—Madras Impartible Estates Act (II of 1904)—Policy of.

The proprietor of an impartible estate is a person incompetent to alienate the lands comprised in the estate within the meaning of sections 31 and 32 of the Land Acquisition Act. The policy of the Madras Impartible Estates Act is that the compensation money payable in respect of the lands acquired under the Land Acquisition Act should not be paid over to him but should be converted into other land to form part of the estate which will not thus suffer from the acquisition. In such a case the acquiring officer should deposit the compensation amount in Court under section 31 of the Land Acquisition Act so as to enable the Court to deal with the same under section 32 of the Act.

APPEALS against the orders of the District Court of Ramnad, dated 25th September 1931, in Original Petitions Nos. 43 and 48 of 1931 (originally presented to the High Court as Civil Revision Petitions Nos. 553 and 554 of 1932 but subsequently directed to be converted into appeals on payment of deficient court-fee).

* Appeals Nos. 232 and 233 of 1934.

These appeals originally came on for hearing before PANDRANG ROW J. who made the following order referring the appeals to a Bench :—

In these cases the compensation amounts due in respect of lands acquired for public purposes were deposited in the District Court, Ramnad, by the Land Acquisition Officer under section 31 (2) of the Land Acquisition Act, because, according to him, there was no person competent to alienate the lands which formed part of the impartible estate known as the Ramnad Zamindari. The question for decision by the District Court was whether, in view of the provisions of section 4 of the Madras Impartible Estates Act (II of 1904), the Rajah of Ramnad who is the proprietor of the impartible estate in question was competent to alienate the lands, and this question was decided by the District Judge in the affirmative.

The Government Pleader has presented these two petitions for revision of the orders of the District Judge, as the question decided by the District Judge is one of general importance, which has arisen and is likely to arise frequently, and there have been contrary decisions given by different District Judges, and it is considered necessary to have the law definitely laid down on the point by the High Court. There can be no doubt that the point is one of considerable general importance, and it seems to me desirable that it should be decided by a Bench, especially in view of the absence of any clear authority. Another question has also been argued before me at some length, viz., whether these revision petitions are not competent because there is a right of appeal from the orders sought to be revised. This question also is one of general importance and should in my opinion be decided by a Bench. The petitions are therefore referred to a Bench of two Judges.

BEFORE THE BENCH :—

The Government Pleader (P. Venkatramana Rao) for appellant.

A. C. Sampath Ayyangar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—Certain land situated in two villages KING J.

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and belonging to the impartible estate of the Rajah of Ramnad was acquired under the Land Acquisition Act for the purpose of making a road. The acquiring officer (the Special Deputy Collector, Ramnad) deposited the compensation-money in Court under section 31 of the Act. The District Judge, holding in effect that the money should not have been deposited, ordered it to be paid to the Rajah. These are revision petitions filed by the Government against his order.

A preliminary objection was raised on behalf of the Rajah that, as the Land Acquisition Act provided in section 54 for an appeal, no revision petition could be heard. Realising that this contention would involve a lengthy argument of only academical interest and realising also the importance of the point raised in the petitions, we converted the petitions into appeals and proceeded to hear them on their merits.

The learned District Judge in a brief order has given two reasons for his decision,

(i), that the very existence of acquisition proceedings which the Rajah could not resist is a necessity which would permit alienation under section 4 of the Impartible Estates Act, and

(ii), that the Rajah is *not* a person who can come within the phrase "incompetent to alienate" in section 31 or "having no power to alienate" under section 32 of the Act.

No attempt has been made at the hearing before us to support the first of these reasons, nor is any serious reliance placed upon the second. Even the learned District Judge himself refers to the Rajah's powers of alienation being "limited by legislation as a matter of public policy." The learned Judges who decided the case reported as

Mrinalini Dasi v. Abinash Chandra Dutt(1) say on page 1027 :

"The Legislature obviously intended to apply the section to cases of persons who have no power to alienate the property acquired as absolute owners."

And with this view we are in entire agreement. In our opinion the Rajah can in no way be held to be absolute owner of his impartible estate, and sections 31 and 32 of the Land Acquisition Act must *prima facie* apply to him. It is true that in *Assistant Collector of Kaira v. Vithaldas*(2) a very subtle distinction is drawn between "disability attaching to a person holding land" and "disability attached to the land held", but with respect we see no reason to follow this distinction. It seems to us obvious that if a person is entitled to land which by reason of some enactment he cannot alienate he is incompetent to alienate it.

The main argument of the learned Advocate for the Rajah is a somewhat different one. The Rajah may perhaps be a person incompetent to alienate the land, but if the whole of sections 31 and 32 is read it will be seen that the sections are unworkable if applied to his case, and can be applied only to cases in which the land acquired would eventually have come into the possession of an absolute owner. The provisions of section 32 are these: If the Court finds that the land acquired belonged to a person who had no power to alienate it, it shall order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership; if such an immediate purchase cannot be made then the money must be invested and interest

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(1) (1910) 14 C.W.N. 1024, 1027.

(2) (1915) I.L.R. 40 Bom. 254.

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must be paid to the person who would have been entitled for the time being to the possession of the land and this must continue until either (i) land is purchased as contemplated above or (ii) any person becomes absolutely entitled to receive the money.

Now there is no authority directly covering the question before us, but the authority which comes nearest to it is *Assistant Collector of Kaira v. Vithaldas*(1) to which incidental reference has already been made. In that case, what was acquired was land the alienation of which was prohibited by the Bhagdari and Narvadari Act (Bombay Act V of 1862). It was held that section 32 *prima facie* applied to the case, but could not apply on closer examination, because (i) no other lands could be purchased to be held under the like title and conditions of ownership, and (ii) there could never be any person more absolutely entitled to the land acquired or the compensation money than the owner of the land at the time of the acquisition. No perpetual investment of money is contemplated by section 32, and therefore section 32 cannot apply.

The learned Advocate for the Rajah relies very strongly on this ruling, but clearly the crux of the whole matter is whether in the present case the purchase of land under section 32 is or is not possible. If it is possible the last remaining reason for not applying the section disappears. Now it is clear from section 3 of the Bhagdari and Narvadari Act that the Act applies to shares in definite Bhagdari or Narvadari villages. If a few acres of land in one of these villages are acquired

(1) (1915) I.L.R. 40 Bom. 254.

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it will of course be impossible to purchase a similar small quantity of land elsewhere to be held under the same conditions of ownership, as there must be a limited number of villages and each village must be limited in area. But the estate of the Rajah of Ramnad is not geographically restricted in this way, and there is no reason why it cannot be added to by the purchase of land to compensate for the loss sustained by the acquisition.

The result is then that *Assistant Collector of Kaira v. Vithaldas*(1) affords no real parallel to the present case, and that there is no reason why section 32 should not be applied to it. In the ordinary sense of the words the Rajah was clearly incompetent to alienate the lands acquired and it is in accordance with the policy of the Impartible Estates Act that the compensation money should not be paid over to him but should be converted into other land to form part of the impartible estate which will not thus suffer from the acquisition. We hold therefore that the Special Deputy Collector was right in depositing the money under section 31, and the District Judge should now proceed to deal with the deposit under section 32 and we allow these appeals with costs (One set).
G.R.

(1) (1915) I.L.R. 40 Bom. 254.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1934,
October 16.

DASARI NAGABHUSHANAM (PLAINTIFF), PETITIONER,

v.

KUNEMNENI VENKATAPPAYYA (DEFENDANT),
RESPONDENT.*

Court Fees Act (VII of 1870) (as amended by Madras Act V of 1922), Sch. II, art. 17-A (i)—Consequential relief and additional relief—Distinction between—Suit for declaration that an instrument is a forgery and for refund of costs incurred in registration proceedings—Character of—Proper court-fee to be levied for the two prayers.

N complained to the Registrar that his signature in a sale deed had been forged and objected to the registration of the same. In spite of the objection the Registrar directed its registration. N filed a suit praying that the instrument may be declared to be a forgery, and also prayed for a refund of the costs incurred in the registration enquiry. A question arose as to what was the proper court-fee payable on the same.

Held (1) that, so far as the relief for declaration was concerned, it fell under Schedule II, article 17-A(i), of the Court Fees Act inasmuch as he, not being a party to the instrument, was not bound to ask for the cancellation of the same as a consequential relief;

(2) that, in regard to the refund claimed, *ad valorem* fee should be paid on the amount claimed by way of refund since it was merely an additional relief and not a consequential one.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Tenali, dated 21st February 1933 and made in Original Suit No. 306 of 1931.

V. Subrahmanyam for petitioner.

* Civil Revision Petition No. 878 of 1933.

P. V. Rajamannar and K. Subba Rao for Government Pleader (P. Venkatramana Rao) for respondent.

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JUDGMENT.

In my opinion, the view of the Court-Fee Examiner and the decision of the District Munsif supporting that view, are clearly wrong. There is a distinction between the getting rid of a document to which a person is a party and one to which he is not. The plaintiff in the suit complains that the sale deed was forged by the defendant, that, in spite of his objection, the Registrar directed its registration, and he prays that the instrument may be declared to be a forgery.

When a person impeaches a deed as having been forged, to refer to him as being a party to it, is an obvious misuse of words. Mr. K. Subba Rao, who supports the lower Court's view, contends that the provision applicable is section 7 (iv-A) of the Court Fees Act, which runs thus :

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed,

if a part of the decree or other document is sought to be cancelled, such part of the document or value of the property."

His contention is that, for the purposes of the Court Fees Act, it is incumbent upon the plaintiff to have even a forged sale deed set aside or cancelled; in other words, that the section (in regard to the decrees and instruments of the kind

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dealt with by it) forbids declaratory suits and enacts that cancellation should always be prayed for. This argument is, in my opinion, utterly untenable. To declare what the substantive rights of the parties are or to prescribe the modes of enforcing those rights is outside the province of a fiscal enactment like the Court Fees Act. The question then really is, when a person alleges that a forged instrument has been brought into existence as if he were a party to it, does the law cast upon him a duty to have it cancelled or set aside by suit? There are two statutory provisions which show that a suit for declaration lies : (i) Section 39 of the Specific Relief Act, illustration (b) to that section contains an express reference to forged instruments ; and (ii) article 92 of the Limitation Act refers to suits "to declare the forgery of an instrument issued or registered". While the law thus entitles a person to sue to have the document adjudged a forgery, does it compel him or make it obligatory upon him to get it cancelled or set aside? The cases cited by Mr. Subba Rao refer to instruments or decrees to which the plaintiff was a party. In *Arunachalam Chetty v. Rangasawmy Pillai*(1) the referring Judges clearly point out the distinction between a document to which a person is a party and that to which he is not. When a document is of the former class, they point out that until it is set aside, it cannot be treated as void and that the necessary result of declaring that such a document is not binding on the plaintiff is to cancel or set aside the deed. The case might be different, they go on to add, where a declaration is sought by a person who is

(1) (1914) I.L.R. 38 Mad. 922 (F.B.).

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not a party to the document ; the suit may in such a case be properly regarded as one for declaration only. In the second case referred to by the learned Counsel, namely, *Venkatasiva Rao v. Satyanarayanamurty*(1), this distinction is equally borne in mind. Adverting to *Balakrishna Nair v. Vishnu Nambudri*(2), REILLY J. affirms that it was correctly decided, because the plaintiffs there, not having been parties to the decree, could have asked only for a declaration and it would not have been appropriate for them to pray that the decree should be set aside. Throughout his judgment, the learned Judge makes it perfectly clear that he is dealing with decrees obtained by fraud ; in such a case, the plaintiff being a party to the decree which, he complains, is vitiated by fraud, there can be no doubt that he must get it set aside. ANANTAKRISHNA AYYAR J. refers to this distinction in even clearer terms. Observes the learned Judge :

"In fact, not being a party to the document, he cannot have it 'set aside'. All that he can pray for is a declaration that he is not affected in any way by that document."

Dealing with the case of a forged will, I made the following observation in *Kattiya Pillai v. Ramaswamia Pillai*(3) which, I think, applies with equal force here :

"For instance, if a person, who feels aggrieved by a will, sues for recovery of immovable property covered by it which happens to be in the possession of a third party, claiming the property on the strength of the will, can it be successfully contended that such a suit is governed not by the ordinary twelve years period but that the plaintiff is first bound to get the will set aside within the shorter period provided by article 91 of the Limitation Act? Such a contention cannot prevail."

(1) (1932) I.L.R. 56 Mad. 212.

(2) 1930 M.W.N. 509.

(3) (1929) 56 M.L.J. 394.

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In *Ratnamasari v. Akilandammal*(1) there is an observation of BHASHYAM AYYANGAR J., which is even more germane to the present discussion, as it deals with forged instruments. The learned Judge treats it as beyond doubt that, when a person seeks to recover immovable property, the period of limitation is not under articles 92 and 93 abridged, because the defendant resists the action by relying upon a forged conveyance (see page 313). In deciding what the proper court-fee payable is, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for, *Kattiya Pillai v. Ramaswamia Pillai*(2). Where it is therefore essential for the plaintiff to pray for cancellation, he cannot, by merely asking for a declaration, evade the provisions of the Court Fees Act. But in the present case I am clearly of the opinion that the only relief that the plaintiff can ask for is that of declaration and that a prayer for cancellation would be quite inappropriate.

It is next contended that section 39 of the Specific Relief Act itself shows that the plaintiff is under a duty to pray for cancellation also. In overruling a similar contention, I made the following observations in *Kattiya Pillai v. Ramaswamia Pillai*(2), already referred to :

"The plaintiff asks that the will may be declared void. That section further enacts that in such a suit the Court may, in its discretion, adjudge the instrument void or voidable and order it to be delivered up and cancelled. In a suit rightly framed under that section, it is the Court's function to order the instrument to be cancelled; it is not a part of the prayer in the plaint. Then again, the section goes on to say that if the instrument is one that has been registered under the

Registration Act, the Court shall send a copy of its decree to the Registration Officer, who shall note in his book that the instrument has been so cancelled. This, again, is not a relief which it is the duty of the plaintiff to sue for, but is the duty of the Court to grant."

REILLY J., who was also a party to that judgment, concurred in this view.

As to the effect of registration, I think, the judgment in *Mohima Chunder Dhur v. Jugul Kishore Bhattacharji*(1) may be usefully referred to. As in the present case, the defendant there obtained from the Registrar an order for the registering of the document, and the plaintiff, alleging it to be a forgery, brought the suit to have it declared void. The learned Judges held that the decision of the Registrar, whose proceedings were only those of an executive officer, did not have even the effect of shifting the onus of proof and that it lay upon the defendant to establish that the deed impeached was genuine.

I must mention that Mr. Subba Rao has brought to my notice the decision of STONE J. in Civil Revision Petition No. 1597 of 1933. He says that, in circumstances somewhat similar, the learned Judge held that the case fell within section 7 (iv-A). The judgment contains no discussion and merely purports to follow *Venkatasiva Rao v. Satyanarayanamurty*(2) which, as I have shown above, does not bear out the learned Counsel's contention.

Lastly, it is argued that the prayer for the refund of the costs incurred in the registration enquiry must be deemed to be one for consequential relief. I do not think this contention requires

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(1) (1902) I.L.R. 26 Mad. 291.

(2) (1929) 56 M.L.J. 394.

(1) (1881) I.L.R. 7 Calc. 736.

(2) (1932) I.L.R. 56 Mad. 212.

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serious notice. The relief for the refund is undoubtedly an additional relief but in no sense a consequential relief; it is not a relief consequential upon the declaration.

My decision therefore is, that, so far as the relief of declaration is concerned, the case falls under Schedule II, article 17-A (i) and that the court-fee that the plaintiff has paid is proper. In regard to the refund claimed, *ad valorem* fee on the amount should be paid.

I make no order as to costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

A. L. RAMA PATTEN AND BROTHERS BY PARTNER
A. L. RAMA PATTEN (PLAINTIFFS), APPELLANTS,

v.

MANIKKAM ALIAS LINGAPPA GOUNDER
(THIRD DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 16—Scope of—Indian Trusts Act (II of 1882), sec. 89—Effect of undue influence—English Law—Applicability of—Burden of proof.

Section 16 of the Indian Contract Act deals with the exercise of undue influence on one party to a contract by the other party, whether directly or in conspiracy with or through the agency of others. But apart from that section, the principle of English cases like *Maitland v. Irving*, (1846) 15 Sim. 437; 60 E.R. 688, has been made applicable here by section 89 of the Indian Trusts Act, with the result that, even in India, the onus lies on a third party, who takes the benefit of a transaction with notice or knowledge of circumstances raising a presumption or

* Appeal No. 398 of 1932.

probability of undue influence by the other party to the contract on the party complaining of undue influence, of proving that he (the third party) derived no unfair advantage or that the party complaining of undue influence acted as a free agent.

The dictum of VENKATASUBRA RAO J. in *Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar*, (1927) 53 M.L.J. 842, to the effect that the third party's knowledge of fiduciary relationship between the parties to a contract puts the third party under the same disability as the other party who occupied the position of confidence, *approved*.

Semle.—Whether the observations of Lord SHAW in *Poosathurai v. Kannappa Chettiar*, (1919) I.L.R. 43 Mad. 546 (P.C.), about the exercise of undue influence "in conspiracy with or through the agency of others" are not wide enough to take in the full scope of the doctrine as illustrated by English cases.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No. 6 of 1932.

T. M. Krishnaswami Ayyar and C. S. Swaminathan for appellants.

Advocate-General (Sir A. Krishnaswami Ayyar), C. Unnikanda Menon and K. Kuttikrishnan Nair for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The plaintiffs-appellants are a family of landlords and money-lenders in Palghat. Defendants 1 and 2 are brothers, and the third defendant is their nephew. They too owned extensive properties in the neighbourhood of Palghat, but have latterly got into difficulties and defendants 1 and 2 were adjudicated insolvents in 1932. The suit was laid for the recovery of a sum of about Rs. 58,000 due as per account, Exhibit A. The third defendant was the only contesting defendant and the question in the appeal relates to

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his liability. The claim in the appeal has been limited to a sum of Rs. 15,000 on the ground, perhaps, that the third defendant has not assets enough to yield anything more, or on the ground that the balance could be realised from the assets of first and second defendants. But this makes no difference so far as the question to be decided is concerned.

The point in dispute was embodied in one comprehensive issue, viz., whether the third defendant's signature to Exhibit A has not been obtained under circumstances mentioned in his written statement and whether, if so, he is not liable. The story in the written statement was that the third defendant has from his infancy been living with and under the protection of defendants 1 and 2 till October 1930, that, though he attained majority in 1928, he was in the habit of affixing his signature to any paper, if so directed by the first defendant, and he must have so signed in the plaintiffs' book, Exhibit A, without understanding the matter or making any enquiry whatever, because he feared the first defendant and believed that there would be no fraud or deception in the matter. It further alleged that he subsequently discovered that he had been defrauded in the matter, and that the plaintiffs who were well aware of the circumstances of the family had conspired with defendants 1 and 2 to get the third defendant involved in this liability for their own better security.

Exhibit A is an account book beginning from September 1928. But it is clear from the evidence that the plaintiffs had been lending moneys to defendants 1 and 2 for at least two years before

that date. Exhibit A is headed as an account of plaintiff's dealings with defendants 1 and 2. It begins with an entry, dated 29th of September 1928, whereby defendants 1 and 2 acknowledge liability for a sum of Rs. 13,702-11-0, said to be due for principal and interest under a promote of earlier date. Between October 1928 and February 1929 there were further borrowings to a considerable extent; but no amount seems to have been repaid. In September 1929 defendants 1 and 2 wanted a further advance of Rs. 8,000; but, as they were heavily indebted to plaintiffs even by that time, the plaintiffs refused to lend more, unless defendants 1 and 2 gave security. According to the evidence of the first witness for plaintiff (who is one of the plaintiffs), the first defendant then said that it was not possible to give security at that time and that he would get his brother's son (third defendant) also to sign. The witness adds that, as the Vakil whom he consulted advised him that money might be advanced if third defendant also signed, he intimated the same to the first defendant, that accordingly the three defendants came to the plaintiffs' shop on the evening of 22nd September 1929 and received Rs. 8,000 after signing an entry in the plaintiffs' book (Exhibit A) in the following terms:—"Having admitted that I am liable for the balance of principal amount and interest and for future credit and debit found under this book, I have signed this." Seven days later, the account for the Malayalam year was struck and the three defendants signed on a one anna stamp below the entry showing the debit balance due on that date. It is on the strength of these signatures

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of the third defendant in Exhibit A that the plaintiffs seek to hold him liable.

The evidence shows that the third defendant's father had died in 1913, and the widow and the third defendant, then an infant, continued to live with defendants 1 and 2, who were in management of the family properties. The boy was at school up to March 1931, and in the partition suit (Original Suit No. 63 of 1922) which another uncle had filed against these defendants, the present first and second defendants were conducting a common defence on behalf of the third defendant as well, though his mother was the guardian *ad litem* on record. He attained majority in September 1928 but continued to live with defendants 1 and 2 till October 1930. Though in the plaint it was alleged that defendants 1 and 2 had borrowed the amounts shown in Exhibit A for the "common necessities" of the family of defendants 1 to 3, no serious attempt was made to prove this allegation. The onus of proving the same would by no means have been light, in view of the fact that the third defendant was only a nephew of the defendants 1 and 2 and defendants 1 and 2 were in possession of extensive properties yielding a large income. There have, no doubt, been litigations since 1922, in which considerable sums must have been spent. But as no attempt has been made to bind the third defendant on the ground of family necessity, we need not pursue this question. Mr. T. M. Krishnaswami Ayyar (for the appellants) suggested that, though the binding character of the loans could not be said to have been proved, the possibility of the utilization of the loans for family purposes

might have been one of the reasons that induced the third defendant to take upon himself an express liability for these loans, and to this extent, the presumption or inference of undue influence would be negatived. But there are no materials on the record to afford sufficient basis even for this argument.

There appears to have been considerable discussion in the lower Court as to the exact nature of the plea raised by the third defendant, namely, whether it is one of fraud or one of undue influence. But, as the matter has really to be dealt with on the facts appearing in the case, Mr. Krishnaswami Ayyar did not press this objection as to the form of the plea. After all, as shown by the judgment of Lord HARDWICKE in *Chesterfield (Earl of) v. Janssen*(1), the equitable jurisdiction based on undue influence is only a development of the principle of relief on the ground of fraud; see also *Lancashire Loans, Ltd. v. Black*(2).

The defence of the third defendant was in substance set forth in Exhibit III, a notice which he sent to the plaintiff as early as 22nd October 1930. This was sent within a few days after the third defendant began to live separate from defendants 1 and 2. It has been suggested that it was sent at the instance of another uncle of the third defendant who had quarrelled with defendants 1 and 2 and who is now helping the third defendant. This might be true; but that is just the way the thing would have happened even if the third defendant's plea of undue influence by defendants 1 and 2 is well founded. We have only

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(1) (1750) 2 Ves. Sen. 125; 28 E.R. 82.

(2) [1934] 1 K.B. 380, 403, 404.

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got to see whether the facts proved in the case support that plea and we are not much concerned with the motives or circumstances that led the third defendant to repudiate his liability.

The learned Subordinate Judge has found that

“the plaintiffs were anxious to get the third defendant also to sign the hand-book as the money advanced was fairly large and as defendants 1 and 2 wanted more money. They must have therefore asked defendants 1 and 2 to get the third defendant also to sign the hand-book. . . . That the third defendant signed the book when he was under the influence of defendants 1 and 2 cannot be doubted. . . . I am of opinion that the third defendant did not appreciate the magnitude of the liability he was undertaking when he signed Exhibit A. . . . The plaintiffs can be said to have notice of the influence exercised on the third defendant by defendants 1 and 2. The first defendant was in a position to dominate the will of the third defendant. . . . He has taken an unfair advantage over the third defendant.”

As to the law, he said that, in the circumstances, the burden lay on the plaintiffs to show a free consent, i.e., that the third defendant had such protection as would secure to him a free and unfettered judgment, independent of any sort of control. Following the decision of VENKATA-SUBBA RAO J. in *Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar*(1), the learned Subordinate Judge held that, on the facts found, the plaintiffs could not hold the third defendant liable.

Mr. Krishnaswami Ayyar contended that the third defendant sought to rely on the ground that the plaintiffs in collusion with defendants 1 and 2 fraudulently caused him to sign Exhibit A, and, no such fraud having been made out, the plaintiffs'

(1) (1927) 53 M.L.J. 842.

claim against the third defendant should have been upheld. He further pointed out that on more than one matter the third defendant has not spoken the truth and that his version of the transaction should not be accepted. Even if it were permissible to deal with the case as one of undue influence, he maintained that the onus lay on the third defendant to prove the exercise of undue influence and that it had not been discharged. In particular, he insisted that, whatever might have happened between defendants 1 and 2 on the one hand and the third defendant on the other, there was no proof that the plaintiffs exercised any undue influence over the third defendant and thereby obtained an unfair advantage. As to the law, he argued that the decision of VENKATA-SUBBA RAO J. in *Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar*(1) ought not to be followed, because it is based upon the decisions of English Courts of Equity in disregard of the warning contained in several pronouncements of the Judicial Committee, viz., that in this country questions as to undue influence must be decided on the provisions of the Indian Contract Act alone and that the principles on which English Courts of Equity deal with similar questions are entirely inapplicable.

As we have already pointed out, the written statement of the third defendant sets out all material facts and his claim to relief must be decided with reference to them independently of their being labelled as fraud or undue influence; see *Smith v. Kay*(2), Per Lord CRANWORTH. The mere fact that on one or two matters the lower

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(1) (1927) 53 M.L.J. 842.

(2) (1859) 7 H.L.C. 750; 11 E.R. 299.

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Court was not prepared to accept the third defendant's evidence will not disentitle him to relief, for, in such cases, the conclusion of the Court rests not so much upon direct evidence showing that any deception was practised, as upon inference arising from the situation of the parties and the nature and effect of the transaction. That the transaction is seriously detrimental to the interests of the third defendant can admit of no doubt. With very little thought as to and without due appreciation of its nature and effect, the third defendant undertakes liability not merely for the amount actually advanced at the moment of his signing but also for all the advances taken by defendants 1 and 2 from the plaintiffs in the past and, what is more curious, for all loans which may be taken by them in the future. That defendants 1 and 2 stood in a fiduciary relation to the third defendant can again admit of no doubt; and that they used their influence to obtain an unfair advantage to themselves can scarcely be disputed.

It is noteworthy that defendants 1 and 2 have not been examined in this case. We are unable to agree with Mr. Krishnaswamy Ayyar that it was for the third defendant to examine them. It is true that at one stage the first defendant had been summoned on behalf of the third defendant, but the plaintiffs could not have been misled by this step, because they began to lead evidence only after the third defendant's case had been closed.

That the plaintiffs gained a substantial advantage by reason of the third defendant making himself jointly liable for the amounts advanced

and to be advanced to defendants 1 and 2 can scarcely admit of any doubt. It is also clear from the evidence on the plaintiffs' side that they knew of the circumstances of the defendants' family, and that the third defendant had only recently come of age. It is also fairly clear that it was at their instance that the third defendant was brought into the transaction.

With these indisputable circumstances it will be instructive to compare the findings on which FRY J. based his decision in *Bainbrigge v. Browne*(1) in favour of the creditor. The learned Judge there found that the creditors did not even know the age of the plaintiff who sought relief on the ground of undue influence, that they did not know that the plaintiff was resident under his father's roof or was in any way under his control, that they had reason to believe he was assisted by a solicitor as well as by certain family friends and were led to believe that the plaintiff was acting independently of the father; Cf. *Cobbett v. Brock*(2).

As regards the part taken by the plaintiffs in the exercise of undue influence, there can be no doubt that under the English authorities, the result will be the same whether the plaintiffs themselves exercised the undue influence or took the benefit of a transaction with notice that that transaction was the result of undue influence, exercised by their debtors, defendants 1 and 2. As observed by VENKATASUBBA RAO J. at page 852 of *Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar*(3), once it is shown that the plaintiffs

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(1) (1881) 18 Ch. D. 188.

(2) (1855) 20 Beav. 524; 52 E.R. 706.

(3) (1927) 53 M.L.J. 842.

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were aware of the existence of a fiduciary relationship between the first and third defendants, they are under the same disability as the party who occupied the position of confidence.

Mr. Krishnaswami Ayyar's main contention therefore was that, in this country, the question must be decided solely with reference to the terms of section 16 of the Contract Act, *Lala Balla Mal v. Akad Shah*(1), *Raghunath Prasad v. Sarju Prasad*(2) and *Gafur Mohammad v. Mohammad Sharif*(3); that, under that section, the undue influence must be shown to have been exercised by the other party to the contract, whether directly or in conspiracy with or through the agency of others, *Poosathurai v. Kannappa Chettiar*(4); and that mere notice or knowledge of circumstances raising a presumption or probability of undue influence as between the defendants *inter se* did not throw on the plaintiffs the onus of proving that they had derived no unfair advantage or that the third defendant acted as a free agent.

It may be conceded that section 16 of the Contract Act deals in terms with the exercise of undue influence by one party to the contract on the other. Indeed, this is the ordinary type of cases of undue influence. The question of the effect of undue influence exercised by somebody other than the grantee or promisee does not seem to have arisen in the cases that went up to the Judicial Committee from India, except in *Poosathurai v. Kannappa Chettiar*(4). We are not sure whether the observation of Lord SHAW in that case about the exercise of influence "in conspiracy with or through the agency of others"

(1) (1918) 35 M.L.J. 614 (P.C.).

(3) (1932) 63 M.L.J. 54 (P.C.).

(2) (1923) I.L.R. 3 Pat. 279 (P.C.).

(4) (1919) I.L.R. 43 Mad. 546 (P.C.).

is not wide enough to take in the full scope of the doctrine as illustrated by the English cases; for "agency" may in such cases well include instances in which the creditor or transferee knowingly or intentionally leaves everything in the hands of his principal debtor. As observed by their Lordships in *Turnbull & Co. v. Duval*(1), the creditor who conveniently leaves everything to be managed by another "must abide the consequences". Further examination of the question became unnecessary in *Poosathurai v. Kannappa Chettiar*(2) because the Judicial Committee came to the conclusion that the transferee had obtained no unfair advantage and that the sale had not been shown to have been for an undervalue.

Confining ourselves however to the statute law of India, it is clear that the principle of the English Cases referred to by VENKATASUBBA RAO J. has been made applicable in this country by section 89 of the Indian Trusts Act. As early as *Roop Laul v. Lakshmi Doss*(3) the application of these rules in this country was recognized by SANKARAN NAIR J. (see pages 21 and 22) and when that case went up on appeal before three Judges, they too observed that it made no difference that the claim under the deed was made not by the person who exercised the undue influence but by a third party; see *Lakshmi Doss v. Roop Laul*(4). In that particular case the third party was a volunteer and some of the earlier English cases are also cases relating to volunteers, but numerous later decisions in England have applied the same principles even to creditors or transferees for value, provided they had notice of all the relevant facts.

(1) [1902] A.C. 429.

(3) (1905) I.L.R. 29 Mad. 1.

(2) (1919) I.L.R. 43 Mad. 546 (P.C.).

(4) (1906) I.L.R. 30 Mad. 169.

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In view of Mr. Krishnaswami Ayyar's insistence on the inapplicability of the English rule, it is interesting to find, that, in the footnote to section 89 of the Indian Trusts Act in Stokes' Anglo-Indian Codes, reference is made to *Maitland v. Irving*(1) (though the reference is wrongly printed as 15 Simon 43). Its significance lies in the fact that, as stated by him in the introduction, Dr. Whitely Stokes was the draftsman of the Indian Trusts Act and the footnotes refer to the English decisions on which the sections were founded. *Maitland v. Irving*(1), thus relied on by him, was a case very much like the present. A and B consented to postpone the payment of £5,000 due to them from C in consideration of C procuring and giving them the plaintiff's guarantee for that sum ; and C at the same time informed A and B that the plaintiff was his niece and was possessed of considerable property, that she had resided with him for some time, that he had been her guardian and that she had been of age for about a year and a half. The guarantee thus given was held unenforceable by the creditors. The Vice-Chancellor observed :

"It seems very extraordinary that with full knowledge of those circumstances, they should have at once acceded to the proposal without making any enquiry or taking any pains to ascertain whether the young lady was a free agent and perfectly willing, with a full knowledge of the consequences, to do what the guardian said he would invite her or propose to her to do . . . They must have perceived that by adopting the suggestion of McLean (the debtor) they relied on the influence that he had over the young lady . . . Knowing the defenceless situation of the young lady, they combined with McLean, who disclosed it to them, in order that advantage might be taken of her defenceless situation for

(1) (1846) 15 Sim. 437 ; 60 E.R. 688.

the benefit of all the three and my opinion is that they must all three be considered as standing in the same situation."

When it is found that the principle of this decision has been adopted by the Indian Legislature in enacting section 89 of the Trusts Act, there is no substance in the contention that later English authorities of the same type furnish no guidance to us in the application of the rule.

It is unnecessary to refer again to the cases reviewed by VENKATASUBBA RAO J. We therefore content ourselves with noting the latest decision of the Court of Appeal in England in *Lancashire Loans, Ltd. v. Black*(1). A married daughter living with her husband and away from her mother had, at the mother's request, entered into transactions with the mother's creditors with a view to help her. The Court of Appeal refused to hold the transactions binding on the daughter. LAWRENCE L.J. observed that in cases of this kind

"the question is not merely whether the son or the daughter knew what he or she was doing, had done or proposed to do, but how the intention was produced . . . The law protects young persons of an impressionable age, when gratitude, affection and respect for a parent are fresh and strong, not by curtailing their capacity to deal with others but by binding the consciences of those who deal with them . . . The mother seems to have taken it for granted that she could get the daughter to comply with her request . . . and it never seemed to have occurred to the daughter to do otherwise than accede to whatever her mother asked her to do . . . The transaction was never properly explained to the daughter and she did not fully understand what she was doing."

As to the position of the creditors, the Lord Justice said :

"It is plain that they knew or had notice of all the relevant facts . . . They were permitting, if not inducing,

(1) [1934] 1 K.B. 380.

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RAMA PATTAR a young woman . . . to enter into a transaction the whole
v. burden of which they anticipated would fall on her . . .
LINGAPPA They are in no better position than the mother would have
GOUNDER. been in, had the daughter assigned her reversion directly to
VARADA- her, instead of to the respondents, for her benefit."
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[See also *O'Connor v. Foley*(1), *Kempson v. Ashbee*(2) and the cases collected in the note in 16 Madras Law Journal, page 252, of the journal portion.]

With reference to the observation of BROUGHTON J. in *Raj Coomar Roy v. Alfuzuddin Ahmed*(3) from which VENKATASUBBA RAO J. dissents, we may state that, even there, the learned Judge does not seem to have felt any doubt as to the applicability of the English rule. It does not even seem to us wrong to say, as he did, that where a third party stands in no confidential relation to the promisor or grantor, the onus does not *in the first instance lie* on the former to show that no undue influence was used. It is only when he is found or could be assumed to have had notice of the exercise of undue influence by another or at least of circumstances raising a presumption or probability of undue influence that the onus will be shifted on to him.

We are of opinion that the principles followed by Courts of Equity in England in dealing with similar transactions are equally applicable in this country and, judging the suit transaction by those principles, the plaintiffs cannot hold the third defendant liable. The appeal therefore fails and is dismissed with costs.

G.R.

(1) [1905] 1 Ir. Rep. 1. (2) (1874) L.R. 10 Ch. App. 15.
 (3) (1881) 8 C.L.R. 419.

APPELLATE CIVIL.

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

THE MUNICIPAL COUNCIL, SALEM, REPRESENTED BY ITS
 CHAIRMAN (DEFENDANT), PETITIONER,

1934,
 October 5.

v.

B. GURURAJAH RAO (PLAINTIFF), RESPONDENT.*

*Madras District Municipalities Act (V of 1920), sec. 93—
 Profession tax—Commutation money received by pensioner
 —Liability to profession tax.*

When a pension is commuted it ceases to be a pension and becomes a capital sum. Commutation money received by a pensioner is not therefore taxable under the Madras District Municipalities Act.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Salem in Small Cause Suit No. 2183 of 1932.

T. M. Krishnaswami Ayyar for petitioner.

S. V. B. Rao for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—The respondent is a retired Sub-ordinate Judge. He retired from service on 6th September 1930 on a pension. Under the Madras District Municipalities Act he was liable to pay profession tax to the petitioner, the Municipal Council, Salem, half-yearly. In 1931 he commuted a portion of his pension, viz., Rs. 150 a month for a lump sum of Rs. 17,820. The petitioner levied

* Civil Revision Petition No. 978 of 1933.

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profession tax on that sum in addition to the tax payable on the uncommuted pension treating it as a receipt of pension. The respondent refused to pay the tax in respect of that sum, but later on paid it under protest and sued the petitioner in the District Munsif's Court for a refund of the tax paid. The District Munsif gave a decree in favour of the respondent here holding that the sum received in lieu of the portion of his pension when it was commuted was no longer pension and therefore was not taxable under the Act. With this view we entirely agree. Pension has been defined in *The Secretary of State for India in Council v. Khemchand Jeychand*(1) as "a periodical allowance or stipend for past services" and in *Lachmi Narain v. Makund Singh*(2) as "a periodical payment of money" to the pensioner. *Amna Bibi v. Najm-un-nissa*(3) and *Nawab of Murshidabad v. Karnani Industrial Bank, Ltd.*(4) also give the same description to "pension". When a pension is commuted there is no longer any periodical payment; the pensioner receives once and for all a lump sum in lieu of the periodical payments. The pension is changed into something else, and becomes a capital sum. In an English case, *Crowe v. Price*(5), it was held that money paid to a retired officer of His Majesty's Forces for the commutation of his pension does not retain its character as pension so as to prevent it from being taken in execution. On page 217, COLERIDGE C.J. says :

"It is clear to me that commutation money stands on an entirely different ground from pension money, and that if an

(1) (1880) I.L.R. 4 Bom. 432.

(2) (1904) I.L.R. 26 All. 617.

(3) (1909) I.L.R. 31 All. 382.

(4) (1931) I.L.R. 59 Calc. 1 (P.C.).

(5) (1889) 58 L.J.R.Q.B.D. 215.

officer commutes his pension for a capital sum paid down, the rules which apply to pension money and make any assignment of it void, do not apply to this sum."

In our view the District Munsif was clearly right and we dismiss the petition with costs.

A.S.V.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

MANIKKAM PILLAI (PLAINTIFF), PETITIONER,

1934,
September 7.

v.

N. M. NAGASAMI AYYAR, AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Court Fees Act (VII of 1870) and Madras Act (V of 1922), art. 17-B of Sch. II—Tank-bed land—Court-fee payable in respect of.

A tank-bed being land which has no market-value because it is unsaleable except as accessory to other property, and for ascertaining whose value in the event of sale no means exist, falls under article 17-B of Schedule II of the Court Fees Act (VII of 1870) for purposes of court-fee to be paid, and not under section 7, clause (v) (c).

Rajagopala Naidu v. Ramasubramania Ayyar, (1923) I.L.R. 46 Mad. 782, referred to.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Melur, dated the 29th day of July 1933 and made in Original Suit No. 180 of 1932.

* Civil Revision Petition No. 1159 of 1933.

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R. Gopalaswami Ayyangar for petitioner.

K. Venguswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

The petitioner is a landholder and he sues the defendants, who occupy a holding under him, to eject them from part of a tank-bed upon which he alleged that they had encroached. A preliminary issue has been framed as to the correct court-fee to be paid, and this revision petition has been presented against an order requiring payment of an *ad valorem* fee under section 7, clause (v) (c), of the Court Fees Act which provides that, where land pays no revenue, the value is to be taken as fifteen times the net profits, or if no net profits have arisen therefrom, as the value of similar land in the neighbourhood. It is contended that the appropriate provision is article 17-B of Schedule II of the Act which relates to plaints in suits :

"Where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act."

The contention is supported by two separate arguments. The reliefs asked for were the eviction of the defendants, an injunction restraining them from interfering with possession, and a mandatory injunction directing them to remove the mud which, to make the land cultivable, they had thrown upon it. It is suggested in the first place that the substantial relief asked for lies in the injunctions requiring the defendants to restore the tank-bed to the *status quo ante* and to cease from interfering with it, and not in the prayer for possession which is merely ancillary

But recovery of possession, it can scarcely be gainsaid, is an essential element of any suit filed to turn out an encroacher, and I do not think that in such a case the plaint can be deemed to fall outside the scope of section 7 merely because other reliefs are also claimed.

The other argument is that article 17-B of the second Schedule applies and not section 7 (v) because the land is incapable of valuation. The learned District Munsif has called upon the plaintiff to state what net profits arose upon the land during the year preceding suit, and has added that if no net profits so arose, court-fee must be paid with reference to the value of similar land in the neighbourhood. Now it is clear, I think, that since the plaintiff claims the land as tank-bed it is as tank-bed that it must if possible be valued, and not as the cultivated land into which, as he alleges, it has been temporarily and wrongfully converted. But no net profits arise from an isolated area of tank-bed as such. Nor, I think, can it be assessed to a value by comparison with other similar lands, i.e., tank-beds, in the neighbourhood.

All tank-bed lands are of value only in the degree to which they subserve the requirements of other, and cultivable, lands by contributing to their irrigation. Regarded as separate entities it is not, I think, possible to place a money value upon them, because they are not so saleable. The principle for determining the market-value of property under the Court Fees Act has been laid down in *Rajagopala Naidu v. Ramasubramania Ayyar*(1) in the case of a temple where it was held that as

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(1) (1923) I.L.R. 46 Mad. 782.

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there can be no market for a temple as such, so there can be no market value for it. A temple has no market-value as it is inalienable, and a tank-bed has no market-value because it is unsaleable except as accessory to other property. No means exist for ascertaining what, in the event of such a sale, its value would be. Accordingly it is impossible to apply the provisions of section 7 (v), because the value of the subject-matter is indeterminate. The only course is to assess the court-fee under article 17-B. I allow the petition with costs, set aside the District Munsif's order, and direct him so to assess it.

K. W. R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Curgenvven.

ALAKKI VENKATARAMAYYA (PLAINTIFF), APPELLANT,

v.

MAHARAJA OF PITTAPURAM AND EIGHT OTHERS
(DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 145, 146 and 55—Transfer of holding—Several transfers—Case of—Benefit of ss. 145 and 146—Last transferee's right to—Intermediate transferee not registered as a ryot—Effect of—Application by all transferors and transferees—Necessity—Transferee whose transfer has been recognised by landholder—Suit by, under sec. 55 of Act—Maintainability of—Remedy under sec. 145 (2) of Act not availed of by him—Effect of—Determination of proper rate of rent in such suit—Permissibility.

Where there has been more than one transfer of a holding or a portion thereof, the last transferee can get the benefit of

* Second Appeal No. 893 of 1931.

sections 145 and 146 of the Madras Estates Land Act (I of 1908) even though the immediate transferee has not been registered as a ryot. But all the transferors and the transferees should join in the application to the landlord and until then he is not bound to recognise the transfer.

A transferee whose transfer has been recognised by the landholder and who has therefore become a ryot can sue under section 55 of the Madras Estates Land Act, even though he has not availed himself of the remedy under section 145 (2) of the Act, and the proper rate of rent can be determined in such suit. The effect of the transferee's failure to avail himself of the remedy under section 145 (2) of the Act is not to confer upon the landholder the right to fix the rent arbitrarily and in any manner he chooses.

Failure of all the co-sharers to agree is not a circumstance which, under the Act, justifies the landholder in not making a fair and equitable distribution.

Ramanathan Chetty v. Arunachalam Chettiar, (1920) I.L.R. 44 Mad. 43, relied upon.

APPEAL against the decree of the District Court of East Godavari in Appeal Suits Nos. 227 and 228 of 1926 preferred against the decree of the Court of the Headquarters Deputy Collector of Cocanada in Land Suit No. 94 of 1925.

P. Somasundaram for appellant.

K. Subramaniam for Advocate-General (Sir A. Krishnaswami Ayyar) for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by RAMESAM J.—The question arising in this second appeal is one relating to the application and working of sections 145 and 146 of the Madras Estates Land Act. The first respondent in this second appeal is the Maharaja of Pittapuram. In the village of Pavara in his Estate, three brothers of the Ohelikani family, Buchirayanam Garu, Tammayya Garu and Achuta Rayanim Garu,

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were holding certain lands under patta No. 6. The holding consisted of the following Survey Nos. with their corresponding extents :—

Survey No.	Extent. ACS.
201/2	0.95
205	10.64
214/2	1.26
242/2	40.48
246	6.2

The rent of the whole holding was Rs. 392-11-0. The evidence shows that the three brothers divided the holding and were enjoying their respective portions separately. Of these fields, the second and the third abovementioned, namely, Survey Nos. 205 and 214/2, fell to the share of the eldest brother Buchirayanim Garu. The shares of the other two brothers were sold to various persons. In the year 1912 steps were taken to have a register of record of rights for this village under Chapter XI of the Madras Estates Land Act. The preliminary register is Exhibits D-1 to D-5. Objections were filed by the two brothers (Exhibits E and E-1). Thereupon an order was passed (Exhibit E-2) recognising their transfer and registering the alienees along with the eldest brother. The final record of rights was then prepared (Exhibits G, G-1 and G-2, dated 30th May 1913). According to this record of rights the rent for Survey No. 205 was Rs. 74-8-0 and for Survey No. 214/2, Rs. 3-2-0. Thus the rent for the two survey fields in the possession of Buchirayanim Garu was Rs. 77-10-0. In the proceedings before the Revenue Officer who prepared the record of rights there was no dispute about the rent of the various fields. The objection

related to the alienations and all the parties agreed to the rates of rent as finally settled in the record of rights. Buchirayanim Garu and his sons then began to alienate these two fields by sale deeds, Exhibits C, C-1, C-2 and C-3, ranging between April and October 1913. The vendee, Venkatachalam, and his undivided brother, Venkataswami, sold the property to the plaintiff under two sale deeds, dated 22nd September 1923 (Exhibits A and B). Soon after the sale, the plaintiff and his vendors put in a petition to the zamindar praying that the transfer to the plaintiff should be recognised and that patta should be issued in his name. No reply was received to this petition. Paragraph 4 of the plaint contains an allegation that after receipt of this petition the zamindar "caused notice to be sent by the karnam of his village, collected sist of Rs. 77-10-0 fixed for the said two fields and cesses and granted a receipt to the plaintiff as purchaser but he neither granted patta in the name of the plaintiff nor caused the land to be entered in his name". This allegation in the plaint was not denied in the written statement. Some time after, on 7th July 1925, another notice was sent by the plaintiff praying that the patta should be issued to him. The defendant-zamindar replied to this saying that the other co-sharers in the holding have not agreed to the subdivision as prayed for by the plaintiff. He also objected to the recognition of the transfer in plaintiff's favour on the ground that his transferors were themselves not registered as ryots. Thereupon the plaintiff filed an application before the Collector under section 145 of the Madras Estates Land Act but that application was

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dismissed. The ground given by the appellate Court was that it was barred by time. Thereupon the present suit was filed by the plaintiff under section 55 of the Madras Estates Land Act praying for the issue of a patta. The first defendant is the zamindar. In paragraph 5 of the written statement he refers to the reply he gave to the plaintiff's notice of July 1925, and prays that it may be read as part of the written statement. In paragraph 4 of the written statement he contends that the joint pattadars did not agree to the subdivision of the holding. After this plea all the remaining co-sharers in the holding have been impleaded as additional parties as defendants 2 to 9. Of these, defendants 2 to 5 resisted the subdivision in the manner claimed by the plaintiff. The other defendants did not appear. No defendant objects to the transfer to the plaintiff. The Deputy Collector who tried the suit found that the plaintiff should be regarded as a "ryot", that his transfer should be recognised and therefore he is entitled to the issue of a patta, and that the dismissal of the application under section 145 by the Collector does not make the present suit *res judicata*. He gave a decree to the plaintiff directing a patta to be issued with rent of Rs. 77-10-0 as settled by the record of rights. On appeal, the learned District Judge also found that the plaintiff was entitled to a separate patta, and that the suit was not barred by *res judicata*. But he also found that, as the plaintiff's application under section 145 was dismissed, the zamindar acquired a right to fix the rent in any manner he liked and as the zamindar pleaded that Rs. 131 was the proper rent for the plaintiff's holding he

directed patta to be issued to the plaintiff with that rent. He also directed that each party should bear his own costs. The plaintiff now appeals.

The first point that arises in the second appeal is whether the plaintiff is entitled to be recognised as a transferee and is entitled to a separate patta. Both the lower Courts have decided this in favour of the plaintiff but the respondents again raise the contention. They contend that the original ryot of the holding must join in an application for transfer and wherever he does not join the zamindar is not bound to recognise the transfer. They even contend that, where the immediate transferor is not a ryot and is himself a transferee who has not yet been registered as a ryot, the zamindar is not bound to recognise his transfer at all. In fact, the latter part of the contention amounts to this, namely, that where there is more than one transfer and the intermediate transferee has not been registered as a ryot, the last transferee cannot get the benefit of sections 145 and 146 of the Act. We have no hesitation in rejecting this portion of the contention. It is opposed to the language of section 10 and such an extreme construction is not necessary for protecting the interest of the landholder. While rejecting this portion of the contention, we agree with the Advocate for the respondents in thinking that when there is more than one transfer, all the transferors and all the transferees should join in the application to the landlord and until then he is not bound to recognise the transfer. In this case, if the zamindar had taken his stand from the beginning on this plea he would probably be

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technically right, but, as already mentioned, paragraph 4 of the plaint contains an allegation that the zamindar, as a matter of fact, recognised the transfer and collected the rent from the plaintiff in accordance with the record of rights and gave him a receipt. The allegation is not denied. That being so, it appears that the zamindar did recognise the plaintiff's transfer in 1923, though later on he began to raise objections to it and would not recognise it in 1925. On this ground we hold that the zamindar, as a matter of fact, recognised the plaintiff's transfer and cannot now refuse to recognise the same. The plaintiff's transfer being recognised by the first defendant he becomes a "ryot".

The plaintiff having become a ryot can he now sue under section 55 even though his application under section 145 was barred? We think he can. It must be remembered that the zamindar has got the first right to subdivide the holding whenever there is a transfer of a portion. It is in the nature of both a right and a duty. In his own interest he is entitled to make an equitable distribution of the rent of the holding. There is also a duty on his part to make such a fair distribution in the interest of the co-sharers also. Section 145 says that he ought to do it in a fair way and within a reasonable time. In the present case, the zamindar has never made any distribution, fair or unfair, within a reasonable time. He simply kept quiet after the first notice and merely collected the rent. On account of his delay the plaintiff ought to have filed an application under section 145 within the time mentioned in clause 25 of Schedule B. Not having filed an application

within the time he lost that right. But can it be said that merely because the plaintiff lost that right the zamindar acquires a right to fix the rent arbitrarily and in any manner he chooses? We do not think that he acquires any such right by reason of the default of the plaintiff in filing an application in time. It must be remembered that such an application has become necessary by the zamindar's own delay in making a distribution, and he is not to gain by his own default. The excuse mentioned in the reply given by the zamindar in 1925 that all the co-sharers did not agree is irrelevant. That is not a circumstance which, under the Act, justifies the zamindar in not making a fair and equitable distribution. Whether all the co-sharers agree or not it is his duty to make a fair and equitable distribution. He failed to do so and, merely because the transferee-plaintiff failed to avail himself of the remedy given by the Act, the zamindar cannot get any advantage thereby. The policy of the Act is to see that every holding should be liable to a fair and equitable rent, neither more nor less, and that policy is not to be defeated by allowing the zamindar to fix any rent he chooses arbitrarily. There must therefore be some proceeding open to one or the other of the parties by which a proper rate of rent should be determined. Such a proceeding is the proceeding for the obtaining of a patta. Just as in a suit for rent a proper rate of rent can be determined incidentally where it is not already known even though a suit under section 55 for the obtaining of a patta was not filed, similarly, though the remedy under section 145 (2) has not been made use of by the ryot

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still the proper rate of rent can be determined in a suit for obtaining a patta under section 55. This conclusion is in accordance with the decision in *Ramanathan Chetty v. Arunachelam Chettiar*(1), and is consonant with the policy of the Act. The analogy relied on by the learned District Judge based on article 91 of the Limitation Act is misleading and is not a good analogy. We are of opinion that a suit under section 55 lies and, if a suit lies, the terms of the patta can be considered by the Court, one of the terms being the proper rate of rent.

On the above conclusion, if there is any further point to be considered in the case, we should call for a finding from the lower appellate Court to determine the proper rate of rent. The record of rights is only presumptive evidence (section 167) but cannot be conclusive about it. But both the lower Courts have expressed the opinion that in the present case the rent in the record of rights is the proper rent, and, seeing that it has never been seriously objected to by any co-sharers, we have no doubt that the finding is correct. In these circumstances, it is unnecessary to call for a fresh finding.

It is only fair to the zamindar to settle this matter finally in such a way that he should not be harassed by the other sharers by way of claiming a lower rate of rent than their holding should reasonably bear. We declare that the other sharers are liable to the rate of rent mentioned in the record of rights for their holding, nothing being shown to the contrary, and that the zamindar should be entitled to the total rent of the

(1) (1920), I.L.R. 44 Mad. 43.

whole holding of Rs. 392-11-0, and it should not be open to the other co-sharers to say that their lands are liable for smaller rent. We wanted to hear the other sharers if they have got anything to say in the matter but they were not represented and no arguments were advanced on their behalf. We therefore allow the second appeal and direct that the patta to the plaintiff should be issued by the first defendant with rent of Rs. 77-10-0 and corresponding cesses. The decree of the Deputy Collector will be restored with costs here and in the lower appellate Court to be borne by the first defendant. The declaration should be entered in the decree.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

PAPI NAIDU (DECEASED) AND FOUR OTHERS (SECOND
DEFENDANT AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1934,
March 7.

v.

SUBBARAYA CHETTY AND FOUR OTHERS (PLAINTIFF AND
DEFENDANTS 3 TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 46 and 54—Mortgage with possession—Debt under—Attachment of, under r. 46—Permissibility—Effect of—Security and right to possession if affected by—Separate attachment of security or of right to possession under r. 54—Necessity.

A mortgage debt under a possessory mortgage can be attached under Order XXI, rule 46, of the Code of Civil Procedure. The attachment of the mortgage debt operates not only on the debt but also on the security which fastens itself to the debt. There is therefore no further necessity to attach

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the security as immovable property. A valid attachment of the mortgage debt under rule 46 affects also the right to possession and it is not therefore necessary to separately attach the right to possession under rule 54 of Order XXI. The expression "security" covers the right to possession.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 88 of 1928 preferred against the decree of the Court of the District Munsif of Krishnagiri in Original Suit No. 253 of 1927.

D. Ramaswami Ayyangar for *C. S. Venkatachariar* for appellants.

B. Somayya for *V. V. Chowdary* for first respondent.

JUDGMENT.

This appeal raises an important question as regards the validity of an attachment effected under Order XXI, rule 46, of the Code of Civil Procedure. The first defendant held an anomalous mortgage and, under the terms of the mortgage deed, was in possession of the property. The plaintiff obtained a decree against him, attached his interest in the mortgage under rule 46, brought it to sale and purchased it in court-auction. The plaintiff, as the purchaser of the first defendant's mortgage interest, has brought this suit for possession and for mesne profits. As regards his claim to possession, no question arises, as the property has since the suit been delivered to the plaintiff. The lower appellate Court has passed a decree for mesne profits not only against the first defendant, who does not appeal, but also against defendants 2 to 6, with whose liability alone we are now concerned. I have said that the plaintiff himself became the purchaser at the

court-sale; he obtained the sale certificate on the 27th July 1926 and on the next day, i.e., on the 28th, the first defendant leased the property to the second. On the 5th May 1927 the present suit was commenced and the property was delivered to the plaintiff on the 9th May 1928. The mesne profits claimed are for the period between the date of the lease and the date of the delivery.

Mr. Ramaswami Ayyangar for the appellant (the second defendant) contends that, though by reason of the attachment under rule 46 the mortgage debt was validly attached, there was, so far as the right to possession was concerned, no legal attachment. It must now be taken as settled that the procedure to be followed as regards the attachment of the mortgage debt is that prescribed by rule 46. The question arose whether a mortgage debt was "a debt not secured by a negotiable instrument" within the meaning of that provision. The contention was put forward that a mortgage was an interest in immovable property and that rule 46 would not therefore apply; but that contention was rejected and the Courts held that a debt secured by a mortgage was none the less a debt for the purpose of the rule in question. The earlier cases that arose, such as *Karim-un-nissa v. Phul Chand*(1), *Tarvadi Bholanath v. Bai Kashi*(2) and *Nataraja Iyer v. The South Indian Bank of Tinnevely*(3), were in respect of simple mortgage debts; the argument that a mortgage debt should be treated as immovable property was repelled, as I have said, in those cases and the judgment in *Tarvadi Bholanath v. Bai Kashi*(2)

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(1) (1893) I.L.R. 15 All. 134.

(2) (1901) I.L.R. 26 Bom. 305.

(3) (1911) I.L.R. 37 Mad. 51.

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contains a lucid statement of the reasons for the view the learned Judges adopted. In those cases the question was left open, whether or not a mortgage debt under a possessory mortgage could be attached under this provision; that question has since been answered in the affirmative in *Chullile Peetikayil Nammad v. Othenam Nambiar*(1) and *Ramasami Mooppan v. Srinivasa Iyengar*(2). The effect of these decisions is shortly this: the attachment of a mortgage debt operates not only on the debt but also on the security, which fastens itself to the debt; the security therefore follows the debt. In other words, even granting that the interest of the mortgagee is immovable property, that interest arises from the debt and is ancillary to it; therefore there is no further necessity to attach the security as immovable property, when the debt has already been attached. In *Manilal Ranchod v. Motibhai Hemabhai*(3), in the case of a usufructuary mortgage, a different view seems to have been taken; but that decision has been distinguished by our Court in two cases, *Ramasami Mooppan v. Srinivasa Iyengar*(2) and *Nataraja Iyer v. The South Indian Bank of Tinnevely*(4), the ground of distinction being that in the Bombay case it was assumed that the mortgagor had no right to pay and the mortgagee no right to demand. But Mr. Ramaswami Ayyangar urges that the point he now raises is uncovered by authority; what he contends is that, although the debt has been validly attached under rule 46, the right to possession has not been affected, because

(1) (1914) 27 M.L.J. 239.
(3) (1911) I.L.R. 35 Bom. 288.

(2) (1915) I.L.R. 39 Mad. 389.
(4) (1911) I.L.R. 37 Mad. 51.

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it can only be attached under rule 54 as immovable property. That is to say, according to him, the debt must be attached under rule 46 and further, under rule 54, the right to possession must be separately attached; there must thus be a two-fold attachment. I think, on the authorities as they stand, I cannot accede to this contention. According to both *Tarvadi Bholanath v. Bai Kashi*(1) and *Nataraja Iyer v. The South Indian Bank of Tinnevely*(2), the security follows the debt and it is difficult to distinguish between one part of the security, i.e., the right to bring the property to sale, and the other part of it, namely, the right to possession; indeed, the expression "security", as used in *Ramasami Mooppan v. Srinivasa Iyengar*(3), is expressly made to cover the right to possession, as the following passage shows:—

"On the other hand the decision in *Chullile Peetikayil Nammad v. Othenam Nambiar*(4) proceeds on the basis that, where there is a debt payable by the mortgagor, the fact that the mortgagee is in possession of the land does not the less make it a debt, nor is the mode of attachment of such debt affected by the collateral security for such debt, even though that security may take the form of possession of the property."

Mr. Ramaswami Ayyangar points out that some hardship results from the view I have taken. Under rule 46 an attachment is effected *inter alia* by a prohibitory order being served upon the debtor; but, if the debtor happens to be at a place different from where the mortgaged property is, there being no proclamation under rule 54, the attachment is not brought to the knowledge of

(1) (1901) I.L.R. 26 Bom. 305.
(3) (1915) I.L.R. 39 Mad. 389.

(2) (1911) I.L.R. 37 Mad. 51.
(4) (1914) 27 M.L.J. 239.

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third parties. I cannot, however, allow considerations of this sort to influence my judgment. As has been pointed out in *Tarvadi Bholanath v. Bai Kashi*(1) by JENKINS C.J., even in the case of a simple mortgage debt,

"it may be that a more complete safeguard could be devised, but that is beside the question."

If the hardship pointed out is real, that may be a good reason for the changing of the rule, but with that I am not here concerned.

In the result, the second appeal is dismissed and in this Court I direct each party to bear his costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

KAILASANATHA MUDALIAR AND THREE OTHERS
(DEFENDANTS 1 TO 4), APPELLANTS,

v.

PARASAKTHI VADIVANNI AND ANOTHER
(PLAINTIFFS 2 AND 3), RESPONDENTS.*

*Hindu Law—Daughter—Stridhanam of mother inherited by—
Surplus income—Devolution of, on daughter's death—
Surplus income accretion to mother's estate, if—Marriage—
Asura form of—Essence of.*

Two daughters of a deceased Hindu woman sued, as her heirs, for the recovery, *inter alia*, of certain properties purchased out of the income accruing from their mother's estate subsequent to her death, and of a large sum, by way of profits, on the ground that for a number of years their father and their

brother had been managing the estate on their (the daughters') behalf. Pending the suit one of the daughters died and her husband was added as her heir and legal representative. The question in appeal was whether the properties purchased out of the income and the sum claimed in the suit by way of profits formed an accretion to the main estate of the mother and therefore devolved exclusively on the surviving daughter, or whether they belonged absolutely to the two daughters in equal shares and, on the death of one of them, her share devolved on her husband as her heir.

The purchases in question were made during the minority of one of the daughters by their father who acted as their guardian and managed their mother's properties. Even after the daughters attained majority, they were never put in possession, but their brother was in management and he continued to be in management up to date of suit.

Held that the properties and profits claimed in the suit did not form accretions to the main estate of the mother but belonged absolutely to the two daughters in equal shares and, on the death of one of them, her share devolved on her husband as her heir.

Whatever reason or justification—historical or sacerdotal—may exist for looking with disfavour on a widow's right to dispose of her surplus income or transmit it to a line of heirs different from her husband's, the same considerations need not be extended to the case of a daughter and much less to a daughter inheriting her mother's stridhana. The Hindu Law-givers never looked with disfavour on the succession of a daughter or imposed upon her restraints of abstinence or even continence, as in the case of a Hindu widow. The estate taken by a daughter as heir to her mother's stridhana is no doubt not an absolute estate, but the doctrine of "reverter" may well be limited to the original estate and proved accretions to it.

Case-law relating to accumulations and investments made by Hindu widows reviewed.

The distinctive feature of the Asura form of marriage is the giving of money or money's worth to the bride's father for his benefit or as consideration for his giving the girl in marriage.

Where it appeared that, in accordance with the custom of the community relating to "parisam", a jewel was presented by the bridegroom's father and placed on the bride's neck at

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August 23.

(1) (1901) I.L.R. 26 Bom. 305.

* Appeals Nos. 434 of 1928, 88 of 1929 and 236 of 1932.

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the time of the betrothal ceremony, and that the form or value of the jewel was not even the subject of a bargain but merely left to the pleasure of the bridegroom's father,

held that the marriage was not in an unapproved form.

APPEALS against the decrees of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 87 of 1926 and against the order of the Court of the Subordinate Judge of Tinnevely dated 14th November 1930 and made in Interlocutory Application No. 192 of 1929 in Original Suit No. 87 of 1926.

P. Venkataramana Rao and S. Kalyanasundara Mudaliar for appellants.

T. M. Krishnaswami Ayyar and R. Krishnaswami for first respondent.

B. Sitarama Rao and K. Venkateswara Ayyar for other respondents.

Cur. adv. vult.

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CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—*Appeal No. 88 of 1929.*—This is an appeal by the third plaintiff—the husband and legal representative of the first plaintiff—and relates only to a portion of the subject-matter of the suit. The plaint was presented only by two plaintiffs, the daughters of the first defendant by his deceased first wife, Santhanayaki. They claimed possession of the scheduled properties and other reliefs, as the heirs of their deceased mother. The second defendant is the first defendant's son by that wife. Third and fourth defendants are the sons of the first defendant by his second wife. The first plaintiff died very soon after the institution of the suit; and, after some contest as to who her legal representative was

the third plaintiff was added as legal representative by order dated 21st March 1927 on Interlocutory Application No. 102 of 1927. The question decided by this order has been re-agitated before us, though not seriously, and it has been argued that the husband is not the heir, because the marriage was in an unapproved form. This question of heirship may be briefly disposed of.

The evidence recorded in connection with Interlocutory Application No. 102 of 1927 shows that, in accordance with the custom of the community relating to "Parisam", a jewel was presented by the bridegroom's father and placed on the bride's neck at the time of the betrothal ceremony. The form or value of the jewel was not even the subject of a bargain, but merely left to the pleasure of the bridegroom's father. This can in no sense be called "bride-price". From Manu's texts as well as from the decided cases it is clear that the distinctive feature of the Asura form of marriage is the giving of money or money's worth to the bride's father, *for his benefit or as consideration* for his giving the girl in marriage. [See *Muthu Aiyar v. Chidambara Aiyar*(1), *Authikesavulu Chetty, S. v. S. Ramanujam Chetty*(2) and *Jaikisondas Gopaldas v. Harkisondas Hullochandras and another*(3)]. In *Reverend Gabriel-nathaswami v. Valliammai Ammal*(4), there was a finding by the lower appellate Court that the "Parisam" in that case was in the nature of a "bride-price". In *Samu Asari v. Anachi Ammal*(5) and in Second Appeal No. 236 of 1925 the

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(1) (1893) 3 M.L.J. 261.

(3) (1876) I.L.R. 2 Bom. 9, 15.

(2) (1909) I.L.R. 32 Mad. 512.

(4) (1919) 10 L.W. 491.

(5) (1925) 49 M.L.J. 554.

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money was held to have been paid for the father's benefit, though utilised by him to meet the expenses of the marriage, which he must have otherwise defrayed out of his own funds. [See also *Ratnathanni v. Somasundara Mudaliar*(1.)] As pointed out in *Jaikisondas Gopaldas v. Harkisondas Hullochandas and another*(2), the texts clearly distinguish between payments to the father for his own benefit and payments to the bride, received by her kinsmen not for their own use. We therefore affirm the conclusion of the lower Court on this point.

The main question in the appeal is, whether, taking the third plaintiff to be his wife's heir, he is entitled to any, and if so to which, of the properties claimed in the suit. The learned Subordinate Judge has, in paragraphs 14, 42, 46, 49 and 55 of his judgment, recorded findings to the following effect as to the title to the various items of properties specified in the plaintiff schedules, viz., that the properties in schedules I to I-d had been purchased in Santhanayaki's name and belonged to her; that there were cash deposits in her name to the extent of Rs. 30,000; that, out of this sum, the properties in schedules II-b, c and e, items 1 to 3 in schedule II and items 1 to 4 in schedule II-d were acquired, after her death, in the names, sometimes of the two plaintiffs, sometimes of the two plaintiffs and the second defendant jointly and sometimes of the second defendant alone, but that they all belonged in law to the two plaintiffs; and that the property in schedule II-a and items 7 to 18 of schedule II had been purchased out of the *income* accruing from

(1) (1921) 13 L.W. 582.

(2) (1876) I.L.R. 2 Bom. 9, 15.

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Santhanayaki's estate subsequent to her death. He held that all these *three* sets of properties constituted "Santhanayaki's estate" and as such devolved on the second plaintiff as sole heir, on the first plaintiff's death (paragraph 72). The appeal is confined to the third group of properties above described, i.e., those specified in schedule II-a, and the items 7 to 18 of schedule II. As these are found to have been acquired out of the *income* accruing after Santhanayaki's death, it has been argued on behalf of the appellant that these properties did not form accretions to the main estate but belonged absolutely to the daughters in equal shares and, on the death of one of them, her share devolved on the third plaintiff as her heir.

The plaintiff also claimed a large sum, by way of profits, on the ground that for a number of years the first and second defendants had been managing the estate on behalf of the two plaintiffs. The Court below held (paragraph 73) that the sum awardable under this head must also be held to devolve on the second plaintiff as an "accretion" to the estate. This conclusion has also been attacked before us and the appellant claims that he is entitled to a half share in the profits.

On behalf of the respondents, Mr. Sitarama Rao reiterated before us the contention put forward on behalf of the defendants in the Court below, that the first two groups of properties (as classified above) should not be held to belong to Santhanayaki or to her daughters and therefore not the third group also. The title to the first set of properties and the deposit in respect of the cash fund undoubtedly stood in Santhanayaki's

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name. The defendants made some suggestions of benami but they had no *definite* case, for there are obvious difficulties in substantiating a theory of benami. The second defendant suggested that upto a certain stage it was benami for the mother and aunt of Santhanayaki and later on those people purchased properties out of those funds in the names of whomsoever they wanted to benefit. There is very little proof of this either. Mr. Sitarama Rao suggested that the old ladies could not have intended that the second defendant—the daughter's son—should get no benefit and that they must have intended to give a kind of "daughter's estate" to Santhanayaki, so as to make it descendible to the second defendant at her death. No such case was put forward in the pleadings; on the other hand, it is inconsistent with the case actually put forward, viz., that Santhanayaki was only a benamidar. Beyond putting forward these hypotheses, Mr. Sitarama Rao did not seriously assail the findings of the Court below (as above set out) and we do not therefore pursue these hypotheses further.

On the findings of the Court below as to the title of Santhanayaki and of plaintiffs 1 and 2, both sides have elaborately argued before us the question of law as to the devolution, on the first plaintiff's death, of her share of the items claimed in the appeal. In dealing with their arguments certain facts and dates are material. The second defendant was born in 1902, the first plaintiff in December 1905 and the second plaintiff in June 1907. Santhanayaki died in December 1909. She was born in a rich family and throughout her life lived with her mother and aunt (father's brother's

widow), the first defendant also living with them. Plaintiffs 1 and 2 also lived with her aunt or mother till they were married sometime about 1920. During the minority of the plaintiffs, the first defendant has (as found by the lower Court in paragraph fifty-six) been acting as their guardian up to 1920, managing Santhanayaki's properties and making the various purchases above referred to. After the second defendant attained majority, he has been in management of the suit properties since 1921. (See paragraph sixty-three of the lower Court's judgment.) Even after the plaintiffs attained majority, they were never put in possession, but the management continued with the second defendant up to date of suit. The importance of these circumstances is this:—if, before the theory of "accretion" to the main estate could be applied, it is necessary that the limited owner should be in possession of the main estate or should have received the income therefrom or made investments out of such income, there would be no scope for its application here; because plaintiffs 1 and 2 never had possession, never received the income and never made any investments themselves. Again, if any act or expression of intention on their part should be held necessary to constitute the surplus income (or the investments thereof in the purchase of land) an accretion to the main estate, there has been no such act or declaration of intention on their part, prior to suit. Even if any *presumption*, whether of fact or of mixed law and fact, were necessary to send the accumulations and their investments in the same line of devolution as the corpus, no such presumption could,

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according to the decisions, be made when the limited owner has never been in possession [Cf. *Saodamini Dasi v. The Administrator-General of Bengal*(1), *Rajah Parthasarathy Appa Rao v. Rajah Venkatadri Appa Rao*(2), *Ayiswaryanandaji Saheb v. Sivaji Raja Saheb*(3) and *Sridhar Chatopadhyaya v. Kalipada Chuckerbutty*(4)]. Indeed, during all the time when the properties claimed in the appeal were purchased, the second plaintiff was a minor.

The respondents relied upon the statement in paragraph twelve of the plaint as proof of the plaintiffs' intention to make the purchased properties an accretion to the mother's estate. We shall presently deal with this argument. But Mr. Sitarama Rao mainly pressed the contention that the question of "intention" is material only when the female owner has made an alienation and that, independently of any acts or intention of the limited owner, the income derived from an estate inherited by her is of such a character that, unless the limited owner has appropriated it or disposed of it or at least otherwise made it her own by some positive act, the income and any investments thereof will go with the main estate and not devolve on the personal heirs of the limited owner.

The contention based on paragraph twelve of the plaint may be briefly disposed of. In that paragraph reference is made to the purchases made by the first defendant out of the corpus of the funds that belonged to Santhanayaki and also

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to purchases (by defendants 1 and 2) out of the income that accrued after Santhanayaki's death; and in respect of both these sets of properties it is stated that "they lawfully belong to the estate of Santhanayaki. They have been purchased only for the benefit of the plaintiffs." The next succeeding sentence as well as paragraphs 8 and 9 of the plaint make it clear that the averment relied on was meant to negative the claim put forward on behalf of the second defendant that the purchases were made for his benefit. There was no occasion at that stage to think of any contradistinction between the "inherited properties" and the "acquired properties" and the allegation is at best only a statement of law ("lawfully" is the word used). It does not seem reasonable to read into it any expression of intention, if such be necessary for the respondents' case.

On the point of law, we have been taken through a number of decisions relating to accumulations and investments made by Hindu widows. Both sides rightly pointed out that, in most of the cases, there had in fact been dispositions made by the widows and the observations as to what should happen if there were no dispositions were *obiter*. The divergence of view noticeable in the decisions in India may be illustrated by the two following extracts. In *Subramanian Chetti v. Arunachelam Chetti*(1) SUBRAMANYA AYYAR J. observed :

"Where the widow making the purchase has, while not annexing it to her husband's estate, left it undisposed of, whether the descent thereof is to be to her husband's heirs or to her own is a question which *can hardly be treated as settled*." ;

(1) (1904) I.L.R. 28 Mad. 1, 3.

(1) (1892) I.L.R. 20 Calc. 433 (P.C.).

(2) (1922) I.L.R. 46 Mad. 190, 220.

(3) (1925) I.L.R. 49 Mad. 116, 151. (4) (1911) 16 C.W.N. 106.

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and the learned Judge proceeded to give reasons why it should be held that what the widow could dispose of at pleasure is

“her own property, not limited but absolute, exclusive and separate in every sense and *devolving as such*”.

On the other hand, in *Kula Chandra Chakravarti v. Bama Sundari Dasee*(1) IMAM and CHAPMAN JJ. said :

“It is now a *well-settled* rule of Hindu law that property acquired by a Hindu widow with the accumulation of the income of her husband's estate does not constitute her *stri-dhanam* but forms *part of the corpus of the estate*.”

(The italics in both the extracts are ours.)

In *Sarat Chandra Mitra v. Charusila Dasi*(2) PAGE J. laid down that whatever power of disposition a Hindu widow might have over the savings or their investment, could be exercised by her only during her lifetime but she had no *testamentary power* even in respect of her income or its accumulations, or investments therefrom. Mr. Sitarama Rao did not however support this distinction between dispositions *inter vivos* and dispositions by will in view of the decision of the Privy Council in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(3).

As the High Courts in India have, in dealing with this question, purported to follow or explain away certain observations of the Judicial Committee, it will be convenient to refer at some length to the decisions of the Judicial Committee. The respondents have principally relied on *Isri Dutt Koer v. Hansbutti Koerain*(4), *Sheolochun Singh v. Saheb Singh*(5) and *Nabakishore Mandal*

v. Upendrakishore Mandal(1) ; the appellant seeks to derive support from *Saodamini Dasi v. The Administrator-General of Bengal*(2) and *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(3).

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The judgments in *Sheolochun Singh v. Saheb Singh*(4) and *Nabakishore Mandal v. Upendrakishore Mandal*(1) do not throw much light on the precise question now under consideration. In the former case, their Lordships accepted the positive finding of the High Court that

“upon the evidence there is not the slightest doubt that the properties in question were dealt with by the widows as accretions to their husband's estate.”

The only general observation in the judgment is in the following words :

“Where a widow comes into possession of the property of the husband and receives the income and does not spend it but invests it in the purchase of other property, their Lordships think that *prima facie* it is the intention of the widow to keep the estate of the husband as an entire estate and that the property purchased would *prima facie* be intended to be accretions to that estate.”

This can hardly be read as a statement of a rule of law, for it is clearly expressed in terms of an inference of fact and that is how it has been understood in the Madras cases. The headnote however uses the word “presumption”, and in the Calcutta cases this decision has been understood as laying it down that, whenever there is a *permanent investment* by the widow of her accumulated savings, the onus is thrown on the other side to prove that it was not meant to be an accretion. How far this view can be justified in the face of the observations in *Saodamini Dasi v.*

(1) (1914) I.L.R. 41 Calc. 870, 874. (2) (1928) I.L.R. 55 Calc. 918.
(3) (1925) I.L.R. 48 Mad. 312 (P.C.). (4) (1883) I.L.R. 10 Calc. 324 (P.C.).
(5) (1887) I.L.R. 14 Calc. 387 (P.C.).

(1) (1921) 42 M.L.J. 253 (P.C.). (2) (1892) I.L.R. 20 Calc. 433 (P.C.).
(3) (1925) I.L.R. 48 Mad. 312, 320, 321, 324 (P.C.).
(4) (1887) I.L.R. 14 Calc. 387 (P.C.).

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The Administrator-General of Bengal(1) is a point that we need not pursue here, because there has been no investment in the present case by the limited owner.

In *Nabakishore Mandal v. Upendrakishore Mandal*(2) the circumstances of the purchase and the nature of the interests purchased were held to justify the view that the rights acquired "would be an obvious accretion to the husband's property". Starting from that basis, their Lordships added "if it were possible for her to segregate the purchased rights, it would require some more unequivocal act for the purpose than anything to be found in this evidence". It is obvious that this remark must be read in connection with their Lordships' view of the evidence in the case. The only other observation in that judgment which has been relied on runs in these terms :—

"Though it is true that, when that property (meaning apparently the income) had been received, it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with and in this case there is no sufficient evidence of this having been done."

Even this observation would not support the respondents' argument in the form presented before us, for, in the Privy Council case, there has been an attempt by the widow at an *alienation* of the property acquired out of the savings. To that extent, it could not be said that it was "unappropriated". It is clear that their Lordships' remark was made *in the light of the nature of the investment that the widow had made*, and not as a general proposition of law

(1) (1892) I.L.R. 20 Calc. 433, 442, 443 (P.C.).
(2) (1921) 42 M.L.J. 253 (P.C.).

throwing upon the widow and her heirs the onus of proving that she has done some act to show her intention to appropriate the income for herself. As early as in the case of *Saodamini Dasi v. The Administrator-General of Bengal*(1), their Lordships had held that the widow's income, as it fell due, became "her absolute property"; and why is any further act of "appropriation" necessary in respect of what is already her own? If, from the mere act of "saving", the fund could be held to acquire a new character—and this was one of the contentions in that case (*see page 442*)—it is sufficient in the present case also, as in the case of *Saodamini Dasi v. The Administrator-General of Bengal*(1), to say that even the *saving* was not the act of the plaintiffs, because they never had possession and never received the income.

The respondents' argument had thus to be rested solely on the observations in the case of *Isri Dutt Koer v. Hansbutti Koerain*(2). Even there, the widow had made an alienation, thus showing her intention, if possible, to make the acquired property her own, but their Lordships held that it was no longer open to her to do so, because the evidence showed that she had already made the acquired property an accretion to her husband's estate. There, however, occur the following observations in the judgment :—

"If she has made no attempt to dispose of them (savings) in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow who might have spent the income, as it accrued, has in fact saved it and afterwards *attempts* to alienate it." (Page 335.)

(1) (1892) I.L.R. 20 Calc. 433 (P.C.). (2) (1883) I.L.R. 10 Calc. 324 (P.C.).

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After referring to the earlier cases, their Lordships say on page 337 :

"Nor do they think it possible to lay down any sharp definition of the line which separates accretion to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it."

The succeeding portion of the judgment shows that this must be dealt with as a question of *fact* in each case. With this may be compared their Lordships' observation in *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(1) :

"It is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property."

The question now is, is it justifiable to treat the first of the above extracts from the case of *Isri Dutt Koer v. Hansbutti Koerain*(2) as embodying a *decision* or even *pronouncement* by their Lordships on the point of law. The argument before them proceeded on the *assumption* that, according to the then state of the authorities, "a widow's savings from her husband's estate are not her stridhanam"—for the obvious reason that in *Bhagbutti Deyi v. Bholanath Thakoor*(3) the Board had observed that

"one consequence of the widow's estate no doubt would be that she would be unable to alienate the profits or that at all events whatever she purchased out of them would be an increment to her husband's estate."

In the High Court, AINSLIE J. unquestioningly accepted this dictum so far as the *devolution* of the undisposed portion went and he only struggled to establish at least a limited power of disposition;

(1) (1918) I.L.R. 42 Mad. 581, 588 (P.C.).
(2) (1883) I.L.R. 10 Calc. 324 (P.C.).
(3) (1875) I.L.R. 1 Calc. 104 (P.C.).

[See *Hunsbutti Korain v. Ishri Dutt Koer*(1), see also page 523, where the learned Judge reiterates: "On this point I think there is no difference of opinion."]. On page 525, the learned Judge observes that this view would fit in with DWARAKANATH MITTER J.'s theory in *Kery Kolitany v. Moneeram Kolita*(2) that the widow is in possession as a kind of "trustee"; but he attempted his own explanation by the theory of a presumable intention "to add such moneys or properties to the estate and to abstain from exercising her full rights over them". Though dissenting from DWARAKANATH MITTER J.'s theory, AINSLIE J. (on page 527) accepted the decision in *Chundrabulee Debia v. Brody*(3), which was largely founded on the doctrine that the Hindu widow takes her husband's estate only for purposes of maintenance. On page 528 he would have it that, even if the widow severed the accumulations from the main estate, he would only go the length of giving her a power of testamentary disposition over it but not recognize its descendibility to her own heirs apparently because it will not fall under the categories of stridhana enumerated by Jimutavahana [see *Chundrabulee Debia v. Brody*(3)]. The report of the argument on page 328 in the case of *Isri Dutt Koer v. Hansbutti Koerain*(4) would show that this is all that respondent's Counsel sought to maintain before the Judicial Committee.

Their Lordships' remarks on page 334 in the case of *Isri Dutt Koer v. Hansbutti Koerain*(4) show

(1) (1879) I.L.R. 5 Calc. 512, 521, 522.
(2) (1868) 13 B.L.R. 50. (3) (1868) 9 W.R. 584.
(4) (1883) I.L.R. 10 Calc. 324 (P.C.).

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that the law relating to "widow's estate" was then taken to have advanced only one step from the earlier view, i.e., from the "trusteeship" theory, to a stage wherein the widow had a "more free and complete *usufruct* of her husband's property". Hence it is that their Lordships formulate to themselves the question as to the point of time or the circumstances under which the widow loses her control over the unexpended portion of her income from her husband's estate. If, as is now established by the decision in *Saodamini Dasi v. The Administrator-General of Bengal*(1), the income is her "absolute property", and, as shown by the decision in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(2), she does not lose her power of control *even at her death* but can deal with the accumulated income by her *will*, there is no reason for drawing the line at testamentary disposition and refusing to reach the logical conclusion that, even if she happens to die intestate, the surplus amount should be treated as "her absolute property" for purposes of *devolution* as well.

It will be instructive to compare the decision in *Chundrabulee Debia v. Brody*(3) with that in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(2). In the former case, the High Court held that a decree for mesne profits obtained by a widow could not, after her death, be made available for the discharge of her personal debts; but, in the latter case, the Privy Council have laid down that the income due to the widow from the receiver was, on her death, "part of her estate"

(1) (1892) I.L.R. 20 Calc. 433 (P.C.). (2) (1925) I.L.R. 48 Mad. 312 (P.C.).
(3) (1868) 9 W.R. 584.

available for payment of legacies bequeathed by her. It certainly cannot be said that what is available for payment of legacies cannot be made available for payment of debts of the deceased. Their Lordships' observations in this latest case also suggest that, unless the widow had made the surplus income an accretion to the husband's estate, such surplus would remain part of "her estate" even after her death. The case also answers—and answers from a far more liberal standpoint—the question left open by the Judicial Committee at the end of their judgment in *Gonda Kooer v. Kooer Oodey Singh*(1) and by WALLIS C.J. in *Narayanan Chetty v. Suppiah Chetty*(2). As for the decision of JACKSON J. in *Pavani Subbamma v. Mungamur Venkatakrishna Row*(3), it is clear from the judgment in *Piramanayakam Pillai v. Krishnaswami Pillai*(4) that he himself did not regard it as authoritative after *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(5). Similarly it would be difficult to reconcile the decision in *Sridhar Chattopadhyaya v. Kalipada Chuckerbutty*(6) with the decision in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(5) in so far as the Calcutta High Court held that the rent due to the deceased female owner would not be available for the satisfaction of her debts.

There is little force in the argument that Jimutavahana's definition or enumeration of "Stridhana" will not comprise this kind of assets. Even the Calcutta High Court has latterly refused to adopt a literal construction of that text or

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(1) (1874) 14 B.L.R. 159 (P.C.). (2) (1920) I.L.R. 43 Mad. 629, 631.
(3) (1924) 80 I.C. 290. (4) (1929) M.W.N. 355.
(5) (1925) I.L.R. 48 Mad. 312 (P.C.). (6) (1911) 16 C.W.N. 106.

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consider the enumeration there as exhaustive [See *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya*(1)]. This Court has long been accustomed to give a wide scope to the doctrine of "Stridhana" in view of the liberal definition thereof in the *Mitakshara* [See *Salemma v. Lutchmana Reddi*(2)]; and the view indicated by SUBRAMANYA AYYAR J. in *Subramanian Chetti v. Arunachelam Chetti*(3) as to the devolution of the widow's savings and acquisitions on her stridhanam heir was accepted in *Veeraraghava Reddi v. Kota Reddi*(4) and by KUMARASWAMI SASTRI J. in *Ayiswaryanandaji Saheb v. Sivaji Raja Saheb*(5). As observed in *Tadiboyina Peda Punnayya v. Debba Kattamma*(6), once it is established that certain property is the absolute property of a woman under her entire unfettered control, there ought to be only one rule of succession recognized in Madras, namely, the rule of succession relating to stridhanam property. Indeed this conclusion would follow even from the observations of the Privy Council in *Bhagbutti Deyi v. Bholanath Thakoor*(7) where, speaking of a life estate (as contradistinguished from a widow's estate), they said (at page 260):

"She would have the power of making whatever use she chose of the proceeds of her estate; and if she bought land or personal property with them, that land and that property would be hers and would devolve on the defendant (granddaughter) who represents her."

There is no particular point of distinction in the income being derived from the husband's

- (1) (1905) I.L.R. 33 Calc. 315. (2) (1897) I.L.R. 21 Mad. 100.
(3) (1904) I.L.R. 28 Mad. 1. (4) 1916 31 M.L.J. 465.
(5) (1925) I.L.R. 49 Mad. 116, 151. (6) (1915) 17 M.L.T. 363, 368.
(7) (1875) I.L.R. 1 Calc. 104 (P.C.).

estate, because that was the case even in *Bhagbutti Deyi v. Bholanath Thakoor*(1). (See also page 262.)

Of the Indian decisions relied on by Mr. Sitarama Rao, *Sridhar Chattopadhyaya v. Kalipada Chuckerbutty*(2), *Sheonandan Prasad v. Damodar Prasad*(3) and *Sm. Bharateswari Dasi v. Bhagaban Chandra Chakravarty*(4) are directly in point; but we are, with all respect, unable to follow them, because, as already indicated, they are based on a different view as to the effect of the *dicta* in the case of *Isri Dutt Koer v. Hansbutti Koerain*(5). Further, the first two were decided before *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(6) and in the third, no reference was made to *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(6). Even in Calcutta, one learned Judge has, in a recent case, *Bankim Behary v. Proboth Chandra*(7), followed the Madras view that the *dicta* in the case of *Isri Dutt Koer v. Hansbutti Koerain*(5) have more than been counterbalanced by later decisions. We think that the trend of opinion in this Court since *Subramanian Chetti v. Arunachelam Chetti*(8) is in consonance with their Lordships' latest pronouncement.

Amongst text-writers, Sir Dinshah Mulla seems to endorse the Madras view (see his *Hindu Law*, 7th edition, page 176 *et seq.*) In Mayne's book the learned Editor of the 9th edition, after referring to the decisions in *Akkanna v. Venkayya*(9) and *Subramanian Chetti v. Arunachelam Chetti*(8),

- (1) (1875) I.L.R. 1 Calc. 104 (P.C.). (2) (1911) 16 C.W.N. 106.
(3) (1923) 78 I.C. 306. (4) (1928) 33 C.W.N. 193.
(5) (1883) I.L.R. 10 Calc. 324 (P.C.).
(6) (1925) I.L.R. 48 Mad. 312 (P.C.).
(7) A.I.R. 1934 Cal. 284. (8) (1904) I.L.R. 28 Mad. 1.
(9) (1901) I.L.R. 25 Mad. 351.

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added a remark that the view there taken "is no longer tenable", apparently in view of the decision in *Nabakishore Mandal v. Upendrakishore Mandal*(1). We do not know what he would have thought if he had the judgment in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(2) before him. Sir John Trevelyan has, in the latest edition of his book, reproduced the statement found in the earlier edition which was quoted in its entirety by the Allahabad High Court in *Wahid Ali Khan v. Tori Ram*(3). According to him, so much of the widow's savings as had not been disposed of by her during her lifetime would not pass to her heir but would be treated as a portion of the husband's estate. He has not considered the bearing and effect of the decision in *Venkatadri Appa Rao v. Parthasarathi Appa Rao*(2). Nor is this case referred to in the sixth edition of Sirkar's Hindu Law. We may add that, whatever reason or justification—historical or sacerdotal—may exist for looking with disfavour on a widow's right to dispose of her surplus income or transmit it to a line of heirs different from her husband's, the same considerations need not be extended to the case of a daughter and much less to a daughter inheriting her mother's stridhana. The Hindu Lawgivers never looked with disfavour on the succession of a daughter or imposed upon her restraints of abstinence or even continence, as in the case of a Hindu widow. The Privy Council have no doubt held that the estate taken by a daughter as heir to her mother's stridhana is not an "absolute estate" [*Sheo Shankar Lal v. Debi Sahai*(4) and

Sheo Partab Bahadur Singh v. The Allahabad Bank(1)], but the doctrine of "reverter" may well be limited to the original estate and proved accretions to it.

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The view we have taken receives some support from the analogy of the law relating to savings and acquisitions made out of the income by the holder of an impartible estate belonging to a joint family. It is true that there is this difference between the two cases, viz., that, unlike the female holder, the impartible estate holder is during his lifetime an *absolute* owner of the estate; but, for our present purpose, there is sufficient similarity between the two cases, in that, in both instances, the holders for the time being are absolute owners of the *income* and that, after their death, there are two lines of devolution, one for the main estate and another for their personal property. The following observations of the Judicial Committee in *Rani Jagadamba Kumari v. Wazir Narain Singh*(2) are equally apposite to the present case :—

"The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely disassociated from the ownership of the Raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

In *Gurusami Pandiyan v. Pandia Chinna Thambiar*(3) a woman who was entitled to an impartible estate died before getting possession and the income had accumulated in the hands of

(1) (1921) 42 M.L.J. 253 (P.C.).
(3) (1913) I.L.R. 35 All. 551.

(2) (1925) I.L.R. 48 Mad. 312 (P.C.).
(4) (1903) I.L.R. 25 All. 468 (P.C.).

(1) (1903) I.L.R. 25 All. 476 (P.C.).
(2) (1922) I.L.R. 2 Pat. 319, 325 (P.C.). (3) (1920) I.L.R. 44 Mad. 1.

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a receiver. The learned Judges determined the succession to such accumulated income on the footing that it was her "absolute property" (see page 34).

We therefore hold that the appellant (third plaintiff) is entitled to the half share of the first plaintiff in the properties claimed in Appeal Suit No. 88 and to the share of the profits that may on the taking of accounts be found due to the first plaintiff. He will also be entitled to a half share of the mesne profits between the date of plaint and the date of the first plaintiff's death. As from the date of the first plaintiff's death, the appellant will be entitled to mesne profits in respect of the share of the properties decreed to him. The respondents will pay the appellant his costs in the appeal and proportionate costs in the lower Court. The case will go back to the Subordinate Judge for passing a final decree after effecting a division of the properties, taking the necessary accounts and ascertaining profits prior to suit and mesne profits subsequent to suit.

[The rest of the judgment has been omitted as being unnecessary for the purpose of this report.]

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APPELLATE CIVIL.

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

KHUMCHAND DHULAJI PALADUVALA
(FIRST DEFENDANT), PETITIONER,

1934,
October 19.

v.

GOMRAJ FATECHAND (PLAINTIFF), RESPONDENT.*

*City Civil Court (Madras)—Leave to sue—Application for, if
may be made after filing of plaint—Madras City Civil
Court Act (VII of 1892), sec. 8—"Law" in—Meaning of.*

In the Madras City Civil Court leave to sue can be applied for even after the plaint is filed.

Section 8 of the Madras City Civil Court Act does not include the procedure in force in the High Court. The word "law" in that section was chosen with reference to the provisions of the Letters Patent.

PETITION under sections 115 of Act V of 1908 and 107 and 108 of the Government of India Act praying the High Court to revise the order of the Court of the City Civil Judge, Madras, dated 9th October 1933 and made in Civil Miscellaneous Petition No. 1883 of 1933 in Original Suit No. 530 of 1933.

S. Panchapagesa Sastri and T. K. Rangaswami
for petitioner.

C. Sreeraman for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
KING J.—Six plaintiffs filed a suit in the Court

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of the City Civil Judge, Madras, against two defendants for dissolution of partnership. As one of these defendants was admittedly not living in Madras leave to sue in the City Civil Court had to be obtained. Leave was granted by the City Civil Judge although it was applied for only after the plaint had been filed, and the question at issue in this revision petition is whether it is not obligatory in the City Civil Court for such leave to be applied for *before* the suit is filed.

In support of this position reliance is placed upon section 8 of the Madras City Civil Court Act which runs as follows :—

“All questions which arise in suits or other proceedings under this Act in the City Court shall be dealt with and determined according to the law for the time being administered by the High Court in the exercise of its ordinary original civil jurisdiction.”;

and it is admittedly one of the rules of practice in the High Court that leave to sue in circumstances such as this must be asked for in the plaint itself.

The question then is whether section 8 of the Madras City Civil Court Act is wide enough to include the *procedure* in force in the High Court. We do not think it is, and we think the word “law” in section 8 was advisedly chosen with reference to the provisions of the Letters Patent. The “law to be administered by the High Court” is to be found in Clauses 19 to 21 of the Letters Patent where reference is made to law, equity and rule of good conscience, but nothing is said about the details of procedure. We see no intrinsic reason why the City Civil Court should be placed in the same position as the High Court in the matter of procedure—or why it should not be governed by

the Civil Procedure Code in which case admittedly leave to sue can be given after the plaint is filed.

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There are thus no sufficient reasons for holding that the order of the City Civil Judge is wrong, and this petition must be dismissed with costs.

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APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

A. M. RANGACHARIAR (COMPLAINANT), PETITIONER,

1934,
September 10.

v.

VENKATASAMI CHETTI (ACCUSED), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 207 (i)—Offence complete under, on failure to remove or alter encroachment after service of notice to do so—Another distinct offence not brought into being by subsequent notice on same facts—Fresh trial barred under sec. 403, Criminal Procedure Code (Act V of 1898).

The offence under section 207 (i) of the Madras Local Boards Act (XIV of 1920) consists in the failure to obey the notice issued under section 159 of that Act to remove or alter an encroachment. Once there is such failure, the offence is complete; and another separate or distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority, to the same person, and relates to the same encroachment or contains the same direction.

Where an accused had once been tried for an offence under section 207 (i) of the Madras Local Boards Act (XIV of 1920) and acquitted on the ground that there had been no failure to remove an encroachment,

held, that section 403, Criminal Procedure Code Act (V of 1898), was a bar to his being tried again for failure to

* Criminal Revision Case No. 99 of 1934.

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Moidi Beary v. President, Taluk Board of Mangalore, (1932) 36 L.W. 426, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Bench Magistrate of Conjeevaram in Bench Case No. 2419 of 1933.

E. R. Krishnan and Mahommad Fazlullah for petitioner.

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

N. T. Raghunadhan for Srinivasaraghavan and Thiyagarajan for respondent.

Cur. adv. vult.

ORDER.

The petitioner contends that the order of the First Class Bench Magistrate's Court, Conjeevaram, dated 31st October 1933, discharging the respondent is contrary to law. The petitioner admitted during his examination as Prosecution Witness 1 in that Court that "for the same offence the accused was charged in Bench Case No. 378 of 1933", and the order of the Court, dated 3rd March 1933, which decided that case showed that the accused had been acquitted. The Court held that the accused was not liable to be tried again for the same offence in view of section 403, Criminal Procedure Code, and the ruling reported as *Ramanujachariar v. Kailasam Iyer*(1).

It is now contended that the offence is not the same because the subsequent complaint alleged a

subsequent notice to remove the same encroachment; except that the notice in the present case bears a subsequent date all the facts alleged in the present case are exactly the same as those alleged in the previous case of the same year which ended in acquittal.

The question for decision is whether the issue of a subsequent notice avoids the bar imposed by section 403, Criminal Procedure Code. This question has been answered in the affirmative by *PAKENHAM WALSH J.* in the two cases reported as *Moidi Beary v. President, Taluk Board of Mangalore*(1) and *President, Panchayat Board, Velgode v. Venkata Reddi*(2) after reviewing all the previous decisions. It is clear, however, from the Bench decision in *Ramachandra Chetti v. Chairman, Municipal Council, Salem*(3), that the point now to be decided was not decided therein; on the other hand, it is expressly stated therein that

"if a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but that question does not arise here."

There are conflicting decisions by single Judges on the point, and I feel myself at liberty to act upon the view which commends itself to my judgment. The offence consists, as laid down by the Bench in *Ramachandra Chetty v. Chairman, Municipal Council, Salem*(3), in the failure to obey the notice issued under section 159 of the Local Boards Act to remove or alter the encroachment; or, in other words, it is the failure to remove or alter the encroachment specified in the notice that constitutes the offence; once there is such failure the offence is complete, and failure to perform an

(1) (1932) 36 L.W. 426. (2) (1932) 36 L.W. 429.
(3) (1926) I.L.R. 49 Mad. 880.

(1) (1925) I.L.R. 48 Mad. 870.

RANGACHARIAR ^{v.} VENKATA-SAMI CHETTI. act is *ex necessitate rei* continuous in character. Another separate or distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority and to the same person, and relates to the same encroachment or contains the same direction. To hold otherwise would be to go against the spirit of the ancient maxim "*Nemo debet bis vexari pro eadem causa*" which is embodied in section 403. I cannot bring myself to believe that it would be right or just, when the Court has once decided that there has been no failure to remove an encroachment and acquitted the accused, to make the same person liable to be tried again and again for failure to remove the same encroachment, simply because the same authority hopes to get a different decision later on by issuing one notice after another. Otherwise, there would be no end to such prosecutions. The policy of the law relating to this subject is clear: if a person has been convicted for failure to remove an encroachment he is to be prosecuted again, not under sub-section (1) of section 207 of the Local Boards Act for failure to remove the same encroachment, but for "continuing breach" under sub-section 2 of that section which provides an effective remedy. The necessary implication is that if the person has been acquitted he goes free altogether. Courts must generally lean, in cases of doubt, against any construction of a penal law which is patently oppressive to the subject and in favour of a construction which is in accord with the general policy of the criminal law, which is to protect the subject from a fresh prosecution after he has been convicted or acquitted in respect of what is in

substance the same matter. Even if the question of law had to be decided otherwise, I would not have been prepared in the circumstances of the case to interfere in revision with the order of the First Class Bench Magistrate's Court. The revision petition is therefore dismissed.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

MAYANDI NADAR (PROSECUTION WITNESS 1), PETITIONER,

v.

PALA KUDUMBAN AND TWO OTHERS (ACCUSED 2 TO 4),
RESPONDENTS.*

1934,
October 31.

*Criminal Procedure Code (Act V of 1898), ss. 408 and 562—
Order under sec. 562—Whether appealable—"Conviction"
—Meaning of.*

An appeal lies to the Sessions Judge from an order of a First Class Magistrate passed under section 562, Criminal Procedure Code (Act V of 1898).

The word "conviction" in sections 408 and 562 of the Code must be given its ordinary meaning of an adjudication of guilt.

Emperor v. Hira Lal, (1924) I.L.R. 46 All. 828, *Bahadur Molla v. Ismail*, (1924) I.L.R. 52 Calc. 463, and *Madhav v. Emperor*, A.I.R. 1926 Bom. 382, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of

* Criminal Revision Case No. 540 of 1934.

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Session of the Tinnevely Division, dated the 22nd day of March 1934 and passed in Criminal Appeal No. 13 of 1934, preferred against the judgment of the Court of the Stationary First Class Magistrate of Srivaikuntam, dated the 23rd day of January 1934 and passed in Calendar Case No. 797 of 1933.

K. S. Jayarama Ayyar for *J. S. Vedamanikkam* for petitioner.

P. N. Marthandam Pillai for respondents.

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

Cur. adv. vult.

CURGENVEN J. The ORDER of the Court was delivered by CURGENVEN J.—The question raised in this case is whether an order passed by a Court under section 562, Criminal Procedure Code, is appealable. The petitioner was complainant in a case in which four persons were convicted of breaking into a shop at night and committing theft, under sections 457 and 380, Indian Penal Code. The first and second accused were boys aged twelve and fifteen respectively and the Stationary Sub-Magistrate who convicted them released them after due admonition under sub-section (1A) of section 562. The third accused was of mature years and received a fine of Rs. 25. The fourth and last accused was a youth aged seventeen and he was released under section 562 (1) on entering into a bond with one surety. The accused two to four preferred an appeal and the learned Sessions Judge who disposed of it has, we think rightly, held that the release after admonition of the second accused was illegal because sub-section (1A) does not apply to a case of house-breaking and further, that the sentence of fine alone imposed upon the third

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accused was illegal because section 457, Indian Penal Code, makes a sentence of imprisonment, with or without fine, compulsory. In the result he set aside the orders of the Court below, thereby acquitting the accused, and left the matter there, considering the case not of sufficient gravity to merit further action.

Mr. Jayarama Ayyar for the petitioner argues that no appeal lay from the orders of the Stationary Sub-Magistrate (who, it may be explained, exercises first class powers) to the Sessions Judge. We may take it that no appeal would lie from the order imposing a fine under section 457, Indian Penal Code, although it was an illegal order, because such an appeal would be excluded by the terms of section 413, Criminal Procedure Code. The question then is whether an order under section 562 is appealable. If it is appealable the other persons convicted at the trial would have a right of appeal under section 415 A.

Under section 404, no appeal lies from any judgment or order except as provided for by the Code, and, under section 408, any person "convicted" on a trial held by a Magistrate of the first class may appeal to the Court of Session, subject to the qualifications as regards minimum sentence contained in sections 413 and 414. Section 562 provides that a first offender dealt with under its provisions must first be "convicted"; and if the word "convicted" is used in the same sense in that section and in section 408, there can be no escape from the conclusion that a person dealt with under section 562 has a right of appeal. The argument that section 423, which defines the powers of an appellate Court in disposing of an

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appeal, does not contain any provision for setting aside an order under section 562 does not, we think, avail to affect that conclusion. The language of section 423 has remained unchanged since the Code of 1882, which contains no provisions similar to those of section 562. It is unnecessary to regard section 423 as an exhaustive statement of the powers of an appellate Court or to hold that an appeal from a conviction can only be entertained when the conviction is accompanied by a sentence. On the other hand, section 408 renders an order made or sentence passed under section 380, Criminal Procedure Code, appealable—an amendment inserted in 1923 probably in consequence of doubts such as arose in *Emperor v. Bhimappa*(1)—and it is difficult to see why, if an order under section 380 is appealable, an order under section 562 should not be appealable. Altogether we think that, if the word “conviction” be consistently given its ordinary sense of an adjudication of guilt, the terms of the Code leave no doubt as to the answer to be given to the question raised.

The petitioner’s learned Advocate has endeavoured to create a doubt as to the meaning of the word “conviction” by referring to certain English cases, but they do not support him in his main contention. In *Burgess v. Boetefeur*(2) certain persons had pleaded guilty to keeping a disorderly house. The judgment was respited that the nuisances might in the meantime be abated, and, this having been done, the parties were afterwards brought up for judgment, when they were each fined one shilling and discharged.

(1) (1915) 17 Bom. L.R. 895. (2) (1844) 7 Man. & G. 481; 135 E.R. 193.

The question was whether the conviction took place when the defendants pleaded guilty or when they were brought up and received sentence. TINDAL C.J. observed that the word “conviction” was undoubtedly *verbum aequivocum*, being sometimes used as meaning the verdict of a jury and at other times in its more strictly legal sense for the sentence of the Court. But he decided that in the case before him it must mean the judgment of the Court. We propose no other meaning here. Another case under the same statute was *Jephson v. Barker and Redman*(1). There the defendant pleaded guilty and was ordered to enter into his recognizances to come up for judgment when called on. STEPHEN J. held that there had been a judgment—that is to say,

“there had been an order of the Court that the prisoner should enter into his recognizance to come up for judgment if called upon.”

This case, as Mr. Jayarama Ayyar has to admit, is directly against him. In the third case, *Hartley v. Hindmarsh*(2), it was held that there was no conviction as the order passed was not an adjudication upon the case.

Several decisions have held that an order under section 562 is appealable. In *Emperor v. Hira Lal*(3), BOYS J., in so deciding, notices an objection which has been suggested here too—why should an order under section 562, which involves no sentence, be appealable when a first class Magistrate can pass an unappealable sentence of fine up to a certain amount? We can see nothing very anomalous in this. The general effect of the relevant

(1) (1886) 3 T.L.R. 40.

(2) (1866) 1 C.P. 553.

(3) (1924) I.L.R. 46 All. 828.

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CURGENVEN J. provisions of the Code has been reviewed by MUKERJI J. in *Bahadur Molla v. Ismail*(1). This case has been approved and followed in Bombay in *Madhav v. Emperor*(2). All these judgments are subsequent to the amendment of section 408 by Act XVIII of 1923.

We hold that an appeal lay to the Sessions Judge from the orders passed under section 562 and also therefore, by force of section 415 A, from the sentence imposed under section 457, Indian Penal Code. This being the only point taken in revision, we conclude that there is no sufficient reason to interfere with the judgment of the Court below. The criminal revision petition is dismissed.

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(1) (1924) I.L.R. 52 Calc. 463.

(2) A.I.R. 1926 Bom. 382.

CRIMINAL, FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Madhavan Nair, Mr. Justice Curgenven, Mr. Justice Cornish, Mr. Justice Pandrang Row and Mr. Justice Burn.

M. RAMANUJAM (PRISONER), PETITIONER,

1934,
November 5.

v.

KING-EMPEROR.*

Letters Patent (Madras), Cl. 26—Advocate-General's powers of certification—Condition precedent to—Competency of Advocate-General's certificate—Court's power to go into, on enquiry following grant of certificate by him—Dismissal of petition without enquiry into merits on certificate being found to be incompetent—Court's power of—"Point of law decided" in Cl. 26—Meaning of—Admission of inadmissible evidence not objected to—Placing of such evidence without objection before jury—Decision of a point of law within Cl. 26, if—Case not raised by accused nor relied upon by him and having no basis in evidence on record—Failure of Judge to put to jury—Decision of a point of law within Cl. 26, if.

Held by THE FULL BENCH.—The Advocate-General derives his powers of certification from Clause 26 of the Letters Patent and Clause 26 alone. The decision of a point or points of law by the trial Judge is a condition precedent to the Advocate-General's power to issue a certificate under that clause.

Held by BEASLEY C.J., RAMESAM, MADHAVAN NAIR, CORNISH, PANDRANG ROW and BURN JJ. (CURGENVEN J. leaving the question open).—The Advocate-General's certificate is not conclusive upon the question of a point of law having been decided by the trial Judge and the Court on an enquiry following the grant of the certificate has jurisdiction to say that the Advocate-General's certificate is misconceived and should not have been granted on the ground that there is no decision on a point of law involved in the case, and, if it comes to that conclusion,

* Criminal Miscellaneous Petition No. 910 of 1934.

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the petition may straightway be dismissed without any further consideration of the merits of the case.

Held by BEASLEY C.J., RAMESAM, CORNISH, PANDRANG ROW and BURN J.J. (MADHAVAN NAIR and CURGENVEN J.J. *dissenting*).—The expression “a point of law” in Clause 26 of the Letters Patent has the same meaning as it has in Clause 25 thereof. When points of law are raised during the trial and submissions made thereon, the Judge has the alternative, either of giving a ruling upon the point or points of law submitted, or of reserving the point or points for the consideration of the High Court. Clause 26 of the Letters Patent, so far as the Advocate-General’s powers are concerned, relates only to the before-mentioned point or points of law not reserved but decided, although mis-statements of the law in laying it down in the charge to the jury are also included. It was not intended by that clause to give a right of first appeal similar to that from a mofussil criminal trial. Unless the point of law has been raised in such a way that it can be said to have been presented to the Judge’s mind for decision, it cannot be held that there has been a decision of a point of law within the meaning of Clause 26.

It is no doubt the duty of the trial Judge to decide what evidence is admissible and what is not; but it does not follow that he has decided that every item of evidence found in the record is admissible. The reception of inadmissible evidence, when no objection is taken as to its admissibility and the Judge’s mind is never directed to the question of its admissibility and he has never been asked to say whether it is admissible or not, cannot be held to be a decision of a point of law within the meaning of Clause 26. Similarly, if the Judge refers in his charge to the jury to such evidence, also without any objection, he cannot be held to have decided the question of its admissibility.

Observations to the contrary in *C. K. N. Sundaresa Iyer v. King-Emperor*, 1930 M.W.N. 249 (F.B.), overruled.

Per MADHAVAN NAIR J.—The point of law with respect to which the Advocate-General certifies an error in the decision thereof is not confined to a point such as can be reserved by a Judge under Clause 25.

A decision on a point of law within Clause 26 is not confined to a conscious or considered decision by the Judge but would

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also include an implied decision though inadvertent. An error of law would also amount to a decision on a point of law within the meaning of Clause 26. The expression “point or points of law decided” in the clause is used in contradistinction to “points of law reserved” occurring in the earlier part of the clause. “Decision” would include all matters decided by the trial Judge; or, in other words, matters which were not explicitly but only tacitly decided would also fall within the meaning of the word.

The admission of inadmissible evidence would amount to an error in the decision of a point of law. When inadmissible evidence is admitted, though no objection is taken and no ruling is given by the Judge, it should be held, having regard to his duties, that the Judge has decided to admit the evidence and so there is a “decision” within the meaning of Clause 26.

Per CURGENVEN J.—When something is said or done which would be right upon one view of the law and wrong upon another, the law must be taken to have been decided in the one way, and not in the other. For it is the duty of the Judge to decide the law, and, if what he does has all the consequences of a conscious decision, it makes no difference whether it is produced by inadvertence or any other cause. It is only the result that matters, and if, implicit in that result, is a certain view of the law in its application to the facts, the Court must be deemed to have taken that view, and to have decided the point of law accordingly.

Section 298 of the Code of Criminal Procedure makes it the duty of the Judge to decide all questions of the admissibility of evidence, and this duty is laid upon him whatever may be the attitude of the parties. The admission of inadmissible evidence to the record, even without dispute, will therefore constitute a “decision” by the Court. Where the Judge has given a certain direction to the jury and that direction can only be justified upon a certain view of the law, it must be taken that the Judge has decided the law in that manner and not otherwise. If he has allowed the jury to act upon inadmissible evidence, then he must be held to have incorrectly decided the law whatever may be the cause of his error and whether he has in his own mind a correct notion of the law or not. Where an erroneous decision is implied in the action taken, Clause 26 should be taken to cover it. *C. K. N. Sundaresa Iyer v. King-Emperor*, 1930 M.W.N. 249 (F.B.), is not correct in so far as

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it lays down that an error in law is necessarily an erroneous decision upon a point of law. A misdirection of fact may be an infringement of a provision of law and would therefore be merely an error of law.

Held also by THE FULL BENCH.—The failure of a Judge to put to the jury a case not raised at all by an accused nor relied upon by him and having no basis in the evidence on the record is not a decision on a point of law within the meaning of Clause 26 of the Letters Patent.

Emperor v. Upendra Nath Das, (1914) 21 C.L.J. 377 (F.B.), referred to.

The following statement of the facts of the case is taken from the judgment of His Lordship the CHIEF JUSTICE :—

At 1-34 a.m. on the 13th January of this year, the Parcels Express train which left the Egmore station at Madras at 10-40 p.m. arrived at Karunguzhi station on the South Indian Railway. There it delivered six parcels. Five of these were handed over to the respective owners on production by them of the tickets relating to them at about 7 o'clock on the same morning. The sixth remained undelivered as no one claimed it. It is described by T. S. Narayanaswami Ayyar (P.W. 28), the Assistant Station Master at Karunguzhi to whom all the parcels were delivered, as a bed parcel packed in a date leaf mat. The receipt of this parcel and the others was acknowledged by this witness in Exhibit U. In order that parcels could be carried by that train as luggage it is necessary for the senders to have passenger tickets and the number of each passenger ticket is entered on a luggage ticket form which gives the particulars of its respective parcel. Exhibit W is the one which relates to the undelivered parcel. The passenger's ticket number therein is III Class No. 4901. The tickets relating to the other five

parcels were duly collected on the night in question. Passenger ticket No. 4901 was not collected that night and has never been collected, thus raising a very strong inference that the sender of this parcel did not travel by train at all but only got the passenger ticket in order to enable him to send the parcel by the train and this is shown by the prosecution evidence. On the night of the 13th a foul smell was detected coming from the store room in which the undelivered parcel had been placed and on the morning of the 14th this smell was found to come from the parcel. At 5-30 p.m. on the same day, namely, the 14th January, the parcel was opened in the presence of the Railway Police Sub-Inspector of Chingleput, the Sub-Magistrate of Madurantakam, the Station Master and others and was found to contain the dead body of a woman. This was rolled in a date leaf mat and pieces of gunny and rolled round the body was a mattress. The post-mortem examination resulted in a medical opinion that the dead woman had been killed by manual strangulation, the hyoid bone having been fractured. The majority verdict of the jury at the trial shows that the prosecution evidence identifying the dead body as that of a woman named Seethammal was accepted by them. This woman was the wife of Parthasarathy Ayyangar (P.W. 1). According to the prosecution evidence she left him on the 4th August 1933 and joined the prisoner taking with her her jewels and some silver vessels. The prosecution evidence is that Seethammal and the prisoner were living together thereafter at various addresses in Madras and in the statement made by the prisoner at the Sessions trial he admitted

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that he lived with her in a house at Muthukrishnier Street for four or five days and then went with her to No. 24 Peddunaicken Street, and it is in this latter house that the prosecution alleged that Seethammal was strangled to death on the night of the 11th January. In his statement the prisoner denied that he ever lived in a house in the Post Office Street as deposed to by one prosecution witness. The prisoner and Seethammal went to No. 24 Peddunaicken Street on or about the 22nd December 1933. The prosecution evidence, as stated by P.W. 2, the lessee of No. 24 Peddunaicken Street, P.W. 3, a tenant of a portion of the house, and P.W. 6, a milk-seller who was supplying milk to Seethammal and the prisoner and who used to deliver milk to the former at the top of the stairs which led to the room occupied by the couple each morning at 5-30 or 6, shows that Seethammal lived at that address with the prisoner until the 11th January, being last seen in that house at 6 or 6-30 p.m. on that date by P.W. 2 downstairs in the court-yard drawing water from a water-tap, by P.W. 3 at 7 or 7-30 p.m. the same day, and by P.W. 6 the milk-seller on the morning of the same date. Thereafter Seethammal was never seen alive. On the morning of the 12th January, P.W. 6, the milk-seller, went as usual to deliver the milk but found on going up the stairs that the door leading into the room was locked or secured from outside. She then went downstairs and told P.W. 2 that she had been unable to find anyone upstairs. At this time her account for milk supplied was unpaid. Later on she was paid Rs. 4 by P.W. 2 who received that sum on the morning of the 12th from the prisoner who,

upon being questioned about what the milk-woman had reported, said that he had taken Seethammal that morning to his sister's house at Saidapet to assist his sister who was in labour. The prosecution case was that this explanation for the absence of Seethammal was untrue and in his statement at the Sessions trial the prisoner himself gave it up because he there stated that Seethammal left him on the 4th January. The prisoner remained at Peddunaicken Street until the 13th January when he went to another address and thereafter he pledged some silver vessels identified by the prosecution as those taken away by Seethammal when she left her husband on the 4th August 1933. Before this, on the 4th January 1934, he had pledged another silver vessel similarly identified by the prosecution. Efforts to trace the sender of the parcel containing Seethammal's body resulted in the discovery of P.W. 25 Munuswami, a coolie porter at the Egmore Railway Station, and P.W. 26 Jagannatha Thathachari, assistant parcels clerk at the Egmore railway station, the former of whom received the parcel from the accused at the Egmore railway station at about 9-45 p.m. on the 12th January and with the assistance of another porter, not a witness in the case, carried it and weighed it in the weighing machine at the parcels office. The latter witness booked the parcel to Karunguzhi at the request of the prisoner. Both these witnesses identified the prisoner at an identification parade and at the trial. The case for the prosecution, therefore, was that Seethammal was last seen alive in No. 24 Peddunaicken Street where she was then living with the prisoner on the 11th January and that on the

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evening of the next day the prisoner sent her dead body wrapped up in a parcel to Karunguzhi by train and that afterwards he pledged silver vessels and jewellery alleged to belong to Seethammal. In these circumstances the prosecution contended that the jury were entitled to and ought to draw the inference that the prisoner had committed the murder, in the absence of any explanation from him which could be accepted as true accounting for her disappearance from No. 24 Poddunaicken Street and her reappearance as a dead body wrapped up in a parcel and sent by the prisoner by train to Karunguzhi, the medical evidence being that she had been strangled. As I have stated before, beyond the two contradictory statements made by him—his denial that he committed the murder, and in the Committing Magistrate's Court his statement that he knew nothing about Seethammal—there was no explanation with regard to why and when Seethammal left the house and why he sent off her dead body in a parcel, if he did so. The jury by a majority of six to three found the prisoner guilty of the offence of murder and, there being no mitigating circumstances present, he was sentenced to death.

Thereupon the prisoner applied to the Advocate-General for a certificate under Clause 26 of the Letters Patent of the High Court of Madras and the Advocate-General granted a certificate which, as amended, was in the following terms (the amendments are shown in italics):—

Now, I, Sir Alladi Krishnaswami, Advocate-General of Madras, do under and in virtue of the powers vested in me by Clause 26 of the Letters Patent of the High Court of Judicature at Madras, bearing date 28th November 1865, certify:

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I. that in my judgment whether the alleged statements of the accused, while in the custody of the Police, spoken to

(a) in the chief-examination of P.W. 10: "the accused pointed out the shop, saying that it was in that shop that he purchased the mattress";

(b) in the cross-examination of the same witness:—

(i) "the accused himself pointed out the shop saying that it was at this shop that he purchased adding 'I paid an advance of 8 annas and I subsequently paid Rs. 2-8-0'";

(ii) "the accused looking at me said, 'I have purchased from him on the 12th a coir mattress'";

(iii) "it was the accused that was looking at me and asking me 'I purchased from you, is it not, on the 12th a coir mattress'";

(iv) "thereupon the accused said, 'I purchased it of you for Rs. 3; I paid an advance of 8 annas and I sent the balance of Rs. 2-8-0 through the cooly woman'";

(c) in the cross-examination of P.W. 11: "the accused himself mentioned me and said that it was a woman wearing a coral necklace";

(d) in answer to a question by the Court: "when I went there the accused said 'it was this woman that carried the articles'";

(e) in the cross-examination of P.W. 42: "while we were coming out, the accused pointed out that woman with coral beads on her neck and said 'that was the cooly that carried my mattress'";

are in the circumstances admissible in evidence under section 27, Indian Evidence Act, as relating to the discovery of any fact by reason of such statements within the meaning of the section, or whether the same are admissible under section 8 of the Indian Evidence Act, *or any other provision of law; and*

whether the fact that no exception was taken to the reception of this evidence during the trial and the fact that some of these statements were elicited by Counsel for the accused during the cross-examination of prosecution witnesses affects the point as to their admissibility.

And the points of law arising out of the reception in evidence of these statements and the placing of the same before the jury *which are in my judgment decisions on points of law* require further consideration.

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II. Whereas the learned Chief Justice refers in his address to the jury to the deceased having been last seen with the accused and known to have with her certain silver articles, to the accused being found in possession of them after the date of the alleged murder and disposing of them to the pawn-brokers, whereas the evidence of the prosecution is that the deceased woman was found to be in possession of the articles while she resided at No. 2/26 Post Office Street, which she quitted on or about the 17th December 1933 and there is no evidence as to her being in possession of the same subsequent to that date, in my judgment, whether there is an error of law or a misdirection or a non-direction amounting to an error of law by reason of the learned Chief Justice not directing the attention of the jury to the question whether in the circumstances of the case the jury would draw a presumption under section 114 of the Indian Evidence Act as to the continued possession of the articles by the deceased down to the date of her death requires further consideration, and, in my judgment, the facts and circumstances mentioned above are and constitute a decision on a point of law under Clause 26 of the Letters Patent.

On the basis of the Advocate-General's certificate the prisoner applied to the High Court for a review of the case and his application was heard by a Full Bench of seven Judges constituted as above mentioned. The arguments of counsel appear fully from the judgment.

T. R. Venkatarama Sastri and *R. Rangachari* for prisoner.

Crown Prosecutor (T. S. Anantaraman) and *S. Ranganatha Ayyar* for the Crown.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—Before dealing with the first point to be considered by this Full Bench, I propose to set out some of the facts of this case.

[His Lordship set out the facts as given on pages 526–530 above and proceeded :—]

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It is now necessary to refer to a matter in the case which is the foundation for the first point covered by the certificate of the Advocate-General. When the parcel was opened, Seethammal's body was found to be wrapped up in a coir mattress and the case for the prosecution was that a mattress identified as similar to this was purchased during the morning of the 12th January from one Sheik Nannu Sahib, a mattress-seller in Madras, whose servant was P.W. 10 Mohammad Kasim, and that the prisoner was its purchaser. The purchase price was three rupees. The purchaser paid only eight annas as he had no money with him then and asked that the mattress should be sent by a coolie and said that he would send the balance with the coolie. This coolie was Thayammal P.W. 11. A cash bill, Exhibit D-I, was given. In that bill neither the name nor the address of the purchaser is given. P.W. 11's evidence was that on instructions from the purchaser she went to the fish market at Kondithope and there waited for him. After some time the purchaser came and took her to a house near the fish market where she deposited the mattress outside a house at about 12 noon, received the balance of the purchase price and took that back to the mattress shop. Although unable to give the number of the house or the street, this witness subsequently pointed out the house to the police and it was No. 24 Peddunaicken Street where the accused was living on the 12th January. From this evidence it might be inferred by the jury that the purchaser of the mattress did not wish to let the vendor know where he was living, viz., in that house. Whilst P.W. 10 was being examined-in-chief at the sessions trial when

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asked the following question : "Subsequently did the police come to you in connection with this case ? ", he answered : "About ten or eleven days afterwards, about 4 p.m., this Inspector and another Ayyar came with the accused and the accused pointed out the shop saying that it was in that shop that he purchased the mattress." No objection to this evidence with regard to what the prisoner stated was taken by learned Counsel for the prisoner—an Advocate of very large experience. This witness was then cross-examined by the prisoner's Advocate with regard to what the prisoner had said on that occasion. P.W. 11 stated nothing about what the prisoner had said on this occasion in examination-in-chief but in cross-examination she said : "The accused himself mentioned me and said that it was a woman wearing a coral necklace." No objection was taken by the learned Advocate for the defence to this answer. She was also questioned by the Court on this matter. P.W. 42, S. R. Krishna Ayyangar, Inspector of Police, in cross-examination stated : "While we were coming out, the accused pointed out that woman with coral beads on her neck and said 'That was the coolie that carried my mattress.'" In examination-in-chief he had stated that he and the prisoner had gone to the premises of the mattress-seller and that the prisoner pointed out the premises having taken the witness direct to that shop. As stated in the certificate of the Advocate-General no objection was raised with regard to the admissibility of the evidence as to what was stated by the prisoner on that occasion. In my charge to the jury I referred to this matter as follows :

"The evidence is that the accused came to the shop in a motor car, got out and pointed out to the Police, 'this is the

shop ; that is the man and this is the coolie woman who carried the mattress.' But the accused denies all this. This is not only the evidence of these two witnesses but it is also the evidence of the Crime Branch Inspector Mr. Krishna Ayyangar who gave evidence at the end."

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In the opinion of the Advocate-General the reception of this evidence, though without any objection to its admissibility being taken, and my placing it before the jury in my charge to them are decisions on points of law which require further consideration. The second point raised in the certificate is that in my charge to the jury I failed to tell the jury that there was no evidence that Seethammal was ever in possession of the silver articles after she quitted No. 2/26 Post Office Street, on or about the 17th December 1933, and that the jury ought to have been told that there was no evidence as to her being in possession of them subsequent to that date. This omission is, according to the amended certificate of the Advocate-General, in his judgment a decision on a point of law under Clause 26 of the Letters Patent. The Crown Prosecutor gave notice that he intended to take a preliminary objection at the time of the hearing of this application to the Full Bench, the objection being that the application is incompetent as there was neither an error in a decision of a point of law decided by the trial Judge nor a decision on a point of law requiring further consideration, and submitting that the Full Bench decision in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) has wrongly interpreted the words "decision on a point of law decided by the trial Judge" occurring in Clause 26 of the Letters

(1) 1930 M.W.N. 249 (F.B.).

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Patent, which he contends is not warranted by the language and spirit of the Letters Patent. In view of this objection a Full Bench of seven Judges was formed to consider this preliminary objection of the learned Crown Prosecutor.

The relevant clauses of the amended Letters Patent are Clauses 25, 26 and 41. The marginal note of Clause 25 reads :

"No appeal from High Court exercising original jurisdiction—Court may reserve points of law."

The clause itself says that

"there shall be no appeal to the said High Court of Judicature at Madras from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction . . . But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court."

Clause 26, the marginal note of which is :

"High Court to review on certificate of Advocate-General",
reads as follows :

"And we do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

Clause 25, therefore, directly prohibits any appeal to the High Court from its own Criminal Sessions but power is given to the Sessions trial Judge to reserve any point or points of law for the

opinion of the said High Court. This latter provision clearly refers to cases where a submission on a point of law has been made to the Court, whether by way of an objection to the admissibility of evidence or mis-joinder of charges or any other legal question, or to points of law raised by the trial Judge himself. Such point or points of law as have been reserved by the Judge are then considered by the High Court under Clause 26 which enables the High Court also on a certificate of the Advocate-General to consider a point or points of law decided by the High Court Criminal Sessions trial Judge. The question before us is whether the words of Clause 26 are to be given their ordinary meaning, that is to say, that there must be a point of law and that point of law must be actually decided, or whether the meaning to be given to them is so wide a one as to include what is called "matter of law" in section 418 of the Code of Criminal Procedure, that is, such misdirection or non-direction as would permit an appeal from a mofussil Court against the verdict of a jury. This would include not only an error in laying down the law but defects in summing up the evidence or in not summing it up or summing it up erroneously or any infringement of the law as laid down in section 297 of the Code of Criminal Procedure which would also include errors of procedure. Mr. T. R. Venkatarama Sastri on behalf of the prisoner contends that all matters which would entitle a person convicted at a Sessions Court by a jury to appeal to the High Court entitle him on conviction at the Criminal Sessions of the High Court to ask the Advocate-General for his certificate under Clause 26 of the Letters Patent.

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This is not the first occasion on which a preliminary objection similar to that of the learned Crown Prosecutor has been taken because, in *Queen-Empress v. O'Hara*(1), the Standing Counsel, Mr. Phillips, raised the same objection. This appears from page 657. He contended that under Clause 26 there must be a point of law and that point of law must have been decided. In dealing with the question of whether there had been a decision, he contended :

"Secondly, there was no *decision*. What a Judge may say inadvertently in his charge and which is afterwards looked into and said to contain a point of law, is no decision. No notice is taken of what the Judge may have said till after the case is over. It is not necessary for me to say that nothing that a Judge says in a charge is not a decision; but under Clause 26 the matter must be a matter raised and decided consciously and not inadvertently."

The question raised by the Standing Counsel the Full Bench did not consider it necessary to decide although they stated that in their opinion it was clear that, in a case of misdirection such as there was there and of improper reception of evidence such as had taken place, the Court should exercise its powers of review. On page 667, PETHERAM C.J. says :

"In the view we take of the case, it is unnecessary to deal with the argument for the prosecution as to the powers of the Court acting under section 26 of the Charter."

In *King-Emperor v. Peary and Lakshi Peshakar*(2) the Standing Counsel, Mr. Das, raised the objection that under Clause 26 of the Letters Patent the Advocate-General has no power to grant a fiat for a misdirection on a question of fact. He argued that there is a distinction between the law applicable to Sessions trial at the

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High Court and that governing the procedure of mofussil criminal Courts. SANDERSON C.J. in his judgment expressed no opinion upon the point raised by the Standing Counsel as it was not necessary to do so because on the merits no sufficient case was made out for the Court to interfere. In *Reg v. Pestanji Dinsha*(1) Mr. Scoble for the Crown contended that under Clause 26 of the Letters Patent there must be some point of law decided. The exact scope of Clause 26 nevertheless remained undefined by the Full Bench except that it was held that non-direction by a Judge is not a matter upon which the Advocate-General should grant a certificate under Clause 26 of the Letters Patent. I next come to *C. K. N. Sundaresa Iyer v. King-Emperor*(2). In that case before the Full Bench the same preliminary objection as that raised in this case was taken and a direct decision upon the point was given. The Full Bench held that a mistake made by the trial Judge in stating the law to the jury is a misdirection and amounts to a decision of a point of law. WALLACE J., who delivered the judgment of the Court (EDDY J. *dissenting*), held that the words "decision of a point of law" are not confined to the point of law specifically put up and decided by the trial Court. They include in his opinion all matters decided or which fall to be decided by the trial Judge in the case. They include his conclusions arrived at and stated whether right or wrong. They also include what he does not state. In this view the word "decision" includes every mental conclusion on which the charge or judgment is based whether

(1) (1873) 10 B.H.C.R. 75 (F.B.).

(2) 1930 M.W.N. 249 (F.B.).

(1) (1890) I.L.R. 17 Calc. 642 (F.B.).

(2) (1919) 23 C.W.N. 426 (F.B.).

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stated correctly or misstated. It includes directions, misdirections and non-directions to a jury. Misdirection includes not only error in laying down the law by which the jury are to be guided but also a defect in summing up the evidence or in not summing it up or in summing it up erroneously, such error and defect being in all cases an infringement of the law laid down under section 297 of the Criminal Procedure Code which applies to all criminal Courts including the Sessions of the High Court. Therefore in his opinion a trial at the Criminal Sessions of the High Court is on the same footing as one in the mofussil and gives the prisoner the right of appeal or review on all points in respect of which he could claim the same remedy on conviction by a mofussil Sessions Court. In the course of his judgment, WALLACE J. says :

"It seems absurd to argue that a judgment which stated nothing or stated nonsense would not be a decision. The Judge in his judgment or charge as read or pronounced is deciding all the time. For example, if he omits altogether to sum up the law, he has decided that it is not his duty to sum it up."

With all respect to WALLACE J., I am unable to see how an omission to sum up the law can be a decision upon a point of law although it might be an error. He then continues :

"If he admits and discusses certain evidence, he has decided to admit it, even though neither party raised the question of its admissibility. If he states that the defence case is so and so he has decided that it is in fact so and so. Clearly the word 'decision' includes every mental conclusion on which the judgment or charge is based, whether stated or not stated, whether stated correctly or misstated."

He further holds that the words "point of law" are the same as what is called "matter of law"

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in section 418 of the Criminal Procedure Code. It is true that these observations may be taken to be general since the point for consideration in that case was whether a mistake in laying down the law of the offence charged to the jury was a misdirection and amounted to a decision on a point of law. But even though these observations were not necessary for the decision of that point they must be considered here as I am bound to say that they appear to me to go far beyond what is intended by Clause 26 of the Letters Patent. According to WALLACE J., a "decision" includes that which was not stated to the jury. It includes an omission to put certain evidence before the jury, but I must observe that it is not the duty of a trial Judge to put every piece of evidence before the jury nor is it his duty to read out the whole of the defence statement.

Yet, according to WALLACE J., if he has omitted to refer to any piece of evidence or to any part of the statement made by the prisoner at the Sessions trial, it is open thereafter to an ingenious Counsel to select such omissions and ask the Advocate-General to certify that there has been a decision on a point of law which is or may be erroneous. In my view, this cannot be intended by Clause 26 of the Letters Patent. In *King v. Cohen and Bateman*(1) CHANNELL J., in discussing section 4 (1) of the Criminal Appeal Act, says :

"A mistake of the Judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a *wrong decision of a point of law*, but merely comes within the very wide words 'any other ground', so that the appeal should be allowed according as there is or is not a 'miscarriage of justice'."

(1) (1909) 2 Cr. App. R. 197.

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It would be fair to include also, in my opinion, in the above statement of the position by CHANNELL J. an omission to refer to a piece of evidence or to a part of the prisoner's statement made to the Court, and there are doubtless many other matters of a similar nature. Suppose, for example, the Judge in his charge to the jury makes no reference to a piece of evidence because he has forgotten about it. How can it possibly be said that he has come to any decision with regard to it and where is the point of law involved? EDDY J., who delivered the dissenting judgment in the Full Bench case, refers to *King v. Cohen and Bateman*(1) in support of his view which is that a point of law referred to in Clause 26 means a point of law submitted to and decided by the trial Judge or any direction as to the law given by him in the course of his summing up to the jury. In his view, it is essential that, first of all, there must be some point or points of law and, secondly, a decision thereon; and that is what Clause 26 of the Letters Patent says. A decision must mean a conclusion arrived at. It is true that a person may come to a conclusion in his own mind and, although he does not state it because it is not necessary to state it, it is none the less a conclusion. A person may decide in his own mind to do something and in pursuance of that decision may do it but what has to be considered here are not cases such as that but what the meaning of "decided" is in relation to a point of law. When a Judge in his charge to the jury states the law to them he is probably deciding the law. It is his duty to state the law and he consciously states it;

but when it is contended that the reception of inadmissible evidence, where no objection is taken as to its admissibility and the Judge's mind is never directed to the question of its admissibility and he has never been asked to say whether it is admissible or not, is a decision of a point of law, in my view it is stretching the meaning of the word "decision" beyond reasonable limits. The Judge has not even come to a mental conclusion upon the matter. Similarly, if he refers in his charge to the jury to this same evidence, again without any objection, I am of the same opinion, namely, that he cannot have decided the question of its admissibility. What he has done at most is inadvertently to refer to what is already in evidence and he has, if it is inadmissible, been guilty of an error which, if it is sufficiently serious, may have resulted in a miscarriage of justice and on that ground the trial may be vitiated but not on the ground that there has been an error in the decision of a point of law. WALLACE J. is of the opinion that, if such matters as he sets out in his judgment are not "decisions" upon "points of law" within Clause 26 of the Letters Patent, the accused has no remedy. With this view I am unable to agree because it seems to me clear that he has a remedy under Clause 41 of the Letters Patent which enables an appeal to be carried to the Privy Council from any judgment, order or sentence of the High Court made in the exercise of original criminal jurisdiction provided that the said High Court shall declare that the case is a fit one for such appeal, or in any criminal case where any point or points of law have been

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(1) (1909) 2 Cr. App. R. 197.

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reserved for the opinion of the High Court in the manner before provided in the Letters Patent, i.e., by Clause 25, by any Court which has exercised original jurisdiction provided that the High Court declares that the case is a fit one for such appeal. The earlier part of this clause, in my opinion, entitles a prisoner, provided that he has got a certificate of fitness of the High Court, to go direct to the Privy Council in all cases except where the Judge has reserved any point or points of law under Clause 25. In *Reg. v. Pestanji Dinsha*(1) it was held that non-direction by a Judge is not a matter upon which the Advocate-General should grant any certificate under Clause 26 of the Letters Patent. If that opinion is correct, which in my view it is, there is that distinction between an appeal from a mofussil criminal Court and a criminal trial at the High Court Sessions and it is also stated that on an appeal from the mofussil the High Court has a much wider sphere of action. There are cases in which the wrong admission of evidence was dealt with by a Full Bench as a matter arising under Clause 26. One of these is *Emperor v. Narayan Raghunath Patki*(2) which related to the admission of a confession. But I gather that there had been a ruling of the trial Judge during the course of the trial that the evidence was admissible and this of course would be a decision. But it was also held in the same case that a decision by a Judge as to whether or not a confession is voluntary is not a decision on a point of law but on a question of fact. The observations

(1) (1873) 10 B. H.C.R. 75 (F.B.).

(2) (1907) I.L.R. 32 Bom. 111 (F.B.).

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of WALLACE J. in *C. K. N. Sundaresa Iyer v. King-Emperor*(1), however, would express the contrary opinion. In *Queen-Empress v. O'Hara*(2) the Judge read to the jury a statement (which had been objected to and had not been admitted in evidence) saying that he would read it and it would do no harm and it was held that the improper reception of such evidence constituted a decision erroneous in point of law calculated to prejudice the prisoner. This was a case certified by the Advocate-General under Clause 26 of the Letters Patent. This is not actually an authority against the learned Crown Prosecutor's contention here. On page 667 in the course of the judgment, it is stated :

"We think that to lay before the jury these statements, not admitted nor admissible in evidence, was in itself a decision erroneous in point of law."

In *Emperor v. Upendra Nath Das*(3), the Full Bench stated the opinion that no error of law is committed by a Judge who refrains from directing the jury as to exceptions which had neither been raised nor relied upon by the accused and had no basis in evidence on the record ; and it was stated by MOOKERJEE J. that mere non-direction is not necessarily misdirection and by the same Judge that the expression "lay down the law" in section 297, Criminal Procedure Code, does not signify "lay down the whole law on the subject irrespective of the facts of the particular case before the Court". From his judgment, with which I agree, it is clear that the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such

(1) 1930 M.W.N. 249 (F.B.). (2) (1890) I.L.R. 17 Calc. 642 (F.B.).
(3) (1914) 21 C.L.J. 377 (F.B.).

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evidence and not to questions which do not properly arise at all. I refer to this as it has a strong bearing upon the second point raised in the certificate of the Advocate-General. HOLMWOOD J., on page 394, stated that he had no doubt that

“no error of law is committed by a Judge who refrains from directing a jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record.”

It is true of course that what was being considered by the Full Bench there were the exceptions to section 300 of the Indian Penal Code, but these opinions are certainly useful ones as showing that the failure of a Judge to put to the jury a case not raised at all by an accused nor relied upon by him and having no basis in evidence on the record is not a misdirection to the jury.

In considering the scope of Clauses 25 and 26 of the Letters Patent it is important to remember that on the date of the amended Letters Patent there was in England a statute (11 and 12 Vict. c. 73) out of which there came the Court for Crown Cases Reserved; and it is reasonable to suppose that the Crown had in mind that statute when it enacted Clauses 25 and 26 of the amended Letters Patent. I say this because section 1 of 11 and 12 Vict. c. 73 has somewhat similar words to Clause 25. By that section power is given to the trial Judge or Recorder of a Court of Quarter Sessions or Justices of the Peace before whom a criminal case shall have been tried in his or their discretion to reserve any question of law which shall have arisen on the trial for consideration of the Judges. Upon such question being reserved the Judge is to state a case setting out the

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question or questions of law which have been so reserved. The Court before whom these questions came was the Court for Crown Cases Reserved. Section 5 gives the Court of Queen's Bench the power to reverse judgments on writs of error issued upon the fiat of the Attorney-General. The history of writs of error in criminal cases is contained in Stephen's History of the Criminal Law of England, Vol. I, commencing at page 308. Formerly these were issued entirely as a matter of favour. The defendant brought his writ of error. The Attorney-General admitted that there was error. The Court accepted his admission and the conviction was set aside. But in the third year of Queen Anne's reign Courts decided that they would not be content with the Attorney-General's admission of error but would judicially determine whether error existed or not. Then in cases of misdemeanour writs of error were granted as a matter of justice but in cases of felony and treason exclusively as a matter of favour. It would appear that this method of review in criminal cases was very rarely used and only errors apparent on the face of the record were capable of being reviewed and the record on the date when Sir James Fitzjames Stephen published his History of the Criminal Law of England, namely, 1882, took no notice either of the evidence or of the direction given by the Judge to the jury. This appears on page 309. On page 312 in the foot-note it is stated that the writ of error in *Orton's case* (March 1881) and in *Bradlaugh v. The Queen*(1) were the only writs of error in criminal cases which had been decided for a considerable time. In the three cases

(1) (1878) 3 Q.B.D. 607.

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referred to in argument before us, viz., *Ex parte Newton*(1), *Ex parte Lees*(2) and *Rex v. Wilkes*(3), the errors were all errors apparent on the record. In *Bradlaugh v. The Queen*(4) it was again an error on the face of the record. It was there held that in an indictment for publishing an obscene book it is not sufficient to describe the book by its title only for the words thereof alleged to be obscene must be set out and, if they are omitted, the defect will not be cured by a verdict of guilty and the indictment will be bad either upon arrest of judgment or upon error. It is clear that in all the cases referred to in argument there what were being considered were some errors appearing in the indictment. In *Orton's case* (*vide* the foot-note to page 309 in Stephen's History of the Criminal Law of England) the main question was whether cumulative punishment could be awarded for two offences charged in separate counts of the same indictment. In my view, it is clear that writs of error dealt entirely with points of law apparent on the face of the record such as an indictment. Therefore, on the date of the Letters Patent, there was in England a very restricted right of review in criminal cases, that is to say, on points of law reserved by the trial Judges and cases stated by them covering such points and writs of error with the fiat of the Attorney-General dealing only with errors of law on the then record, such cases being extremely rare. What was the intention of the Crown when Clauses 25 and 26 of the Letters

(1) (1855) 4 El. & Bl. 869; 119 F.R. 323.

(2) (1860) El. Bl. & El. 828; 120 E.R. 718.

(3) (1770) 4 Burr. 2527; 98 E.R. 327.

(4) (1878) 3 Q.B.D. 607.

Patent were enacted? It seems to me only reasonable to suppose that an endeavour was being made to give a similar power of review in the case of trials at the Criminal Sessions of the High Court, although the contention of the Crown here concedes that a slightly greater right of review has been given in that, instead of writs of error dealing only with errors appearing in the indictment, the Advocate-General is entitled to give his certificate in respect of a point or points of law submitted during the trial to the Court which the Court has not reserved for the opinion of the High Court but given a decision thereon, the contention of the Crown being that, when points of law are raised during the trial and submissions made thereon, the Judge has the alternative either of giving a ruling upon the point or points of law submitted or of reserving the point or points for the consideration of the High Court, and that Clause 26, so far as the Advocate-General's powers are concerned, relates only to the before-mentioned point or points of law not reserved but decided, although it is conceded by the Crown that misstatements of the law in laying it down in the charge to the jury are also included. In my view, this contention is right. Having regard to the then existing powers of review in criminal cases in England, I can see no warrant for the contention that the Crown intended to give a right of first appeal similar to that from a mofussil criminal trial; and I am satisfied that the view taken by WALLACE J. that there is such a right is incorrect, though the decision in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) on the

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main question is no doubt right. In connection with the contention that there is a right of first appeal in such cases similar to that from a mofussil criminal trial, I must observe that this view does not appear to have been the one generally taken because, as far as I have been able to ascertain, since 1881, before which date there are no records, only three cases have come before the High Court under Clause 26 of the Letters Patent. I am of the view that neither of the points raised in the certificate of the Advocate-General here is within the purview of Clause 26 of the Letters Patent. With regard to the first point, although the admissibility of evidence is without doubt a question of law, there was no decision thereon at the trial. If the evidence was inadmissible then it was an error of law but I am unable to see how there was a decision upon a point of law. It was open to the learned Counsel for the prisoner either during the charge to the jury or afterwards to make a submission with regard to the admissibility of the evidence, and indeed it was his duty to do so if in his opinion the evidence was inadmissible unless he thought that, in view of the other evidence in the case, its admission did not materially prejudice his client.

Turning to the second point, I am quite satisfied that this does not come within Clause 26. In the way in which the point was first set out in the Advocate-General's certificate, it was exceedingly difficult to understand what the alleged point of law was, much less so, how there had been any decision with regard to it. The Advocate-General was allowed to amend his certificate and has done so by adding the words "and in

my judgment the facts and circumstances mentioned above are and constitute a decision on a point of law under Clause 26 of the Letters Patent". After some difficulty Mr. Venkatarama Sastri formulated the following contention, namely, that it is the duty of the trial Judge to tell the jury upon whom the onus of proof rests and that in a criminal case the onus, subject to certain exceptions, is always upon the prosecution. With this contention no one will quarrel. He then contended that I ought to have told the jury in my charge that the Crown had to prove that Seethammal was in possession of the silver vessels during the time when she was living in No. 24 Peddunaicken Street and that the prosecution evidence only showed that she was last in possession of them when she was living with the prisoner at No. 2/26 Post Office Street which she left in his company on or about the 17th December 1933 and that the jury would be entitled to say that it had not been proved that Seethammal had these articles with her down to the time of her death. The answer to this contention—and it is one which is so obviously given in the statement of the prisoner at the trial that it is difficult to see how with all respect the Advocate-General could have overlooked it—is that this question was never in issue in view of the prisoner's own case. I must here again refer to the case for the Crown with regard to these articles. It was that they had been taken away by Seethammal from her husband when she left him in the previous August and after her death were pledged by the prisoner, and indeed one of them a week before her murder. The prisoner did not dispute the pledging

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of the silver vessels but he denied that they were Seethammal's and said that they belonged to him. In his statement made to the Court he said :

" There were also certain silver articles with me such as silver plate, silver cup, panchapatram, etc., which were presented to me by my father-in-law's people. I was keeping these jewels and other things for my own use. They are all my own ",

and later on :

" As I have pledged *these* silver articles, etc., which belonged to myself, when I was questioned I said that I had pledged such and such jewels at such and such places. They are articles of my own."

It was not the prisoner's case that he left No. 24 Peddunaicken Street before the 12th or 13th of January. The question was, to whom did these articles identified in Court as the pledged articles and admitted by the prisoner to have been pledged by him belong? Seethammal's husband had identified them as belonging to him. The question as to whether or not they were in No. 24 Peddunaicken Street was never in issue in view of the prisoner's case. He said that the articles were his, that they were with him and that he had been using them. The point now put forward was one which was not raised by the prisoner by way of defence and it appears to me to be unsound to contend that nevertheless the jury should have been invited by me to disbelieve the prisoner's admission that these articles were with him and, as it were, contradict him on that point and that instead the jury should have been directed that they were entitled to infer that they were left behind in No. 2/26 Post Office Street when Seethammal and the prisoner removed themselves from there to No. 24 Peddunaicken

Street which was never the case of the prisoner. I am wholly unable to see how this was even a non-direction as to the question of onus ; and I am satisfied that this is not a decision on a point of law within Clause 26 of the Letters Patent.

An objection was taken to the learned Crown Prosecutor's preliminary objection and that was that the certificate of the Advocate-General is conclusive with regard to all matters it contains except his opinion with regard to the error. It was contended that his certificate is final and conclusive and that the Court is not competent to say that there is no point of law or a decision upon it within Clause 26 if the Advocate-General certifies that there is. Mr. Venkatarama Sastri argued that the Advocate-General's judgment in Clause 26 relates to the error in the decision of the point or points of law and not to whether a point or points of law has or have been decided. But in his amended certificate the Advocate-General has added the words, " which are in my judgment decisions on points of law ". I am quite unable to see why the High Court is limited in its powers to a consideration of whether the Advocate-General's judgment is wrong with regard to the error and has no power to consider his judgment on the other points. During the course of his argument Mr. Venkatarama Sastri was asked whether the Advocate-General could convert a question of fact into a " point of law " decided merely by stating that it was a point of law in his certificate ; and to this question no satisfactory answer was forthcoming. The Advocate-General derives his powers of certification from Clause 26 and Clause 26 alone. His powers are limited to

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points of law decided. If there is no point of law or no decision upon it, then he has no jurisdiction to grant a certificate; and I cannot accept the contention that the High Court is nevertheless bound to entertain the reference where the Advocate-General has mistaken a question of fact for a point of law or mistakenly thought that there has been a decision upon it. The High Court only gets its powers of review in such cases from Clause 26 and, if the High Court reviews questions which are not points of law or points of law which have not been decided, it is exceeding its powers of review. During the argument another question was put to Mr. Venkatarama Sastri, namely, suppose the Judge reserves a point under Clause 25 erroneously believing it to be a point of law whereas it is a question of fact, would the High Court be bound to entertain the reference; which on the face of it is one on a question of fact, merely because the trial Judge has reserved that point? I understood Mr. Venkatarama Sastri to agree that the High Court would not be bound to do so. If this is so, I am quite unable to understand why it should be contended that the Advocate-General is in any better position. Both he and the trial Judge derive their power from Clauses 25 and 26 respectively. I am, therefore, of the opinion that the Advocate-General's judgment not only as regards the error but as regards there being points of law decided is open to be questioned by the High Court, and, for the reasons I have already given on the main question, neither of the points set out by the Advocate-General in his certificate is, in my opinion, a point of law decided within the meaning of Clause 26

of the Letters Patent and that therefore we cannot entertain this criminal miscellaneous petition.

RAMESAM J.—In this case the accused was tried for the offence of murder under section 302, Indian Penal Code, before my Lord the CHIEF JUSTICE of this Court assisted by a jury. The jury by a majority of six to three brought in a verdict of guilty. My Lord accepting the verdict of the majority sentenced the accused to death. Thereupon the accused applied to the learned Advocate-General and obtained a certificate which purports to be a certificate under Clause 26 of the Letters Patent. On the basis of the Advocate-General's certificate the accused applied to this Court for a review of the case. The matter accordingly came up before a Full Bench of seven Judges.

The facts of the case, so far as they are relevant for the purpose of this judgment, are stated in the judgment of my Lord the CHIEF JUSTICE and it is unnecessary to repeat them.

The Crown Prosecutor has taken a preliminary objection that the certificate given by the Advocate-General does not satisfy the requirements of Clause 26 of the Letters Patent and gives no jurisdiction to this Court to review the case. He contends that there must be a point or points of law decided by the Court of original criminal jurisdiction and, where there is such a point of law decided by the Court, the Advocate-General may certify that there is an error in the decision or that the point or points of law should be further considered, but the Advocate-General can give no certificate if there is no decision by the Court of

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original criminal jurisdiction on a point or points of law.

In *Queen-Empress v. Shib Chunder Mitter*(1) an objection of this kind was taken by Mr. Phillips who appeared for the Crown but the judgments delivered in the case do not relate to this point but proceed to deal with the merits of the case.

Again in *Queen-Empress v. O'Hara*(2) a similar objection was taken by the Standing Counsel who appeared for the Crown. PETHERAM C.J., in delivering the judgment of the Full Bench, observed :

"In the view we take of the case it is unnecessary to deal with the argument for the prosecution as to the powers of the Court acting under section 26 of the Charter. We take it to be clear that in a case of misdirection such as this and of improper reception of evidence such as took place in the present case this Court may and ought to exercise powers of review."

In an earlier part of the judgment the question was discussed whether an omission by the Judge to advise the jury according to the rule that an accomplice is unworthy of credit unless he is corroborated in material particulars would be a ground for interference, and the learned CHIEF JUSTICE observed :

"We are not prepared to say that this Court might not feel bound even on the ground of such an omission alone to review the case under Clause 26 of the Letters Patent. This difficult question however need not be decided in the present case."

In *Reg. v. Pestanji Dinsha*(3) Counsel for the prisoner asked the presiding Judge to rule that there was no case to go to the jury but the learned

(1) (1884) I.L.R. 10 Calc. 1079. (2) (1890) I.L.R. 17 Calc. 642 (F.B.).
(3) (1873) 10 B.H.C.R. 75 (F.B.).

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Judge refused to do so holding that there was certainly a case to go to the jury. At the close of Counsel's address his junior Counsel, by his direction, asked the learned Judge to reserve under Clause 26 of the Letters Patent for the opinion of the High Court a certain point of law, but the learned Judge declined to do so saying that he did not think there was then any question of law to be reserved. The Advocate-General who gave the certificate appeared in support of the conviction. He stated that he gave the certificate on the representation of the Counsel but he did not admit as a fact that a direction alleged to have been given had in fact been given. Thereupon the Court suggested that the certificate might be amended which was accordingly done. After amendment the certificate stated that the Judge did not instruct the jury on a certain point of law, and did tell the jury that there was no point of law to be reserved for the opinion of the High Court. WESTROPP C.J. observed :

"The allegation in that certificate that the Judge . . . refused to reserve the point of law . . . states no error in law . . . The first part of this allegation, viz., that the Judge 'did not instruct, etc.,' is an averment of an omission and no more on the part of the learned Judge. It simply puts forth a non-direction by him, not a misdirection."

After referring to some of the authorities, the learned CHIEF JUSTICE quoted BARON PARKE in *M'Alpine v. Mangnall*(1) who said :

"That which you complain of here is a non-direction which cannot clearly be made the subject of a bill of exceptions . . . It is misdirection and not non-direction that is the proper subject of a bill of exceptions."

(1) (1846) 3 C.B. Rep. 496.

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Again he quotes CROMPTON J. in *Sedly v. M'Gowan*(1) who said :

"A Judge is not by law compelled to charge at all, though in many (indeed in most) cases it may be right and expedient so to do. The exception should be for misdirection, not for non-direction."

Then the learned CHIEF JUSTICE referred to two cases, *Elahee Buksh v. Reg*(2) and *Queen v. Nawab Jan*(3), which were relied upon by Counsel for the defence for showing that the omission to direct will be treated as an actual misdirection and observed :

"But, for that purpose, those cases are not in point upon questions reserved by a Judge or certified by the Advocate-General at the Original Jurisdiction Side of the High Court, where the procedure in criminal cases is not regulated by the Criminal Procedure Code, but, in the main, by the English practice as it existed in the Supreme Court, save where altered by special legislation, or by the Charter of the High Court. . . . On an appeal from the mofussil, the High Court has a much wider sphere of action than upon Clauses 25 and 26 of the Letters Patent in cases on the Original Jurisdiction Side. But even supposing that on the present occasion we were disposed to allow to ourselves a greater latitude than seems to be permitted in cases reserved under the Stat. 11 and 12 Vict. c. 78 in England, and to enquire whether the alleged non-direction in this case amounted to misdirection and had misled the jury or was likely to mislead them . . . we have come to the conclusion that the Court ought not to interfere with the convictions had in this case."

In *Empress v. Patrick McGuire*(4) the Standing Counsel, Mr. O'Kinealy, in the course of the argument, said :

"Can it be said that there is a decision so as to bring the case within Clause 26 of the Letters Patent? It was taken as a matter of course that these two banks were governed by the Bankers' Books Evidence Act by all parties concerned."

(1) 7 Ir. C.L. Rep. 434.
(3) (1867) 8 W.R. Cr. R. 19.

(2) (1866) 5 W.R. Cr. R. 80.
(4) (1900) 4 C.W.N. 433 (F.B.).

MACLEAN C.J. in the course of his judgment observed :

"I entertain a very grave doubt whether, having regard to the language of section 26 of the Letters Patent, a certificate ought to be granted by the Advocate-General in a case in which he thinks that a Judge of this Court, sitting in the Ordinary Original Criminal Jurisdiction of this Court, has not properly exercised his judicial discretion, during the trial of the case . . . Under section 26 of the Letters Patent, it is not compulsory on the Court to deal with a certificate founded upon such a point . . . Nor do I wish to be regarded as saying that an improper exercise of judicial discretion may not, in certain cases, be matter for review as a point of law."

These observations related to an application by the prisoner's Counsel for an adjournment which was refused. Assuming that an erroneous exercise of judicial discretion in refusing an adjournment is matter for review as a point of law, it is clear that a refusal would then be regarded as a decision on a question of law in a matter actually raised before the Court. The decision in *Empress v. Patrick McGuire*(1) does not help us in a case where the point or points of law were not expressly raised before the Judge. I do not suggest that the point or points of law should be raised by the parties. It may be raised by the Judge himself either as a question to be discussed or raised by him in the course of his charge to the jury in laying down the law. On this last matter, it was agreed on all hands during the argument before the Full Bench that an erroneous laying down of the law by the Judge in the course of his charge to the jury should be regarded as an erroneous decision on a point of law within the meaning of Clause 26 of the Letters Patent. Leaving such

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cases aside, the question arises whether when no point of law was raised before the Judge it could still be said that there was an erroneous decision on a point of law simply because certain inadmissible evidence, to the admission of which no objection was taken, has been admitted or there has been a misdirection to the jury on a question of fact. For the purpose of appeals under the Criminal Procedure Code it has always been held by the Indian High Courts that a misdirection to the jury by the Sessions Judge on an important question of fact is a question of law within the meaning of section 418 (1), Criminal Procedure Code. But the question before us now is whether such admission or misdirection can be regarded as a decision on a point of law by the trial Judge within the meaning of Clause 26 of the Letters Patent. An objection that such admission or misdirection would not amount to a decision on a point of law was raised in *Queen-Empress v. Shib Chunder Mitter*(1), *Queen-Empress v. O'Hara*(2) and *Empress v. Patrick McGuire*(3) but, as pointed out by me in the above summary of these cases, the objection was not expressly decided.

In *Reg v. Pestanji Dinsha*(4) it seems to have been assumed that a misdirection on a question of law would be a ground for the Advocate-General's certificate and for the High Court's review but that a non-direction would not, but there is no decision on the point.

In *King-Emperor v. Peary and Lakshi Peshakar*(5) the Standing Counsel took a preliminary

(1) (1884) I.L.R. 10 Calc. 1079. (2) (1890) I.L.R. 17 Calc. 642 (F.B.).
(3) (1900) 4 C.W.N. 433 (F.B.). (4) (1873) 10 B.H.C.R. 75 (F.B.)
(5) (1919) 23 C.W.N. 426 (F.B.).

objection that the Advocate-General has no power to grant a certificate on the ground of misdirection on a question of fact. SANDERSON C.J. observed as to this :

"I express no opinion upon that point and in my judgment in this case it is not necessary to express an opinion because, assuming that it was competent to the learned Advocate-General to grant a certificate on these grounds, I have come to the conclusion that there was no sufficient cause made for the Court to interfere."

WOODROFFE J. expressed a similar opinion.

The decisions in *Emperor v. Fateh Chand Aggarwalla*(1) and *Emperor v. Narayan Raghunath Patki*(2) do not touch upon this point.

The last decision to be referred to in this connection is the decision of this Court in *C. K. N. Sundaresa Iyer v. King-Emperor*(3). The judgment of the majority of the Court was delivered by WALLACE J. This decision is undoubtedly against the Crown Prosecutor and in support of the accused, and I understand that because the Crown Prosecutor had given previous notice that he intends to question the correctness of that decision a larger Bench has been constituted. Whatever may be the actual points that arose in that case, WALLACE J.'s observations certainly go to the full length of laying down that not only an erroneous exposition of the law to the jury but a misdirection on an important question of fact, improper reception of evidence, any irregularity in procedure, whether such points were actually raised by the parties or by the Judge or not and whether the reception of evidence or the irregularity in procedure is conscious or a mere slip, all

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(1) (1916) I.L.R. 44 Calc. 477 (F.B.). (2) (1907) I.L.R. 32 Bom. 111 (F.B.).
(3) 1930 M.W.N. 249 (F.B.).

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these would justify the Advocate-General in granting a certificate under Clause 26 and would compel the Court on an application based on such a certificate to review the case. In other words, every matter of the kind referred to would amount to a decision by the trial Judge on a point or points of law. I do not think WALLACE J.'s observation, "No one has evidently ever thought of raising it before", is correct.

Now it seems to me that, apart from the decision in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) and the decision in *Queen-Empress v. O'Hara*(2) on which it is to some extent based, the other authorities referred to above do not really help us. The decision in *Queen-Empress v. O'Hara*(2) must be taken to have held that a reference by the Judge in his address to the jury to a matter which had been objected to and excluded from the evidence amounted to "a decision on a point of law decided by the trial Judge" though the learned Judges do not say so expressly in so many words. In my opinion besides these two decisions there is practically no authority on the matter and though the question has been raised it was never expressly decided. It is now necessary to decide the point raised by the Crown Prosecutor.

Some reference has been made to us by both sides as to the origin of Clause 26 of the Letters Patent and its analogue in English Law. It corresponds to the fiat or writ of error of the Attorney-General. Whatever its origin may be, after 11 and 12 Vict. c. 73, section 5 of which gave to the Queen's Bench jurisdiction to interfere

on a writ of error by the Attorney-General, it seems to have been exercised in all cases where the Attorney-General thought that there was a miscarriage of justice. It is not confined to any particular ground and the form of the writ shows that no particular ground of law or fact need be stated by the Attorney-General. It simply ran "Let there be a fiat" or some words to that effect. If so, the Attorney-General's power of issuing a fiat bears no resemblance to the Advocate-General's certificate under Clause 26 of the Letters Patent. Under section 20 of the Court of Criminal Appeal Act (7 Edw. VII. c. 23) writs of error were abolished. Under section 3 of this Act an appeal was given on a question of law, or with the leave of the Judge on a question of fact or a mixed question of fact and law or any other ground, or with the leave of the Court of Criminal Appeal against the sentence. Under section 4 the Court of Criminal Appeal may allow an appeal on the ground of any question of law or on the ground that there is a miscarriage of justice. Under section 1, clause 6, if the Director of Public Prosecutions or the prosecutor or the defendant obtains the Attorney-General's certificate that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought, he may appeal to the House of Lords. I do not think the analogy of English Law helps us in the construction of Clause 26 and the decisions in appeals under 7 Edw. VII. c. 23 cannot afford any guide in the present case.

Now coming to the clause itself, the opinion of WALLACE J. that even a non-direction amounts

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(1) 1930 M.W.N. 249 (F.B.).

(2) (1890) I.L.R. 17 Cal. 642 (F.B.).

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to a decision on a point of law is opposed to the opinion of WESTROPP C.J. in *Reg v. Pestanji Dinsha*(1) and his observation that misdirection on an important question of fact amounts to a decision on a point of law is opposed to the observation of WESTROPP C.J. that the power under Clauses 25 and 26 of the Letters Patent is not so wide as the power which the High Court possesses in regard to appeals from the mofassil. If the interpretation of Clause 26 by WALLACE J. is correct, the ground for the certificate of the Advocate-General would be as wide as the grounds of appeal from the mofassil under the Criminal Procedure Code. But if this was the effect intended, it strikes one that the language of Clause 26 of the Letters Patent (leaving aside cases of reservation of points of law by the Judge) would have been similar to section 418, Criminal Procedure Code, and would not have run in the terms in which it now actually runs; and the wording of Clause 25, which is similar to section 1 of 11 and 12 Vict. c. 73 in enabling the trial Judge to reserve a point or points of law but otherwise provides that there is no appeal, strikes one as rather curious after the wide interpretation of Clause 26 contended for by the accused.

The word "decision" ordinarily means "a judgment or decree pronounced by a Court in settlement of a controversy submitted to it and by way of an authoritative answer to the questions raised before it". (Black's Law Dictionary, page 337). It is true that a case of misdirection to the jury on a question of law may not in strictness be covered by this definition but one may say in a

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loose sense that a direction to the jury is an authoritative answer on a point arising before the Judge. But leaving this case aside on which all are agreed, I do not think that the word "decision" should be made to cover cases where the Judge has never applied his mind to the matter and has not pronounced an opinion on it. It is true that under section 297, Criminal Procedure Code, it is the duty of the Judge to decide all questions of law arising in the course of the trial and all questions as to the relevancy of facts and the admissibility of evidence, and the section says nothing about the question being raised by a party. It is somewhat difficult to say that if no one raises the question there is any question to be considered by the Judge unless it suggests itself to him. It is true that under section 165 of the Evidence Act the judgment must be based upon facts which are relevant under the Evidence Act; and, if the Judge allows evidence to go in which is not relevant by not advertent in his mind to the question of its relevancy in cases where no objection is raised by the party, it may be that he commits an error of law. One may say that such an error is plainer in a case where the inadmissible evidence is actually referred to in the direction to the jury than in a case where it has merely gone into the record but was not referred to in the direction to the jury. But in both these cases can it be said that there is a decision on a point of law? In the sense in which WALLACE J. uses the expression, undoubtedly there is; but with great deference to that learned Judge I am unable to say that such cases should be described as cases of decision on a point of law. There may be a

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failure on the part of the trying Judge in not advertg to such matters in his mind but still it cannot be said to be a decision. What happens may be described to be an absence of a decision—just the opposite of what is required. On this ground I would say that the existence of a point of law decided by the trial Judge, which is the condition precedent to the Advocate-General's certificate, being wanting in this case, the certificate is incompetent and confers no jurisdiction on us to review the case.

I would dismiss this petition.

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MADHAVAN NAIR J.—This is an application for review of a criminal case on the certificate of the Advocate-General under Clause 26 of the Letters Patent. One Ramanuja Ayyangar was tried at the Third Criminal Sessions of this year before my Lord the CHIEF JUSTICE and a special jury, on a charge of an offence punishable under section 302 of the Indian Penal Code. The jury found the accused guilty by a majority of six to three. My Lord, agreeing with the majority, sentenced the accused to death.

On behalf of the accused an application was made to the Advocate-General for a certificate under Clause 26 of the amended Letters Patent of the High Court of Madras. This clause runs as follows :

26. " And we do further ordain that, on such point of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as

may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

Acting under this clause the Advocate-General gave a certificate which, to make the points raised clearer, was slightly amended in the course of the argument. The certificate as amended is in the following terms. [His Lordship set out the certificate as given on pages 530-32 above and proceeded:—]

To appreciate the points raised in the certificate, it is necessary to refer, though briefly, to some aspects of the prosecution case. The deceased Seethammal, a young woman of twenty-two, left her husband's house on 4th August 1933. The case against the accused was that since that date she lived with him in various houses in Madras till the night of the 11th January 1934 when she was strangled to death by him, that on the morning of the 12th January he bought a coir mattress from one Sheik Nanu, the master of P.W. 10, and had it carried to his house by a woman, Thayammal P.W. 11, that he put the body of the deceased in a parcel made of this coir mattress and sent it from the Egmore Station to Karunguzhi on the South Indian Railway, and that between the 12th and the 21st January he pledged with a pawn-broker various silver articles identified as her husband's and alleged to have been taken by her when she left his house. With respect to the purchase of the coir mattress, the accused is said to have made statements (see the certificate) while in the custody of the police pointing out the shop from where and the man from whom he purchased the coir mattress and also the woman who carried

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it to his house. This evidence which has a material bearing on the guilt of the accused is stated to be inadmissible.

In the first part of the certificate objection is taken to the reception in evidence of statements made by the accused while in the custody of the police—set out in the certificate and not objected to by the Counsel, some of them being elicited by him in cross-examination of prosecution witnesses—and the placing of the same before the jury which are described as *decisions on points of law*. It may here be mentioned that what happened at the time of the trial was that the alleged inadmissible evidence was received into the record, and it was placed before the jury without any objection being offered to the same on behalf of the accused. As the certificate shows, some portion of this evidence was elicited by the Counsel for the prisoner in the cross-examination of the prosecution witnesses. In the second part of the certificate exception is taken to what is described as an error of law on the part of the learned Judge in not bringing to the notice of the jury the question whether in the circumstances they could draw a presumption under section 114 of the Evidence Act as to the continued possession of the articles by the deceased, the circumstances and facts mentioned showing that there was a decision on a point of law by the learned Judge. These objections, says the certificate, are decisions on points of law which require further consideration in the judgment of the Advocate-General.

It will be observed that under Clause 26 of the Letters Patent a certificate to review a decision by

the High Court exercising original criminal jurisdiction can be granted by the Advocate-General if in his judgment there is an error in the *decision* of a point or points of law decided by the Court of original criminal jurisdiction, or if a point or points of law which has or have been decided by the said Court should be further considered. The certificate may be granted in either of the two forms mentioned in Clause 26. It is interesting to note that in this Court certificates have been granted under this clause in four cases, *Subrahmaniam Ayyar v. King-Emperor*(1), *Muthukumaraswami Pillai v. King-Emperor*(2), *C. K. N. Sundaresa Ayyar v. King-Emperor*(3) and the present one; and in all these cases except in *Subrahmaniam Ayyar v. King-Emperor*(1), the certificates granted have been in the second form, i.e., that there is a point or points of law that should be further considered. A primary condition for the exercise of jurisdiction by the Advocate-General under Clause 26 is that there should be a *decision* of a point or points of law decided by the Court of original criminal jurisdiction.

By way of preliminary objection the learned Crown Prosecutor argues that the certificate is incompetent, as, with respect to the first point raised in it, there was no *decision* by the trial Court, and, with respect to the second point, there was neither a point of law nor any decision on it. There can be no doubt that the erroneous reception of evidence is a point of law. The question therefore to be considered on the preliminary objection with reference to the first point is

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(1) (1901) I.L.R. 25 Mad. 61 (P.C.). (2) (1912) I.L.R. 35 Mad. 397 (F.B.).
(3) 1930 M.W.N. 249 (F.B.).

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whether there are *decisions* by the Judge in admitting the alleged inadmissible evidence, and placing the same before the jury ; and, with reference to the second point, both the questions have to be considered, whether there is a decision, and, if there is one, whether the point on which that decision has been given, that is, the misdirection or non-direction complained of, is a point of law.

It was contended by the learned Crown Prosecutor that, in order to constitute a "*decision* on a point of law decided by the trial Court" within the meaning of Clause 26 of the Letters Patent, the point must be specifically raised and decided consciously and not inadvertently by the Judge. Soon after the argument began this extreme contention was modified and it was said that a *decision* would include, besides a decision on a specific point raised and decided by the Judge, also a direction as to the law given by the Judge in the course of his summing up to the jury, where, I must observe, admittedly no point of law is submitted to and decided by the Judge. Towards the close of his argument the learned Crown Prosecutor summed up his position thus : that, in order to constitute a *decision* on a point of law within the meaning of Clause 26 of the Letters Patent, there must be an express determination by the Judge on a point of law submitted for his decision, or a statement of the law while explaining it to the jury in which case it would be an expression of opinion, or, in other words, a decision by him as to what the law is. In other words, nothing short of an actual expression of opinion by the Judge on a point of law would constitute a *decision* within the meaning of this

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clause, the implication being that, if, in laying down the law, the Judge should omit to mention some of the ingredients of an offence, the omission to mention the ingredients would not amount to a *decision*, while only the statement of the law would constitute the decision ; the omission would only amount to an error in law and will not be a *decision* on a point of law. No authority was cited in support of the contention except the meaning of the word *decision* given in some of the well-known dictionaries, such as, the Oxford Dictionary, Stroud's Judicial Dictionary, etc. On the question what is a point of law, it was submitted that it would not include such defects as material misdirection and non-direction in summing up the case to the jury, for example, failure to sum up, defective summing up, etc.

In thus interpreting the term "*decision* on a point of law" the learned Crown Prosecutor calls into question some of the important observations made by WALLACE J. in his judgment in *C. K. Sundaresa Iyer v. King-Emperor*(1) to which I, along with JACKSON and ANANATAKRISHNA AYYAR JJ.—EDDY J. *dissenting*—was a party. It is conceded that the case was rightly decided by us as there was an error in the "*decision*" as *now* explained by the learned Crown Prosecutor on a point of law decided by the trial Judge in that case, what is objected to being only certain general observations in the process of reasoning adopted by WALLACE J. with whom all but EDDY J. concurred.

I will presently refer to these observations and the judgment in detail ; but, before doing so, I

(1) 1930 M.W.N. 249 (F.B.).

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will deal with the arguments advanced by the learned Crown Prosecutor based upon the various clauses of the Letters Patent in support of his contention above stated. The clauses relevant for the purpose are Clauses 25, 26 and 41. These clauses run as follows :—

Clause 25. "And we do further ordain that there shall be no appeal to the said High Court of Judicature at Madras from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court."

Clause 26 has already been quoted. (See page 566 above.)

Clause 41. "And we do further ordain that from any judgment, order or sentence of the said High Court of Judicature at Madras, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs, or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf."

Reading these clauses together it is argued that, in order to constitute a "decision" within Clause 26, there should be a conscious decision on the part of the Judge and that a mere error in law, such as an omission to state all the ingredients of an offence in explaining the law to the jury, or an erroneous reception of evidence without any express decision on it, should not be construed as a "decision" on a point of law, as by so doing we will virtually be allowing an appeal while an appeal is specifically prohibited

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under Clause 25, regard also being had to the fact that in such a case, that is, where there is only a mere error of law, the accused, though he is deprived of the right of an appeal to the High Court, is not without a remedy as he can prefer an appeal to the Privy Council as provided in Clause 41 of the Letters Patent. This argument when examined does not carry us very far. It only means that Clause 26 should be construed strictly, but it does not in any way mean that it should not receive its proper construction within its limits. Though the point involved is an error of law, yet, if it amounts to a "decision" on a point of law, then Clause 25 cannot prevent the accused from resorting to Clause 26. The question will always be whether there is an erroneous decision on a point of law; if there is such an erroneous decision, then Clause 26 can be invoked. Clause 41 can have no bearing on the construction of Clause 26, *unless it is shown that that clause and Clause 26 are mutually exclusive*. It may be that on a decision involving an error in law the accused may have a right of appeal to the Privy Council under Clause 41, but observe that that right of appeal is subject to the condition that the High Court shall declare that the case is a fit one for an appeal; and, as is well known, such leave to appeal will not be granted except in very exceptional cases.—See *Reg v. Pestanji Dinsha*(1). In this connection see also the observations of the Privy Council in *Barendra Kumar Ghosh v. Emperor*(2) wherein their Lordships say that they do not give any encouragement

(1) (1878) 10 B.H.C.R. 75, 92 (F.B.).

(2) (1924) I.L.R. 52 Calc. 197, 221 (P.C.).

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to appeals in criminal matters under Clause 41 where no point of law has been reserved by the Judge. Further, the fact that he may have a right of appeal under Clause 41 cannot prevent him from claiming relief under Clause 26 if the error involves a *decision* on a point of law. Similarly, in a case in which there is an express decision by a Judge on a point of law, there is nothing to prevent the accused from resorting to Clause 41 instead of applying under Clause 26. I am not satisfied that Clauses 26 and 41 of the Letters Patent are mutually exclusive. In my opinion, neither Clause 25 nor Clause 41 helps us in determining the meaning of the term *decision* in Clause 26.

Reference was made to sections 1 and 2 of the Crown Cases Act, 1848 (11 and 12 Vict. c. 78), and also to the nature of the “fiats” or writs of error used to be issued by the Attorney-General in England in olden days before such fiats were abolished by the Court of Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), to explain the scope of Clause 25 and Clause 26 of the Letters Patent. It is generally stated that sections 1 and 2 of the Crown Cases Act formed the model for Clauses 25 and 26 of the Letters Patent. After stating in section 1 that the Judge or Commissioner or Court of Quarter Sessions before whom a case is tried may reserve any “question of law”, section 2 of the Act states that the authority concerned

“shall thereupon state in a case signed in the manner now usual, the question or questions of law which shall have been so reserved with the special circumstances upon which the same shall have arisen and such case shall be transmitted to the said Justices and Barons and the said Justices and Barons shall thereupon pass orders”

such as those mentioned in the section. As pointed out in *Reg v. Pestanji Dinsha*(1), to a considerable extent the provisions of the Act resemble the provision in 25th Clause of the Letters Patent, but, as to the 26th Clause empowering the Advocate-General to certify a question of law, there is not any corresponding section in the Statute 11 and 12 Vict. c. 78. As observed by WHITE C.J. in *Subrahmania Ayyar v. King-Emperor*(2), a power to review the case with reference to the evidence given to the High Court under Clause 26 of the Letters Patent is altogether absent in section 2 of the English Act and in it there is also no reference to any certificate by the Attorney-General, such as the Advocate-General's certificate contemplated by Clause 26 of the Letters Patent. If the “fiats” used to be issued by the Attorney-General were restricted in their scope as being confined to errors apparent on the face of the record, it has to be admitted that the power of the Advocate-General to grant certificates is wider as he can examine the evidence and find out whether there is any error in the decision on a point of law decided by the trial Judge. In my opinion, neither the Crown Cases Act nor the nature of the fiats issued by the Attorney-General helps us in determining the significance of the expression “error in the decision of a point of law” in Clause 26.

It was next argued by the learned Crown Prosecutor that the point of law with respect to which the Advocate-General certifies there is an error must be a point such as can be reserved by a Judge under Clause 25 as both are referred to in

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(1) (1873) 10 B.H.C.R. 75 (F.B.).

(2) (1901) I.L.R. 25 Mad. 61 (P.C.).

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the same connection in Clause 26 as grounds for asking the High Court to review the case. Having regard to the language of Clause 26, this argument cannot, in my opinion, be accepted. This question has already been dealt with in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) in the following manner and I have nothing to add to it :

“It was next argued that the point of law on which the Advocate-General certifies an error in the decision thereof must be such point as has been reserved under Clause 25. This we cannot accept. Clause 26 does not say in that context ‘such point’ but ‘a point’ as contrasted with ‘such point’ ‘reserved as aforesaid’ under Clause 25.”

Thus far I have dealt with the general arguments advanced by the learned Crown Prosecutor. No authority has been cited to show that the term “decision” in Clause 26 should be limited to an actual expression of opinion by the Judge on a point of law and should not be extended to what may be called decisions by implication having regard to the trial and the circumstances in which the point arises for determination.

I shall presently show when I refer to *C. K. N. Sundaresa Iyer v. King-Emperor*(1) that a decision on a point of law within Clause 26 is not confined to a conscious or considered decision by the Judge but would also include an implied decision though inadvertent, and further, an error of law would also amount to a decision on a point of law within the meaning of Clause 26. In my opinion, the word “decision” in Clause 26 has not been used by the Legislature in any technical or abstract or literal sense. It was, I think, intended to be interpreted in the light of the conduct of the trial. What that interpretation

(1) 1930 M.W.N. 249 (F.B.).

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should be would appear when I deal with the learned Crown Prosecutor's arguments with reference to the decision in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) which I now proceed to do.

The facts of that case may be stated very briefly. The first accused in the case was convicted on the third count, one of cheating. The charge against him was that by statements in his trust bond, Exhibit A, that he was in absolute control and possession of 4,000 bags of groundnut, the accused intentionally and dishonestly deceived the Central Bank and induced them to enhance his overdraft limit which resulted in damage or loss to the Bank. In explaining the law of cheating to the jury, the learned Judge, after referring to the section which described the ingredients of the offence, told them that if they were satisfied beyond all reasonable doubt “that he (the first accused) told a lie and thereby induced the Bank to enhance the overdraft limit the offence of cheating is complete.” In the judgment all the specific portions in the learned Judge's charge to the jury which bear on this matter have been extracted. It will be found from those extracts that the learned Judge did not mention to the jury that they must find as a fact that the Bank suffered or was likely to suffer loss if the accused was to be convicted of cheating; that is to say, in his charge he did not refer to the last ingredient of the offence. This was referred to as a defective direction by the learned Judge to the jury as to the ingredients they had to find proved before they could convict on the count of cheating, particularly the question of damage.

(1) 1930 M.W.N. 249 (F.B.).

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On this point, after referring to the definite directions to the jury given by the Judge with regard to the necessary ingredients, WALLACE J. stated :

“ These are very definite directions to the jury and therefore decisions on this point of law. I think there is disclosed here a very serious misdirection on this point of law, namely, that the jury were not further directed that they must before they could convict be satisfied that the Bank suffered loss or was likely to suffer loss by such enhancement.”

Then the evidence bearing on the question of loss was referred to and finally it was pointed out

“ that the jury was never invited to find what was the damage suffered or likely to be suffered by the Bank and was never warned that it was necessary for the prosecution to establish such damage.”

We felt this omission seriously prejudiced the accused and if it had not occurred he would have been acquitted by the jury. The question we had to consider was whether in these circumstances there was a decision by the learned Judge on a point of law.

On the above point we were asked to hold that “ decision ” is restricted to matters actually stated at the Bar for the direct decision by the Court. We overruled this argument and held that it would include matters decided or which fall to be decided by the trial Court. It is the latter part of our conclusion and the reasons given for it that are now attacked by the learned Crown Prosecutor. As pointed out at the commencement, he first wanted to maintain the position that the word “ decision ” is restricted to matters actually stated at the Bar for the direct decision of the Court—as was argued on the last occasion by the then Crown Prosecutor—but this position he gave up. Then he stated that the erroneous statement

of the law made by the Judge is the “ decision ” and his omission to state the necessary ingredient was merely an error in law and not a decision by itself. The reasoning given in the judgment which was attacked runs as follows :

“ The word ‘ decision ’ is not restricted to matters actually stated at the Bar for the direct decision of the Court. It includes all matters decided or which fall to be decided by the trial Court in the case. The trying Judge in his judgment or in his charge is continually making decisions. These include his conclusions arrived at and stated, whether right or wrong ; they also include what he does not state, since a decision not stated is equally a decision. It seems absurd to argue that a judgment which stated nothing or stated nonsense would not be a decision. The Judge in his judgment or charge as read or pronounced is deciding all the time. For example, if he omits altogether to sum up the law, he has decided that it is not his duty to sum it up. If he admits and discusses certain evidence, he has decided to admit it even though neither party raised the question of its admissibility. If he states that the defence case is so and so, he has decided that it is in fact so and so. Clearly the word ‘ decision ’ includes every mental conclusion on which the judgment or charge is based, whether stated or not stated, whether stated correctly or misstated. It includes directions, misdirections, or non-directions to a jury. If this is not so, then, even if the Judge entirely disregards the law, if he omits to sum up, or refuses to sum up, either on the law or on the facts, if he refuses to decide the point specifically put up to him, the accused has no remedy.”

The position explained in this passage was subjected to a searching criticism. The points of criticism covered such a vast field, both psychological and legal, that it is difficult to deal with all of them ; but two questions of a fundamental nature were asked in the course of the arguments, viz., (i) how can it be said that the Judge has passed a decision on a particular point if the point was never present to his mind, when he did

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not even consider it? and (ii) how can it be said that when a Judge has omitted to refer to a point in his exposition of the law he has decided not to state it? In my opinion, these questions have to be considered with reference to the duty of a Judge presiding over a criminal trial. Those who press for a narrow construction of the term *decision* forget this altogether or do not realise sufficiently its importance. The duty of a Judge in a trial with jury is defined by section 297 of the Code of Criminal Procedure and is further elaborated under section 298. This section, which applies to the High Court also, says, amongst other things, that in cases triable by jury it is the duty of the Judge to

“decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.”

It may be mentioned that the discretion referred to herein, according to the decisions, does not relate to the admissibility of evidence but only to the production of inadmissible evidence. At each moment, as the trial goes on and evidence is adduced, the Judge is expected to be considering in his mind questions, such as, which evidence is admissible and which is not, which evidence is relevant, etc. One is quite familiar with questions from the Bench when inadmissible evidence is adduced—How is that evidence relevant? How is it admissible? Very often Counsel take the objections; but it is not unusual for a Judge himself to take the objection and exclude the

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evidence when he finds that it is not admissible. No doubt, it sometimes happens that by inadvertence no objection is taken either by the Counsel or by the Judge or it is taken somewhat late and inadmissible evidence, as a result, creeps in, passing the barrier of the Counsel and the Judge; but is this a reason for saying that there has been no “decision” by the Judge when that particular evidence gets into the record? I think not. While I am on this point I may just mention that the duty of the Judge to make proper decisions when inadmissible evidence is admitted or is read out to the jury should be considered apart from the failure of the prisoner’s Counsel to take the necessary objection at the proper time. This point will be considered in greater detail when I specifically deal with the first point in the certificate in which one of the questions raised is:

“Whether the fact that no exception was taken to the reception of this evidence during the trial and the fact that some of these statements were elicited by Counsel for the accused during the cross-examination of prosecution witnesses affects the point as to their admissibility.”

I think that all questions which have to be necessarily decided in a trial and which in effect have been decided by the Judge, though not expressly, would fall within the meaning of the word “decision”. If the “decision” under Clause 26 is confined to express or considered decisions, the result would be this: On a considered decision of the Judge on a point of law which happens to be erroneous the Advocate-General can certify and bring the matter up for review by the High Court under Clause 26, while, with respect to the same point, if it be only an inadvertent error of law committed by the Judge

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which comparatively speaking is a much less serious mistake on his part, neither the Advocate-General nor the High Court has got any power to correct it ; and the accused has got to go to the Privy Council under Clause 41 to get relief. I do not think such a result would have been contemplated by the framers of the Letters Patent. In my opinion the words "decision" and "decided" in Clause 26 should be liberally construed. The expression "point or points of law decided" is used simply in contradistinction to "points of law reserved" occurring in the earlier part of the clause. As mentioned by WALLACE J.,

" 'decision' would include all matters decided or which fall to be decided by the trial Court " ;

or, in other words, matters which were not explicitly but only tacitly decided would also fall within the meaning of the word. Let me make myself clear on this latter point. It was pointed out by WALLACE J. that the omission on the part of the Judge in not mentioning to the jury one of the ingredients of the offence and that they must be satisfied before convicting the accused that the bank suffered loss or was likely to suffer loss was a *decision*. The learned Crown Prosecutor says that this no doubt was an omission but it is only an error of law and the decision of the Judge is that part of the law which he expounded to the jury and does not include what he has not told them, though both formed parts of the same question which he was expounding to the jury. The distinction which he seeks to make appears to me to be without any foundation. The question is one of substance and not of form. The omission to state one of the ingredients of the

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offence is as much a *decision* as the decision which stated the other ingredients. I think the difficulty cannot be got over by calling the one an error in law and the other an express decision. In the concluding portion of the extract quoted above, WALLACE J. says :

"Decisions include directions, misdirections or non-directions to a jury. If this is not so, then, even if the Judge entirely disregards the law, if he omits to sum up, or refuses to sum up, either on the law or on the facts, if he refuses to decide the point specifically put up to him, the accused has no remedy."

The learned Crown Prosecutor says these are all errors of law and not "decisions", and it is not right to say that, with respect to such errors committed by the Judge, the accused has no remedy and must resort to Clause 26, because he can make them grounds of appeal to the Privy Council under Clause 41 of the Letters Patent. As I have already pointed out, Clause 41 can have no bearing on the question.

Section 165 of the Indian Evidence Act has also a very important bearing on the question as to what amounts to a "decision". After referring to the Judge's extensive powers to put questions or order production of documents, the section enacts that these are subject to the proviso

"that the judgment must be based on facts declared by this Act to be relevant and duly proved".

If evidence irrelevant or inadmissible has been placed before the jury, can it not be said that the Judge decided to place that evidence before the jury, as otherwise he will not have put it before them and that therefore there was a "decision" by him that the evidence should be put to the jury? That there was a decision by him is shown by his

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act of putting the evidence before the jury. This aspect of the question will be considered in its relation to the facts of the present case when I deal specially with the points raised in the certificate.

Two other points of criticism directed against this part of the judgment may now be mentioned. With reference to the point raised by the Crown Prosecutor that, in order that there may be a decision, the point of law must have been specifically put up and decided as a point of law, WALLACE J. says in his judgment, "No one has evidently ever thought of raising it before." It is said that the learned Judge is wrong in making this statement. No doubt, the point was raised in some cases in the Calcutta High Court—*Queen-Empress v. Shib Chunder Mitter*(1), *Empress v. Patrick McGuire*(2), *King-Emperor v. Peary and Lakshi Peshakar*(3) and *Reg v. Pestanji Dinsha*(4)—but in none of the cases was the point decided by any learned Judge. *Queen-Empress v. O'Hara*(5), another case in which also this point was raised, may in my opinion be taken to have decided that the placing before the jury of inadmissible evidence is a wrong decision on a point of law, whether the same was objected to by the Counsel for the accused or not. It may be observed that no objection was taken to either of the statements when they were placed before the jury. The learned Judges observed at page 667:

"These statements could not, we think, be laid before the jury: they had already, or one of them had, been tendered, objected to, and not put in. We think that to lay before the

(1) (1884) I.L.R. 10 Calc. 1079.

(3) (1919) 23 C.W.N. 426 (F.B.).

(2) (1900) 4 C.W.N. 433 (F.B.).

(4) (1873) 10 B.H.C.R. 75 (F.B.).

(5) (1890) I.L.R. 17 Calc. 642 (F.B.).

jury these statements, not admitted nor admissible in evidence, was in itself a decision erroneous in point of law, and calculated to prejudice the prisoner on his trial."

I may here remark that the decision in *Queen-Empress v. O'Hara*(1) was referred to by ABDUR RAHIM J. in *Muthukumaraswami Pillai v. King-Emperor*(2) as having held that the language of Clause 26 was wide enough to extend to cases where what is complained of involves a violation of the law or a failure to give effect to the injunctions of law. The learned Judge observed, referring to *Queen-Empress v. O'Hara*(1), that in that case

"a question was raised whether the words of Clause 26 'an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction' are to be understood in a strictly literal sense as being applicable only to cases in which certain questions of law have been expressly raised and decided at the trial, and it was held that the language was wide enough to extend to cases where what is complained of involves a violation of law or a failure to give effect to the injunctions of law. There can be no doubt in my opinion that this interpretation of Clause 26 is correct and it has not been contended otherwise in the present case." (pages 469-470).

Then it was said, having regard to the last sentence in the paragraph I have quoted from WALLACE J.'s judgment, that the learned Judge's consideration of the question is defective as he did not realise that the accused has a remedy in the circumstances, that remedy being the appeal provided for under Clause 41. I have already shown that Clause 41 has no bearing on the point under consideration.

By way of analogy I will now refer to a few cases decided by the Court of Criminal Appeal in

(1) (1890) I.L.R. 17 Calc. 642 (F.B.). (6) (1912) I.L.R. 35 Mad. 397 (F.B.).

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England from which we can inferentially gather as to what that Court must have understood as the meaning of the term "decision" in the expression "a wrong decision on any question of law" occurring in section 4, clause 1, of the Criminal Appeal Act, 1907, though it did not in any way attempt to define or interpret it. Under section 3, clause (a), of that Act, a person convicted on indictment may appeal to the Court of Criminal Appeal

"against his conviction on any ground of appeal which involves a question of law alone".

Clauses (b) and (c) deal with other grounds of appeal. Section 4, Clause 1, says :

"The Court of Criminal Appeal, on any such appeal against conviction, shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a *wrong decision* on any question of law or that on any ground there was a miscarriage of justice ; and in any other case shall dismiss the appeal." (the italics are mine)

It is not necessary to refer to the proviso to this clause or the other provisions of the section for our present purpose. Under this section the Court of Criminal Appeal can set aside a conviction by the lower Court amongst other grounds "on the ground of a *wrong decision* on any question of law". The expression used in Clause 26 of the Letters Patent is "error in the *decision* of a point or points of law"

In Russell on Crimes, Vol. II, page 1848, under the heading : "*Wrong decision on any question of law*", the learned author says :

"Where the Court comes to the conclusion that the Judge of the Court of trial has wrongly decided a question of

law, the Court will quash the conviction unless it can hold that the wrong decision cannot reasonably be said to have materially affected the verdict."

Then instances of cases where the conviction by the lower Court was challenged on the ground that evidence was wrongly admitted are given in the footnote. Of these, two cases, *Rex v. Fisher*(1) and *Rex v. Norton*(2), may be referred to with advantage. *Rex v. Fisher*(1) was a case where inadmissible evidence was admitted at the trial. Nothing is stated in the report as to whether objection was taken to its admissibility. The conviction by the lower Court was set aside by the Court of Appeal on the ground that inadmissible evidence was admitted. The Court evidently thought that there was a wrong decision on a question of law, the question of law and the decision being the reception of inadmissible evidence. I must point out that there is nothing discussed in the judgment as to whether there was a decision by the trial Court on a question of law. The next case, *Rex v. Norton*(2), is more interesting and more relevant for my present purpose. That was also a case where a conviction by the trial Court was challenged on the ground that inadmissible evidence had been wrongly admitted. In the course of the judgment it is stated at page 449, last paragraph, :

"No objection was taken in this case to the admission of the statements in the evidence."

The conviction was set aside under section 4, subsection 1, of the Court of Criminal Appeal Act of 1907. Evidently the learned Judges must have thought that the admission of the evidence which

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(1) [1910] 1 K.B. 149.

(2) [1910] 2 K.B. 496.

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they held to be inadmissible was a wrong decision on a question of law within the meaning of the statute. Here again I must say that the judgment does not contain any discussion of the question as to whether there was a decision. Evidently it must have been taken for granted that there was a wrong decision of a question of law when the inadmissible evidence was admitted, though without objection. Apart from the reasons which I have already given, I think on the analogy of these cases also we may well hold that in Clause 26 of the Letters Patent the admission of inadmissible evidence would amount to an error in the decision of a point of law, the point of law and the decision on it being the reception of inadmissible evidence.

The next point of attack was directed against WALLACE J.'s consideration of the scope of the words "point of law". The learned Judge stated that there was no real distinction between the "point of law" in Clause 26 and what is called "matter of law" in section 418 of the Code of Criminal Procedure and came to the conclusion that

"such misdirection or non-direction as would permit an appeal against a verdict of a jury would come within the meaning of the words 'point of law'. Such misdirections, according to decisions, would include not only an error in laying down the law by which the jury are to be guided but also a defect in summing up the evidence, or in not summing it up, or in summing it erroneously, which may often prejudice the accused more than not summing at all."

The learned Judge pointed out that all such misdirections or non-directions would amount to points of law under Clause 26 of the Letters Patent and the Advocate-General might give a

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certificate when there is a "decision" with respect to such points in the trial Court's charge to the jury. In the course of his discussion he pointed out that misdirections and non-directions as explained above would constitute errors in laying down the law under section 297 of the Code of Criminal Procedure which applies to the High Court as well as to the mofussil Courts. Section 297, Criminal Procedure Code, says :

"In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided."

The reference to section 297 is only for this reason that whatever would be considered, having regard to section 297 of the Code of Criminal Procedure, as mistakes on matters of law when they arise in connection with the mofussil Sessions Courts should also be considered as mistakes on points of law if committed by the High Court and would be points of law for the Advocate-General to consider under Clause 26 of the Letters Patent. This process of reasoning was resorted to for the reason that the expression "point of law" is not defined or explained anywhere so far as he knew, while what would amount to a "matter of law" appears from various decisions under section 418, Criminal Procedure Code. Now the criticism levelled against the above reasoning of the learned Judge, as I understand it, is this. Section 418, Criminal Procedure Code, refers to what matters are admissible in an *appeal* to the High Court from a trial held by the Sessions Court. The learned Judge in discussing the question what is a point of law shows, by his reference to

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this section, that he is considering the question from the standpoint of an appellate Court, i.e., as if an appeal lay to the High Court from a trial held by the Court exercising original criminal jurisdiction, while such a standpoint is not permissible as no appeals are allowed to the High Court in criminal cases under Clause 25 of the Letters Patent. In my opinion this criticism is beside the point. The learned Judge is only trying to explain the scope of the expression "point of law" appearing in Clause 26 of the Letters Patent. It is conceded that no case thus far decided has explained what it is. He finds that an expression very similar to it, "matter of law", is used in section 418, Criminal Procedure Code, and he thinks that what would be a matter of law as used in that section may well be taken to be a point of law under Clause 26 as well. I do not think that the learned Judge, in saying that a point of law under Clause 26 would mean the same thing as a matter of law under section 418, Criminal Procedure Code, has in any way overlooked Clause 25 of the Letters Patent, which says that there shall be no appeal to the High Court from the decision of the trial Judge. It must be noted that it is only when the Advocate-General certifies that there is an error in a *decision* on a point of law that the accused can claim relief under Clause 26. This limitation is pointed out by the learned Judge in the judgment. In *Muthukumaraswami Pillai v. King-Emperor*(1), ABDUR RAHIM J. says this :

"Now, whether the High Court exercises its powers as an appellate Court under section 417 (this is obviously a mistake

for 418), Criminal Procedure Code, in cases tried by a jury, or as a Court of error under Clause 26 of the Letters Patent, in either case it can interfere only when the trial is vitiated by an error in law and there is no substantial difference in the conditions of interference in the two cases."

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In *Queen-Empress v. O'Hara*(1), referring to an omission by the Judge to advise the jury according to the rule contained in section 114, illustration (b), of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars, the learned Judges say :

"Having regard to the course of decisions in this Court (although no doubt those decisions were, as pointed out in the Bombay case referred to, come to in appeal from the mofussil), we are not prepared to say that this Court might not feel bound, even on the ground of such an omission alone, to review the case under clause 26 of the Letters patent. This difficult question, however, need not be decided in the present case."

Observe that the inference that the omission may, if necessary, be treated as a decision on a point of law is drawn from cases which went up in appeal to the High Court from the mofussil.

I think that *Queen-Empress v. O'Hara*(1) is also an authority for the position that a misdirection in fact which is material can amount to a decision on a point of law under Clause 26 of the Letters Patent. In that case the Judge charged the jury that they were not to convict upon the evidence of "G" if satisfied that he was an accomplice and uncorroborated, but coupled the direction with a strong expression of opinion that "G" was not an accomplice. It was held that this "was not an omission only but an affirmation" and that "it constituted a misdirection in fact though not in

(1) (1912) I.L.R. 35 Mad. 397, 469 (F.B.).

(1) (1890) I.L.R. 17 Calc. 642 (F.B.).

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form " calculated to prejudice the prisoner's case. In *Reg v. Pestanji Dinsha*(1) WESTROPP C.J. is of opinion that non-direction will not amount to misdirection, but it may be observed that the learned Judges also dealt with the case assuming that the non-direction in that case would amount to misdirection. In my opinion a *material* non-direction which would prejudice the accused would also amount to a misdirection and would be a wrong decision on a point of law. A non-direction to be a misdirection in law should be such as will be sufficient to cause the Court to quash the conviction if it comes to the conclusion that it is reasonably probable that the verdict of the jury was affected thereby. [See the remarks of MOOKERJEE J. in *King-Emperor v. Barendra Kumar Ghose*(2).] Such a non-direction will be a decision on a point of law on which the Advocate-General can certify under Clause 26. On the point under consideration this is all what WALLACE J. says in his judgment. The decision in *Emperor v. Narayan Raghunath Patki*(3) does not help us in determining the meaning of the expression "decision on a point of law". After a careful consideration of the arguments advanced I have not been persuaded that our conclusions on what is meant by a "decision on a point of law" under Clause 26 in *C. K. N. Sundaresa Iyer v. King-Emperor*(4) are wrong or unsound. It is unnecessary to restate those conclusions.

I will now pass on to the certificate of the Advocate-General and examine whether the points

raised in it amount to "decisions" on points of law decided by the trial Judge. The first point, as already stated at the commencement, relates to the reception of the alleged inadmissible evidence and the placing of the same before the jury. It is argued that the statements referred to in the certificate led to the discovery of no material object and are at the most some information to the police and are not admissible either under section 27 or 8 of the Indian Evidence Act or any other provision of law. There can be no doubt that the question raised is a point of law. The more difficult question is whether it can be said that the learned Judge has passed any "decision" when the statements were received in evidence in the course of the trial and when they were placed before the jury. I have already pointed out in discussing the meaning of the term "decision" that, when inadmissible evidence is admitted, though no objection is taken and no ruling is given by the Judge, it should be understood having regard to his duties that the learned Judge has decided to admit the evidence and so there is a "decision" within the meaning of Clause 26 of the Letters Patent. The facts that no objection was taken to the reception of this evidence during the trial and that some of the statements were elicited by Counsel for the accused during the cross-examination of the prosecution witnesses do not in my opinion affect the point as to their admissibility, nor do they affect the point whether the reception amounted to a "decision" within the meaning of Clause 26. It seems to me that those questions should be considered apart from the conduct of the Counsel, though his conduct

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(1) (1873) 10 B.H.C.R. 75 (F.B.). (2) (1923) 28 C.W.N. 170, 199 (F.B.)
(3) (1907) I.L.R. 32 Bom. 111 (F.B.).
(4) 1930 M.W.N. 249 (F.B.).

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cannot be ignored when questions of a different kind arise. That the Counsel failed to take objection cannot on principle be a ground for holding that what would have been a decision if he had objected is not a decision because he did not object and get a ruling from the Judge. Nor can it be said that what is inadmissible evidence is rendered admissible because he did not object at the proper time. In *The Queen v. Gibson*(1) inadmissible evidence was admitted without objection from the Counsel and in summing up the jury's attention was directed to this evidence. After the jury retired, the prisoner's Counsel took exception to the evidence that was admitted. In setting aside the conviction, MATHEW J. made the following observations :

" We have to lay down a rule which shall apply equally where the prisoner is defended by Counsel and where he is not. In either case, it is the duty of the Judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner."

In the same case, WILLS J. observed :

" I think no reasonable fault can be found with the prisoner's Counsel for assuming that the Chairman would give a proper direction to the jury, but I agree that the course taken by the Counsel has no bearing upon the question before us. If a mistake had been made by Counsel, that would not relieve the Judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously as I think—that the Judge should be Counsel for the prisoner ; but at least he must take care that the prisoner is not convicted on any but legal evidence."

I think these observations which were made with reference to the summing up may also be applied to the stage of the case when inadmissible evidence is admitted without objection. In

(1) (1887) 18 Q.B.D. 537.

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Rex v. Bridgwater(1), the prisoner was asked by the Counsel for the prosecution, " Have you ever been convicted ?" and replied, " Yes, sir, I have." After this question was answered without any objection from the prisoner's Counsel, the prisoner was asked a further question as to the nature of the offence for which he had been convicted. This question was objected to by the prisoner's Counsel. The learned Recorder in his summing up did not warn the jury that they were to disregard the prisoner's answer as to his having been previously convicted. In the course of the judgment, Lord ALVERSTONE C.J. (with whom LAWRENCE, KENNEDY, RIDLEY and CHANNELL JJ. concurred), after pointing out that the Counsel cannot stand aside and allow an improper question to be put and afterwards rely upon that question as a ground for quashing the conviction, set aside the conviction as the Recorder did not tell the jury that they were to disregard the prisoner's answer about his previous conviction. In the concluding sentence of the judgment, his Lordship observed :

" And therefore the question ought not to have been put ; and, as it was put, and the jury were not cautioned to disregard the answer, the conviction cannot stand and must be quashed."

This would show that, though the Counsel did not take the necessary objection, the Court should not have allowed the question to be put and should not have put that evidence before the jury. I am not now concerned with the question, what bearing the Counsel's conduct in not taking objection has on his right to insist that the conviction should be set aside on account of the

(1) [1905] 1 K.B. 131.

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inadmissibility of the evidence. What I wish to emphasise is only this : that his conduct in not taking objection at the time when the evidence was admitted has nothing to do with the duty of the Judge to see that only legally admissible evidence is admitted. This I think is made clear from the remark that "the question ought not to have been put". That what I have stated above is the correct position appears to be clear from the judgment of the Court (Lord ALVERTON C.J., JELF, BRAY, A. T. LAWRENCE and Lord COLERIDGE JJ.) read by BRAY J. in *Rex v. Ellis*(1). In this case, the appellant, while being examined on his own behalf, gave evidence inadmissible in law under section 1, clause (f), of the Criminal Evidence Act, 1898, during the course of his cross-examination. After some portion of the evidence was elicited, the appellant's Counsel interposed with the objection that the cross-examination was irrelevant. The objection was overruled and the cross-examination proceeded. In the course of the judgment the learned Judges, after stating that the Court

"must be careful in allowing appeals on the ground of the reception of evidence that ought not to have been admitted when no objection has been made at the trial by the prisoner's Counsel";

and that "objection was taken, though not at the earliest opportunity", observed :

"In our opinion it is the duty of the Judge not to wait for any objection from the prisoner's Counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the Judge to direct the jury to disregard it and not let it influence their minds."

(1) [1910] 2 K.B. 746.

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If I may say so with very great respect, those observations which are of general applicability sum up the position which I should like to emphasize. I also venture to think that the position would be the same if by mistake some of the statements were elicited in cross-examination by the Counsel for the accused. These cases show that the inadmissible evidence which has been admitted remains inadmissible notwithstanding the fact that it was not objected to by the Counsel at the time of its reception or at the time when it was placed before the jury. In the case before us the alleged inadmissible evidence was admitted, and it was also read out to the jury without any warning to disregard it. In his charge (at page 261) my Lord the CHIEF JUSTICE told the jury that

"the evidence is that accused came to the shop in a motor car, got out and pointed out to the police 'this is the shop, this is the man, and this is the cooly woman who carried the mattress.'"

With the greatest respect, is it wrong to say that, unless the learned Judge had decided in his mind that this particular evidence should be put before the jury, he would not have read it out to them? The objection urged is that my Lord did not think about the question at all, nor did anybody bring the point to his notice. As already pointed out, in the light of section 298 of the Criminal Procedure Code and section 165 of the Indian Evidence Act, this objection can have no force. On both the occasions I must hold, for the reasons already given and also on the analogy of the English cases under the English Criminal Appeal Act, that "decisions" were made by the learned Judge on a point of law, the second occasion being the stronger instance of a decision than

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the first, inasmuch as he *specifically* put before the jury the inadmissible evidence for their consideration. Whether the jury would have convicted the accused if this alleged inadmissible evidence had not been admitted or put before them is not a matter on which I can express any opinion as the case was not argued before us on the merits. In my opinion the certificate granted by the Advocate-General is competent with respect to the first point mentioned in it.

The second point raised in the certificate relates to the omission on the part of the learned trial Judge in not directing the attention of the jury to the question as to the continued possession of the articles (subsequently pledged by the accused) by the deceased down to the date of her death from the 17th December. Having regard to the plea of the accused in his statement that the properties belonged to him and not to the deceased, the question of continued possession of the articles by the deceased down to the date of her death did not, in my opinion, arise for consideration. The only question put in issue between the parties was whether the articles belonged to the deceased or whether they belonged to the accused. If they belonged to the deceased, the pledging of them by the accused immediately after her death would require explanation ; if they did not, no explanation is called for. As pointed out by JENKINS C.J. in *Emperor v. Upendra Nath Das*(1) :

“ The duty of the Judge is (in my opinion) to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the minds of the jury with considerations that are outside the legitimate scope of the

(1) (1914) 21 C.L.J. 377 (F.B.)

enquiry. It is, I think, the duty of the Judge to keep the jury within proper limits, and, for this purpose, to simplify as far as he can the issues fairly and properly before the Court, and direct the minds of the jurors to those issues and those issues alone.”

The question of continued possession not arising in the case having regard to the plea of the accused, there was no need to direct the jury with respect to it. I therefore think that the Advocate-General was not justified in saying that the point required further consideration.

The last argument of Mr. T. R. Venkatarama Sastri was that the Advocate-General's certificate cannot be reviewed by this Court, i.e., that, if the Advocate-General grants a certificate, then this Court has no jurisdiction to say that the certificate is incompetent either on the ground that there is no decision or that there is no point of law ; and that its only duty is “to examine the matter”. The explanation as to what he meant by the latter statement was not satisfactory. At one stage he said that it was open to us to consider the question whether there was a decision on a point of law but that this should be considered not as a preliminary question but in the course of the case after hearing the evidence. Thus stated, the argument loses much of its importance and reduces itself to this, namely, whether it is competent to the learned Crown Prosecutor to raise the point by way of preliminary objection, that is, whether the Counsel for the prisoner should not begin in the first instance opening the case as a whole, leaving it to the Court to decide the question in the course of the case. But, later on, after he took time to consider, the learned Counsel modified his position, and I understood him

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finally to say that our duty is to examine the case on the assumption that there is a decision on a point of law, because the Advocate-General "in his judgment" has said so when he granted the certificate, and that we have power only to examine whether there is "error" in the decision on the point and then deal with the case in the manner indicated in the clause. This would show that we cannot at any stage, either at the beginning or in the course of the case, hold that the certificate is incompetent but must hear the case if the Advocate-General certifies that in his judgment there is an "error . . . consideration".

The basis of the argument is that the Advocate-General in India occupies a position similar to that of the Attorney-General in England—see section 114 of the Government of India Act—and that, in the case of the latter officer, flats or writs of error used to be issued by him in days prior to the passing of the Criminal Appeal Act were not open to review by the Court and that the same is the case with regard to the certificates he is entitled to issue under the Act. In this connection our attention was invited to the constitutional position and powers of the Attorney-General in England as explained in decisions, such as, *Ex parte Newton*(1), *Ex parte Lees*(2), *Reg v. Comptroller-General of Patents*(3), and also to the history of the "Writs of Error" given in Stephen's History of the Criminal Law of England, Vol. I, page 308. One case which was specially referred to is the decision in *Thompson v. The King*(4). Under sub-

(1) (1855) 4 El. & Bl. 869; 119 E.R. 323.

(2) (1860) El. Bl. & El. 828; 120 E.R. 718.

(3) [1899] 1 Q.B. 909.

(4) [1918] A.C. 221.

section 6 of section 1 of the Criminal Appeal Act, if the Attorney-General certifies that "the decision of the Court of Criminal Appeal involves a point of law of exceptional importance and that it is desirable in the public interest that a further appeal should be brought", an appeal is allowed from that decision to the House of Lords. In the case just mentioned, Lord SUMNER, after remarking that "no point of law of exceptional importance arose in it" and that

"I cannot help regretting that it should have been thought to be desirable in the public interests that a further appeal should be brought",

observed :

"The certificate of the Attorney-General which is the condition precedent to an appeal to your Lordships' House from a decision of the Court of Criminal Appeal is granted in his discretion and is a subject neither of review nor of criticism. But I hope that other persons in like position to the appellants will not be encouraged by this case to attempt to obtain such a certificate on similar grounds."

Though the certificate was thus found to be incompetent, the case was heard and disposed of not on any preliminary ground. The House of Lords, holding that the alleged inadmissible evidence was admissible, affirmed the decision of the Court of Criminal Appeal.

In my opinion it is not necessary to pursue any further the point outlined above in its broad aspects, for, whatever the powers of the Advocate-General may be, his jurisdiction to issue a certificate is conferred upon him by the express provisions of Clause 26 of the Letters Patent; and what we have to decide is whether the Court in the light of Clause 26 of the Letters Patent can

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declare that the certificate issued by the Advocate-General is misconceived or incompetent.

“The certificate of an Advocate-General is naturally entitled to respect; the Letters Patent require that it should reflect the *judgment* of the Advocate-General and not a mere surmise, and the certificate is presumably granted in the interests of justice after a careful consideration of all available materials.”

In *Emperor v. Upendra Nath Das*(1) in which these observations by JENKINS C.J. appear, the learned Judge held that the certificate granted was misconceived and disclosed no error in the decision of a point of law decided by the Judge at the trial. He concluded his judgment as follows :

“In this view of the case, it is not within our power to reopen the case, and I regard myself as not entitled to express any opinion as to its merits. In fact I am not in a position to deal with the merits, for they have not been discussed before us nor have those conditions been established on which alone they could be considered by us. Our powers are circumscribed, for we can only act in conformity with Clause 26 of the Letters Patent. If there was no misdirection or other error as certified, the certificate was misconceived, and we have no power to interfere.”

In the same case, WOODROFFE and MOOKERJEE JJ. expressed themselves as follows :

WOODROFFE J. remarked :

“With the merits, however, we are not concerned until it is established that there has been an error in law which opens out the case for our judgment.”

MOOKERJEE J. concluded his judgment with these words :

“In the view I take, no error of law has been established, and, consequently, the Court is not called upon to express an opinion as to the propriety of the conviction and sentence, although, as WOODROFFE J. has pointed out, if the Court could

(1) (1914) 21 C.L.J. 377. (F.B.).

examine the case on the merits, there might be matters for careful consideration.”

In *King-Emperor v. Barendra Kumar Ghose* (1) this case was followed and the scope of Clause 26 was examined by MOOKERJEE J. in considerable detail. The learned Judge points out that the enquiry following the grant of a certificate by the Advocate-General under Clause 26 of the Letters Patent has four stages. These are : (i) the Court reviews the entire case or such part of it as may be necessary ; (ii) the Court finally determines the point or points of law reserved or certified ; (iii) the Court thereupon alters the sentence passed by the trial Court ; and (iv) the Court passes such judgment and sentence as shall seem right to the Court. Then he says :

“As regards the first stage, it is plain that the Court reviews that case in whole or in part with a view to decide the point of law reserved or certified. This is placed beyond doubt by the use of the word ‘necessary’, which clearly means ‘necessary for the decision of the point of law reserved or certified’. The Court does not at this stage treat the case as open for re-consideration in all its generality, as might have been possible if an appeal had not been excluded by Clause 25. As regards the second stage, it is equally clear that what is finally determined is the point of law reserved or certified. This confirms the view just indicated as to the function of the Court in the first stage.”

Then the learned Judge says, as regards the third and the fourth stages, that, if the Court decides the point or points of law in favour of the accused, then the Court will alter the sentence and pass such judgment and sentence as shall seem right to the Court. The third and the fourth stages will arise “only upon final determination

(1) (1923) 28 C.W.N. 170 (F.B.).

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of the point or points of law reserved or certified in favour of the prisoner ”.

[See also the incidental observation of BEAMAN J. in *Emperor v. Narayan Raghunath Patki*(1)]. If the Court finds the point against the prisoner, then it is clear that the certificate is incompetent and the case may be dismissed at that stage. The extracts which I have quoted above show sufficiently that this Court on an enquiry following the grant of a certificate has jurisdiction to say that the Advocate-General's certificate is misconceived and should not have been granted on the ground that there is no decision on a point of law involved in the case, and, if it comes to that conclusion, the petition may straightway be dismissed without any further consideration of the merits of the case. Having regard to the terms of Clause 26 of the Letters Patent, no other conclusion is possible. If this conclusion is sound in law, the question, whether the Advocate-General's certificate is competent should be argued on a preliminary objection raised by the Crown Prosecutor or should be decided after the case is opened by the Counsel for accused, is not of much material importance. The proper procedure to be followed should, I think, be this. The Counsel for the accused should first open the case. If this is done, we will be giving practical effect to what is implied in the dictum of JENKINS C.J. “that the certificate has been granted and we therefore have to deal with the case”, so much relied on by Mr. Venkatarama Sastri for quite a different purpose, namely, to show that we have no alternative but to hear the whole case when once a

(1) (1907) I.L.R. 32 Bom. 111, 145 (F.B.).

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certificate has been granted. *Prima facie* the certificate is entitled to weight as containing the considered opinion of the Advocate-General and as a matter of practice the Counsel for the accused should as usual in cases of appeal have the first hearing. The objection that the certificate is incompetent was never argued at first as a preliminary objection in any of the cases where the point was pressed on behalf of the Crown. However, this matter is not of much material importance, and I must overrule the objection urged by Mr. Venkatarama Sastri.

In the result, I hold, for the reasons stated above, that the case should be heard with respect to the first point raised in the Advocate-General's certificate in accordance with the provisions contained in Clause 26 of the Letters Patent.

CURGENVEN J.—This Bench has been formed to consider the correctness of the former Full Bench's opinion, reported as *C. K. N. Sundaresa Iyer v. King-Emperor*(1) which the learned Crown Prosecutor gave notice that he would contest, the substantial questions being what is meant by a point of law, and by a decision of a point of law, in Clauses 25 and 26 of the Letters Patent.

Mr. T. R. Venkatarama Sastri for the petitioner has raised an even more fundamental point—whether the opinion of the Advocate-General upon these points can be questioned by the Court.

In the view I take of the answers to be given to the former questions, this latter point does not arise in the circumstances of the present case.

(1) 1930 M.W.N. 249 (F.B.).

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The two points taken by the learned Advocate-General are : (i) that my Lord the Chief Justice admitted certain evidence and directed the attention of the jury to it in his charge, and that the admissibility of this evidence requires further consideration and (ii) that the correctness of a certain direction given to the jury with regard to the possession by the deceased woman of certain articles at the time of her death requires further consideration.

Point (i). Whether or not the evidence in question was admissible was undoubtedly a "point of law", since, if decided at all, it had to be decided in accordance with the terms of the Evidence Act. Under section 298 (1) (a) of the Criminal Procedure Code it is one of the "questions of law" which the Judge has to decide, and I am unable to distinguish between a "question of law" and a "point of law" in this context. Was that point of law "decided"? The expression may be used in a stricter or in a broader sense. In the stricter sense it may be said that no point of law has been decided unless it has been formally raised, or expressly brought into issue, and formally and expressly adjudicated upon by the Court. In the broader sense a point may be said to have been decided whenever the Court acts in a manner appropriate only upon a certain view of the law in its application to the facts. For instance, if it is a question of the admissibility of a piece of evidence which has been admitted, upon the stricter view the point of law will only have been "decided" if the admissibility of the evidence has been contested and the Court has ruled that it is admissible ; upon the broader view, the admission

of the evidence to the record, even without dispute, will constitute a "decision" by the Court, because the question of admissibility is one for the Court to decide, and that Court has acted as though it had decided it in the one way and not in the other.

I do not obtain much help from the language of Clauses 25 and 26 of the Letters Patent in deciding this question. Under Clause 25 the Court of original criminal jurisdiction may reserve any point or points of law for the opinion of the High Court. Under Clause 26 the Advocate-General is empowered to certify that there is

"an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered."

Some guidance as to what is a "point of law" for the purposes of the Advocate-General's certificate may perhaps be obtained from the consideration that it should be *ejusdem generis* with a "point of law" reserved by the trial Court. But what amounts to a decision is not, I think, indicated by the terms of these clauses, and we must construe the word upon such general principles, and with the help of such analogies, as would seem to apply. In particular, regard must be had to the duty of a Judge in trying a case with the help of a jury. To advert first to the stricter construction, it cannot I think be a necessary condition that the point of law has been raised by one of the parties and what is so urged resisted by the other ; because such a point may have been raised *suo motu* by the Court, and then decided. Section 298 of the Criminal Procedure Code makes it the duty of the Judge to decide, for example, all

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questions of the admissibility of evidence, and this duty is laid upon him whatever may be the attitude of the parties. Suppose he disallows a question on the ground that the answer would be inadmissible in evidence. Can it be said that his action amounts to a decision if it is taken at the instance of a party and does not amount to a decision if it is spontaneous? Since the law clearly empowers and obliges a Judge who tries a case by jury to decide questions of law irrespective of whether or not they are expressly raised, I cannot accept such a test.

The further question then is whether to restrict the terms "decide" and "decision" to cases in which it appears that the Court applied its mind to the point of law, and performed the intellectual operation of deciding it, or whether to extend them to other cases in which, while it is doubtful or even improbable that any such process took place, yet the effect was the same. To give an illustration, if the Judge says to the jury, "There is evidence, *which I consider to be admissible under section 27 of the Evidence Act*", he would be in express terms deciding a point of law. Would he be deciding it if he omitted the words italicized? If we are to limit the meaning of "decide" in the manner suggested, the answer will be "Yes" if in fact he had made up his mind that the evidence was admissible, and "No" if he had not done so. If the record fails to throw light upon the matter, it can only be settled by the Judge himself. If his reply be that he considered the question of admissibility and thought the evidence admissible, the convicted person will have redress under the clause, but he will have no

such redress if the admissibility of the evidence received no consideration.

It may be conceded that, unless sufficient reason to the contrary appears, words should be given their ordinary meaning; and, if this discussion were taking place in the realm of psychology and not of law, it would doubtless be all-important to ascertain precisely the nature and extent of the mental operations involved, before determining whether a point had been "decided". But in law it is sometimes necessary to treat the apparent as if it were the existent, and to construe a man's intentions by his acts. I am not much influenced, therefore, by the dictionary definitions of the word, if there are principles of judicial procedure which demand that it should be given a more extended meaning. I think that such an extension is required by the following considerations.

The whole purpose of correctly deciding points of law is that the proper materials may be laid before the jury to enable them to arrive at their verdict. It is to secure this object that nothing but admissible evidence must be admitted, and that, where the verdict has to depend upon the application of a provision of law to the facts, that provision must be correctly explained. It follows that we are not concerned with what passes through the Judge's mind, but with what he does and what he says. In other words, the record of what took place at the trial must be accepted as the sole test. The jury, for whose guidance points of law are decided, can have been influenced only by what so took place, and in dealing with this matter we must, I think, put

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ourselves in the position of the jury and inquire in what manner their minds are likely to have been affected. If the Judge has succeeded in conveying to them a correct impression of the law by which they should guide themselves, if he admits and lays before them only such evidence as the law declares to be admissible, then he has correctly decided for them a point of law. If he has conveyed an erroneous impression, or allowed them to act upon inadmissible evidence, then he has incorrectly decided the law whatever be the cause of his error, and whether he has in his own mind a correct notion of the law or not.

Similar considerations lead, I think, to this further conclusion—that where something is said or done which would be right upon one view of the law and wrong upon another, the law must be taken to have been decided in the one way, and not in the other. For it is the duty of the Judge to decide the law, and if what he does has all the consequences of a conscious decision it makes no difference to the jury or to the Crown or the accused whether that consequence is intended, or whether it is produced by inadvertence or any other cause. It is only the result that matters, and if, implicit in that result, is a certain view of the law in its application to the facts, the Court must be deemed to have taken that view, and to have decided the point of law accordingly. I think this principle is commonly enough recognized—in dealing, for example, with second appeals. Where an issue involves a point of law, and there is a finding given, we infer that the point of law has been decided in consonance with the terms of that finding—and we do not

concern ourselves with whether the Judge was awake to the necessity of applying the law or whether his action was produced by a failure on the part of one of the parties sufficiently to direct his attention to the point or is attributable to a mere disregard of the law or to negligence. For the purposes of section 100, Civil Procedure Code, the finding is all that we need look at in order to settle whether “the decision is contrary to law”.

So in a criminal trial, where the Judge has given a certain direction to the jury and that direction can only be justified upon a certain view of the law, it must be taken, I think, that the Judge has decided the law in that manner and not otherwise. It cannot be said that the point of law involved remains undecided. This has indeed been conceded before us in the special case of a mis-statement of the law by the Judge in laying it down to the jury, to whatever cause that mis-statement may be due—for an example, reference may be made to the previous Full Bench. Unless we put this construction upon the Judge's action, reading a decision into it where a decision fell to be made, we shall become involved in serious practical difficulties. Are we to limit a “decision” to something of which the record contained express proof that it was “decided” in the sense of a conscious mental operation? That would be to exclude cases in which it seems probable that there was in fact a decision, although the Judge has not expressly recorded it. If, on the other hand, we are to include such other cases, we should have to make inquiry into the working of the Judge's mind, although, so far as the

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consequences were concerned, the state of his mind was not what mattered. It is, I think, a universal rule—I can at least call to mind no exception in this country—that all questions of fact or of law, of substantive law or of procedure, which arise for decision in any appellate, revisional or other proceedings of like character, whether out of a criminal or of a civil cause, are to be decided upon the record under scrutiny, unsupplemented by extraneous matter. It would be very unusual, in such circumstances, to take into consideration a statement by the Judge as to what took place in Court. To go further and take into consideration what passed through his mind, when that could not be ascertained from the record, would be a unique departure from accepted principles. Yet we should be faced with the need for such an inquisition, whenever the matter was in doubt, before the certificate of the Advocate-General, that a point of law had been decided, could be entertained. The wider construction of “decided” offers no such difficulties, because we need only examine the record to ascertain how the matter involving the point of law was dealt with, and the “decision” will emerge.

It may be objected that such a construction would unduly widen the scope of Clause 26, and would lead to points of law being raised after the trial which were never raised during it. This latter objection is certainly true, but I am not sure whether, having regard to the duty laid upon the Judge by section 298, Criminal Procedure Code, it is a very valid one. That duty, it must be remembered, is absolute, not contingent upon

the issue being raised by the parties. How, for instance, would the matter stand in the case of an undefended accused? As regards the scope of the clause, I agree that WALLACE J. in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) goes too far, and, if I may say so with respect, confounds an erroneous decision of a point of law with an infringement of a provision of law, such as misdirecting as to fact. But where, in my view, an erroneous decision is implied in the action taken, I think that the clause should be taken to cover it, on the principle that substance should be preferred to form, and that the effect on the jury is the same, by whatever causes produced.

For these reasons I think that, so far as the first of the learned Advocate-General's points is concerned, this Court should accept jurisdiction and proceed to determine the point of law involved.

Point (ii).—The point involved is one of misdirection of fact, not of law. Such a misdirection may be an infringement of a provision of law (section 297, Criminal Procedure Code), and therefore an error of law; but I do not agree with WALLACE J. that an error in law is necessarily an erroneous decision upon a point of law. As EDDY J. inquires, what is the point of law decided?

Now Clause 26 confers jurisdiction not only upon the Advocate-General to certify the case but also upon the Court to review it. One condition is common to the jurisdiction of each: the Advocate-General must find a point of law, which in his view has been wrongly or doubtfully

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decided ; the Court must find a point of law, for it has finally to determine it. Whatever may be the powers of the Court to control the Advocate-General, it clearly has no basis of action if in its view no point of law to be determined has been laid before it. On this ground I would decline to entertain point (ii).

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CORNISH J.—In my opinion the objection taken by the learned Crown Prosecutor to the maintainability of this application is well founded.

The Advocate-General's power to issue a certificate under Clause 26 of the Letters Patent is exercisable at his discretion, and it is clear upon authority that its exercise by him is not subject to the control of the Court. But there is no sanction in the Letters Patent for the proposition advanced in the argument that his certificate is conclusive upon the question of a point of law having been decided. It was not, as I understood the argument, maintained that if a Judge purporting to reserve a point of law under the power given by Clause 25 should erroneously have reserved a question of fact, the High Court would be bound to consider it as a point of law. There is no apparent reason why the certificate of the Advocate-General should in this respect stand in a better position than the case reserved by the Judge for the consideration of the High Court. Clause 26 limits the power of the Advocate-General to certify with regard to a point of law decided ; it does not say that he may certify with regard to a point of law which the Judge ought to have decided but has failed to decide.

The language of Clause 26 of the Letters Patent is plain enough ; and, but for the judgment of

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WALLACE J. in *C. K. N. Sundaresa Iyer v. King-Emperor*(1), I think there would be no difficulty in saying that the words "decision of a point or points of law decided by the Court of original criminal jurisdiction" mean a point or points of law which arose at the trial and on which the Judge has given a decision. But WALLACE J. has held that there is no real distinction between the expression "point or points of law" in Clause 26 and the words "matters of law" in section 418 of the Criminal Procedure Code. And from this he has concluded that every dereliction of duty imposed by section 297 of the Code upon the Judge in his charge to the jury, whether it be in the shape of misdirection or non-direction, which would give a right of appeal under section 418, is equivalent to a decision of a point of law within the compass of Clause 26.

With great respect I think that the learned Judge was in error in resorting to section 418 of the Code to find the meaning of Clause 26 of the Letters Patent. It is a fallacious mode of interpretation to construe one enactment in the light of another not in *pari materia*, not having the same scope, and expressed in different terms ; see Maxwell on Statutes, 7th Edition, page 34 ; Craies on Statute Law, 3rd Edition, page 122, and the cases there cited. The language and scope of Clauses 25 and 26 of the Letters Patent differ entirely from those of section 418 of the Code. The section gives the right of appeal to the High Court ; whereas Clause 25 begins by ordaining that there shall be no appeal to the High Court from a sentence or order passed in the exercise of

(1) 1930 M.W.N. 249 (F.B.).

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the ordinary criminal jurisdiction of the High Court. Besides, not every matter of law which would support an appeal under section 418 would amount to a decision of a point of law. For instance, it is a matter of law, in the sense that section 281 requires it, that the jury shall be sworn. And if by inadvertence one of the jurors was not sworn and the mistake was not discovered until the trial had ended, no doubt this would suffice to support an appeal on the ground of a mis-trial; but I fail to see how it could be said that the trial Judge had decided a point of law. For the same reason I am of opinion that non-direction by the Judge, though it might be a failure of duty on his part, would not be a decision of a point of law.

Clause 26 directly limits the Advocate-General's power of certification to "a point or points of law decided by the Court of original criminal jurisdiction". The ordinary meaning of this limitation is that there must have actually been a decision by the Judge of the point or points of law certified by the Advocate-General for the further consideration of the High Court. This was evidently the meaning which Sir JOHN WALLIS (then WALLIS J.) thought should be given to Clause 26 in *Muthukumaraswami Pillai v. King-Emperor*(1), where he says :—

"The Advocate-General's certificate has been granted under that part of Clause 26 which empowers him to certify that a point or points of law which has or have been decided by the said Court shall be further considered. The certificate purports to have been granted upon certain representations made to the learned Advocate-General and does not show whether the written judgments of the Court were before him.

(1) (1912) I.L.R. 35 Mad. 397, 437 (F.B.).

They are before us and we have to satisfy ourselves in the first place as to what was actually decided . . . with reference to each of the points of law and as to whether the decision was erroneous."

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Indeed, it is difficult to understand how the Advocate-General can be expected to certify that a point of law has been, in his judgment, erroneously decided or that the decision requires further consideration unless there has been an actual decision. A point of law may be decided without being the subject of a formal ruling by the Judge. If the Judge has misdirected the jury on the law or on what is admissible evidence, there is no difficulty in concluding that what the Judge has told the jury has been decided by him to be the law or legal evidence. It is evident from his direction to the jury. But it seems to me to require recourse to a fiction, not warranted by Clause 26, to say that a point of law which has lain dormant throughout the trial has been decided by the Judge. I am unable to find upon the record that the points of law certified by the learned Advocate-General for further consideration were points of law decided by the learned trial Judge. The first point, though it is discoverable in the record, was not the subject of a decision by the Judge and, of the second point there is no trace in the record.

For these reasons I think that the application for a review must fa

PANDRANG ROW J.—This application for review is made under Clause 26 of the Letters Patent of 1865 by virtue of a certificate granted to the prisoner under the same clause by the Advocate-General.

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A preliminary objection has been raised on behalf of the Crown to the certificate as well as to the application for review based thereon, and, in short, it is to the effect that both are incompetent because there has been no *decision on a point of law* by the trial Judge. There can be no doubt that our decision on this preliminary objection must depend upon the correct interpretation of Clause 26 of the Letters Patent which alone gives the Advocate-General power to grant a certificate and gives us power to review the case. That clause contains the entire law on these subjects, and if reference has to be made to any other provision of law or to the practice of Courts it can only be for the purpose of ascertaining the true import of Clause 26 of the Letters Patent.

The relevant part of this clause runs as follows :—

“ And we do further ordain that . . . on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law.”

The meaning is clear, and, but for the elaborate argument addressed to us, it would be unnecessary to lay stress on what is obvious. Even in *C. K. N. Sundaresa Iyer v. King-Emperor*(1), the majority judgment in which was strongly relied upon by the Advocate for the prisoner, it was held that Clause 26 applies only if the trial Judge has decided a point of law. WALLACE J. who

(1) 1930 M.W.N. 249 (F.B.).

pronounced the judgment of the majority of the Bench said :

“ It is next argued that the error must be in the decision of a point of law, and that the section (Clause) 26 of the Letters Patent only applies if the Judge has decided a point of law. *That, of course, is so*, but when it is further argued that the point of law must have been specifically put up and decided as a point of law I am unable to agree. There is no direct authority on the point.”

It was nevertheless contended by the Advocate for the prisoner that we have no power to declare that a certificate granted by the Advocate-General is incompetent either on the ground that there is no point of law or on the ground that there was no decision, but that we are bound, even if we are of opinion that there was no decision on a point of law, to go on with the case, or, as he put it, “ to examine the matter ”. It was, however, conceded by him that we are not wholly powerless in the matter, for he agreed that after hearing the application for review on the merits it would be open to us to say that there was no decision on a point of law and that we have therefore no power to review the case. His contention then comes to this, namely, that the objection cannot be raised or decided as a preliminary objection but only after the application for review is heard on the merits. In other words, it means that the judgment of the Advocate-General expressed in the certificate that a point of law has been decided by the trial Judge cannot be questioned by the other side and that it entitles the person to whom the certificate is granted to have his application for review argued on the merits, though the Court which hears the application is not bound by that judgment and can pronounce the certificate to be

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incompetent or misconceived, and decline to pronounce any decision on the merits on the ground that no point of law had been decided by the trial Judge. It has to be mentioned in this connection that no objection was taken at the outset by the Advocate for the prisoner to the raising of the preliminary objection on behalf of the Crown, and that he was not prevented from referring to such part of the case on the merits as he thought necessary for the purpose of supporting his argument that there was a decision on a point of law. Even if this objection is well-founded no harm has been done by the course adopted in the hearing. I am, however, of opinion that the Court is not bound to hear the application for review on the merits fully before pronouncing the certificate to be incompetent or misconceived, so long as no bar is placed on such reference to the merits of the case as is thought necessary for the purpose of supporting the certificate. It is a mere matter of procedure, and, in the absence of any statutory enactment prescribing the procedure to be observed in the hearing of applications for review under Clause 26 of the Letters Patent, it is open to this Court to follow such procedure as it thinks fit, so long as it does not offend against the fundamental principles of justice, equity and good conscience. I may add that preliminary objections to certificates by the Advocate-General have been allowed in the past to be raised on behalf of the Crown without any objection being taken thereto in this High Court as in other High Courts. The objection taken in the present case at a late stage must, in my opinion, be overruled.

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I conclude, therefore, that the Advocate-General has power to give a certificate under Clause 26 of the Letters Patent only if a point of law has been decided by the trial Judge, and that in deciding whether a point of law has been decided by the trial Judge in this case the opinion or judgment of the Advocate-General is not binding on us, and that it is open to us, nay, even incumbent upon us, to arrive at our own judgment in the matter.

We have first to see what the certificate says about this matter. As it was originally given, it did not even state that there had been any *decision* of a point of law, or that any point of law had been *decided* by the trial Judge; the words “decision” and “decided” were not to be found in it. Apparently in order to amend this defect or to rectify this omission the Advocate-General amended his certificate during the hearing of this application and at the instance of the Advocate for the prisoner. The amended certificate no doubt contains the word “decisions” in two places, but it does not, in my opinion, show with sufficient clearness what the “decisions” were. Omitting whatever is not absolutely necessary for our present purpose, the amended certificate is to the following effect. [*Vide* pages 530 to 532 above.]

The certificate does not say clearly what points of law were decided and what the decisions were. The reason for this want of clarity is obvious; as a matter of fact the trial Judge had not decided any of the points mentioned in the certificate, using the words “decide” and “decision” in their ordinary sense. There was no decision by the trial Judge that the statements in question were admissible evidence or that a presumption under

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section 114 of the Evidence Act did or did not arise for consideration by the jury. There is nothing in the record of the trial from which it can be said that there was any decision on the points referred to in the certificate. It is not alleged that such an inference could be drawn from anything said by the Judge during the trial. What is alleged by the Advocate for the prisoner, and that is apparently what was meant by the Advocate-General, is that, because the statements in question are found in the record of the evidence given at the trial, and some of them are mentioned in the charge to the jury (though without the least reference to their admissibility), the trial Judge must be deemed in law to have decided that the statements were admissible evidence, and that, because the trial Judge omitted to say anything about the presumption under section 114 of the Evidence Act, he must similarly be deemed to have decided not to say anything about it. Actual decisions there were none; the record does not disclose them, and we have the statement of my Lord who was the trial Judge that he did not decide these points at any time during the trial. As observed by WESTROPP C.J. in *Reg v. Pestanji Dinsha*(1) :

"The statements of the Judge, who presides at a trial, whether it be in a criminal or civil case, is, as to what has taken place at the trial, conclusive. Neither the affidavits of by-standers, nor of jurors, nor the notes of Counsel, nor of shorthand-writers are admissible to controvert the notes or statement of the Judge: *The King v. Grant*(2), *Everett v. Youells*(3), *Gibbs v. Pike*(4)."

(1) (1873) 10 B.H.C.R. 75, 81 (F.B.).

(2) (1834) 5 B. & Ad. 1081; 110 E.R. 1092.

(3) (1833) 4 B. & Ad. 681, 683; 110 E.R. 612.

(4) (1842) 9 M. & W. 351; 152 E.R. 149.

The learned CHIEF JUSTICE then quotes certain observations by COLERIDGE J. and MARTIN B. in *Queen v. Aaron Mellor*(1) which lend support to his observations. It is needless to repeat them here or to labour this point further; it has not been pressed before us that there were any deliberate or conscious decisions by the trial Judge on the points in question. The argument pressed is that something undone and something else done should in law be deemed to be decisions by the trial Judge. The point of law regarding the admissibility in evidence of the statements was never present to the mind of the trial Judge; nor was it present to the minds of Counsel appearing on either side. What happened was that the statements were spoken to by some of the witnesses, and some of them were mentioned, without any reference to their admissibility, in the charge to the jury. If objection had been taken at any time, and nevertheless the statements had been received as evidence or referred to as such in the charge, a decision that they were admissible could be inferred. By saying this I do not, of course, mean that what is not admissible in evidence becomes admissible if no objection is taken. What I mean is that, though the omission to object does not alter the law regarding admissible and inadmissible evidence, it is an important and material factor to be taken into consideration in deciding whether there was or was not a decision about the admissibility of the evidence. An objection means the Judge's mind was directed to the point of admissibility, and even though no oral decision is pronounced thereon, the reception

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(1) (1858) 27 L.J. N.S. 121 Mag. Cas.

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of the evidence objected to is itself an actual decision. When no objection is taken it is impossible to infer that there was an actual decision, when no decision is pronounced and the Judge himself is not aware of having decided the point of admissibility. Then again, mere mention of some of the statements in the charge to the jury is no doubt a decision to mention them, but is not necessarily a decision that they are admissible evidence merely because the Evidence Act lays down that a judgment should be based only on relevant facts. As regards the second point relating to the non-direction about the presumption under section 114 of the Evidence Act, the position is the same, if not actually worse, from the prisoner's point of view; this second point did not even arise for decision in view of the defence set up by the prisoner during the trial. A non-direction on a point which did not arise for decision in the case cannot, in my opinion, be said to be or constitute a decision on the point.

It is clear to my mind that there was in this case no decision by the trial Judge of any of the points mentioned in the certificate, using the word "decision" in its ordinary sense about which there is, and can be, no doubt. The word is a popular, and not a technical word, and its meaning can be found in any dictionary. When one speaks of any point decided by a Judge or of a decision by a Judge on any point, one means a concluded opinion arrived at after applying his mind to it. It cannot possibly include anything of which the Judge is not even aware or conscious; mere inadvertence is not a decision whatever be the importance of the point not

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adverted to. Decision even by one who is not acting as a Judge necessarily implies some process of deliberation or ratiocination, however short, and the mind must necessarily be aware of it. What a decision is, is a matter of psychology and not of law as such, and perhaps this is the reason for the lack of any judicial interpretation of the word except in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) referred to already.

The actual point decided in the above case was that there had been a serious misdirection by the trial Judge in his charge to the jury on a point of law, viz., the ingredients of one of the offences for which the prisoner was tried. That such a misdirection is a decision on a point of law is clear, and is not disputed by the Crown Prosecutor. It is obvious that a Judge, when he states to the jury what the ingredients of the offence charged are, has consciously decided in his mind what they are, and expresses his concluded opinion thereon. In the judgment of WALLACE J. in that case, with which three other learned Judges agreed, are, however, to be found certain general observations of the nature of *obiter dicta* on which much reliance is placed on behalf of the prisoner. These observations fall under two heads, viz., (i) the meaning of the word "decision" and (ii) the meaning of the words "point of law". If I may say so, and I say it with the greatest respect, the observations under the first head are a mixture of what is unquestionable and what is questionable. For instance, WALLACE J. says:—

"The word 'decision' is not restricted to matters actually stated at the Bar for the direct decision of the Court.

(1) 1930 M.W.N. 249 (F.B.).

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It includes all matters decided or which fall to be decided by the trial Court in the case."

The first of these two observations is in my opinion not open to doubt ; otherwise a misdirection as regards the ingredients of the offence charged would not be a decision if no question regarding the same was raised at the Bar. The second observation is not sufficiently clear to me ; if the first word " it " refers to the word " decision " in the earlier sentence, I fail to see how a decision can include matters decided ; a decision and the subject or matter decided are two different things. If, on the other hand, the word " includes " means " refers to ", I cannot agree that the decision may refer to matters which fall to be decided though not actually decided. The learned Judge goes on to say that a Judge's decisions " also include what he does not state, since a decision not to state is equally a decision ". Of course, if we assume that there is a decision—whatever be its purport—there is a decision ; in this sense, no doubt, a decision not to state is a decision. But does it follow that mere non-stating and no more is necessarily a decision ? A decision is a decision—whatever may be its subject-matter or purport—but is this self-evident proposition of any assistance in finding out whether in any particular case and on any particular point there was a decision ? I think not.

The further observation that, if a trial Judge

" admits and discusses certain evidence, he has decided to admit it, even though neither party raised the question of its admissibility "

demands more detailed consideration. If the evidence is " admitted " after a conscious conclusion has been come to by the trial Judge on the

question of its admissibility no doubt he has decided a point of law. But if the Judge by pure inadvertence fails to prevent the introduction of certain evidence by reason of his mind not being directed by himself or by any one at the Bar to the question of its admissibility can it be said that he has decided that question ? In short, when he has given no thought to it can it be said that he has decided it ? In the case of an ordinary man the only possible answer is there can be no decision of any point without any thinking about it. Is a Judge in a different position from the ordinary man in this respect ? *Prima facie* one would be inclined to say that there would be more and not less thinking before a Judge comes to a decision than an ordinary man. It is urged, however, that the duties imposed on a Judge trying a criminal case with the aid of a jury by sections 297 and 298 of the Criminal Procedure Code make all the difference. It is no doubt his duty *inter alia* " to decide upon the admissibility of evidence " ; and " also, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties ". The argument based on this is that if the Judge omits to do his duty in this matter, such omission, even though it was really due to inadvertence, must be deemed to be a decision that whatever evidence was actually given at the trial was admissible in law. It is further argued that because it is the duty of the Judge to sum up the evidence he must be deemed to have decided that every particle of evidence which he mentioned in his charge to the jury is admissible in law. These arguments find support

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in the further observation of WALLACE J. that the word "decision" includes non-directions to the jury even in the summing up on facts. The reason given is that if this is not so, then, even if the Judge entirely omits to sum up or if he refuses to decide the point specifically put up to him, the accused has no remedy. This reason presupposes that Clause 26 of the Letters Patent was intended to provide a remedy in such cases; otherwise, the absence of a remedy for the accused would not be relevant to the consideration of what is meant by the words "decision" and "decided" found in that clause which alone defines and provides the remedy by way of an application for review based on a certificate by the Advocate-General.

A consideration of the relevant clauses of the Letters Patent shows that the only appeal, unrestricted in scope, allowed by the Letters Patent in criminal cases is the appeal referred to in the first sentence of Clause 41, i.e., to His Majesty in Council, that the right of such appeal to the High Court is negatived in express terms by Clause 25, and that the only remedy available in the High Court in cases of the present kind is only a limited right to have such points of law as are either reserved by the trial Judge, and/or such points of law which have been decided by the trial Judge and certified by the Advocate-General, determined by the High Court by way of review, after which determination the High Court can alter the sentence of the trial Judge, and pass such judgment and sentence as shall seem right. I have not been able to discover anything in the Letters Patent from which it can be inferred that any remedy wider in scope than the words in Clause 26 would

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warrant was intended to be provided by it; in any case, it is clear that a right of appeal of the same amplitude as is given by section 418 of the Criminal Procedure Code was not intended to be given by Clause 26 of the Letters Patent. The assumption to the contrary underlies most of the reasoning in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) and most of the argument addressed to us by the Advocate for the prisoner.

The language used in Clause 26 of the Letters Patent is in my opinion clear and unambiguous, and it is not necessary, even if it were permissible, to seek any light from the state of the law in England regarding the Attorney-General's right to grant writs of error in criminal cases, and to discover by way of analogy the scope of the Advocate-General's right to grant certificates under Clause 26 of the Letters Patent. It is enough to say that the Attorney-General's right to grant writs of error, though originally recognized as being entirely within his discretion—and the writ of error was then final and accepted by the Court without question—was, after *Paty's case*(2) in 1705, made subject to the control of the Court both as regards the grant and the effect thereof, so far as misdemeanours were concerned, and that such writs of error, being confined to errors apparent on the record which consisted only of the arraignment, the plea, the issue and the verdict, could not be granted in respect of evidence wrongly admitted or misdirections in the charge to the jury, as the record did not contain either the evidence or the charge to the jury.

(1) 1930 M.W.N. 249 (F.B.)

(2) 2 Salk 503; 91 E.R. 431.

Proceedings by writ of error granted by the Attorney-General in England, and proceedings by way of review on certificate by the Advocate-General here, are so different from each other that no argument by analogy can be based on a comparison of the two.

The observations of WALLACE J. under the second head are to the effect that the words "point of law" mean the same thing as the words "matter of law" found in section 418, Criminal Procedure Code, i.e., such misdirection or non-direction as would permit an appeal under that section, and that therefore even a defect in summing up the evidence and indeed any infringement of the law laid down in section 297, Criminal Procedure Code, would constitute a decision on a point of law. It may be there is not much difference between "point of law" and "matter of law", though the latter seems to connote a wider category than the former, but the conclusion that wherever an appeal lies on a matter of law under section 418, Criminal Procedure Code, there must have been a decision of a point of law is based really on the earlier observations as to the meaning of the words "decision" and "decided". If these observations are right it would no doubt follow that even a defect in summing up the evidence in the charge would be a decision on a point of law, because it is the duty of the Judge to sum up the evidence properly and a failure to perform the duty is alleged. Whether the defect is material and amounts to misdirection is a point to be decided on the merits; for, according to this view of what "decision" means, any defect or any alleged

defect, however slight, in summing up the evidence is a decision on a point of law, and whether that decision is wrong is to be determined only after a hearing on the merits. In dealing with the preliminary objection raised in this case we have only to determine whether there was a decision on a point of law, and not whether, if there was a decision, it is wrong. We cannot question the certificate or its propriety on the ground that the decision was right or that there was no need for any direction on the point. If the interpretation given to the word "decision" by WALLACE J. is correct, no distinction can, in my opinion, be made between the two points covered by the certificate of the Advocate-General at the present stage without hearing the application for review fully on the merits.

With the greatest respect I find myself unable to accept this interpretation of the word "decision" as correct, and I am clearly of opinion that there was no decision by the trial Judge on any of the points mentioned in the Advocate-General's certificate, that the certificate is therefore misconceived, and that, in any case, we have no power or authority to determine these points under Clause 26 of the Letters Patent. Whether there were decisions on these points is a matter of fact and not of law, and I am convinced, even apart from what was stated by my Lord the CHIEF JUSTICE, that there were, in fact, no decisions by him on these points. In matters of fact we have no right, it seems to me, to assume anything to have happened if we are convinced that it did not happen, in order to enable us to exercise a

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jurisdiction which otherwise we do not possess. This may appear at first sight to be a narrow view of our jurisdiction under Clause 26 of the Letters Patent, but, if the words used in it are themselves such as would justify only that view, we cannot and should not take a wider or more liberal view. Our duty is to ~~act~~ according to the law as it stands and not according to our notions as to what it should be ; otherwise, we shall be making the law suit our opinions instead of making our opinions suit the law. If Clause 26 of the Letters Patent had been intended to confer a right of appeal of the same scope as section 418, Criminal Procedure Code, which however I seriously doubt, the intention would have been made clear by employing the words "misdirection" or "error of law", the legal significance of which was well-known, instead of the words "decision" and "decided". The intention of the clauses in the Letters Patent which relate to appeal or review in criminal cases tried in the High Court is clear : there was to be no right of appeal to the High Court, but only to His Majesty in Council ; the High Court could however review the case for the purpose of determining such points of law as may be reserved by the trial Judge, or such points of law decided by the trial Judge which are certified by the Advocate-General. Where there are no decisions on points of law by the trial Judge the obvious remedy is to apply to the trial Judge to reserve the points of law for the opinion of the High Court under the last sentence of Clause 25 of the Letters Patent or under section 434, Criminal Procedure Code ; instead of availing himself of this obvious remedy, the

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prisoner chose to apply to the Advocate-General for a certificate and the Advocate-General chose to grant a certificate in respect of points which had not been decided by the trial Judge. The argument, therefore, that the prisoner is left without any remedy under Clause 26 of the Letters Patent when there has been no decision by the trial Judge is thus without force. The prisoner had a remedy but he did not avail himself of it. Whether the remedy is not still available to him is not for me to say. I am, however, convinced that the remedy which he seeks in this application is misconceived and does not exist.

I would therefore dismiss this application.

BURN J.—This is an application under Clause 26 of the Letters Patent for review of the judgment in Sessions Case No. 5 based on the learned Advocate-General's certificate that in his judgment two matters require to be further considered by this Court. The learned Crown Prosecutor has taken a preliminary objection that the certificate granted by the learned Advocate-General is itself incompetent, and that consequently this Court has no jurisdiction to consider the matters of law set out in the certificate.

BURN J.

The learned Crown Prosecutor's objection is based upon the terms of Clause 26 of the Letters Patent. The material portions of the clause are as follows :

" . . . on its being certified by the said Advocate-General that, in his judgment, . . . a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or

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points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

The learned Crown Prosecutor contends that a "point of law" in this passage must mean some proposition of law which has arisen in the trial, which has been presented to the Judge for consideration (whether on the representation of Counsel on either side, or of the Judge's own motion) and upon which the Judge has made an express pronouncement of law. In the present case, the first of the two points certified by the learned Advocate-General as requiring further consideration is whether certain statements, said to have been made by the accused while in the custody of the police, were admissible in evidence. The second point is to the effect that the learned trial Judge omitted to direct the jury properly in regard to the absence of any evidence of possession by the deceased woman of certain silver articles during the period between the 17th December 1933 and 11th January 1934. As regards the first point, it is not contended for the accused that any objection was taken during the trial to the admission of the evidence, or that any question as to its admissibility was raised; such a contention would be impossible in view of the fact that of the eight statements set out in the certificate, six were elicited by the learned Advocate for the accused in the cross-examination of three of the prosecution witnesses. As regards the second point, it is not contended for the accused that there was any evidence about the possession of the silver articles by any one other than the deceased woman during the period after 17th December; the suggestion is only that the

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learned trial Judge ought to have pointed out to the jury that there was no evidence about the possession of these silver articles after 17th December, and that his omission to do so may be "misdirection or non-direction amounting to an error of law". In these circumstances, according to the learned Crown Prosecutor's contention, it cannot be said that the learned trial Judge decided any point or points of law, and, if that is so, there is no point of law which can, under Clause 26 of the Letters Patent, be further considered by this Court.

For the accused Mr. T. R. Venkatarama Sastri makes a two-fold reply. In the first place he offers a counter-objection to the entertainment of any such preliminary objection as that raised by the learned Crown Prosecutor. Reduced to the briefest possible statement, the counter-objection is to this effect: the Advocate-General is the sole judge of the facts necessary to be established before he can give his certificate, and when once the Advocate-General has granted a certificate, this Court has no jurisdiction to examine the grounds on which the certificate has been granted, but must proceed forthwith to review the case, or so much of it as may be necessary, and finally decide the point or points of law raised in the certificate. In the second place, his contention is that, even if this Court has jurisdiction to go into the question whether there has or has not been a decision by the trial Judge of a point or points of law, what was done by the learned trial Judge in Sessions Case No. 5 did in fact amount to a decision of both the points of law mentioned in the Advocate-General's certificate.

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Mr. T. R. Venkatarama Sastri's counter-objection is supported by a lengthy argument based upon cases in which the power of the Attorney-General in England to issue a *fiat* or a certificate has been exercised. With respect, I do not think it is necessary, strictly speaking, to discuss the powers of the Attorney-General in England. The only power of the Attorney-General which, as it seems to me, is at all relevant to the matter before us, is the power of certifying for a second appeal to the House of Lords from the decision of the Court of Criminal Appeal. Under section 1 (6) of the Criminal Appeal Act of 1907, if the Attorney-General certifies that the decision of the Court of Criminal Appeal "involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought", then the Director of Public Prosecutions or the prosecutor, or the defendant may appeal to the House of Lords. It has been observed by Lord SUMNER in *Thompson v. The King*(1) :

"The certificate of the Attorney-General, which is the condition precedent to an appeal to your Lordships' House from a decision of the Court of Criminal Appeal, is granted in his discretion and is the subject neither of review nor of criticism . . ."

On this and similar *dicta*, Mr. T. R. Venkatarama Sastri bases his contention that, when the Advocate-General has granted his certificate under Clause 26 of the Letters Patent, this Court must go on to consider the point or points of law mentioned in the certificate and cannot say that the Advocate-General's certificate is itself

incompetent. It is however to be observed that the wording of section 1 (6) of the Criminal Appeal Act of 1907 is very different from the wording of Clause 26 of the Letters Patent, and I am of opinion that the learned Crown Prosecutor is in a strong position when he contends that, since Clause 26 has been specially enacted to define the powers of the Advocate-General in connection with criminal trials before this High Court, the general provision in section 114 (2) of the Government of India Act cannot be read as giving him wider powers in the same matters. This question must therefore be considered only in relation to the terms of Clause 26 of the Letters Patent.

If this is so, I am quite unable to see why it should be supposed that this Court has no power to deal with such a preliminary objection to the Advocate-General's certificate as the one raised by the learned Crown Prosecutor in this case. It is not disputed that this Court can, after a review of so much of the case as may be necessary for the purpose, hold that the trial Judge has committed no error in his decisions on points of law. Why then it should be supposed that this Court is unable to hold that the trial Judge has not in fact decided any point of law, I cannot at all understand. I would therefore overrule the counter-objection raised by the learned Advocate for the accused, and hold that it is quite within the competence of this Court to entertain the learned Crown Prosecutor's preliminary objection.

The real problem is whether the preliminary objection is well-founded. As to this, I respectfully agree with all that my Lord the CHIEF JUSTICE has said. With due deference to the

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(1) [1918] A.C. 221.

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judgment of WALLACE J. in the case of *C. K. N. Sundaresa Iyer v. King-Emperor*(1), it appears to me that the expression "a point of law" in Clause 26 must have the same meaning as it has in Clause 25 of the Letters Patent. Just as it is not possible for the trial Judge to reserve a point of law under Clause 25 without knowing and stating what the point of law is, so, in my opinion, it is impossible to say that the trial Judge has decided a point of law for the purposes of Clause 26, unless the point of law as such has been definitely and precisely put before him. The point of law may have been raised by Counsel for the prosecution or defence, or it may have been raised by the Judge himself, but unless it has been expressly raised in such a way that it can be said to have been presented to his mind for decision, it cannot be held, without doing violence to the ordinary meaning of words, that there has been a decision of a point of law. The word "decision", according to any dictionary, connotes, a *positive* act, and in my opinion it is not permissible, by means of any legal fiction, to turn it into a word with a negative meaning, or even with no meaning at all. With all respect it appears to me that WALLACE J. in the case of *C. K. N. Sundaresa Iyer v. King-Emperor*(1) has used language which deprives the word "decision" of all meaning. In fact, he has gone further; he has made "decision" identical in meaning with "omission to decide". I cannot (I say it with deference) subscribe to the proposition that because it is the duty of the trial Judge to decide what evidence is admissible and what is not, therefore the Judge *has decided* that every jot

(1) 1930 M.W.N. 249 (F.B.).

and tittle of the evidence found on the record is admissible. The question whether the Judge has decided that any particular item of evidence is admissible is a question of *fact*; if in fact the Judge has *not* decided a particular point, I am not prepared to admit that by some legal fiction he must be deemed to have decided it. WALLACE J. seems to have been very much influenced by his fear that even if the Judge disregarded the law altogether, or omitted or refused to sum up, the accused would have no remedy. That fear, I need hardly say, is quite unfounded in fact; no Judge will ever behave in the way WALLACE J. describes. And, as several of my learned brethren have pointed out, it is unfounded in law also, since such conduct on the part of a trial Judge would enable (I might say, would compel) this Court to grant a certificate for appeal to the Privy Council under Clause 41 of the Letters Patent.

I agree with all my learned brethren that the second point certified by the learned Advocate-General never arose, nor could it have arisen, for the consideration of the learned trial Judge. That point therefore cannot be considered by this Court under Clause 26 of the Letters Patent. As for the first point, since we know that the question of the admissibility of the evidence was not in fact raised before the learned trial Judge and was not in fact decided, I would hold that we are precluded from considering it. This application ought therefore to be dismissed on the simple ground that the learned trial Judge did not in fact decide either of the two points, or questions, or matters, of law referred to in the certificate of the learned Advocate-General.

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[After the above decision, His Lordship the CHIEF JUSTICE passed the following order on 5th November 1934 reserving the question as to the admissibility of the statements set out therein for the opinion of the High Court under Clause 25 of the Letters Patent (Madras) and for the determination of the matter under Clause 26 of the Letters Patent :—]

Sessions Case No. 5 of the Third Criminal Sessions of 1934.
—The prisoner was convicted in Sessions Case No. 5 of the Third Criminal Sessions of 1934 of the offence of murder and was sentenced to death by me. Since that conviction and sentence my attention has been drawn to certain answers given by some of the prosecution witnesses which it is suggested may be inadmissible in evidence under the Indian Evidence Act. No objection was taken at the trial to the admissibility of these answers nor was my attention directed before my charge to the jury, during it, and after it before conviction, to the question of their admissibility. The matter is brought to my attention by a certificate granted by the learned Advocate-General under Clause 26 of the Letters Patent of this High Court on being moved by the prisoner raising the question of the admissibility in evidence of these answers, stating that in his opinion the reception in evidence of these answers and the placing of them before the jury required consideration by the High Court.

In view of the majority opinion of the Full Bench formed to consider the question raised in the certificate of the learned Advocate-General in Criminal Miscellaneous Petition No. 910 of 1934, namely, that it is incompetent for the High Court to entertain the petition because there was no point of law decided such as is intended in Clause 26 of the Letters Patent, the question of the admissibility of these statements and the effect of their admission, if inadmissible, upon the jury has not been considered. In my view, the question as to the admissibility of these statements requires to be considered by the High Court and, accordingly, in the exercise of my powers under Clause 25 of the Letters Patent of this High Court, I reserve that question for the opinion of the High Court. It is unnecessary for me to state the facts of this case because these

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are already set out in my judgment in Criminal Miscellaneous Petition No. 910 of 1934. The matter reserved for the opinion of this High Court is the question of the admissibility of statements made by P.W. 10, P.W. 11 and P.W. 42 as the statements alleged to have been made by the prisoner while in the custody of the police.

(i) P.W. 10 in examination-in-chief said: "The accused pointed out the shop, saying that it was in that shop that he purchased the mattress."

(ii) In cross-examination P.W. 10 said: "The accused himself pointed out the shop, saying that it was at this shop, that he purchased, adding: 'I paid an advance of annas 8 and I subsequently paid Rs. 2-8-0';

"the accused looking at me said: 'I have purchased from him on the 12th a coir mattress';

"it was the accused that was looking at me and asking me: 'I purchased from you, is it not, on the 12th a coir mattress';

"thereupon the accused said: 'I purchased it of you for Rs. 3; I paid an advance of eight annas and I sent the balance of Rs. 2-8-0 through the coolie woman'."

(iii) P.W. 11 said in cross-examination: "The accused himself mentioned me and said that it was a woman wearing a coral necklace."

In answer to a question by the Court, "when I went there the accused said 'it was this woman that carried the article'."

(iv) P.W. 42 in cross-examination said: "While we were coming out the accused pointed out that woman with coral beads on her neck and said: 'that was the coolie that carried my mattress'."

I reserve the question as to the admissibility of the above-mentioned statements for the opinion of the High Court under Clause 25 of the Letters Patent of this High Court and for the determination of this matter under Clause 26 of the Letters Patent.

[The matter came on for hearing before a Full Bench consisting of CORNISH, BURN and LAKSHMANA RAO JJ., the same Counsel appearing for the parties as before.]

CRIMINAL, FULL BENCH.

*Before Mr. Justice Cornish, Mr. Justice Burn and
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*Indian Evidence Act (I of 1872), sec. 27—"Fact" in—
Discovery of fact—Meaning of.*

The accused was charged with the murder of a woman with whom he had been living at No. 24 Peddunaicken Street. The case against him was that he strangled her to death on the night of 11th January 1934, that on the morning of the 12th January he purchased a coir mattress from P.W. 10, had it carried to his house, No. 24 Peddunaicken Street, by a coolie woman, P.W. 11, and that he put the body of the deceased in a parcel made of that coir mattress and sent it from the Egmore Station to Karunguzhi on the South Indian Railway. The accused was arrested on the 23rd January and on the same day, in consequence of information given by him, he was taken by a Police Officer, P.W. 42, to the shop of P.W. 10. There, the accused was alleged to have made certain statements relating to his purchase of the coir mattress from P.W. 10 and also to its carriage to his house by P.W. 11. The question was as to the admissibility of those statements which were spoken to by P.W. 10, P.W. 11 and P.W. 42 and which are set out in the order of His Lordship the CHIEF JUSTICE reserving the question as to the admissibility of those statements for the opinion of the High Court under Clause 25 of the Letters Patent.

*Held by CORNISH and LAKSHMANA RAO JJ. (BURN J. dissenting).—*The statements of the accused in question amount to a confession because the purchase of the coir mattress in which the corpse was packed and its carriage to the alleged scene of crime through the coolie woman on the 12th January suggest the inference that the accused committed the crime.

* Case No. 5 of the Third Criminal Sessions of 1934.

Per BURN J.—The statements are incriminating, and to that extent they are of a confessional nature, but they cannot be properly described as anything like a complete confession. KING-EMPEROR
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*Held by CORNISH and BURN JJ. (LAKSHMANA RAO J. dissenting).—*The statements of the accused in question are admissible under section 27 of the Indian Evidence Act.

Two facts were alleged to be, and were really, discovered in consequence of the information given by the accused: (i) the purchase of the mattress by the accused from P.W. 10 and (ii) the engagement of P.W. 11 by the accused to carry the mattress to his house.

The facts referred to in section 27 are not confined to actual physical material objects. They need not be of such a nature that by themselves, without any accompanying statement of a witness, they demonstrate the truth of the information; in other words, the facts need not be "self-probatory".

Per LAKSHMANA RAO J.—The word "fact" is used in section 27 in the sense of a physical fact which can be perceived by the senses. The fact discovered should therefore be a material and not a mental fact; and the word "discovery" is used in that section in the sense of a finding upon a search or inquiry of articles connected with the crime or other material fact. The discovery of a witness to the crime or act of the accused, on his information, would not be a discovery of a fact within the meaning of section 27; and the confirmation or otherwise of the statement of the accused by the witness discovered cannot make any difference. Further, section 162 of the Code of Criminal Procedure prohibits the use of any statement by the witness to the investigation officer. The discovery should therefore be of some concrete fact. Even when a thing is discovered the statement of a prisoner as to how he came by it cannot be proved. The statements in the present case are of this nature and they were verified by P.W. 42, the Police Officer, by examining the witnesses pointed out by the accused. He cannot be said to have discovered any fact within the meaning of section 27, Indian Evidence Act, and the statements in question are not admissible in evidence.

Cur. adv. vult.

JUDGMENT.

CORNISH J.—The learned CHIEF JUSTICE acting under Clause 25 of the Letters Patent has reserved

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KING-EMPEROR ^{v.} RAMANUJAM. as a point of law for determination under Clause 26 the question whether certain statements given in evidence at the trial of M. Ramanuja Ayyangar for murder were admissible. The statements which are in question were made by the prisoner while he was in the custody of a Police Officer at the shop of a witness, P.W. 10, and had relation to the sale of a mattress by that witness at that shop to the prisoner on the 12th January, and to the carriage of the mattress by a coolie woman, P.W. 11, from the shop.

The circumstances in which the statements came to be made may be briefly narrated. It is in evidence that the murdered woman had left her husband on the 4th August 1933 and from that date had been living with the prisoner at different places in Madras. From the 23rd December until the evening of 11th January 1934 which was the last occasion according to the evidence on which she was seen alive, the prisoner and the woman were living together at No. 24 Peddunaicken Street. On the evening of the 12th a package was brought to Egmore railway station in a cart and a luggage ticket taken for its despatch by train that night to Karunguzhi by a man who has been identified as the prisoner. The package was not claimed on arrival at Karunguzhi next morning and lay in one of the station offices until the smell of it led to its being opened and the discovery of the body of the woman sewed up in a coir mattress. This was on the 14th. The medical evidence showed that the woman had been strangled. The police investigation began forthwith. The prisoner, who had moved from his lodging in Peddunaicken Street on the 13th, was

arrested on the afternoon of the 23rd. The same afternoon, in consequence of information given by the prisoner, he was taken by a Police Officer, P.W. 42, to the shop of P.W. 10, and it was there that the statements, the subject-matter of the point of law reserved, were made. P.W. 10 and P.W. 11, it should be observed, have identified the mattress found in the package round the body as the mattress which was sold to the prisoner on the 12th January.

In examination-in-chief the shop-keeper, P.W. 10, deposing to the visit of the prisoner with the police to his shop, said:

"The accused pointed out the shop, saying that it was in that shop that he purchased the mattress."

The witness was cross-examined upon this, and he said:

"It is because ten or eleven days after he made the purchase he came to the shop and himself pointed out the shop saying that it was at this shop that he purchased, adding 'I paid an advance of 8 annas and subsequently paid Rs. 2-8-0' that I remember this man."

The learned Advocate for the prisoner pursued this topic and in answer to further questions the witness stated:

"The car stopped in front of my shop at about 4 p.m. They all got down and entered the shop, and as soon as they entered, the accused, looking at me, said 'I have purchased from him on the 12th a coir mattress'";

and again:

"It was the accused that was looking at me and asking me, 'I purchased from you, it is not (is it not?) on the 12th a coir mattress'. I replied to the accused 'I will look into the account and tell you.'"

Witness then stated that he looked into his account book, and said:

"When I looked into the account, I found that, on the 12th, there was a sale of coir mattress and two pillows for Rs. 3-12-0 and another coir mattress for Rs. 3 and I said

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CORNISH J. therefore I did not know whether it was the one or the other that I sold to the accused. Thereupon, the accused said, 'I purchased it of you for Rs. 3; I paid an advance of 8 annas, and I sent the balance of Rs. 2-8-0 through the coolie woman.'"

Thereupon he was asked :

"So it was the accused that reminded you of the purchase. Otherwise you would not have known it?"

And the witness's answer was :

"Otherwise I could not have known it."

The coolie woman, P.W. 11, who was near the shop at the time of this visit on the 23rd, waiting for a job, in cross-examination said:

"The accused himself mentioned me and said that it was a woman wearing a coral necklace."

In answer to a further question the witness said:

"When I went there the accused said, 'It was this woman that carried the article';"

and again:

"It is upon his mentioning it that I remembered. Pointing to me he said, 'It is this coolie.'"

The Police Officer, P.W. 42, in cross-examination as to when the prisoner pointed out the coolie woman said:

"It is only after the accused pointed out Muhammad Kasim (P. W. 10) and while we were coming out, the accused pointed out that woman with coral beads on her neck and said that that was the coolie who carried his mattress."

The first question to be considered is whether the statements made by the prisoner on this occasion amounted to a confession. I think they did. They come within the definition of a confession in Stephen's Digest of the Law of Evidence as an admission suggesting the inference that the prisoner committed the crime charged against him. It was the case for the prosecution that the prisoner was the man who despatched the package containing the dead body in the

mattress from Egmore railway station on the evening of the 12th. His admission, therefore, that on the morning of the 12th he had purchased a mattress was a highly incriminating statement.

The confession having been made by the prisoner when he was in police custody is ruled out by section 26 of the Indian Evidence Act. But it has to be determined whether any fact has been deposed to as discovered in consequence of the confession. If any fact, provided it is a relevant fact, has been so discovered, section 27 permits so much of the confession as distinctly relates to the fact thereby discovered to be given in evidence; the reason of the rule being that the discovery of the fact confirms the confession. The fact alleged to have been discovered in consequence of the prisoner's statements is that he purchased a mattress from P.W. 10 on the 12th January and had it carried from the shop by the coolie woman, P.W. 11. The Police Officer, P.W. 42, deposes to this discovery. The witness has deposed :

"He (the prisoner) took me direct to that shop and there pointed out Muhammad Kassim (P.W. 10) as the man from whom he purchased the mattress."

And, with reference to the coolie woman, the witness stated that the prisoner pointed her out and said that she was the coolie who carried his mattress. If P.W. 10 and P.W. 11 had denied all knowledge of the prisoner and his purchase, or had been unable to recollect anything of the incident, no fact would have been discovered in consequence of the prisoner's confession, and his confession would have been entirely groundless. But the consequence of the prisoner's statement

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It has been contended that what the Police Officer discovered was not a "fact" within the contemplation of the section. "Fact" is defined by the Evidence Act, section 3, to mean and include "(i) any thing, state of things, or relation of things capable of being perceived by the senses." In my view the definition does not restrict a fact to something which can be exhibited as a material object. The learned Crown Prosecutor gave an apt illustration of a wider meaning of the word. He supposed the case of a prisoner confessing to having kidnapped a girl and informing the police

where he had confined her. I think that the discovery of the girl in that place in consequence of the information given by the prisoner would be the discovery of a fact. It would be the discovery of a "state of things". In *Sukhan v. The Crown*(1) the majority of the Full Bench held that the statement of the prisoner that he had pledged jewellery with a certain man was admissible in consequence of the discovery of the jewels with that man. The fact of the pledge was there treated as a fact discovered. Pledged jewels would naturally be in the possession of the pledgee. In the event of a purchase of an article, such as a mattress, the thing purchased would ordinarily have passed out of the possession of the person who sold it; but I cannot see why a purchase should be any the less a "fact" than a pledge. If the thing purchased has been proved to have been sold and has been identified as the thing sold to the prisoner, all the conditions necessary to the discovery of the fact of purchase are forthcoming. I think that the discovery of the purchase of a mattress by the prisoner on the 12th January was the discovery of a relevant fact in consequence of the confessional statements made by the prisoner to P.W. 42 and that the statements distinctly related to the fact discovered. The statements set out in the case reserving the point of law were therefore, in my judgment, admissible.

This conclusion makes it needless for me to discuss the question whether, assuming that the evidence of the prisoner's statements should have been excluded, the other evidence in the case was sufficient to sustain the conviction. But as the

(1) (1921) I.L.R. 49 Cal. 167.

(1) (1929) I.L.R. 10 Lah. 283 (F.B.).

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BURN J. BURN J.—The facts have been set out in the judgment of my learned brothers and need not be repeated by me.

Without meaning any disrespect to the erudite argument of the learned Advocate for the prisoner, I do not propose to refer to any of the English cases quoted by him. The question for our consideration is whether certain statements alleged to have been made by the accused while in the custody of the police are admissible in evidence. It is now settled beyond dispute that the law of evidence in this country is contained in the provisions of the Indian Evidence Act. Therefore, although study of the English cases may be useful and instructive to any one who wishes to learn the history of any particular section, or to grasp the principles underlying the law of evidence, it is not, in my opinion, legitimate to attempt to deduce the law from the English decisions. When the terms of any provision of the Evidence Act are clear and unambiguous, it is our duty to apply them without hesitation. We are not permitted to say, after discussion of the English cases on which the provision is based, that the Legislature must have meant something different from what it has in fact laid down.

The present case is in one sense quite free from complication. The learned Crown Prosecutor did indeed make a submission that the statements of the accused with which we are concerned might

be admissible under section 8 of the Evidence Act as conduct. But, in view of the terms of Explanation 1 to section 8, the learned Crown Prosecutor, very properly as I think, did not seriously press such a contention. The only section with which we have to do is section 27 of the Act. If these statements are admissible at all it must be under section 27. If they come within the terms of section 27, they are admissible; if they do not, they are inadmissible.

Section 27 runs as follows:—

“ Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

As the first word shows, this is a *proviso*, and it is now well settled that it is a proviso to both the sections 25 and 26 which immediately precede it. Those sections exclude confessions made to a Police Officer, and confessions made by any person whilst he is in the custody of a Police Officer, unless in the latter case the confession be made in the immediate presence of a Magistrate. This section therefore provides that if certain conditions are fulfilled, a confession made to a Police Officer, or a confession made by a person in the custody of a Police Officer, may be proved. It is not however necessary that the information given by a person in the custody of a Police Officer shall be a *confession* before it can be proved under the provisions of this section. This is clear from the words used. Any information which relates distinctly to the fact deposed to as discovered in consequence of the information received may be

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BURN J. proved. In addition it is laid down that such proof may be given even if the information amounts to a confession ; it is the words " whether it amounts to a confession or not " which make this section an exception to the general rules embodied in sections 25 and 26.

Strictly speaking therefore it is not important to decide whether the statements alleged in this case to have been made by the accused amount or do not amount to a confession. The section says that even if they do they may be proved, subject of course to the fulfilment of the other conditions prescribed. If they do not amount to a confession they are equally, if not *a fortiori*, provable. For myself I do not see how these statements can properly be described as a confession, in any complete sense. No one, I imagine, would hold that the jury could have convicted the accused of the offence of murder, if nothing more had been proved against him than that he had made these statements. Even if the jury had been entirely satisfied that the accused had made these statements and that they were true, they could not have held on them alone that the accused had committed murder. They are confessional statements in the sense that if believed they establish one of many facts which taken all together prove the guilt of the accused. It is impossible in my opinion to rate these statements higher than that. Indeed, it is merely to state an obvious truth to say that if the police had not been able to adduce any other evidence than this—that the accused had bought the mattress in which the corpse was found tied up, and had that mattress taken to the house in which he was living—he would never have been

put on his trial. The statements are incriminating certainly, and to that extent they are of a confessional nature, but they cannot be properly described as anything like a complete confession. KING-EMPEROR
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Taking now the provisions of section 27, there is no doubt but that the accused, on the 23rd of January 1934, when he is alleged to have made these statements, was a person accused of an offence, and was in the custody of a Police Officer. He had been arrested by the Inspector of Police (P.W. 42) on a charge of murder, and he was in the custody of that officer. The next point to consider is, in the words of the section, whether any fact was deposed to as discovered in consequence of information received from the accused while in custody. This point is really settled by a reference to the evidence of P.W. 10, the shop-keeper, who said he sold the mattress to the accused, and of P.W. 42, the Police Inspector. P.W. 10 says :

" About 10 or 11 days afterwards, about 4 p.m., this Inspector and another Ayyar came with the accused and the accused pointed out the shop, saying that it was in that shop that he purchased the mattress."

This is the first item of evidence reserved for our consideration by my Lord the CHIEF JUSTICE. Again, P.W. 42, the Police Inspector, says in chief-examination that he went to the shop of Muhammad Kasim (P.W. 10) on the information of the accused, and that the accused pointed out the premises, and that he (the Inspector) discovered the witness Thayi (P.W. 11) on her being pointed out by the accused. In answer to a question by the Court the Inspector said :

" Yes. He took me direct to the shop and there pointed out Muhammad Kasim as the man from whom he purchased the mattress."

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Further in cross-examination, the Inspector replied to questions put to him as follows :—

“ Q.—And did you see the woman Thayammal when you went there ?

A.—Absolutely not.

Q.—When did she turn up there ?

A.—It is only after the accused pointed out Muhammad Kasim and while we were coming out, the accused pointed out that woman with coral beads on her neck and said that that was the coolie who carried his mattress.”

These passages show beyond the possibility of doubt that two facts were deposed to as discovered in consequence of information given by the accused. The two facts are : (i) that the mattress was purchased by the accused from P.W. 10, and (ii) that the woman (P.W. 11) was engaged by the accused to carry the mattress to the house in which he was then living. No attempt was made at the trial, so far as can be inferred from the record, to show that these two facts were discovered in any other manner or in consequence of information given by anyone else. The only reasonable conclusion is that these facts were really discovered in consequence of the information given by the accused while he was in the custody of the Police Inspector. That is *more* than is required by the terms of section 27. The section does not require more than that certain facts shall be *deposed to as discovered* in consequence of information received from a person accused of an offence.

As I have said, Mr. T. R. Venkatarama Sastri for the accused does not contend that these facts were discovered in any other manner than that described by the prosecution. Nor does he contend that they are not relevant facts. Indeed, in

a branch of his argument which I shall consider later, he contends that these were the most important facts in the whole case, but for which the jury could not, or at any rate would not, have convicted his client. He is compelled for the purposes of this case to contend that though these are facts, and relevant facts, they are not the kind of facts with which section 27 is concerned.

The argument as I understand it is briefly as follows : Confessions made to the police or by persons in the custody of the police are excluded because there is a grave risk of their being false. But, in the words of Woodroffe and Ameer Ali,

“ the necessity for the exclusion disappears in a case provided for by this section, when the truth of the confession is *guaranteed by* the discovery of facts in consequence of the information given. It is this guarantee, afforded by the discovery of the property, for the correctness of the accused's statement, which is the ground of the admission of the exception to the general rule. The fact discovered shows that so much of the confession as immediately relates to it is true.”

It follows, according to Mr. T. R. Venkatarama Sastri's contention, that the facts referred to in section 27 must be of a particular kind, must have a particular character. They must be of such a nature that by themselves, without any accompanying statement of a witness, they demonstrate the truth of the information given. In one word, he contends, the facts must be “ *self-probatory* ”. This is an instance of the practice which I have already deprecated. From the reason underlying section 27 an attempt is made to deduce the conclusion that section 27 does not really mean all that it says, but only a part of it. Section 27 says “ any fact ”, but, in spite of that, the contention is, we must suppose that it means only facts of

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BURN J. this peculiar nature. I must decline for my part to accept any such contention. Nothing can be easier to understand than the words "any fact", and I am not prepared to hold that they mean less than they say. I shall therefore not discuss any of the numerous cases cited by Mr. T. R. Venkatarama Sastri in which learned Judges have gone the length of holding that the only facts contemplated by section 27 are actual physical material objects. There is no warrant for any such limitation.

It can be even contended very fairly, as the learned Crown Prosecutor has contended in this case, that the facts discovered in consequence of the information received from the accused satisfy the test deduced from the reason underlying the rule. The accused gives information of the facts of his purchase of the mattress and of his engagement of the coolie woman to carry it to his residence. In consequence of that information the police discover the shop, the shop-keeper and the coolie woman. The witnesses when questioned speak to the two facts disclosed by the accused. There is therefore independent proof of the truth of the information given by the accused. What more than this is forthcoming in the cases in which material objects, such as stolen properties or implements of crime, are found? The actual finding of such things in the place where the accused says they will be found proves no more than that the accused knew where they were. He may say, for instance, that he has hidden stolen property in a straw-stack. The stack is searched and the property is found. That, however, is not in any sense proof that it

was hidden there by the accused. The discovery certainly corroborates the accused's statement to some extent, and ordinarily in such a case no one would have any difficulty in believing that the accused had in fact hidden the property there himself. All that I am now concerned to point out is that the mere finding of the property does not in any way by itself corroborate the accused's story of how it got to the place where it is. This will appear in a moment if we consider a case in which an accused person gives information which incriminates another. It will not be far-fetched to suppose for instance a case in which two men have been jointly concerned in a theft. One of them is arrested and he says: "My confederate has buried some of the stolen property in such a place." The place is searched and the property found. Who will consider the finding of the property as any corroboration of the accused's statement that it was *put there by the other man*? The Magistrate or Judge is far more likely to draw the inference that the accused must have put it there himself. Without discussing this matter at greater length it is, in my opinion, sufficiently clear that material objects have not in themselves any greater probative value than any other facts.

Having thus found that all the other conditions required by section 27 are present, I proceed to discuss the only question that remains, which is:—Do these statements, made by the accused, relate distinctly to the facts discovered in consequence of the information given by him? This part of section 27, like all the other parts of it, has been the subject of interpretation in many

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decided cases. I do not think anything is to be gained by an examination of those cases, for a very simple reason. So far as I am able to understand, the glosses on those words, and the interpretations of them to be found in the decided cases are far less simple and intelligible than the words themselves. It is a commonplace of the schools that what is obscure cannot profitably be explained by what is still more obscure. I will venture to say that the Legislature has used the simplest words possible, words which are not susceptible of explanation in more intelligible terms. Our task is merely to decide whether these words apply to the statements laid before us by the learned trial Judge.

Of the eight items with which we have to deal, only one was brought out by the prosecution in the examination-in-chief of P.W. 10. I have referred to this already. It is the passage in which P.W. 10 says : —“ . . . the accused pointed out the shop, saying that it was in that shop that he purchased the mattress.” This of course relates distinctly to the fact of the purchase of the mattress by the accused, and it is clearly admissible under section 27. One item, the 7th in the Order of the learned trial Judge, is an answer given by the coolie woman to a question put by the Court. That woman (P.W. 11) says : “ When I went there the accused said, ‘ It was this woman that carried the article ’ ”. This statement undoubtedly relates distinctly to the fact that the accused engaged that woman to carry the mattress to the house in which he was living. That also is admissible under section 27. All the other items were brought out in the cross-examination, by the

learned Advocate for the defence, of P.W. 10, P.W. 11 and P.W. 42. No one suggests that statements which would be inadmissible if offered in examination-in-chief for the prosecution can become admissible merely because they were made in answer to questions put in cross-examination. It is, however, a fair presumption that the questions put in cross-examination, especially when they are put by a learned Advocate described by the learned trial Judge as a gentleman of very great experience, will not be quite irrelevant, or unrelated to the matters in issue. In the present case that presumption is borne out by the facts ; the questions were very relevant and had a very near relation to the facts. Items 2, 3, 4 and 5 appear in the cross-examination of P.W. 10. They are as follows :—

“ The accused himself pointed out the shop, saying that it was at this shop that he purchased, adding, ‘ I paid an advance of annas 8 and I subsequently paid Rs. 2-8-0 ’.

The accused looking at me said ‘ I have purchased from him on the 12th a coir mattress.’

It was the accused that was looking at me and asking me, ‘ I purchased from you, is it not, on the 12th a coir mattress ? ’

Thereupon the accused said, ‘ I purchased it of you for Rs. 3 ; I paid an advance of eight annas and I sent the balance of Rs. 2-8-0 through the coolie woman.’ ”

The first and fourth of these statements describe the terms of the purchase, and I do not understand how it can fairly be contended that the terms of a purchase do not distinctly relate to the fact of the purchase. The second and third of these four statements are mere repetition of the statement made in the chief-examination of the same witness, with the addition of the date of purchase and of the person who sold the mattress.

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BURN J. These additions also distinctly relate to the fact of purchase, unless it can be held that the identity of the vendor and the date of sale are matters which do not relate to the fact of a sale.

Items 6 and 7 occur in the deposition of P.W. 11. I have already dealt with item 7. Item 6 is P.W. 11's answer to the question :—

“When you saw this accused on that day did you remember his features when the police asked you about him from what you saw him on that day?”

The reply was :

“The accused himself mentioned me and said that it was a woman wearing a coral necklace.”

When the fact discovered in consequence of the information received from the accused is the fact that he engaged a certain woman to carry the mattress to his house, I fail to see how it can be argued that the identity of the woman is not a matter distinctly related to the fact. The statement of the accused that P.W. 11 was the woman, and the addition of the detail that she was wearing a coral necklace, are clearly admissible under section 27.

The eighth and last item of evidence with which we have to deal is the answer given by the Police Inspector to a question put to him in the course of a cross-examination intended apparently to elicit whether it was really true that the woman Thayammal (P.W. 11) was pointed out to the police by the accused. The learned Advocate first asked the witness :—

“And did you see the woman Thayammal when you went there?”

The reply was :—

“Absolutely not”.

Then the Advocate asked :—

“When did she turn up there?”

and the Inspector replied :

“It is only after the accused pointed out Muhammad Kasim and while we were coming out, the accused pointed out that woman with coral beads on her neck and said that was the coolie who carried his mattress.”

This was precisely the information given by the accused which led directly to the discovery of the fact that he had engaged that woman to carry the mattress to his house, and proof of it is certainly admissible under section 27.

For these reasons I agree with my learned brother CORNISH J. that none of the evidence referred to in the Order of the learned trial Judge was inadmissible.

[His Lordship then considered the question whether, even if the statements in question were inadmissible, the verdict of the jury could or should be sustained and proceeded :—]

In these circumstances I am satisfied that independently of the evidence now in question there was sufficient evidence to justify the decision, and that consequently section 167 of the Evidence Act would forbid us to interfere. I would go further, in view of the *dicta* in certain reported cases, and would say that in my judgment the omission of these items of evidence could not have made any difference to the verdict.

The conviction and sentence must therefore be confirmed.

LAKSHMANA RAO J.—The accused was tried at the third Criminal Sessions, on an indictment under section 302 of the Indian Penal Code, for intentionally causing the death of one Sithammal by manual strangulation on the night of the 11th

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of January 1934, at No. 24 Peddunaicken Street, Georgetown, Madras, and the jury found him guilty of the offence by a majority of six to three. The trial Judge, my Lord the CHIEF JUSTICE, agreed with the majority verdict and the accused was sentenced to death. He moved the Advocate-General for a certificate under Clause 26 of the Letters Patent, which empowers him to certify that a point or points of law which has or have been decided by the Court should be further considered, and the Crown Prosecutor opposed the application. The Advocate-General gave a certificate regarding the reception in evidence of certain statements made by the accused while in the custody of the police, to which exception was not taken at the trial, and the omission of the trial Judge to direct the attention of the jury to the question of the continued possession till her death by the deceased of the silver articles pledged by the accused subsequent to the murder, and the accused applied for a review of the case under Clause 26 of the Letters Patent. The Crown Prosecutor intimated his intention to question the interpretation of the words "decision on a point of law decided by the trial Judge" in the Full Bench decision in *C. K. N. Sundaresa Iyer v. King-Emperor*(1) and to take a preliminary objection to the competency of the application, on the ground that there was no decision on a point of law by the trial Judge requiring further consideration, and a Full Bench of seven Judges was formed to consider the objection. The Full Bench upheld the preliminary objection by a majority of five to two, and it further held that the question of continued possession of the silver

(1) 1930 M.W.N. 249 (F.B.).

articles till her death by the deceased did not arise in the case, in view of the plea of the accused that they belonged to him and not to the deceased. The application for review was therefore dismissed, and since the question of the admissibility of the statements made by the accused while in the custody of the police and the effect of their admission, if inadmissible, could not be considered therein, the learned CHIEF JUSTICE has in the exercise of his powers under Clause 25 of the Letters Patent reserved it for the opinion of the High Court.

[His Lordship then set out the facts of the case and proceeded:—]

It was at P.W. 10's shop that the statements in question which are set out below were made and they came on record in the following manner. P.W. 10 was questioned in examination-in-chief whether the police came to him in connection with the case, and he stated:

"P.W. 42 came with the accused and the accused pointed out the shop saying that it was in that shop that he purchased the mattress."

It was elicited in cross-examination that he had sold some other articles on the 12th January and, in reply to a further question whether he remembered the purchasers, P.W. 10 stated:

"It is because ten or eleven days after he made the purchase he came to the shop and himself pointed out the shop saying, that it was at this shop that he purchased, adding 'I paid an advance of 8 annas and I subsequently paid Rs. 2-8-0', that I remember him."

He was asked next whether the accused stated in his presence that it was the shop in which he purchased, and the witness stated:

"The car stopped in front of my shop at about 4 p.m. They all got down and entered the shop, and as soon as they

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entered the accused looking at me said 'I purchased from him on the 12th a coir mattress'."

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He was then asked whether P.W. 42 stated anything, and the answer was :

"It was the accused that was looking at me and asking me 'I purchased from you, is it not, on the 12th, a coir mattress.'"

The cross-examination was pursued and the witness stated :

"The police then asked me to take the account and I showed the account. When I looked into the account, I found that on the 12th there was a sale of a coir mattress and two pillows for Rs. 3-12-0 and another coir mattress for Rs. 3 and I said therefore I did not know whether it was the one or the other that I sold the accused. Thereupon the accused said 'I purchased it of you for Rs. 3. I paid an advance of 8 annas and I sent the balance of Rs. 2-8-0 through the coolie woman.'"

P.W. 11 was asked in cross-examination whether she remembered the features of the accused from what she saw of him on the date of purchase, and she stated :

"The accused himself mentioned me and said that it was a woman wearing a coral necklace."

Then, in answer to a question by the Court, she stated :

"When I went there the accused said 'it was this woman that carried the article'."

and P.W. 42 deposed in examination-in-chief that he discovered P.W. 11 on being pointed out by the accused. He was cross-examined about it and he stated :

"It was only after the accused pointed out P.W. 10, and while we were coming out, the accused pointed out that woman with coral beads on her neck and said that that was the coolie who carried the mattress."

The purchase of the coir mattress in which the corpse was packed and its carriage to the alleged

scene of crime through the coolie woman on the 12th January suggest the inference that the accused committed the crime and the contention that the statements in question do not amount to a confession is untenable. They were made while in the custody of the Police Officer and their admissibility depends upon the correct interpretation of section 27 of the Indian Evidence Act which is in these terms :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The discovery of a fact as the result of the information is a condition precedent to the reception in evidence of the information or any portion thereof, and, as pointed out in the Full Bench decision in *Sukhan v. The Crown*(1), though the expression "fact" as defined by section 3 of the Indian Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious, it is in the former sense that the word is used in section 27. The fact discovered should therefore be a material and not a mental fact, and, as observed by the learned authors, Woodroffe and Ameer Ali, in their Commentary on the Evidence Act,

"the word 'discovery' may either mean the purely mental act of learning something which was not known before to a person, as the mere mental act of becoming aware of something after hearing it stated, or the physical act of finding upon search or inquiry something or material fact, the existence

(1) (1929) I.L.R. 10 Lah. 283 (F.B.).

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or the exact locality of which was unknown till then. It is in the latter sense that the word is used in this section, that is in the sense of a finding upon a search or inquiry of articles connected with the crime or other material fact, the reason being that it is only this kind of discovery which proves that the information in consequence of which the discovery was made is true and not fabricated."

The fact discovered may thus be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or a material thing in relation to the place or the locality where it is found, and it should confirm the information though its connection with the crime and identification are always provable *aliunde*. The discovery of a witness to the crime or act of the accused, on his information, would not be a discovery of a fact within the meaning of the section, vide *Palaniandi Velan v. Emperor*(1), and the confirmation or otherwise of the statement of the accused by the witness discovered cannot make any difference. Further, section 162 of the Code of Criminal Procedure prohibits the use of any statement by the witness to the investigation officer, and the discovery should in my opinion be of some concrete fact. The *karas* being found in the possession of the pledgee in *Sukhan v. The Crown*(2) would be a fact discovered in this sense, and so would the finding of the person kidnapped and wrongfully confined at the place mentioned by the accused in the illustration suggested by the Crown Prosecutor. There would be no discovery in those cases if the *karas* and person kidnapped were not found, and it is well settled that even when a thing is discovered the

(1) 1934 M.W.N. 601.

(2) (1929) I.L.R. 10 Lah. 283 (F.B.).

statement of a prisoner as to how he came by it cannot be proved. The statements in this case are of this nature and they were verified by P.W. 42, the Police Officer, by examining the witnesses pointed out by the accused. He cannot be said to have discovered any fact within the meaning of section 27 of the Indian Evidence Act and in my opinion the statements in question are not admissible in evidence.

The case has therefore to be reviewed on the evidence properly admissible, and, as pointed out in *Emperor v. Panchu Das*(1), it is incumbent on this Court to investigate whether independently of the evidence improperly admitted there is sufficient evidence to justify the conviction.

[His Lordship then considered the evidence and concluded that the jurors who had found the accused guilty would have come to the same conclusion independently of the statements in question and proceeded:—]

There is therefore no ground for interference and the conviction and sentence will stand.

[After the above decision of the Full Bench the prisoner applied for leave to appeal to the Privy Council. That application came on for hearing before their Lordships, CORNISH, BURN and LAKSHMANA RAO JJ. and their Lordships passed the following order on 4th December 1934:—]

This petition for leave to appeal to the Privy Council is made in a case where a point of law has been reserved for the decision of the High Court. There can be no doubt then, from what is said by their Lordships in *Barendra Kumar Ghosh v. Emperor*(2), that the petition is competent. But the right of appeal given by Clause 41 of the Letters Patent is subject to the proviso that the High Court shall declare that the

(1) (1920) I.L.R. 47 Calc. 671 (F.B.). (2) (1924) I.L.R. 52 Calc. 197 (P.C.).

KING-EMPEROR case is a fit one for appeal. The High Court, therefore, has the duty of satisfying itself, before declaring a case fit for appeal, that the case falls within the limits prescribed by the Privy Council for the entertainment of appeals in criminal matters.

Their Lordships of the Judicial Committee have repeatedly declared that they are not a Court of criminal appeal. In *Dal Singh v. King-Emperor*(1) they say:—"It is well-settled that the unwritten principles of the constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice." And again:—"A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below."

The learned Advocate for the petitioner has founded his argument in favour of the petitioner on two grounds. First, that a wrong construction has been put upon section 27 of the Indian Evidence Act, resulting in the wrongful admission of confessional statements. His second ground relates to the application of section 167 of the Evidence Act. The construction put upon section 27 by the majority of us has ceased to be of practical importance in the case because we have unanimously held that independently of the questioned statements there was sufficient evidence to justify the conviction. There is nothing in the Evidence Act to support the suggestion that section 167 has no application to a case tried by a jury at the High Court Criminal Sessions. On the contrary, there is good authority that section 167 is applicable and that the High Court in exercising its power of review under Clause 26 of the

(1) (1917) I.L.B. 44 Calc. 876 (P.C.).

Letters Patent has full power to decide whether the evidence properly received at the trial is sufficient to sustain a conviction: see *Queen v. Hurribole Chunder Ghose*(1), *Imperatrix v. Pitamber Jina*(2) and *Empress v. Patrick McGuire*(3). No doubt, as urged by the learned Advocate, important questions of law are raised in the case; but that circumstance would not, in the light of what is said by their Lordships in *Dal Singh v. King-Emperor*(4), be a valid reason for sanctioning a further appeal. Admittedly the other evidence given at the trial was properly received, and in our opinion it is sufficient to support the conviction. We think, therefore, that we should not be justified in declaring this case fit for appeal.

[An application was made to His Majesty in Council for special leave to appeal in the above matter. The petition was heard on 16th April 1935 by a Board consisting of Lord THANKERTON, Lord WRIGHT and Sir SHADI LAL.

D. N. Pritt K.C. and C. Sidney Smith instructed by Hy. S. L. Polak & Co. appeared for the petitioner. A. M. Dunne K.C. and W. Wallach instructed by Solicitor, India Office, appeared for the respondent.

The Board after hearing the arguments for the petitioner dismissed the petition without calling on Counsel for respondent.]

A.S.V.

(1) (1876) I.L.R. 1 Calc. 207.

(2) (1877) I.L.R. 2 Bom. 61.

(3) (1900) 4 C.W.N. 433 (F.B.).

(4) (1917) I.L.R. 44 Calc. 876 (P.C.).

PRIVY COUNCIL.

J.C.
1935,
February 12.

NUNE SIVAYYA AND ANOTHER, APPELLANTS,

v.

MADDU RANGANAYAKULU AND ANOTHER, RESPONDENTS*
[AND CONNECTED APPEAL].

[On Appeal from the High Court at Madras.]

Sale of goods—Time for delivery not provided—Lapse of reasonable time—Duty of buyer to apply for delivery—“Absence of any special promise”—Repudiation—Grounds stated for repudiation—Suit for damages for breach—Indian Contract Act (IX of 1872), sec. 93.

By section 93 of the Indian Contract Act, 1872—“In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.”†

The words “special promise” in the section mean an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery, or the necessary implication of such a stipulation from the nature of the contract as expressed. It might also arise out of usage or custom of trade, as provided by section 1 of the Act. But an obligation upon the seller to inform the buyer when the goods are in a deliverable state, said to arise in the present case because the goods had to be obtained by the seller from distant mills, is not a “special promise” within section 93, though it may postpone the obligation of the buyer to apply for delivery; on the elapsing of a reasonable time to enable the seller to procure the goods, the buyer would be entitled and bound to apply for delivery. When the buyer so applies under section 93 the time within which the seller is bound to deliver depends upon the nature and circumstances of the particular contract.

In a suit for damages for breach, by repudiation, of a contract for the sale of goods, the defendant can rely upon any ground for repudiation which existed when he repudiated; he

* Present: Lord THANKERTON, Lord ALNESS and Sir SHADI LAL.

† Section 93 was replaced by section 35 of the Sale of Goods Act, 1930, in which the words “apart from any express contract” are substituted for “in the absence of any special promise.”

is not confined to the ground which he then stated. So far as *dicta* to the contrary in *Braithwaite v. Foreign Hardwood Company*, [1905] 2 K.B. 543, conflict with the principles laid down by Lord SUMNER in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others*, [1923] A.C. 48, 71, they are incorrect.

Consolidated Appeal (No. 64 of 1930) from two decrees of the High Court (September 22, 1927) affirming two decrees of the Subordinate Judge at Bapatla (March 31, 1923).

The appeal arose out of two suits, but in substance related only to Suit No. 86 of 1919. That suit was brought by the appellants as sellers against the respondents as buyers claiming damages for the breach, by repudiation, of contracts made in August 1918 for the sale of yarn. The contracts, which specified no time for delivery, had been partly performed, but on January 3, 1919, the buyers had refused to take further deliveries on the ground that an unreasonable time had elapsed since the date of the contracts. Both Courts in India had dismissed the suit holding that a reasonable time for delivery had expired at latest by the end of November 1918.

The facts of the case appear from the judgment of the Judicial Committee.

Dunne K.C. and *Subba Row* for appellants.—Although under section 46 of the Indian Contract Act performance of the contracts had to be within a reasonable time, the appellants, under section 93, were not bound to deliver until the respondents applied for delivery. As they had not done so there was no default by the appellants on December 19, 1918, when they required the respondents to take delivery. There was no ground for treating the contracts as cancelled or abandoned so as to make section 93 inapplicable: *Jones v. Gibbons* (1), *Pearl Mill Co. v. Ivy Tannery Co.* (2) and *Hartley v.*

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(1) (1853) 8 Ex. 920; 155 E.B. 1626.

(2) [1919] 1 K.B. 78.

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Hymans(1). The respondents' letter of January 3, 1919, was a repudiation entitling the appellants to sue for damages. The respondents cannot now rely upon grounds for repudiation not relied upon in their letter of repudiation: *Braithwaite v. Foreign Hardwood Company*(2), and *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others*(3). That principle has been applied in India: *Nannier v. Rayalu Iyer*(4) and *Ganesh Das-Ishar Das v. Ram Nath*(5).

Upjohn K. C. and Narasimham for respondents.—Both Courts in India held that a reasonable time for performance expired in November 1918. As the contracts did not provide for delivery "as required" the appellants could not on December 19, 1918, rely upon the fact that delivery had not been applied for: *Pearl Mill Co. v. Ivy Tannery Co.*(6), and *Hartley v. Hymans*(1). The appellants thereupon could not on December 19, 1918, require the respondents to take delivery. Further, as held by the High Court, section 93 did not apply, because the contracts were for goods which the appellants had to obtain from distant mills and the respondents could not know when the goods were available; the course of business and the pleadings estopped the appellants from relying upon the section. Moreover the High Court rightly found that the absence of deliveries after October was due to the appellants' failure to take delivery from the mills, and that in December they were not in a position to deliver any goods except those sold by auction. The respondents are entitled to rely upon any ground for repudiation existing on January 3, 1919. Having regard to the judgment of Lord SUMNER in the *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others*(3), *Braithwaite v. Foreign Hardwood Company*(2) is not an authority to the contrary.

Subba Row replied.

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The JUDGMENT of their Lordships was delivered by Lord THANKERTON—This is a consolidated appeal from a judgment and two decrees of the High Court of Judicature at Madras, dated the 22nd September 1927, which affirmed a judgment and two decrees of the Court of the Subordinate

(1) [1920] 3 K.B. 475.
(3) [1923] A.C. 48, 70-72.
(5) (1927) I.L.R. 9 Lah. 148.

(2) [1905] 2 K.B. 543.
(4) (1925) I.L.R. 49 Mad. 781.
(6) [1919] 1 K.B. 78.

Judge, Bapatla, dated the 31st March 1923, and made in Original Suits Nos. 86 of 1919 and 83 of 1922.

In Original Suit, No. 86 of 1919, the appellants sue the respondent No. 1, in Appeal No. 64 of 1930, and his minor son, to whom he is guardian *ad litem*, respondent No. 2 in said Appeal for damages for breach of contract in respect of five contracts of sale of bales of yarn made between the 10th and the 19th August 1918, and this suit has been dismissed by the Court below. In Original Suit No. 83 of 1922 the respondent No. 1 in the above appeal sues the appellants for an amount due in respect of goods supplied, and this suit, out of which the second appeal arises, has been decreed in the respondent's favour, the only defence of the appellants having been that the amount so due has been taken into account in their claim against the respondent in Suit No. 86 of 1919.

The five contracts (Exhibits A, B, C, D and E) were for the purchase of 155 bales of yarn in all, the respective quantities and description being as follows:—

A.—Ten Gaigoda yarn bales and five Raipur yarn bales,

B.—Forty-five Tinnevelly yarn bales,

C.—Sixteen Astodia yarn bales,

D.—Forty-five Goka yarn bales and ten Jemsetjee yarn bales, and

E.—Twenty-four Broach yarn bales.

Upto the 11th October 1918, delivery had been made and accepted of five Gaigoda bales under contract A, thirty Tinnevelly bales under B, and seven Broach bales under E. No question arises as to the ten Jemsetjee bales under D, and they

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need not be further referred to. It may be taken, as the admitted result of the findings of the Courts below, that no further delivery was offered or asked for until the 19th December 1918. The respondents had not paid in full for the bales already delivered, and respondent No. 1 admits that he was indebted to the appellants for over Rs. 26,000 by the end of October. This indebtedness, however, was subsequently discharged by him. It may be added that a serious fall in prices began in the month of September with further gradual falls in the next three months.

On the 19th December 1918, the appellants sent a lawyer's letter to the respondents in the following terms:—

"You have struck a bargain with the people of Chirala Dukanam (shop) pertaining to our clients, Nune Ranganayakulu Garu and Panakalu Garu, agreeing to take delivery from time to time of 160 bales of different sorts of yarn according to different rates and to pay the amount forthwith. Out of that you have taken delivery from time to time of 54 bales and paid some amount. Still there is due about Rs. 24,000 and interest in respect thereof. Out of the bales to be delivered to you, 5 bales of No. 40 Gaigoda yarn and 5 bales of No. 40 Raipur yarn, in all 10 bales are ready at Chirala and 45 bales of No. 26 Goka yarn at Guntur.

You are hereby informed that you should within 31-12-18 pay money and take delivery of the 10 bales of Gaigoda and Raipur yarn, that you should take delivery of No. 26 Goka bales at Guntur if you so please, that if you do not agree to the same and want the goods to be sent to Chirala alone, our clients are ready to despatch them, that you should, by return post, inform our clients about your opinion as regards this, that intimation would be given as soon as the other goods are ready, that, if you fail to take delivery of the goods that are ready, you would be liable to the entire loss caused to our clients, that you should forthwith pay also the principal and interest due by you to our clients as per khata in respect of goods previously taken delivery of and that, otherwise, a suit would be instituted."

To this the respondents sent a reply, also drawn by a lawyer, and dated the 3rd January 1919, in the following terms:—

"Notice issued by M.R.Ry. Govindarajula Venkata Srinivasa Rao, High Court Vakil, Madras, on behalf of Maddu Ranganayakulu Garu, to M.R.Ry. Yeka Lakshmi Narasimham Pantulu Garu.

My client gave me the notice, dated 19th December 1918 sent to him by you on behalf of Nune Ranganayakulu Garu and Nune Panakalu Garu, residents of Guntur, with instructions to give a reply thereto with the matters herein below. I have, therefore, to inform you as follows:—

According to the arrangements effected between your clients and my client, your clients are bound to deliver all the goods relating to the contracts mentioned in your notice, within two months from the dates of the respective contracts. When you have failed to do so my client is not bound to take delivery of the goods after the expiry of the due date. According to the said terms, my client has taken delivery of all goods delivered by your clients within the due date. My client has no objection whatever to pay the amount ascertained to be due to your clients on looking into the accounts relating thereto. It is very strange to write, long after the expiry of the due date, that some goods are now ready, that they should be taken delivery of, and that intimation would be given as soon as the remaining goods are got ready. Your client has no right to ask that the goods should be taken delivery of after such an unreasonable delay. My client is not bound to take delivery either of the goods alleged to have been made ready now or of the goods that might be made ready hereafter. Only on account of the default of your clients, the contracts relating to the said goods were not enforced. They have been cancelled. My client is not liable to pay any damages whatever to your clients. Because your clients were unable to pay the amount due to the mill people, and because your clients were unable to get goods in time from the mill or to take delivery even of the goods received, not only did you fail to supply goods to my client as per contracts but you also write that some goods are ready because the prices have now fallen very low, devising some plan with the evil intention of obtaining wrongful gain. It is learnt that, even as regards the goods which your clients

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have intimated that they are ready, some have not as yet been delivered to your clients. If however it is held for argument's sake that there is nothing like two months' time, all the said contracts are void and are not at all valid in law. Your clients will not have any benefit in the least from such contracts".

The appellants responded on the 23rd January 1919 as follows :—

"The registered letter written on 3rd January 1919 by M.R.Ry. Govindarajula Srinivasa Pantulu Garu on your behalf to Nune Panakalu Garu and Ranganayakulu Garu has been sent to us with instructions to reply to the said letter in this manner. No arrangement was ever entered into between you and our clients, as mentioned in your letter, to deliver the goods either within two months of the date of contract, or within any other time-limit or within any stipulated period. It is also improbable that it should have been effected in the said manner. While you were unable to pay the entire amount, took delivery only of some goods mentioned in the contract out of the goods sent by the mill people to our clients and while unable to pay in full the entire amount also due therefor, you stated that our clients are unable to pay the amount, that they could not deliver the goods, that the contract which was in force when the prices were high have now become void in law, that there was time fixed for the delivery of the goods, and that there was unreasonable delay in excess of the time fixed. While our clients were intimating by means of a registered letter that the goods were ready, you entertained doubts even about it and set up false matters bringing into existence imaginary difficulties on account of the present market rate and that we would not at all be benefited thereby. You are hereby informed that, within the end of this month, you should pay the amount due for the 5 bales of No. 40 Gaigoda yarn and for the 5 bales of No. 40 Raipur yarn, in all, for 10 bales remaining at Chirala with our clients on your account, and the 45 bales of No. 26 Goka remaining in Guntur which are ready, as well as the sum of Rs. 15,500 due to our clients as per previous khata together with the interest thereon and should take delivery of the same; that if you should still entertain the doubt that the goods are not ready, and if you should pay the amount to us, the goods would be arranged to be delivered at our office whenever desired by you; that, if you fail to do so, the 5 bales

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of No. 40 Gaigoda yarn and the 5 bales of No. 40 Raipur yarn, in all 10 bales remaining at Chirala, will be sold in public auction on 2nd February 1919 at your risk in Chirala market by M.R.Ry. Kona Venkata Rao Pantulu Garu, Vakil, District Munsif's Court, Bapatla, and the 45 bales of No. 26 Goka yarn will be sold in public auction on 6th February 1919 at your risk, at the office of Messrs. R. P. Gill and Co., in Guntur Bazaar by M.R.Ry. Kotamraju Venkata Hanumantha Rao Pantulu Garu and that a suit will be instituted without any fresh notice, for the balance sum due to our clients after deducting the net amount realised by the sale after meeting the expenses, and for the amount due on *khata*. Be it known further that, as you have informed our clients by means of the reply dated 5th January 1919 given by you that you do not require the goods remaining in respect of your bargains, my clients are entitled to recover the loss according to the price prevailing in the market on the said date, that you should settle the affair by calculating the amount in the said manner that, if you fail to do so, a suit will be instituted therefor also and that interest at Re. 1 per cent per mensem will be charged on the said amount of damages from 5th January 1919."

Thereafter the appellants sold the 55 bales by public auction, and, on the 14th August 1919, they brought the present suit against the respondents for the balance due on the bales sold in auction and for damages in respect of the remaining bales undelivered under contracts B, C and E.

The main question is whether the respondents were justified on the 3rd January 1919 in treating the contracts as cancelled, or whether the appellants were justified, on the 23rd January 1919 in treating the respondents as having thereby unjustifiably repudiated the contracts. The decision of this question turns on determination of the exact nature of the contractual obligations as to delivery.

The appellants maintained that—there being no express stipulations in the written contracts—the contracts are governed by section 93 of the

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Indian Contract Act (Act IX of 1872), which provides as follows:—

“93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.”

Although Chapter VII of the Contract Act, which included this section, has since been repealed by the Sale of Goods Act (Act III of 1930), the section re-appears as section 35 of the latter Act but with substitution of the words “Apart from any express contract” for the words “In the absence of any special promise”. The appellants also maintained that the respondents were not entitled to seek to justify their repudiation of the 3rd January 1919 except on the two grounds stated in their letter of that date, and further that, assuming section 93 did not apply, the respondents were bound, even after the expiry of a reasonable time for delivery by the appellants, to ask the appellants if they would deliver, before they were entitled to treat the contracts as cancelled.

The respondents maintained that section 93 does not apply to the suit contracts, and that, as the Courts below have concurrently found that the reasonable time for delivery under these contracts had expired at latest by the end of November 1918, they were entitled on the 3rd January 1919 to treat the contracts as cancelled. The respondents further maintained that the appellants’ offer of the 55 bales on the 19th December 1918 was not a genuine offer, but this seems to be irrelevant if the respondents were under the obligations of section 93. They further questioned the genuineness of the auction sales of these

55 bales, but that is a minor point which will be considered later.

It is necessary to advert to the course of the case in the Courts below. Before the trial Judge, the appellants do not appear to have founded on section 93, but they led evidence to prove that they had made oral offers of delivery prior to the 19th December 1918, and that in November the respondents had come to a settlement of the matter, which they had departed from. The trial Judge held against both these contentions. The respondents, on the other hand, maintained (a) that delivery within two months was a term of the contract, (b) that, failing that, the contracts were void from vagueness and uncertainty, and (c) that, in any event, the appellants were unable to deliver and did not offer to deliver the goods within a reasonable time from the dates of the suit contracts, and that the respondents were therefore justified in rescinding the contracts. The trial Judge held against the respondents on (a) and (b), which were the grounds stated in the respondents’ letter of the 3rd January 1919 but decided in their favour on (c), holding that a reasonable time for delivery had expired at latest by the end of November. On appeal by the appellants, the High Court held that section 93 did not apply to the suit contracts, and concurred with the decision of the trial Judge. They stated their reason for holding section 93 to be inapplicable as follows:—

“That contention is against the plaintiffs’ pleadings in the suit; it is against the evidence of P.W. 1, their senior clerk, agent and accountant, as to the custom of their business in respect of such contracts; it is against the very nature of the contracts themselves, under which the plaintiffs were to

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procure from distant parts of India goods, the arrival of which would be within their knowledge and not within the knowledge of the defendants."

It is important to observe that section 93 applies unless there is a "special promise", which, in their Lordships' opinion, indicates an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery, or the necessary implication of such a stipulation from the nature of the contract as expressed. It might also arise out of usage or custom of trade, as provided in section 1 of the Contract Act. But, in their Lordships' opinion, an obligation—assuming that it existed in the present case, as is suggested by the High Court—on the seller to inform the buyer when the goods are in a deliverable state is not a special promise within the meaning of section 93, though it may postpone the obligation of the buyer to apply for delivery, and, on the lapse of a reasonable time to enable the goods to be procured by the seller from the mills, the buyer would be entitled and bound to apply for delivery.

There is no case made or proved of custom or usage of trade, and their Lordships are of opinion that, looking at the evidence as a whole, it is neither proved as a term of the contracts, nor is it a necessary implication from the nature of the contracts, that the buyer was to do nothing until he received an intimation from the seller of the arrival of the goods from the mills. If that be the right view, then there is no special promise, such as would exempt the buyer from his obligation under section 93. It must be remembered that, when the buyer applies for delivery under section 93, it will be a question depending on the

nature and circumstances of the particular contract as to the time within which the seller is bound to comply with the buyer's demand.

Their Lordships are therefore of opinion that the respondents failed to fulfil their obligation under section 93, and that they were not entitled on the 3rd January 1919 to treat the contracts as cancelled.

In maintaining that the respondents were not entitled to justify their repudiation of the 3rd January 1919 except on the two grounds then stated, the appellants founded on the case of *Braithwaite v. Foreign Hardwood Company*(1), but that case related to the effect of repudiation by a party to a contract as involving waiver of performance by the other party, who was not the repudiating party, of any contractual obligations subsequent to the date of the repudiation, and, in so far as any judicial dicta in that case may be said to go further and are in conflict with the principle as expressed by Lord SUMNER in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co. and others*(2) their Lordships are of opinion that they are incorrect, and that the respondents are entitled to justify their repudiation on any ground which existed at the time of the repudiation.

The respondents also sought to maintain that, before the date of their repudiation, the appellants had disabled themselves from fulfilling the balance of the contracts, by cancelling their contracts with the mills, or having pledged some bales received from the mills with the bank. But there is no evidence to show that, if the respondents had

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(2) [1923] A.C. 48, 71.

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applied for delivery and at the same time tendered the contract price, as they were bound to do, the appellants would not have been able to satisfy the demand. Such a contention more naturally arises where particular goods have been specifically appropriated to the contract. Their Lordships are also of opinion that the contention of the respondents that the appellants by their conduct had waived or dispensed with the respondents' obligation under section 93 is not supported by the evidence. It is unnecessary to deal with the contentions of the parties on the assumption that section 93 does not apply to the suit contracts.

The respondents' charge against the *bona fides* of the sale of the 55 bales by auction was based on a finding of the learned trial Judge. The matter was not referred to by the High Court, as it was not necessary for them to consider it. The trial Judge based his finding that the sale of the whole 55 bales was a sham on the admissions of the appellants' first witness, already referred to above. The evidence is that one Chunduri Swami purchased the first lot of two bales of Raipur yarn for Rs. 1,300, that he did not purchase on behalf of the appellants, and that the appellants advanced that sum to Chunduri Swami and debited him with the amount. Their Lordships are unable to agree with the trial Judge that such evidence proves that the sales were a sham. No attempt was made to prove that the appellants had retained the bales. The evidence only related to two bales out of the 55, and the price given for these two bales was only one anna less than was immediately thereafter given for the second lot of three Raipur bales by a purchaser against whom

no suggestion has been made ; both lots were the subject of contested bidding.

Their Lordships therefore hold that the appellants were entitled to treat the respondents' letter of the 3rd January 1919 as a wrongful repudiation of the five suit contracts and to rescind the contracts and recover damages from the respondents. It will be necessary to remand both suits for the ascertainment of the damages in Original Suit No. 86 of 1919, the liability of the appellants under Original Suit No. 83 of 1922 being taken into account in arriving at the appropriate decrees in both suits.

Accordingly their Lordships will humbly advise His Majesty that the judgment and two decrees of the High Court dated the 22nd September 1927, and the judgment and two decrees of the Subordinate Judge, dated the 31st March 1923, should be set aside and that both suits should be remanded to the High Court as already mentioned. The appellants will have their costs in the consolidated appeal, and in the proceedings in the Courts below prior to this time. The costs of the future proceedings in India will be dealt with by the Court disposing of the case.

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

Solicitors for defendant-respondents : *Douglas Grant & Dold.*

A.M.T.

SIVAYYA
v.
RANGA-
NAYAKULU.
—
LORD
THANKERTON.

REFERENCE UNDER THE DIVORCE ACT.

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

ROI (BARI) STREE (PETITIONER), PETITIONER,

v.

RASSINGA NAIK AND ANOTHER (COUNTER-PETITIONER AND
NIL), COUNTER-PETITIONERS.*

*Divorce—Husband—Misconduct of—Cessation of cohabitation
between husband and wife as a result of—Desertion in
law—If, committed by husband—Indian Divorce Act (IV of
1869), sec. 10.*

A wife separated herself from her husband on account of his adultery with a concubine in his house.

Held that, inasmuch as the conduct of the husband brought about a cessation of cohabitation between himself and his wife, in law he had committed an act of desertion.

Dickinson v. Dickinson, (1889) 62 L.T. 330, and *Sickert v. Sickert*, [1899] P. 278, followed.

CASE referred by the Agent to the Governor, Ganjam at Chatrapur in his letter, Ref. Original Petition No. 1 of 1932, dated 17th February 1933, under section 9 of the Indian Divorce Act, for decision of the High Court (Miscellaneous Case No. 1 of 1929 on the file of the Court of the Subdivisional First Class Magistrate and Special Assistant Agent, Balliguda Division).

C. P. Connell appeared as *amicus curiae*.

BEASLEY C.J. BEASLEY C.J.—The ORDER of the Court was delivered by
The ORDER of the Court was delivered by
by the Agent to the Governor at Ganjam. It relates to a petition for divorce on the grounds of adultery and desertion under section 10 of the Indian Divorce Act. The facts of the case are

that the petitioner separated herself from her husband on account of his adultery with a concubine in his house. On these grounds she was awarded maintenance by a Criminal Court on the 29th July 1929 at the rate of Rs. 2 a month. This order the respondent failed to comply with, only paying Rs. 13-3-0 to the petitioner from that date and no more. The learned Agent to the Governor says that, although for judicial separation adultery or desertion may form a reasonable cause, both these facts have to exist before a dissolution can be ordered, but he is of the opinion that the husband's living in adultery does not imply that he deserted the petitioner, but that the fact that he failed to maintain her even after a decision of a competent Court may imply desertion. In his opinion it does do so. The decision of the High Court is requested upon this latter point. The learned Agent to the Governor has, if I may say so, overlooked the real point or the point of importance, which is, whether the conduct of the husband brought about a cessation of cohabitation between himself and his wife. If it did, then in law that is desertion. In the present case the husband brought a concubine into the house where his wife was living with him and she had accordingly to leave the house. There is clear authority in English decisions that such conduct as that by a husband amounts to desertion. The first of these decisions is *Dickinson v. Dickinson*(1), a case exactly in point. There, a wife petitioned for the dissolution of her marriage on the grounds of adultery and desertion. The parties were married

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(1) (1889) 62 L.T. 330.

* Referred Case No. 1 of 1933.

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in 1866, and in 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house and then told her husband that either she or the woman must leave the house. The husband told her that she might do as she liked, but that the woman would remain. The wife thereupon left, and never afterwards cohabited with her husband. It was held that the husband was guilty of deserting his wife. Another case is *Sickert v. Sickert*(1). In that case the observations of GORELL BARNES J. on page 282 are very much in point. He there says :

“ In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.”

In view of these two decisions the real question here must be answered by saying that the petitioner has proved that the respondent, her husband, deserted her. The case must, therefore, be sent back to the Agent to the Governor at Ganjam to be disposed of in the light of the opinion which we have given. We are very much obliged to Mr. Connell for the valuable assistance he has given us as *amicus curiae*.

G.R.

(1) [1899] P. 278, 282.

APPELLATE CIVIL, FULL BENCH.

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

KALAPATI PEDA PICHAMMA AND ANOTHER (DEFENDANTS),
PETITIONERS,

1934,
December 13.

v.

CHIRUVELLA PEDAMUNEYYA AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Court Fees Act (VII of 1870), Sch. II, art. 6—Surety filing security bond for the performance of a small cause decree—Proper stamp on—Inapplicability of article 15 of the Stamp Act (II of 1899)—Order for payment of stamp duty on same, though made under section 17 of the Provincial Small Causes Courts Act (IX of 1887), was in fact one made under Order IX, rule 13, of the Code of Civil Procedure.

A small cause decree was passed *ex parte* for a certain sum of money. The defendant then put in a petition to set aside the *ex parte* decree and filed along with it a security bond executed by a surety for the performance of the decree. The security bond was not stamped. When the petition came on for hearing before the Court, the District Munsif ordered the petitioner to affix the usual court-fee stamp of eight annas to the security bond, which was the practice of that Court. On a reference to the High Court on account of a difference of opinion between him and the Court-fee Examiner,

held that the proper stamp for the bond was eight annas under article 6 of Schedule II of the Court Fees Act and not one rupee four annas under article 15 of the Stamp Act and that the order, though passed under section 17 of the Provincial Small Causes Courts Act, was really an order passed under Order IX, rule 13, of the Code of Civil Procedure.

CASE stated under article 6 of Schedule II of the Court Fees Act by the Additional District Munsif of Nellore regarding security bond filed in the

* Referred Case No. 11 of 1932.

PICHAMMA
v.
PEDAMUNEYTA. application to set aside the *ex parte* decree in Small Cause Suit No. 56 of 1932.

Kasthuri Seshagiri Rao appeared as *amicus curiae*.

Cur. adv. vult.

JUDGMENT.

RAMESAM J. RAMESAM J.—This matter comes up on reference by the Additional District Munsif of Nellore on account of a difference of opinion between him and the Court-fee Examiner.

The facts out of which this reference arises are these. A small cause decree was passed *ex parte* for Rs. 155-10-0. The defendant then put in a petition to set aside the *ex parte* decree and filed along with it a security bond executed by a surety for the performance of the decree. It looks as if the security bond was not originally stamped at all, but, when the petition came on before the Court, the Court ordered the petitioner to affix the usual court-fee stamp of eight annas to the security bond, which was the practice of that Court. The decree has been set aside and the suit restored.

The Court-fee Examiner now thinks that the stamp to be affixed to the security bond is not an eight annas stamp under article 6 of Schedule II of the Court Fees Act, but a stamp of Re. 1-4-0 under article 15 of the Stamp Act. Now, article 15 of the Stamp Act does not apply if the Court Fees Act applies. So we have first to see whether article 6 of Schedule II of the Court Fees Act applies or not. For the Court Fees Act to apply two conditions must be satisfied; (1) the order setting aside the *ex parte* decree must be an order passed under the Code of Civil Procedure and (2)

the bond must be given in pursuance of an order made by a Court. It is true that the order was passed under section 17 of the Provincial Small Causes Courts Act, but it seems to me that nevertheless it is also an order passed under the Civil Procedure Code. The Civil Procedure Code is a general Act of procedure applicable to the Civil Courts in India. The Provincial Small Causes Courts Act is a kind of supplemental Act indicating the special procedure to be followed in Small Cause Courts which are Civil Courts. Order L of the Code of Civil Procedure gives a list of certain provisions of that Code which are not applicable to Provincial Small Causes Courts. This indicates two things; first, that the Civil Procedure Code itself governs the procedure of Small Cause Courts to some extent, and secondly, that the provisions not included in the list apply to Small Cause Courts, and one of them is Order IX, rule 13. So, when a Small Cause Court sets aside an *ex parte* decree, it is really under Order IX, rule 13, Civil Procedure Code. Again section 17 of the Provincial Small Causes Courts Act itself makes the procedure under the Civil Procedure Code applicable to Small Cause Courts. Either way we come to the conclusion that the Provincial Small Causes Courts Act is supplemental to the Civil Procedure Code. But it is said by the Court-fee Examiner that this order is under the proviso to section 17 and not under the first part of the section. The proviso does not add to the section but only cuts down the very wide discretion which Courts have under Order IX, rule 13, Civil Procedure Code, in setting aside an *ex parte* decree, and in imposing terms upon the petitioner. Under

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the proviso the petitioner should either deposit the decree amount or give security. No other alternative, such as, that no condition need be imposed at all, is allowed.

I am therefore clearly of opinion that the order passed is an order under the Civil Procedure Code.

On account of the somewhat inconsistent and therefore obscure language of section 17 of the Provincial Small Causes Courts Act there is some difficulty as to the exact procedure to be followed by a petitioner. This obscurity has been caused by the words

"shall, at the time of presenting his application, either deposit in Court . . . as the Court may direct."

The section contemplates some direction of the Court and the petitioner obeying that direction. The earlier part says that the petitioner shall deposit money or give security *at the time of presenting the application*. There is an apparent difficulty in obeying both these directions. This obscurity has been noticed by most Courts which deal with this section and deserves being cleared up by the Legislature. Most Courts have attempted a practical solution. It is unnecessary to discuss this matter at great length in this case, but it seems to me that, when a party applies to set aside an *ex parte* decree, it may be regarded as consisting of two parts; first, a preliminary application to get a direction of the Court with a view to get the *ex parte* decree set aside, and secondly, after obeying the direction of the Court, the actual application to set aside the *ex parte* decree. The second part follows only after obeying the directions of the Court.

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Looked at in this way the party first applies. Where he deposits money, there is no further difficulty; but where he is unable to do so, he seeks the direction of the Court. The Court may now direct the party either to deposit money or to give security in some form. He should now obey the direction, and when the matter again comes up before the Court it is then we have the actual application to set aside the decree, and it may be said that he has either deposited money or given security with the application. However, in whatever form the Court's direction is obtained and complied with, the bond would be in pursuance of an order made by Court within the meaning of article 6 of Schedule II of the Court Fees Act.

I have indicated the general construction of the article without reference to the particular facts of this case. In this particular case it would appear that the Court actually asked the petitioner to supply a court-fee stamp of eight annas. That would certainly be an order of the Court. Even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court, if the Court orders notice on it to the opposite party and passes final orders setting aside the *ex parte* decree having found sufficient cause, it amounts to an order of Court. The acceptance by the Court of a bond previously furnished is equivalent to an order of the Court followed by compliance with it.

In my opinion, therefore, article 6 of Schedule II of the Court Fees Act applies to the case, and the bond should be stamped with an eight annas stamp.

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So far, I have arrived at the conclusion without referring to any decision. My conclusion is in accordance with the Full Bench decision, *Re The District Munsif of Tiruvallur*(1), where it was held that a bond given in pursuance of rules made under the Code should be deemed to be given in pursuance of an order made by the Court. The conclusion in *Amirthammal v. Ramalinga Goundan*(2) is also similar so far as the Court Fees Act is concerned. The question of the application of article 40 of the Stamp Act does not arise in the present case. The conclusion in *Reference from the Munsif, Habiganj, Re*(3) is also similar. But no question now arises with reference to article 57 of the Stamp Act. There is a circular of the Madras High Court (P. Dis. 265 of 1929, dated 23rd March 1929) which practically adopts the above conclusion. This must have been overlooked by the Court-fee Examiner.

I answer the reference accordingly.

BEASLEY C.J.—I agree.

KING J.—I agree.

G.R.

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

(2) (1920) I.L.R. 43 Mad. 363 (F.B.).

(3) (1925) I.L.R. 53 Calc. 101 (F.B.).

APPELLATE CIVIL, FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Varadachariar and Mr. Justice King.

VENKATARAMA REDDIAR AND ANOTHER (PLAINTIFFS
1 AND 2), APPELLANTS,

1934,
September 19.

v.

VALLI AKKAL AND FOUR OTHERS (DEFENDANTS AND THIRD
PLAINTIFF), RESPONDENTS.*

Negotiable Instrument—Third party to same—Suit by, against promisor for a declaration that the payee named in the instrument is a benamidar—Maintainability of.

Though a promisor cannot, in a suit on a negotiable instrument, plead that somebody other than the payee named in the instrument is the person entitled to sue, nor plead discharge by payment to the alleged real owner, yet, as between the payee named in the instrument and persons other than the promisor, there is no rule which precludes the admissibility of evidence showing that the payee was only a benamidar for another.

Held, accordingly, that a suit could be maintained by A for a declaration that a promissory note executed by C in favour of D and endorsed over by the latter to E was attachable in execution of a money decree obtained by A against B, on the ground that the promissory note was taken, in pursuance of a fraudulent scheme, benami in the name of D in respect of moneys really due by C to B.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 192 of 1928 (Appeal Suit No. 125 of 1928, District Court, Coimbatore) preferred against the decree of the Court of the District Munsif of Dharapuram in Original Suit No. 1663 of 1926.

* Second Appeal No. 963 of 1929.

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N. Sivaramakrishna Ayyar for *T. M. Krishna-swami Ayyar* for appellants.

T. P. Gopalakrishna Ayyar for *Watrap S. Subramania Ayyar* for respondents.

Cur. adv. vult.

VARADA-
CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The plaintiffs appeal against the decree dismissing their suit *in limine*. They had obtained a money decree against the first defendant and in execution thereof they attempted to attach a promissory note, dated 23rd December 1924, executed by the second defendant in favour of the third defendant and endorsed by the third defendant to the fourth defendant. The allegations in the plaint were that, with a view to defraud the plaintiffs of the amount due to them under their decree, the first, third and fourth defendants joined together and got this promissory note executed by the second defendant in favour of the third defendant in respect of a sum of money really due by the second defendant to the first and that in pursuance of the same fraudulent scheme the note was transferred to the fourth defendant without any consideration. An application to attach this promissory note was dismissed, on objection raised by the fourth defendant, on the ground that the promissory note standing in his name or in the name of the third defendant could not be attached. This suit was then laid for a declaration that the promissory note is liable to be attached in execution of the decree obtained by the plaintiffs against the first defendant.

Issues 1, 4 and 5 were argued as preliminary issues in the Court of First Instance and the Court

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held that the present suit was one to obtain relief “on the basis of the promissory note and on the promissory note alone”, that neither the first defendant nor the second defendant could be allowed to prove that the third defendant did not advance the amount for the promissory note or that his endorsee, the fourth defendant, is not entitled to recover the amount due thereunder and that, as the plaintiffs could have no higher rights than the first defendant, the suit must fail. On appeal, the Subordinate Judge, in a very brief judgment, also held that it was not open to the plaintiffs to plead that the payee under the promissory note is not the fourth defendant but somebody else. Hence this second appeal.

The judgments of the Courts below rest upon a misapprehension of the observations in *Subba Narayana Vathiyar v. Ramaswami Aiyar*(1) and similar cases. It is not right to say generally that that class of cases lays down that parol evidence is not admissible to show that a note has been taken *benami* in the name of a person for money advanced by another. It is one thing to say that the promisor, cannot, *in a suit on the note*, plead that somebody other than the payee is the person entitled to sue, nor plead discharge by payment to the alleged real owner, and a wholly different thing to say that as between the payee named in the document and persons other than the promisor there is any rule which precludes the admissibility of evidence showing that the payee was only a benamidar for another. The Negotiable Instruments Act lays down certain special rules of evidence and certain special presumptions and

(1) (1906) I.L.R. 30 Mad. 88.

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precludes certain pleas being raised in particular circumstances : but it will not be right to say that, beyond the scope of such rules or what may follow as necessary implications therefrom, the applicability of the general principles of law or the ordinary rules of evidence is excluded. For instance, it may be noticed that in sections 120, 121 and 122 of the Act particular pleas are barred only in suits on negotiable instruments. In sections 118 and 119 certain presumptions are laid down with reference to negotiable instruments, and in sections 43 and 44 certain pleas, such as, absence of consideration, etc., are permitted to be raised between immediate parties but not as against other holders. By section 117 of the Evidence Act an acceptor of a bill of exchange is precluded from denying that the drawer had authority to draw such bill and to endorse it. But, beyond special rules thus enacted, there is no reason whatever for holding that the ordinary principles of substantive law or the rules of evidence will not govern claims relating to negotiable instruments, especially, where they arise not between the promisor and the promisee or the drawer and the drawee but between the promisee or drawee on the one hand, and a third person on the other.

It has often been recognized that a plea of *benami* is only a plea in the nature of resulting trust and there is nothing in the Negotiable Instruments Act which justifies a payee, who is in the position of a trustee, insisting that the beneficiary should be precluded from proving that he is only a trustee. The observation in *Harkishore*

Barna v. Gura Mia Chaudhuri(1) that the "pro-
perty" in the note is only in the person named as payee does not affect this question at all. It is unnecessary in this case to express an opinion upon the conflict of views as to whether a person claiming to be the real owner, though not named as payee in a promissory note, can under any circumstances maintain a suit on the note against the promisor; Cf. *Surajman Prasad Misra v. Sadanand Misra*(2), *Ramnagina v. Bishwanath*(3), *Sewa Ram v. Hoti Lal*(4) and *Harkishore Barna v. Gura Mia Chaudhuri*(1). The present suit is not really a suit of that kind.

The analogy of the provisions of the Trusts Act clearly goes to show that a suit for a declaration that a person is only in the position of a trustee towards the plaintiffs will lie even in the case of negotiable instruments. Section 63 of the Trusts Act contains a general provision that, where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. Section 64 enacts certain exceptions to this rule, and in so doing, refers specifically to negotiable instruments; and the exception in respect of negotiable instruments is confined to cases where the instrument is in the hands of a *bona fide* holder to whom it has passed in circulation. This clearly implies that if the transferee, even of a negotiable instrument, from a trustee, is not a *bona fide* holder, the beneficiary is entitled to call upon him to admit that he is only a trustee or sue for a declaration

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(1) (1930) I.L.R. 58 Calc. 752.
(3) A.I.R. 1934 Pat. 85.

(2) (1932) I.L.R. 11 Pat. 616.
(4) (1930) I.L.R. 53 All. 5.

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to that effect. It may be that, even upon getting a declaration to this effect, the beneficiary will not directly be able to sue upon the promissory note; but that does not mean that a declaration of this kind will be futile. Under other provisions of the Trusts Act the beneficiary can sue for the execution of the trust by compelling the trustee to take the necessary steps and have a receiver appointed in the course of such proceedings so that the receiver may sue for the debt, or the beneficiary may also insist upon the trustee conveying the legal title to himself, and after such transfer there will be no difficulty in his suing upon the promissory note in his own name; Cf. *Fletcher v. Fletcher*(1), *Sharpe v. San Paulo Railway Co.*(2) and *Ex parte Kearsley. In re Genese*(3). The Trusts Act also recognizes that the right of the beneficiary is capable of being transferred and that the transferee will have all the rights of the beneficiary as against the trustee. Cf. sections 56, 58, 61 and 69 of the Trusts Act.

That the Negotiable Instruments Act should be understood with due regard to its scope and purpose and not interpreted as affecting other branches or rules of law has generally been recognized in this Court, and even in suits upon negotiable instruments, rights and liabilities arising out of the debt to which the negotiable instruments relate have in several instances been permitted to be enforced. The stricter view which DAVIES J. was inclined to take in his dissenting judgment in *Krishna Ayyar v. Krishna-sami Ayyar*(4) has not been followed. This again is a further indication that, except to the extent

(1) (1844) 4 Hare 67; 67 E.R. 564.
(3) (1886) L.R. 17 Q.B.D. 1.

(2) (1873) L.R. 8 Ch. App. 597, 610.
(4) (1900) I.L.R. 23 Mad. 597.

necessarily implied by the special provisions of the Negotiable Instruments Act, the operation of other rules of law is not to be excluded; Cf. *Shanmuganatha Chettiar v. Srinivasa Ayyar*(1), *Gopalu Pillai v. Kothandarama Ayyar*(2), *Ramanadhan Chetty v. Katha Velan*(3) and *Subramania Iyer v. Subban Chettiar*(4). The present case itself affords an illustration of the deplorable consequences that must follow from any other view; because, if the fourth respondent's contention is right, any judgment-debtor can practically defeat his creditors by lending his moneys to others and taking promissory notes in the names of his friends; and a decree-holder will have no means of getting at the funds thus lent. In answer to repeated questions from us, the fourth respondent's learned Counsel could only say that even a hardship of that kind ought not to induce us to lay down bad law. We are unable to believe that such was the policy of the Negotiable Instruments Act and there is no specific provision in the Act itself which compels us to accede to such a contention.

As regards attachability, the matter seems to us to be placed beyond all doubt by the language of section 60 of the Civil Procedure Code, clause 1 of which specifically refers to the attachments of bills of exchange and promissory notes, and the concluding words are:

"whether the same be held in the name of the judgment-debtor or by any other person in trust for him or on his behalf."

There is nothing in the Negotiable Instruments Act which must be understood as practically

(1) (1916) I.L.R. 40 Mad. 727.
(3) (1917) I.L.R. 41 Mad. 353.

(2) A.I.R. 1934 Mad. 529.
(4) (1924) 21 L.W. 696.

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making these concluding words meaningless in the case of attachment of negotiable instruments. It was asked (on behalf of the respondent) what course could the attaching decree-holder adopt on the strength of an attachment in such cases and reference was made to a judgment of CURGENVEN J. in *Somu Naidu v. Sanyasayya*(1), as showing that, even if the promissory note should be attached and brought to sale in the present case and an endorsement obtained from Court, the Court-purchaser will not be entitled to sue the promisor for the money. The judgment in that case has only proceeded upon a consideration of the endorsement to be made by the executing Court and has not noticed the bearing of the provisions of the Trusts Act under which the purchaser of the beneficiaries' interest could call upon the trustee to convey the legal title to him. A similar situation was well known to the English Law under which, prior to the Judicature Act, an assignee of a "chase in action" could not maintain a suit for money in his own name and the Court of Chancery met the situation by compelling the assignor to allow his name to be used in actions at law on an indemnity against costs. We need not say more about that question in the present case, because, by reason of events which have happened during the pendency of the second appeal, the question of suing on the promissory note is not material to the present case.

We have been informed that, during the pendency of the second appeal, the fourth defendant has sued upon the promissory note and obtained a decree. It is therefore unnecessary to

discuss what the proper procedure will be if the promissory note should still remain outstanding and the auction-purchaser of the beneficiaries' interest is to realise the money from the promisor. On account of this course of events, we have also permitted the appellants to amend paragraph 12 (a) of their plaint by adding the words "debt due under" before the words "promissory note dated 23rd December 1924". We see no objection in law to their getting a declaration in terms of paragraph 12 (a) of the plaint as now amended, if they are able to prove the necessary allegations of fact. The prayer in paragraph 12 (b) has now become unnecessary.

We therefore allow the appeal, set aside the decrees of the Courts below and send the case back to the Court of First Instance for trial on the merits. Costs in this and in the lower appellate Court will abide the result of the suit. The plaintiffs will be entitled to refund of court-fee paid on the memorandum of appeal both here and in the lower appellate Court.

G.R.

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ORIGINAL INSOLVENCY.

Before Mr. Justice Mockett.

THE OFFICIAL ASSIGNEE OF MADRAS, APPLICANT,

v.

A. KANNIAH NAIDU, RESPONDENT.*

*Presidency-towns Insolvency Act (III of 1909), sec. 55—
 "Voluntary transfer"—Meaning of—Remission of a debt
 without consideration—If amounts to voluntary transfer
 —Indian Contract Act (IX of 1872), sec. 63—Effect of.*

Section 55 of the Presidency-towns Insolvency Act does not limit the expression "voluntary transfer" to any particular form of alienation. The expression is wide enough to cover all sorts of devices that may be practised or suffered by an insolvent to deprive the creditors of the benefit of his property and, as such, the remission of a debt without consideration amounts to a "voluntary transfer" within the meaning of section 55.

V. Varadaraja Mudaliar for applicant.

C. Veeraraghava Ayyar and P. Sitaram Pantulu for respondent.

JUDGMENT.

The Official Assignee by this notice of motion seeks for a declaration that the settlement of a debt of Rs. 2,453 due to the insolvent by the respondent alleged to have been effected on the 17th of February 1934 by the payment of Rs. 913 is a voluntary transfer under section 55 of the Presidency-towns Insolvency Act so far as the balance Rs. 1,540 is concerned. The facts are these. The insolvent and the respondent have been doing business together and on the above

date the respondent admittedly owed to the insolvent a sum of Rs. 2,453. This debt was settled by payment in cash of Rs. 713 and a promissory note for Rs. 200, making Rs. 913, and by the balance of Rs. 1,540 being waived. The respondent's story is that this amount was remitted because the insolvent had been supplying to him (the respondent) tobacco of a low quality over a period of four years and that at the time of settlement he requested the insolvent to show him some consideration. His exact words are, "I complained and he said he would make an allowance." It should be noticed that the respondent does not suggest that he threatened the insolvent with an action in respect of the quality of the tobacco. He says that Kotayya (the insolvent) sent him a demand notice for the Rs. 2,453, but has not produced the notice, and I am inclined to think that the story is an after-thought with a view to assist his case in some way which I do not quite follow. It would have been more relevant of course if a demand had been made upon the insolvent by the respondent. This version of the facts given by the respondent is used by him in this way. He says this transfer—assuming it to be a transfer, which he denies—was in favour of a purchaser in good faith and for valuable consideration. As to this, as I have pointed out, the only evidence on the record is that the respondent requested the insolvent to make an allowance. There is no suggestion that there was any compromise of a claim. But on the respondent's story, I think, I might have held that this was a settlement of a difference between the respondent and the insolvent and it was protected

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by the saving clause in section 55; that is to say, had I considered that his story was true. But in order to test the veracity of a story such as this, the only valuable evidence is as a rule documentary, that is, records of the transaction made at the time. Now the only record of this transaction is found in the respondent's own book, Exhibit III, under the insolvent's account. This reads:

"17th February 1934. Debit owing to inability to pay the amount due, amount given up as an act of grace as per order of P.K.—Rs. 1,590-0-10."

That is an entry in the handwriting of the insolvent's clerk. There is not a word about any dispute as to the quality of the tobacco. The respondent's explanation is:

"That is the usual way to write such transactions. They must write only like that. There is no other reason."

Then, in the promissory note, Rs. 200 is stated to be "for value received in cash", and there is nothing there about the compromise. None of the attesting witnesses to the promissory note have been called, and it is admitted that none of them objected to the form of the promissory note which was clearly not accurate. The respondent kept no account of the damaged goods. Thus, finally, it comes to this, that the only record, that is Exhibit III, exactly bears out the Official Assignee's case and contradicts the respondent's. I cannot therefore accept the story about the tobacco dispute and I think that this remission of Rs. 1,590-0-10 was for some other reason. Rs. 1,590 is a very large sum to remit out of Rs. 2,453. The whole story is unconvincing read with the book entry.

[His Lordship discussed the evidence and proceeded:—]

The result of these facts, in my view, is as follows. On the 17th of February the insolvent remitted without consideration to the respondent the sum of Rs. 1,590 by receiving, in payment of a debt of Rs. 2,453, cash and a promissory note for Rs. 913 only. There was no dispute about tobacco; there was no threat of any proceedings by the respondent against the insolvent.

The learned Counsel for the respondent says that, even if that is so, remission of a debt is not a voluntary transfer, but I am against him on this. I respectfully agree with the following observations of JAI LAL J. in *Kanaya Lal v. Official Receiver*(1):

"In my opinion, section 53 [Provincial Insolvency Act (V of 1920)] does not limit the expression 'voluntary transfer' to any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property."

In *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar*(2) SESHAGIRI AYYAR and KUMARASWAMI SASTRI JJ. state:

"It would open a wide door to fraud if the remission of a debt is placed on a different footing from a transfer."

This is manifest for the reason that such a process would enable an insolvent to leave a greater part of his assets in the hands of complacent debtors who could thus hold them for the benefit of the insolvent.

It is however argued by the learned Counsel for the respondent that there is good consideration in this case by reason of section 63 of the Contract

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(1) (1928) 110 I.C. 742.

(2) (1914) 27 I.C. 269, 270.

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Act, and that, in the absence of proof of *mala fides*, there is a contract recognized by the Indian Law and that section 55 of the Presidency-towns Insolvency Act cannot override it. I think the answer to that is that, in the first place, I do not consider this transaction was *bona fide*. It is covered up by a lot of evidence that I have found to be untrue and I think I am entitled to infer, having regard to the relations between the insolvent and Kuppuswami Naidu and the state of the insolvent's finances at the relevant time, that this remission, standing as it is totally unexplained, was for the purpose of leaving substantial sums in Kuppuswami Naidu's hands, although nominally in his son's hands. If I am wrong as to that finding of fact, I think that section 55 would override in an insolvency matter the provisions of section 63 of the Contract Act, and it has to be noted that the Presidency-towns Insolvency Act is later than the Contract Act.

The English cases, of which *In re Vansittart. Ex parte Brown*(1) is an example, establish that something must have moved from the transferee in order that he might get something from the transferor and in order to constitute a compromise there must have been some threat or at least some claim against the transferor; see *Miles v. New Zealand Alford Estate Co.*(2). As I have said, there is no evidence of any claim in this case. The most that is proved is that the insolvent was requested to make some concession. I do not lose sight of the fact that section 63 of the Contract Act effected a change from the Common Law, but, with the provisions of section 55 of the Presidency-towns

(1) [1893] 1 Q.B. 181.

(2) (1886) 32 Ch. D. 266.

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Insolvency Act before me, I have no doubt that a remission of a debt without consideration is as much a "voluntary transfer" in India as in England and as such against the Insolvency law. The cases to which I have referred seem to lead to this conclusion.

For these reasons I think that the Official Assignee succeeds and that there should be a decree in terms of this notice of motion with taxed costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

THE CROWN PROSECUTOR, PETITIONER,

v.

MUTHUSAMY (ACCUSED), RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec. 75—Convictions outside British India—Court not bound to consider in determining sentence—Admissibility in evidence of.

The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only by the facts and circumstances of each case unless there is a liability to enhanced punishment by reason of any specific provision of law such as section 75, Indian Penal Code (Act XLV of 1860). Convictions outside British India cannot be made the basis of any charge under section 75, and therefore the Court is not bound to consider such convictions in determining the sentence. Evidence of such convictions is however admissible as proof of bad character. But, as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the sentence to be imposed upon him, the Magistrate cannot be held to have acted

1934,
October 29.

* Criminal Revision Case No. 492 of 1934.

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illegally in the exercise of his discretion if he declines to consider such previous convictions.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, dated the 21st day of February 1934 and passed in Calendar Case No. 246 of 1934.

Crown Prosecutor (T. S. Anantaraman) for petitioner.

Respondent-Accused was not represented by Counsel.

Cur. adv. vult.

ORDER.

This is an application by the Crown Prosecutor, Madras, to enhance the sentence passed on the accused in Calendar Case No. 246 of 1934 on the file of the Chief Presidency Magistrate of Madras. The accused in the case was found guilty of having stolen some cash and cloth, worth in all about twelve rupees, belonging to Prosecution Witness 1 in the case while the latter was bathing at a bathing ghat in Madras. The Magistrate found the accused guilty of an offence punishable under section 379, Indian Penal Code, and sentenced him to pay a fine of Rupees thirty, and in default of payment thereof to undergo rigorous imprisonment for three months, and directed twelve rupees out of the fine, if collected, to be paid as compensation to Prosecution Witness 1. It would appear that the fine has not been paid. The conviction and sentence are dated the 21st February 1934 and it is clear that the accused in the case must have undergone the entire sentence of imprisonment.

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The only ground on which it is contended before me that the sentence imposed by the learned Chief Presidency Magistrate is inadequate is that he failed to consider the antecedents of the accused which were mentioned to him orally by the Prosecuting Inspector of Police who conducted the prosecution. It would appear that the Prosecuting Inspector of Police, in reply to a question put by the Court about the previous record of the accused for the purpose of determining the sentence, stated that the accused had four previous convictions in the Police Courts of Colombo, three for theft and one for cheating, the last of them being on 24th September 1932 for which he had been awarded six months' rigorous imprisonment. It is stated that the accused admitted these convictions but that the learned Chief Presidency Magistrate declined to take these convictions into consideration for the purpose of determining the sentence on the ground that these convictions were not convictions pronounced in British India. It is contended that this view of the Magistrate, viz., that convictions had out of British India should not be taken into consideration in determining the punishment, is wrong. If at all it was open to the Magistrate to take into consideration the previous antecedents of the accused, the convictions outside British India were relevant. But in view of the fact that these convictions could not be made the basis of any charge under section 75, Indian Penal Code, evidence of these convictions could be admissible only as evidence of bad character, and, as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the

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sentence to be imposed upon him, I am unable to say that the learned Chief Presidency Magistrate acted illegally in the exercise of his discretion in declining to consider the previous convictions in this case. The attempt of the prosecution was really to give these convictions outside British India the same effect for practical purposes as convictions within British India, that is to say, to induce the Magistrate to give a higher punishment than he would otherwise award. It may be that the Magistrate is not disentitled, if he thinks fit, to make such enquiries as he thinks proper, and as are not prohibited by the law, about the previous antecedents of the accused. But if he declines to look into these antecedents he cannot be said to act illegally in the exercise of his discretion. The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only with regard to the facts and circumstances of each case unless indeed there is a liability to enhanced punishment by reason of any specific provision of law such as section 75, Indian Penal Code. Apart from these convictions outside British India, it is not contended that the sentence is inadequate. The learned Chief Presidency Magistrate was not bound to consider these convictions in determining the sentence; even though it might have been open to him to have considered them, I am not prepared to interfere in revision and enhance the sentence in this case.

The criminal revision petition is therefore dismissed.

K.W.R.

PRIVY COUNCIL.

RAJA VASIREDDI CHANDRA MOULESWARA
PRASADA BAHADUR ZAMINDAR GARU,
APPELLANT,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL
AND ANOTHER, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Service tenure—Karnam lands—Enfranchisement by Government—Zamindar's claim to resume—Onus of proof—Grant before permanent settlement—Proprietary Estates' Village-service Act (Madras Act II of 1894), sec. 17.

The appellant brought suits alleging that certain lands within the geographical limits of his zamindari had been granted by his predecessor as inams for karnam service; he contended that the Government had acted illegally in enfranchising the lands under section 17 of the (Madras) Proprietary Estates' Village-service Act, 1894, and that he was entitled to resume the lands free from quit rents imposed upon the karnams by the Government. Both Courts in India found that the lands had been granted to the karnams before the permanent settlement made in 1802.

Held, that the suits failed, because the appellant had not discharged the onus, which was upon him, to prove that the grants had been made by his predecessor, and not by the State before the estate was conferred upon the appellant's predecessor.

It was therefore not necessary to determine whether the grants were made or continued by the State within the meaning of the above section.

CONSOLIDATED APPEAL (No. 28 of 1932) from two decrees of the High Court (February 1, 1928) reversing two decrees of the Subordinate Judge of Bezwada (February 2, 1922).

* *Present*: LORD ATKIN, LORD WRIGHT, LORD ALNESS, SIR JOHN WALLIS and SIR SHADI LAL.

J.C.*
1935,
April 16.

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In 1909 the Madras Government, acting under section 17 of the Proprietary Estates' Village-service Act (Madras Act II of 1894), enfranchised certain karnam service lands in two villages within the geographical limits of the appellant's zamindari. In 1920 he instituted two suits claiming that the Government had no power to enfranchise the lands, and claiming to resume possession of them free from quit rents which the Government had ordered the karnams to pay. Both Courts in India held that the lands had been granted to the karnams before the permanent settlement.

The facts, and the terms of section 17 of the above Act, appear from the judgment of the Judicial Committee.

The Subordinate Judge made decrees in favour of the appellant. He held that the lands had been granted by the appellant's predecessor for the performance of private karnam services, and that the grants had not been made or continued by the State so as to be within section 17 of the Act.

Appeals to the High Court were allowed and the suits dismissed.

RAMESAM J. was of opinion that the karnam lands had been excluded from the permanent settlement under section 4 of the Madras Permanent Settlement Regulation (XXV of 1802), and that they could be enfranchised under section 17 of the Act of 1894. He said in conclusion :

"The whole conduct of the Government in allowing these offices and emoluments to remain from 1802 up to 1894 shows that they are being continued within the meaning of section 17, and even if an overt act were necessary, the passing of Regulation XXIX of 1802 itself seems to be such an

overt act, not to mention other provisions relating to karnams. But I do not see why merely permitting the karnams to continue in enjoyment of the lands does not amount to continuing within the meaning of section 17."

VENKATASUBBA RAO J. delivered a judgment to the same effect.

Upjohn K.C., De Gruyther K.C. and Subba Row for the appellant. The suit lands being within the limits of the appellant's zamindari, and not reserved thereout, formed part of his estate and they were granted by the appellant's predecessor for private services. After the settlement the karnams performed some public services, but they remained servants of the zamindar and he still had the right of resumption. The Act of 1894 did not authorize the confiscation of any proprietary right of a zamindar ; that is shown by proviso 2. The High Court in holding that the lands were *lakhiraj* lands, and therefore excluded from the settlement by section 4 of Madras Regulation XXV of 1802, misinterpreted the Regulation. The decision of the High Court was based mainly upon its decision as to karnam lands in *Basavaraju Pitchaya v. Secretary of State for India*(1), but that conflicts with its earlier decision in *Satracherla Veerabhadra Suryanarayana v. Secretary of State* (2). The settlement did not disturb existing titles: *The Collector of Trichinopoly v. Leekamani and others*(3). In *Ranjit Singh Bahadur v. Kali Dasi Debi*(4) the Board held that the proprietary interest of a Bengal zamindar extended to lands granted for *chaukidari chakaran* services. *Prima facie* a zamindar's interest extends to all lands within his zamindari. [Reference was made also to *Rajah Sahib Perhlad Sein v. Doorgapersaud Tewarree*(5), *Prasad Row v. The Secretary of State for India*(6); Fifth Report (Mad. edn.), paragraphs 15 to 18, 22, 25, 26 and Appendix 18 ; Rules of Inam Commission, 1859, rr. 1, 2, 18, 23.]

Dunne K.C., Narasimham and Pringle for the first respondent. From 1799 to the Inam Commission of 1859, and on to

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(1) (1919) 58 I.C. 713.

(2) (1914) 25 I.C. 878.

(3) (1874) L.R. 1 I.A. 282, 313.

(4) (1917) I.L.R. 44 Cal. 841 ; L.R. 44 I.A. 117.

(5) (1869) 12 Moo. I.A. 286.

(6) (1917) I.L.R. 40 Mad. 886 ; L.R. 44 I.A. 166.

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1894, the suit lands can be traced in Government records entered in the names of the karnam as inam lands held free from assessment. The presumption is that they were treated at the settlement as *lakhiraj* lands and so excluded under section 4 of Regulation XXV of 1802. The onus of proving that they were included was upon the zamindar and was not discharged : *Raja Lelanund Sing Bahadoor v. The Bengal Government*(1), *Joykishen Mookerjee v. The Collector of East Burdwan*(2), *Forbes v. Meer Mahomed Tuquee*(3), *Hurryhur Mookhopadhy v. Madub Chunder Baboo*(4) and *Ranjit Singh Bahadur v. Kali Dasi Debi*(5). The judgment in the case last mentioned does not apply, because it was based upon section 41 of Bengal Regulation VIII of 1793 and the Madras Regulation contains no similar provision. Cases cited for the appellant show that it is only *malguzari* lands in the possession of the zamindar at the settlement to which his title is to be presumed to extend. The preamble to Madras Regulation XXXI of 1802 states that the settlement excluded all alienated lands. That karnams were public officers of importance is shown by Madras Regulation XXIX of 1802. The grants were made or continued by Government within the meaning of section 17 of the Act of 1894. Lands in Madras exempt from Government revenue are necessarily lands granted by the ruling power or upon its authority; the appellant did not prove that the grants were made by his predecessor. Whether the grants were made by the Government or not, they were recognized and continued by the Government.

Upjohn K.C. replied.

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LAL.

The JUDGMENT of their Lordships was delivered by SIR SHADI LAL :—This is a consolidated appeal from a judgment and two decrees of the High Court of Judicature at Madras dated February 1, 1929, which reversed the judgments and decrees of the Court of the Subordinate Judge at Bezwada and dismissed two suits brought by the plaintiff.

(1) (1855) 6 Moo. I.A. 101, 119.

(2) (1864) 10 Moo. I.A. 16.

(3) (1870) 13 Moo. I.A. 438.

(4) (1871) 14 Moo. I.A. 152.

(5) (1917) I.L.R. 44 Calc. 841; L.R. 44 I.A. 117.

The plaintiff, who has preferred this appeal, is the zamindar of a permanently settled estate called Chintalapatu Vantu (also known as Muktyala), which is situate in the Kistna District of the Madras Presidency. The circumstances which led to the institution of the suits may be shortly stated. The remuneration of the village officers employed in the permanently settled estates and certain other estates within the Presidency of Madras consisted of grants of lands or assignments of revenue payable in respect of lands. This mode of remunerating the services of village officers, which was sanctioned by ancient practice, continued in force for more than a century; but it was subsequently found to be objectionable. The Government consequently decided to pay, in lieu thereof, certain salaries and allowances in cash, and was empowered by an Act of the Madras Legislative Council called the Proprietary Estates' Village-service Act (Madras Act II of 1894) to establish in each district the village service fund, from which the payment was to be made. The village officers receiving remuneration in cash were no longer entitled to keep the lands which had been granted to them for the performance of their duties, and the statute, therefore, authorized the Government to enfranchise those lands from the condition of service by the imposition of quit rent.

The operative part of section 17, which conferred this authority, is in these terms :

" If the remuneration of a village office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of

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quit rent under the rules for the time being in force in respect of the enfranchisement of village service inams in villages not permanently settled or under such rules as the Government may lay down in this behalf; such enfranchisement shall take effect on or after the date fixed in the notification issued under section 19 for the levy of a village service cess."

The section is not happily worded, but there can be little doubt that in the case of a grant of land made or continued by the State in respect of, or annexed to, a village office, it empowers the Government to free the land from the liability of service and to impose instead a quit rent to be paid by the village officer. The Legislature did not, however, intend to deprive a private proprietor of his right to recover the land, if it was granted by him or his predecessor in interest. This is made clear by a proviso to that section, which expressly states that

"any lands or emoluments derived from lands which may have been granted by the proprietor for the remuneration of village service and which are still so held or enjoyed may be resumed by the grantor or his representative."

Now, it is common ground that two plots of land, which were situate in the villages of Kisara and Peddavaram, were enfranchised under the aforesaid section; and the orders of enfranchisement were made by the revenue officer in 1908. The lands were in the occupation of two village officers who were called karnams and performed the duties of village accountants or patwaris. Neither of these village officers was ejected from the land, but was allowed to hold it on payment of a quit rent. The appellant claimed both the plots of land to be his property, but his claim was rejected by the revenue officer who conducted the enquiry. After waiting for nearly twelve years, he instituted the present suits to establish

his title to the lands in question. The trial Judge allowed the claim, but on appeal by the Secretary of State for India, the High Court have dissented from that conclusion and dismissed both the suits.

The main question raised on this appeal is whether the lands were granted to the karnams by the appellant's ancestor. This was the ground upon which he based his claim; and there can be no doubt that, if that ground be established, he would be entitled under the proviso referred to above to recover the property. It is, however, clear, and, indeed, it is not disputed, that it is for him to prove that the grants were made by his predecessor.

In order to establish his title, the appellant had to state when the grants relied upon by him were made; and before the revenue officer, who conducted the proceedings for enfranchisement, and also in the complaints presented by him to the trial Court, he definitely stated that the grants were made subsequent to the permanent settlement of 1802. Indeed, he attempted to show that the lands were granted in 1834; but the High Court and also the Subordinate Judge find that the attempt has failed, and that, not only is there no evidence to support the allegation of post-settlement grants, but there is ample documentary proof to refute it.

The appellant, having failed to establish that the lands were granted after 1802, shifted his position in the course of the arguments before the Subordinate Judge, and put forward a new ground of claim, namely, that the grants were made before the permanent settlement. The issue which now

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requires determination is whether the lands originally formed part of his estate and were given by his ancestor to the karnams before 1802. On this point he has relied upon certain circumstances, which, in their Lordships' opinion, are inconclusive.

It appears that the disputed property is situated within the geographical limits of the appellant's estate, but that fact would not necessarily lead to the conclusion that the property was originally owned by his ancestor and given by him to the karnams. It is not incompatible with the hypothesis that the grants of the lands had been made by the State to the village officers before the estate was conferred upon the zamindar. Moreover, the lands were exempted from the payment of land revenue before the settlement, and, as held by the High Court, the income derived from them was not included in the assets upon which the permanent land revenue was determined in respect of the zamindari in 1802. The karnams have been in the enjoyment of the rents and profits for more than a century without making any payment either to the State or to the zamindar, and neither the revenue record nor any other document furnishes the slightest indication that the zamindar was, in any way, concerned with the ownership of the property.

The services performed by a karnam are of a public character, but it is argued that the karnams in question have been rendering private services to the zamindar. The documents, upon which this argument is founded, are of a comparatively recent date, and there is no evidence to show that such services were performed at any time before

the settlement, or that the grants were made for rewarding those services. It cannot be disputed that the zamindar is a person of importance and authority in his estate; and if the karnam of a village within the estate does some private work in order to please the landed magnate, he does not thereby cease to be a public officer. Nor does that circumstance necessitate the inference that the land held by him is a grant from a private person.

It is true that in the case of an ancient grant made before 1802 it is well-nigh impossible, in the absence of the document granting the property, to discover with any reasonable certainty the date and other particulars of its origin; and there can be no doubt that in the present case the duty of proving pre-settlement grants by the appellant's ancestor is a very difficult one to discharge. But the appellant himself has undertaken that task, and he cannot invoke its difficulty in order to relieve himself of the burden.

Their Lordships do not think that the evidence, to which their attention has been invited by the appellant, would, even if it stood un rebutted, sustain the proposition that the lands were granted by his ancestor to the karnams either before, or after, the settlement of 1802. On the other hand, there are circumstances which throw doubt upon the genuineness of his claim. As stated above, it was only a few days before the expiry of the statutory period of limitation that he brought the present suits; and this delay does not show that he was anxious to vindicate his rights of ownership. When he did institute the suits, he founded his title upon post-settlement

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grants, and this allegation has been demonstrated to be wholly wrong. It is clear that he himself was not sure of his ground, and his change of front at the last stage cannot but militate against his claim.

Upon an examination of the arguments presented to them, their Lordships have no hesitation in holding that the appellant has failed to discharge the onus of proving that the lands in dispute were granted to the karnams by his predecessor in interest. On this finding the appeal must fail, and it is not necessary to consider whether the grants were made or continued by the State. Accordingly, their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

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

Solicitor for first respondent : *Solicitor, India Office.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

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

TAVVALA VEERASWAMI (PLAINTIFF—DECREE-HOLDER),
PETITIONER,

1934,
December 18.

v.

PULIM RAMANNA AND THREE OTHERS (DEFENDANTS—
JUDGMENT-DEBTORS AND SURETY), RESPONDENTS.*

Suit—Dismissal for default—Effect of, on security bond containing recital that “if the suit is dismissed the security bond should get cancelled”—Subsequent restoration of suit—Effect of.

R executed a security bond in favour of V in the following terms:—“If the suit is to be decreed in favour of the plaintiff (V) in accordance with the plaint he can recover the decree amount from me (R) personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed.” The suit was dismissed for default but was afterwards restored to the file and a decree in favour of V was passed. It was contended that, on the dismissal of the suit for default, the security bond was cancelled.

Held, that the security bond, in such a case, was restored with the restoration of the suit.

Balaraju Chettiar v. Masilamani Pillai, (1929) I.L.R. 53 Mad. 334 (F.B.), distinguished. *Saranatha Aiyangar v. Muthiah Mooppanar*, (1933) 65 M.L.J. 844, approved.

Jia Bai v. Joharmull, A.I.R. 1932 Cal. 858, followed.

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 Rajahmundry, dated 1st November 1930, and made in Execution

* Civil Revision Petition No. 746 of 1931.

VEERASWAMI v. RAMANNA. Petition No. 635 of 1930 in Small Cause Suit No. 463 of 1929.

Ch. Raghava Rao for petitioner.

T. Satyanarayana for fourth respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. — This civil revision petition arises out of execution proceedings. The petitioner in those proceedings was the transferee of a promissory note executed by the first and second respondents in favour of the third respondent. The petitioner filed a suit on the promissory note and obtained a decree and had obtained before judgment an attachment of some money that lay in the Rajahmundry Sub-Court to the credit of the first respondent. The fourth respondent gave security and thereupon the attachment of the money was raised. Subsequently the suit was dismissed for default but was afterwards restored to the file and a decree in favour of the petitioner was passed. The petitioner applied to execute the decree against the surety but the latter contended that on the dismissal of the suit the security bond given by him became cancelled in accordance with the provisions of the security bond and also the law. The District Munsif upheld this contention relying upon the Full Bench decision of this High Court in *Balaraju Chettiar v. Masilamani Pillai*(1) which decides that upon the dismissal of a suit the attachment before judgment ceases under Order XXXVIII, rule 9, of the Civil Procedure Code, even though the Court did not pass an order withdrawing it.

(1) (1929) I.L.R. 53 Mad. 334 (F.B.).

It must be observed, however, that in that case the Full Bench dealt only with the case where the suit had been dismissed and on appeal was decreed and did not deal with a case like the present one where after dismissal for default the suit was restored to the file and eventually decreed in the trial Court; and any observations of the Full Bench upon the latter point are merely *obiter*; and in fact the Full Bench did not express a decided opinion upon this point, although it is contended that certain observations of PAKENHAM WALSH J. appear to express a view contrary to the contention of the decree-holder here and in the Court below. What PAKENHAM WALSH J. stated was as follows :

“As regards the argument that, in the case of a suit dismissed for default and restored in the course of the same day, it would work hardship to hold that the attachment before judgment ceased to have force, it is difficult to see how that can be a hardship which the law commands. There is much that might be said on the other side as to the consequences of holding that an attachment continues in force after a suit is dismissed. As was pointed out by MAHMOOD J. in *Ram Chand v. Pitam Mal* (1), such an attachment will subsist for ever whether there is or not an appeal until it is expressly withdrawn. 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. To say that on a suit being decreed in appeal all the interlocutory orders passed in the course of the suit are at once revived appears to be going too far and might lead to serious difficulties.” (Page 346.)

Here the point to be considered is whether the restoration of the suit to the file makes the security bond still available to the decree-holder. In *Namagiri Ammal v. Muthu Velappa Goundan*(2)

(1) (1888) I.L.R. 10 All. 506.

(2) (1928) 56 M.L.J. 70.

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PHILLIPS J. was of the view that, when an order dismissing a suit for default is set aside on an application made for the purpose, the suit remains as it was on the day that it was dismissed and all proceedings taken up to that date must be deemed to be in force when the dismissal is set aside and all interlocutory orders will be revived on the setting aside of the dismissal and that similarly an order for attachment of property will also be revived. But the Bench in that case, PHILLIPS and DEVADOSS JJ., held that, where a suit is dismissed in the lower Court and the dismissal is set aside in appeal, the attachment before judgment will be deemed to have continued throughout. This view was of course negatived in *Balaraju Chettiar v. Masilamani Pillai*(1). In a later case, namely, *Saranatha Aiyangar v. Muthiah Mooppa-nar*(2), our learned brother, RAMESAM J., sitting alone held that, in the case of a suit dismissed for default and soon afterwards restored to file, in the absence of anything expressly appearing against the view that interlocutory applications were restored, the suit and all incidental matters were restored to file. In that case, our learned brother correctly takes the view that *Balaraju Chettiar v. Masilamani Pillai*(1), upon which the District Munsif relied, does not govern the present case and that the question is not whether the ancillary orders fall with the suit when it is dismissed but whether when the suit is restored they are also restored. I entirely agree with our learned brother's view upon this question. It does not seem to me reasonable that the plaintiff in a suit who has got an attachment before judgment

should have again, after the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that he having done so the defendant should have to apply to raise the attachment by producing a surety or sureties. The common-sense view of the matter is that all ancillary orders should be restored on the restoration of the suit without any further orders. Upon this question there is direct authority of the Calcutta High Court in *Jia Bai v. Joharmull*(1). It may possibly be contended that the decision was based on the wording of the bond because RANKIN C.J. says on page 860 :

"The suggestion was that because the suit had at one time been dismissed for default and was then restored, the bond was of no effect. The learned Judge has very properly held that the bond has reference to the ultimate issue of the suit."

But the bond in that case was of the usual kind as it created an obligation on the part of the surety to satisfy the claim under the decree that might be passed in the suit and stated that if it should be dismissed the obligation was to be void. I can find no difference between the wording of the bond here and the bond in that case. Looking at the bond in the present case, it is obvious that it has reference to the ultimate issue of the suit in the trial Court. It reads as follows :

"If the suit is to be decreed in favour of the plaintiff in accordance with the plaint he can recover the decree amount from me personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed."

Nevertheless it was contended before us that the latter condition shows that it was intended that

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(1) (1929) I.L.R. 53 Mad. 334 (F.B.).

(2) (1933) 65 M.L.J. 844.

(1) A.I.R. 1932 Cal. 858.

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BEASLEY C.J. when the suit was dismissed for any cause, even for default, the security bond was to be cancelled. This contention completely ignores the earlier part of the clause which makes the meaning perfectly clear. In my opinion, therefore, the District Munsif was wrong in thinking that the Full Bench decision in *Balaraju Chettiar v. Masilamani Pillai*(1) governs this case. It does not, and I am quite satisfied that the security bond in such a case is restored with the restoration of the suit. The order of the District Munsif dismissing the petition before him must therefore be set aside and the petition restored to file for disposal according to law. The civil revision petition is allowed with costs here and in the lower Court.

RAMESAM J.—I agree.

KING J.—I agree.

G.R.

(1) (1929) I.L.R. 53 Mad. 334 (F.B.).

APPELLATE CIVIL—FULL BENCH.

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

CHAVA RAMANAYUDU (PLAINTIFF), PETITIONER,

1934,
December 19.

v.

SURYADEVARA SEETHARAMAYYA AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

Abkari Act (I of 1886), sec. 27—Partnership for carrying on toddy shop business with a successful bidder at a toddy shop auction after the bid was knocked down in his favour—Effect of, when permission of the Collector had not been taken to work in such partnership.

A promissory note was executed by A, after he had become the successful bidder at a toddy shop auction, in favour of B for advances to be made by the latter for carrying on the toddy shop business which they agreed to work as partners. The licence was later on issued in A's name and the partnership carried on the business and the moneys covered by the promissory note were lent by B to the partnership. A had not obtained the permission of the Collector to work the toddy shop in partnership.

Held that, inasmuch as section 27 of the Abkari Act had been contravened, the partnership was formed for an illegal purpose and that no suit could be laid on the promissory note.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tenali in Small Cause Suit No. 63 of 1930, dated 22nd December 1930.

V. Govindarajachari for petitioner.

V. V. Chowdary and G. S. Venkatarama Ayyar for respondents.

Cur. adv. vult.

* Civil Revision Petition No. 1026 of 1931.

JUDGMENT.

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RAMAYYA.
BEASLEY C.J.

BEASLEY C.J.—This was a suit on a promissory note. The plaintiff was one Chava Ramanayudu and there were four defendants. The amount claimed was Rs. 907-13-0. The first defendant admitted the claim but pleaded non-liability on the ground that the plaintiff exonerated him. The third defendant was *ex parte*. The second and fourth defendants pleaded that the suit promissory note was for advances to be made by the plaintiff for carrying on a toddy shop which they (the defendants and the plaintiff) agreed to work as partners after the first defendant had already become the successful bidder for the year 1927-28 and that the partnership was an illegal partnership. The learned Subordinate Judge finds as a fact that the promissory note was executed for advances to be made by the plaintiff for the partnership, that the plaintiff was a partner and that the first defendant who obtained the licence was not shown to have obtained the Collector's permission to work the shop in partnership. In view of these findings he dismissed the suit.

The question before the learned Subordinate Judge was, and before us, is whether the partnership was formed for the purpose of doing something which was either illegal or opposed to public policy. The General Sales Notification issued annually by the Commissioner of Excise under the Abkari Act laying down the general conditions applicable to all abkari and opium licences by section 27 provides :

“ No privilege of supply or vend shall be sold, transferred or sub-rented without the Collector's previous permission.

Nor, if the Collector so orders, shall any agent be appointed for the management of any such privilege without his previous approval.”

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This condition is one of those which is set out in the abkari licence. Section 37 provides for the penalties to be inflicted on the infraction of any of the conditions of the licence by a licensee or by any person in his employment. The effect of section 27 is that a partnership in an abkari business is prohibited unless the previous permission of the Collector has been obtained. In *Nalain Padmanabham v. Sait Badrinadh Sarda*(1) the facts were that A and B were farmers of opium revenue under Government. They obtained a licence from the Collector for the sale of opium subject to the condition, among others, that they should not sell, transfer or sub-rent their privileges without the permission of the Collector (similar to section 27 in this case). A and B, without the sanction of the Collector, entered into an agreement with C, by which they admitted him as a partner in the opium business. C having brought a suit for dissolution and winding up of the business, it was held that the agreement was void and the suit was not maintainable, the effect of the agreement between A and B on the one hand and C on the other being to enable C to sell opium without a licence, an act directly forbidden by the Opium Act and made penal by it, that the contract being intended to enable C to do what was forbidden by law was unlawful and void, that the provisions of the Abkari and Opium Acts are not intended merely to protect public rovenue but the prohibitions contained in them

(1) (1911) I.L.R. 35 Mad. 582.

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are based on public policy, and that the agreement was also illegal as it amounted to a transfer by A and B of their privilege to C in violation of the condition against transfer subject to which the licence was granted. In the course of the judgment reference was made to *Marudamuthu Pillai v. Rangasami Mooppan*(1) where it was said :

"The provisions of the Abkari Act, as a whole, show clearly that every person carrying on abkari business as a principal must be licensed. . . .",

and :

"To hold that a person who has not got a licence could still be a partner with one who has a licence and as such partner carry on the business with or without the other would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on abkari business."

Other cases in point are *Behari Lall Shaha v. Jagodish Chunder Shaha*(2) and *Raghunath Lalman v. Nathu Hirji Bhate*(3). For the petitioner, however, reliance was placed upon the following cases, viz., *Appadurai Mudali v. Murugappa Mudali*(4), *Nanna Vazhmuni Mudali v. Nathamuni*(5) and *Narayanamurthy v. Subrahmanyam*(6). In the first case, which is a decision of ODGERS and MADHAVAN NAIR JJ., the plaintiff lent a sum of money on a promissory note to a partnership. The partnership consisted of defendants 1 to 3 and took a contract of sale of arrack in certain shops and borrowed money from the plaintiff for the purpose of that business. First of all, in the opinion of ODGERS J., the business was not an illegal one, on the ground that there was no sufficient material for the Court to so decide, and,

(1) (1901) I.L.R. 24 Mad. 401.
(3) (1894) I.L.R. 19 Bom. 626.
(5) (1929) 122 I.C. 342.

(2) (1904) I.L.R. 31 Calc. 798.
(4) (1925) 23 L.W. 709.
(6) (1928) 114 I.C. 655.

even on the supposition that the condition of the licence was that all the names of the licensees or persons concerned in that particular business by way of partnership must appear on the face of the licence, it was a question whether on the evidence of the plaintiff he could be said to be *particeps criminis* in the carrying on of the illegal trade because, assuming that there was a prohibition in the terms of the licence, there was no evidence that the plaintiff ever knew of it. The important distinguishing feature in that case is that the plaintiff was not a member of the partnership but was a stranger lending money to it. In the present case, the plaintiff was a partner and, if the partnership had for its object the carrying on of an illegal business, the plaintiff as a member of that partnership cannot be heard to deny that he had guilty knowledge. In the second case, which is a decision of ANANTAKRISHNA AYYAR J., the plaintiff was a partner and sued for the taking of the partnership accounts between him and the first and second defendants and for the recovery of the amount to be found due to him on the taking of the accounts. The suit was decreed but on appeal the Subordinate Judge reversed that decree and remanded the suit to the District Munsif for a fresh trial, and, whilst doing so, suggested that the District Munsif might at the retrial consider a new ground pressed before him, namely, that the partnership was illegal. At the retrial the first defendant put in an additional written statement contending that the partnership in question was illegal and opposed to public policy. The District Munsif found that the contract of partnership was illegal and opposed to public policy. The District

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Judge on appeal reversed the decision, and the case came up on second appeal before ANANTAKRISHNA AYYAR J. The facts were that the first defendant held a licence to sell toddy in a shop, and according to him took the plaintiff as a partner in respect of that business. The licence was not produced by the first defendant. The District Judge held that, since the licence relating to the year in question had not been produced, there were no grounds for saying that the contract of partnership was illegal. The licence, however, was produced in second appeal and was sought to be admitted in evidence, but ANANTAKRISHNA AYYAR J. refused to allow it to be admitted in evidence at that stage. ANANTAKRISHNA AYYAR J. held that it was essential that the licence granted to the first defendant should be produced and that the view of the District Judge was correct in stating that at the time the partnership was formed the first defendant had not begun to trade in toddy and had no stock which he made the joint property of all the three partners. In this view the partnership could not be held to be illegal as there was nothing *prima facie* illegal in such a partnership under the Abkari Act. The decision in this case appears to me to have turned on the absence of proof that the partnership was entered into for an illegal purpose. In the last case, which is a decision of REILLY J., it was held that, although a partnership entered into in contravention of a licence or of any rule under the Abkari Act is void and the licensee of a toddy or arrack shop cannot legally take a partner without sanction, yet, it is not illegal for several persons to enter into a partnership for the purposes of

bidding at a toddy shop auction and, if successful in the auction, of obtaining a licence and of carrying on a toddy shop business. REILLY J. holds that it is not illegal for persons to enter into a partnership for the purpose of carrying on a toddy shop business or one for which they hope at a future date to obtain a licence. That is quite true if it is intended at a future date to get a licence in the names of all the partners. That is not the fact here as a few dates will show. The first defendant was a successful bidder at the auction on 30th July 1927 and it was in his name that the licence was issued on 1st October 1927. The promissory note is dated 17th August 1927 and the money was therefore lent to the partnership after the first defendant had become the successful bidder at the auction and was the person in whose name the licence would be issued. The first defendant in his evidence said that the two months' deposit of Rs. 140 was paid by him about the 20th August. After the licence was issued it is plain from the evidence that the partnership carried on the business. The permission of the Collector required by section 27 of the General Sales Notification was neither obtained nor applied for and there is evidence that the plaintiff himself was collecting the money of the business and keeping accounts. One thing, therefore, is perfectly clear, namely, that an illegal partnership was actually being carried on; but it is contended that at the date of the commencement of the partnership it has not been shown that it was formed for an illegal purpose. The plaintiff in his evidence did not say that it was intended to apply for the Collector's permission

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for a transfer of the licence or to carry on the business in partnership, nor was there any cross-examination of the defence witness with regard to this point. The question is whether the learned trial Judge was right in drawing the inference from the facts that it was the intention of the partnership to carry on the business in the name of the first defendant alone. In my view, that is the only fair inference. The partnership was formed after the first defendant had become the successful bidder. The licence would, therefore, be issued in his name. No application had been made for the issue of the licence in the names of the partners. In fact no such licence was ever asked for, nor was the permission of the Collector obtained, and the fair inference is that the object of the partnership was to do that which it did in fact do, namely, carry on the business in contravention of section 27. On the facts of this case I am satisfied that the District Munsif properly decided the case; and in the result this civil revision petition must be dismissed with costs.

RAMESAM J.—I agree.

KING J.—I agree.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

YELURI SATYANARAYANA (DECEASED) AND TWO OTHERS
(PLAINTIFF AND NIL), PETITIONERS,

1934,
December 19.

v.

YELURI MALLAYYA AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

Minor—Guardian—Promissory note executed by—Liability of guardian or minor under—If and when—Promissory note, insufficiently stamped—Debt and making of note simultaneous—Right to fall back upon debt.

A promissory note was executed by the mother of certain minor members of a Hindu joint family. In the body of the promissory note the minors were described as the makers with the words "represented by their mother and guardian, Venkayamma", but she signed the same without any such description attached to her name. This promissory note was itself in renewal of an earlier promissory note by her in similar terms, which again was in renewal of a promissory note executed by the father of the minors. Two questions arose for decision, viz., (i) what was the true intention of the maker of the promissory note, and (ii) whether under the circumstances it was within the competence of the guardian by executing a promissory note to make the minors liable to the extent of the joint family property in their hands.

Held, (i) that all the surrounding circumstances should be looked into in order to find out whether the maker of the promissory note intended to exclude her personal liability as guardian but to make the wards liable; (ii) that, under the circumstances, inasmuch as the promissory note was in renewal of earlier promissory notes ultimately leading up to the liability of the father of the minors, such an intention could be inferred; and (iii) that in a proper case it is within the competence of a guardian by executing promissory notes to make a minor liable to the extent of the joint family property in his hands, and the

* Civil Revision Petition No. 1061 of 1930.

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fact that the payee of the promissory note can succeed against the minor and his estate only if certain facts are established cannot make the liability under the promissory note one other than an unconditional personal liability, and that so long as the form of the promissory note conforms to the definition of a promissory note under the Negotiable Instruments Act, it is not the less unconditional simply because, when the matter goes to a Court of law and the defendant raises some defence, the plaintiff has got to establish certain facts before he can succeed against the minor.

The dictum to the contrary in *Swaminatha Odayar v. Natesa Iyer*, (1932) I.L.R. 56 Mad. 879, overruled and the opinion of the majority of the Full Bench in *Ramajogayya v. Jagannadhan*, (1918) I.L.R. 42 Mad. 185 (F.B.), followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Guntur in Small Cause Suit No. 1399 of 1929.

D. Narasaraju for *N. Rama Rao* for petitioners.

P. Satyanarayana Rao for respondents.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—This revision petition arises out of Small Cause Suit No. 1399 of 1929 on the file of the Court of the District Munsif of Guntur in which the plaintiff sought to recover a sum of money due to him evidenced by the promissory note (Exhibit A) which itself was in renewal of an earlier promissory note (Exhibit A-1). Both these notes were executed by the defendants' mother, Venkayamma. In the body of the promissory notes the minor defendants are described as the makers with the words "represented by their mother and guardian, Venkayamma", but she signed the notes without any such description attached to her name. Exhibit A-1 itself was in renewal of an earlier promissory note (Exhibit A-2)

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executed by the defendants' father on 28th February 1922. According to the Hindu Law the sons are liable to pay their father's debt to the extent of the joint family properties received by them from their father or other assets inherited by them from him. The District Munsif held that on a construction of the suit promissory note it was not intended to make the defendants liable. Referring to *Subbanna v. Subbarayudu*(1), the learned District Munsif observed that

"the liability on a promissory note must be determined on the wording of the note and, in each case, the question is whether the instrument has been so drawn in form as to make the executant liable personally or only in his capacity as agent, guardian, etc."

He then thought that the mother did not intend to make the sons liable because she had used the feminine gender in the operative part of the note. This seems to be scarcely relevant as one finds it difficult to conceive in what other form the promissory note can be drawn up. Finally, purporting to follow the decisions in *Ramaswami Mudaliar v. Muthuswami Ayyar*(2), *Subbanna v. Subbarayudu*(1) and *Muthusami Naicken v. Soma-sundaram Mudaliar*(3), he dismissed the suit. The plaintiff has filed this revision petition.

The revision petition first came on for hearing before SUNDARAM CHETTI J. The respondents did not appear. Following the decision in *Ramajogayya v. Jagannadhan*(4) and *Meenakshisundaram Chetti v. Ranga Ayyangar*(5), the learned Judge set aside the lower Court's decree and passed a decree in favour of the plaintiff as sued for.

(1) (1925) 50 M.L.J. 125.

(2) (1915) 30 I.C. 481.

(3) (1927) 53 M.L.J. 814.

(4) (1918) I.L.R. 42 Mad. 185 (F.B.).

(5) (1931) 35 L.W. 397.

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Afterwards the respondents applied to set aside the *ex parte* decree by showing sufficient cause for their non-appearance. The *ex parte* decree was accordingly set aside and the petition came up for disposal before our brother VARADACHARIAR J. The learned Judge referred the matter to a Bench of two Judges who referred it to a Full Bench.

In *Subbanna v. Subbarayudu*(1) the question in a similar case was whether the guardians were personally liable. It was held that they were not, as it was clear on the note that they intended to exclude personal liability. Whether the minor was liable or not did not arise in that case. But, as it must have been intended to bind somebody and as it was held that the guardians were not liable, probably it would have been held that the minor was liable if the question had arisen. A portion of the case related to executors and the conclusion was different. This case does not therefore support the District Munsif's conclusion.

The decision in *Muthusami Naicken v. Soma-sundaram Mudaliar*(2) is a decision of a single Judge.

The case of *Ramaswami Mudaliar v. Muthuswami Ayyar*(3) was decided in 1915 and is similar to the case of *Muthusami Naicken v. Soma-sundaram Mudaliar*(2). So far as the form of the promissory note and the intention of the maker are concerned, the case before us is similar to *Subbanna v. Subbarayudu*(1). The intention of the makers of the note was to exclude the personal

liability of the guardian and to make the wards liable.

One must look at all the surrounding circumstances in inferring the intention. Seeing that the note was in renewal of earlier promissory notes ultimately leading up to the father's liability, I think this is the proper inference to draw.

But the further question arises whether in such circumstances it is within the competence of the guardian by executing a promissory note to make the minors liable to the extent of the joint family property in their hands. On this point it was held in some of the early cases that the minors may be liable under such circumstances; see *Subramania Ayyar v. Arumuga Chetty*(1), *Krishna Chettiar v. Nagamani Ammal*(2) and *Venkitaswami Naicker v. Muthuswamy Pillai*(3).

The matter came up before a Full Bench in *Ramajogayya v. Jagannadhan*(4). WALLIS C.J. held that a guardian cannot make personal covenants in the name of the ward so as to impose personal liability upon him, relying upon *Waghela Rasanji v. Shekh Masludin*(5). But SESHAGIRI AYYAR and AYLING JJ. held that such a wide proposition was not intended to be laid down in *Waghela Rasanji v. Shekh Masludin*(5) and they were of opinion that the liability of a minor under the Hindu Law is not affected by the fact that the promissory note was made by a guardian. They referred to a number of decisions of this and other High Courts which are in accordance with that view. This decision has always been

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(1) (1925) 50 M.L.J. 125.

(2) (1927) 53 M.L.J. 814.

(3) (1915) 30 I.C. 481.

(1) (1902) I.L.R. 26 Mad. 330.

(2) (1915) I.L.R. 39 Mad. 915.

(3) (1917) 34 M.L.J. 177.

(4) (1918) I.L.R. 42 Mad. 185 (F.B.).

(5) (1887) I.L.R. 11 Bom. 551 (P.C.).

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followed in this Court as settling the law, and I do not think that anything has happened since to induce me to depart from that decision. Its effect, as stated by CURGENVEN J. in *Zamindar of Polavaram v. Maharaja of Pittapuram*(1), is that any liability to which the minor would be subject under the Hindu Law is not the less a liability because it was incurred by his guardian on his behalf. See also *Ramakrishna Reddier v. Chidambara Swamikal*(2) and *Meenakshisundaram Chetty v. Ranga Ayyangar*(3).

In *The Imperial Bank of India, Madras v. Veerappan*(4) our brother PANDRANG ROW J. observed :

"The appellant bank can succeed in fixing the liability on the minor in respect of the promissory notes only if it is shown that the bank believed in good faith that there was a real necessity for the execution of the promissory notes, or that the agent was acting for the benefit of the minor's business."

In that case it was found that this was not shown, and hence the bank failed. There is no such difficulty in the present case. That decision implies that minors may be liable on a promissory note under such circumstances.

But the decision in *Meenakshisundaram Chetty v. Ranga Ayyangar* (3) has been doubted in *Swaminatha Odayar v. Natesa Iyer*(5). In the latter case, the promissory note was executed by a person who was not the lawful guardian at all, but, at page 883, REILLY J. proceeded to observe :

"How can any guardian impose a liability upon a minor by executing a promissory note on his behalf? If a promissory note is to effect anything, it must create an unconditional personal liability."

(1) (1930) I.L.R. 54 Mad. 163.

(2) (1927) 27 L.W. 322.

(3) (1931) 35 L.W. 397.

(4) (1934) 67 M.L.J. 573, 580.

(5) (1932) I.L.R. 56 Mad. 879.

The doubt seems to arise because of the fact that the payee of the note can succeed against the minor and his estate only if certain facts are established. This is true. But I do not think this fact makes the liability under the promissory note one other than an unconditional personal liability. What is meant by that phrase is that the liability mentioned in the note should not be made contingent on some event, for, if it is so made conditional or contingent upon the happening of some event, it will not conform to the definition of a promissory note. But, so long as the form of the promissory note conforms to the definition of a promissory note under the Negotiable Instruments Act, it is not the less unconditional simply because when the matter goes to a Court of law and the defendant raises some defence, the plaintiff has got to establish certain facts before he can succeed against the minor. The truth is that in no transaction entered into by a guardian on behalf of a minor can the opposite party succeed, if challenged, without establishing some facts such as that the transaction was for the benefit of the minor or some such other fact. That such a fact has got to be established does not, in my opinion, make the liability under the promissory note a conditional liability. On the doubt entertained by REILLY J. it follows that a promissory note on behalf of a minor is impossible. Such a view is opposed to the trend of all the decisions in all the High Courts including the Full Bench decision of *Ramajogayya v. Jagannadhan*(1). I am unable therefore to agree with the doubt suggested by REILLY J. The actual conclusion in the case

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RAMESAM J.

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).

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—
RAMESAM J.

before him rested on the fact that the promissory note was not executed by a lawful guardian at all. Otherwise, that decision must be regarded as overruled.

It was suggested that in such a case the suit should be on the debt and not on the note. But this seems to be a merely verbal distinction and not one of substance; *Krishna Chettiyar v. Nagamani Ammal*(1). A note is only evidence of a debt. It is true that in the case of insufficiently stamped promissory notes parties are not allowed to fall back upon the debt where the debt and the making of the note were simultaneous. Such a principle is necessary to protect the interests of public revenue. It is not necessary to extend the principle beyond such a case. In my opinion, therefore, the plaintiff is entitled to a decree. This is also the view of SUNDARAM CHETTI J. and of VARADACHARIAR J.

I would therefore set aside the decree of the District Munsif and give a decree to the plaintiff as prayed for with costs throughout.

BEASLEY O.J.—I agree.

KING J.—I agree.

G.R.

(1) (1925) I.L.R. 39 Mad. 915.

APPELLATE CIVIL.

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

ALLADA LAKSHMIKANTA RAO (DEFENDANT—JUDGMENT-
DEBTOR), APPELLANT,

1934,
October 2.

v.

NADDELLA RAMAYYA (PLAINTIFF—DECREE-HOLDER),
RESPONDENT.*

*Indian Limitation Act (IX of 1908), art. 182 (4)—Amended
final decree—Execution of—Limitation for—Starting point
of—Decree barred at date of application for amendment—
Amendment formal and wholly unnecessary.*

Under article 182 (4) of the Indian Limitation Act a decree-holder seeking to execute an amended final decree has a period of three years starting from the date of the amendment of the decree, even if the final decree had become barred by the date of the application for the amendment of the decree or the amendment applied for was merely a formal one and was really unnecessary. Those are matters to be dealt with by the Court to which the application for amendment is made.

Nagendranath De v. Sureshchandra De, (1932) I.L.R. 60 Cal. 1 (P.C.), applied.

Ahammad Kutty v. Kottekkat Kuttu, (1932) I.L.R. 56 Mad. 458, considered.

APPEAL against the order of the District Court of Kistna at Masulipatam dated the 4th day of March 1929, and made in Appeal No. 171 of 1928 preferred against the order of the Court of the District Munsif of Gudivada, dated 3rd May 1928 and made in Execution Petition No. 86 of 1928 in Original Suit No. 147 of 1917.

Ch. Raghava Rao for appellant.

A. Lakshmayya for respondent.

Cur. adv. vult.

* Appeal against Appellate Order No. 193 of 1929.

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v.
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BEASLEY C.J.

THE JUDGMENT of the Court was delivered by BEASLEY C.J.—This appeal raises a question of limitation. The final decree in the suit was passed on 2nd December 1921. On 21st October 1925 that decree was amended. It is contended here that the final decree of 2nd December 1921 had become barred by the date of the application for the amendment of the decree and its amendment on 21st October 1925. On 28th March 1927 the decree-holder applied for execution. This application was dismissed on 4th May 1927. He again applied on 4th November 1927. His application was again dismissed on 22nd November 1927. The execution petitioner filed another petition on 20th January 1928 and objection was raised that the petition was barred by limitation as having been presented more than three years after the passing of the final decree on 2nd December 1921. The District Munsif upheld this objection. The lower appellate Court reversed the District Munsif's decision. Hence this appeal.

It is argued here that the amendment of the decree was merely a formal one and that the final decree was an executable one even in its unamended form. In our view, we are not concerned with that. The fact that the final decree had already become barred or that the amendment applied for was unnecessary were matters to be dealt with by the Court to which the application had been made for the amendment, and we agree with the view of the District Judge that the effect of article 182 (4) of the Limitation Act must be that it is an answer to any objection taken with regard to the plea of limitation so far as the earlier final decree is concerned. The words of article 182 (4) of the

Limitation Act are : where the decree has been amended a period of three years' limitation is given starting from the date of the amendment of the decree. It was the amended decree that the decree-holder sought by his subsequent applications to execute. We propose to give the words of that article of the Limitation Act their plain meaning following the principle of construction laid down by the Privy Council in *Nagendranath De v. Sureshchandra De* (1). The headnote of that case reads as follows [See 53 M.L.J. 329] :

"Under the Limitation Act, article 182, clause 2, 'where there has been an appeal,' time for execution of the decree runs from the date of the decree of the appellate Court. The words of the article are plain and without any qualification either as to the character of the appeal or as to the parties to it. Held, therefore, that, where an appeal, irregular in form and insufficiently stamped, was dismissed both on the ground of irregularity and upon the merits, it was nevertheless an 'appeal' within the meaning of article 182, clause 2, and though the judgment-debtors against whom the execution was now sought were not parties to the appeal, time only ran against the decree-holders from the date of the appellate Court's decree dismissing the appeal. Equitable considerations are out of place in the construction of the Statute of Limitation and the strict grammatical meaning of the words must be given effect to."

On page 334, SIR DINSHAH MULLA, in delivering the judgment of their Lordships' Board, says :

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. 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

(1) (1932) 53 M.L.J. 329; I.L.B. 60 Calc. 1, 6 (P.C.).

LAKSHMIKANTA RAO v. RAMAYYA. BEASLEY C.J. 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 decision of the Privy Council is not quoted by MADHAVAN NAIR J. in *Ahammad Kutty v. Kottekkat Kutty*(1), who in consequence does not rely on the express language of the article and does not apply the principle there laid down. In our opinion, applying that principle, this appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

ATHIMANNIL MUHAMMAD (PLAINTIFF), APPELLANT,

v.

THE MALABAR DISTRICT BOARD (DEFENDANT),
RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 225, sub-ss. (1) and (3)—Contract entered into with Vice-President of Local Board—President cancelling same acting under section 106 (1) of the Act—Suit for damages filed after six months—Limitation—Test, whether the action is one on contract or independent of contract, only a working rule—Real test, whether the act complained of was done in pursuance of a statute.

M filed a suit against a District Board, more than six months after the date of the accrual of the cause of action, claiming damages on the ground that its President improperly cancelled a contract of lease, for one year, of the tolls in

(1) (1932) I.L.R. 56 Mad 458.
* Appeal No. 94 of 1930.

certain places, which was stated to have been entered into by him with the Board through its Vice-President. The President in performance of what he (the President) thought was his duty under the Madras Local Boards Act, as he interpreted the same, accepted a higher offer by another person, and the cancellation of the acceptance of M's offer was the necessary result.

Held (i) that section 225, sub-sections (1) and (3) of the Madras Local Boards Act applied and the suit was out of time;

(ii) that, though the distinction between actions on contract and actions independent of contract may be convenient enough as a working rule in such cases, the real test to be applied was whether what was complained of was some act done in pursuance of a statute.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated the 30th March 1929, and passed in Original Suit No. 3 of 1928.

P. S. Narayanaswami Ayyar for appellant.

P. Govinda Menon for respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—We have heard arguments on this appeal only on the question raised by the second issue, namely, whether the suit is barred under section 225 (3) of the Madras Local Boards Act, as it has admittedly been instituted more than six months after the accrual of the alleged cause of action. As we agree with the lower Court in its conclusion on this point, it is unnecessary to deal with the other issues arising in this case.

The plaintiff filed this suit, claiming damages from the District Board of South Malabar, on the ground that by the order dated 31st March 1925 the President improperly cancelled a contract with the plaintiff whereby the plaintiff had been given the lease, for one year of the tolls in certain

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BOARD.

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places in the Malabar District. The material facts are, that, pursuant to an invitation of tenders, the plaintiff made a tender on the 23rd March 1925 which was accepted by the Vice-President, during the President's absence, on the 24th March. The President seems to have left directions that the papers relating to the lease of tolls should be placed before him and he was, therefore, apparently of opinion that the acceptance by the Vice-President was not authorized. He also seems to have found that there was another contractor who offered a much larger amount in respect of the same toll-gates. He naturally accepted the tender of the other man and, as a necessary result, cancelled the acceptance of the plaintiff's tender. Both these subjects are embodied in one order of the President (see Exhibits III and V). The question for consideration under the second issue is whether or not the action is in respect of "any act done or purporting to be done in pursuance or execution or intended execution of the Act".

On behalf of the appellant, Mr. Narayanaswami Ayyar has contended that several cases have held that this provision does not apply to cases arising out of breach of contract but is limited to liabilities arising out of the execution of, or the omission to execute, statutory duties of such bodies. Reference may, in this connection, be made to *Mayandi v. McQuhae*(1), *The President, District Board, Malabar v. Kenti Kanaran*(2), *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*(3), *Municipal*

(1) (1878) I.L.R. 2 Mad. 124.

(2) (1906) 17 M.L.J. 390.

(3) (1901) I.L.R. 25 Bom. 387.

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Council of Kumbakonam v. Veeraperumal Pada-yachi(1) and *Bradford Corporation v. Myers*(2). This distinction between actions on contracts and actions independent of contracts may be convenient enough as a working rule, but we do not think it can be said to represent accurately the basis of the applicability of the rule. This was realised by JENKINS C.J. even in *Ranchordas Moorarji v. The Municipal Commissioner for the City of Bombay*(3) and is emphasised by Lord SHAW in *Bradford Corporation v. Myers*(2). The real test is whether what is complained of is some act done in pursuance of the statute. In cases where there is no dispute as to the existence of a contract, all further rights and liabilities between the parties are governed by the ordinary law relating to contracts; and it is true enough, in such a case, to say that the rights and liabilities of the parties in respect of the contract are matters of ordinary law and not matters governed by the statute. But where, as in the present case, we find that the cancellation of the acceptance of the plaintiff's offer is the necessary result of what the President thought, in accordance with the terms of the Act as he interpreted them, his duty to accept, viz., the highest tender—and he did this on the footing that the Vice-President's acceptance of the plaintiff's tender is not a compliance with the Act—we cannot say that the question does not relate to an act done under the statute. The right to levy tolls is a special privilege conferred by the statute upon local bodies and, under the

(1) (1914) 28 M.L.J. 147.

(2) [1916] 1 A.C. 242.

(3) (1901) I.L.R. 25 Bom. 387.

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terms of section 106 (1), Local Boards are authorized either to manage the collection of the tolls themselves or through their own agency or to lease them out. In either case what the President as representing the Board does in connection with the leasing out of the right to levy tolls is undoubtedly an act done in execution of his powers or duties under the Act.

The discussion in *Bradford Corporation v. Myers*(1) is itself sufficient to show the difficulties in the way of attempting anything like an exhaustive definition or clear-cut differentiation of the cases falling under the section and of cases not falling under the section. Lord BUCKMASTER L.C., for instance, emphasises the distinction between an incidental power to trade and a direct duty to trade, even in cases where a statutory body is authorized to trade and the LORD CHANCELLOR was of opinion that anything falling under the second head will be governed by the provisions of the Act. Both Lord HALDANE and Lord SHAW emphasise the impossibility of framing anything like a general test. The question must depend upon the circumstances of each case, and, for the reasons already given, we hold that the present case is within the terms of section 225 (1) of the Local Boards Act. In *Municipal Council of Kumbakonam v. Veeraperumal Padayachi*(2) NAPIER J. takes care to point out that, in the case then before the Court, the contract was not of such a character as must necessarily arise out of statutory powers given to the local body. The same cannot be said of

(1) [1916] 1 A.C. 242.

(2) (1914) 28 M.L.J. 147.

the contract here. In *Bhagchand Dagadusa v. Secretary of State for India*(1) the Privy Council, in dealing with a similar provision, namely, section 80 of the Code of Civil Procedure, pointed out that, if a particular action falls within the language of the statute, it is not for the Court to canvass the policy or even the expediency of interfering with a person's right of action by such a restrictive provision. In the view that the present action is clearly within the terms of section 225, sub-sections 1 and 3 of the Local Boards Act, the suit must fail on the ground that it has been instituted more than six months after the accrual of the alleged cause of action. The appeal is, therefore, dismissed with costs.

G.R.

(1) (1927) I.L.R. 51 Bom. 725 (P.C.).

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1934,
September 27.

MINOR LAKSHMANAN CHETTIAR, BY HIS MOTHER AND
GUARDIAN LAKSHMI ACHI, AND ANOTHER (RESPONDENTS
10 AND 11), APPELLANTS,

v.

MINOR CHIDAMBARAM CHETTIAR, BY HIS MOTHER
AND NEXT FRIEND UNNAMALAI ACHI, AND SEVEN OTHERS
(SECOND PETITIONER AND RESPONDENTS 1 TO 4 AND
6 TO 8), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXII, rr. 4 (4) and
11—Appeals—Applicability—Respondent not entering ap-
pearance within time limited by notice of appeal—Death of
—Legal representatives of—Bringing on record of—Neces-
sity—Decree adverse passed without his legal representa-
tives—Nullity, if—O. XLI-(A), rr. 2 and 3; O. XLI,
r. 14—Applicability and effect of—Executing Court—
Validity of decree—Jurisdiction to question.*

The plaintiff in a suit for the recovery of some property appealed to the High Court from the decree dismissing his suit. One of the defendants who had contested the suit in the Court below and was impleaded as a respondent in the appeal was served with notice of the appeal but he failed to comply with the terms of the notice by not entering an appearance within the thirty days allowed. He died subsequently during the pendency of the appeal and an application to bring his legal representatives on record was dismissed on the ground that, under Order XXII, rule 4, of the Code of Civil Procedure, no legal representatives need be impleaded. The appeal was heard in due course and the decree of the lower Court reversed. For the purpose of executing the appellate decree a petition was filed in the lower Court for the addition of the heirs of the said respondent as legal representatives.

Held, that the order exempting the plaintiff-appellant from the necessity to substitute the legal representatives of the deceased respondent was one which the High Court had jurisdiction to pass, that the appellate decree had the same force

* Appeal against Order No. 464 of 1932.

and effect as if it had been pronounced before the said respon- LAKSHMANAN
dent died and that the order of the lower Court bringing his CHETTIAR
legal representatives on record for the purpose of executing the CHIDAMBARAM
decree was right. CHETTIAR.

Semble, the executing Court is not entitled to enquire into the validity of the appellate decree passed against the said respondent.

Govindan Nadar v. Natesa Pillai, (1931) 61 M.L.J. 520, approved.

Subramania Ayyar v. Vaithinatha Aiyar, (1913) I.L.R. 38 Mad. 682, and *Arunachalam Chetty v. Abdul Subhan Sahib*, (1925) 50 M.L.J. 232, disapproved.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah dated the 24th day of October 1932 in Execution Petition No. 105 of 1932 in Original Suit No. 22 of 1923.

T. M. Krishnaswami Ayyar for appellants.

C. S. Venkatachariar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—The appeal arises out of exe- CURGENVEN J.
cution proceedings taken in a suit filed to recover some property from a number of defendants. We are here concerned with the ninth defendant. With the others he contested the suit and it was dismissed with costs. The plaintiff appealed to the High Court, the ninth defendant being impleaded as the eighth respondent. On 2nd May 1926 he was served with notice of the appeal but he failed to comply with the terms of the notice by not entering an appearance within the thirty days allowed. The appeal was disposed of in December 1930 and sometime in June 1927, while it was pending, the eighth respondent died. After his death three petitions were filed by the appellant in the appeal—(i) to excuse the delay which had

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CURGENVEN J.

occurred, (ii) to set aside the abatement of the appeal, and bring on the legal representative of the eighth respondent, namely the present first appellant, as tenth respondent and (iii) to appoint his mother as his guardian, he being a minor. In disposing of these petitions the learned Judges, PHILLIPS and DEVADOSS JJ., passed an order in these terms :

" Under Order XXII, rule 4, Civil Procedure Code, no legal representative need be impleaded. The petitions are dismissed."

The appeal was heard in due course and the decree of the lower Court reversed, the appellate decree directing the respondents to put the legal representative of the plaintiff in possession. For the purpose of executing this decree a petition (Execution Petition No. 105 of 1932) was then filed praying that the present appellants might be added as legal representatives of the deceased ninth defendant, and that has been ordered by the lower Court.

That order is contested on the grounds that rule 4 (4) of Order XXII, Civil Procedure Code, has no application to appeals, that the learned Judges who passed their order under this rule had therefore no jurisdiction to exempt the appellant from the necessity to substitute the legal representatives of the deceased respondent and accordingly that the appellate judgment, having been pronounced against the dead eighth respondent, is not binding on his legal representatives.

Rule 11 of Order XXII provides for the application of the Order to appeals, so far as may be. Unless therefore there is something in the terms of rule 4 (4) which precludes its application to appeals, there can be no doubt that, equally with

a number of other provisions of the Code which are in language adapted to suits, the intention is to apply a similar rule to both forms of proceeding. It is worth notice that a provision of somewhat analogous character, embodied in the proviso to rule 14 of Order XLI, and enabling the appellate Court to dispense with service of notice on respondents against whom the suit has proceeded *ex parte*, was introduced into the Code at the same time as rule 4 (4) of Order XXII. Mr. T. M. Krishnaswami Ayyar argued that it is not possible to apply this latter rule to appellate procedure. He contends that no such omission or default can be made by a respondent in an appeal as will correspond to that of a defendant

" who has been declared *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing."

Such a respondent cannot be declared *ex parte*. He has nothing to do and cannot therefore commit default in doing anything, until the actual hearing of the appeal. Even if he has failed to enter an appearance, yet if he appears in person or by pleader on the day of the hearing he must be heard.

This does not, we think, give quite a correct view of the position of a respondent, at least in relation to proceedings before this Court. The procedure is specified in Order XLI-(A), which modifies Order XLI of the Civil Procedure Code. Rule 2 (2) of this Order prescribes a period of thirty days from service of notice for entry of appearance by the respondent and filing by him of a memorandum of cross-objections if any. Under rule 3, if the respondent intends to appear and defend the appeal he shall within the period

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specified enter an appearance by filing in Court a memorandum of appearance. If he fails to enter an appearance within the time allowed and in the manner provided, he shall not be allowed to translate or print any part of the record. Failure therefore to appear may involve the exclusion of part of the record from consideration in appeal, so that, even though a respondent who has not complied with these rules may be heard, he must do without such portions of the record as the appellant has not been interested to print. He cannot have something done for him the time for doing which is over. It appears to us that this is just the nature of the penalty attached to default by a defendant in a suit. If a defendant is *ex parte*, Order IX, rule 7, provides that he can only be heard in answer to the suit as if he had appeared on the day fixed for his appearance, if he assigns good cause for his previous non-appearance. If he has failed to file a written statement or, having filed it, has failed to appear and contest at the hearing, he cannot claim to go back to the stage reached before the default occurred. On the other hand, it is always open to him at any time after such default to appear and contest the suit in its remaining stages. No more than in an appeal therefore does any finality attach to a default of appearance in a suit. We think that the rule, alike for suits and appeals, is grounded not upon some irrevocable default committed by the defendant or respondent before his death but upon the creation, by his conduct, of a reasonable expectation that, had he survived the later stages of the suit or the hearing of the appeal, he would have remained *ex parte*. That expectation seems to us to be at least as strong in the case of a

respondent who has failed to put in an appearance within the time allowed as in the case of a defendant who for instance has filed a written statement but has not appeared and contested at the hearing and has then died. The power which the rules give to the Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. Where, as in the present case, there are several respondents whose interests are common, and some contest and others do not enter appearance, it is fairly safe to assume that the defence of the decree has been left in the hands of some on behalf of all. We think therefore that the learned Judges who passed the order under reference had jurisdiction to pass it, that the appellate decree has the same force and effect as if it had been pronounced before the eighth respondent died and that the order of the lower Court bringing on his legal representatives must be confirmed.

We have heard some further argument upon the question whether, assuming the order to have been without jurisdiction, so that the appellate decree would not bind the eighth respondent's heirs, the matter can be raised in execution. Since anything which we may now say on this point will be merely *obiter*, we do not propose to discuss the question at length. We have been referred to two Privy Council cases in which it is said objection has been allowed in execution to the validity of the decree. In *Khiarajmal v. Daim*(1) the question was whether the right of a mortgagor to redeem was affected by certain sales

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(1) (1904) I.L.R. 32 Cal. 296 (P.C.).

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in execution under decrees in which he as a minor was not properly represented, and it was held that he could proceed to redeem without taking any proceedings to get the sales and decrees set aside. The principle accepted was, therefore, that in a separate suit such a decree could be treated as a nullity, and nothing was said as to the power of an executing Court to go behind the terms of the decree. In *Wajid Ali Khan v. Puran Singh*(1) the trial Court passed a decree for pre-emption. There was an appeal, and while it was pending one of the respondents (plaintiffs) died and the legal representative was not brought on. The suit was dismissed in appeal and the defendant obtained restitution of possession. The plaintiffs then contended that by reason of the death of one of their number the whole appeal had abated and that the appellate decree was a nullity, so that the defendant was not entitled to possession. It was held that the abatement was limited to the appeal against the deceased respondent's interest and that the appellate decree did not bind his legal representatives, so that they were entitled to re-delivery of possession. The point was not raised or decided whether the validity of such a decree could be questioned in execution proceedings. Moreover the proceedings were by way of restitution and it is at least doubtful whether the same principle would apply to them. So far as this Court is concerned, we have been shown three decisions of single Judges, *Subramania Aiyar v. Vaithinatha Aiyar*(2), *Arunachalam Chetty v. Abdul Subhan Sahib*(3) and *Govindan Nadar v. Natesa*

(1) (1928) I.L.R. 51 All. 267 (P.C.). (2) (1913) I.L.R. 38 Mad. 682.
(3) (1925) 50 M.L.J. 232.

Pillai(1). In the first of these OLDFIELD J. and in the second MADHAVAN NAIR J. have accepted the principle that an executing Court can satisfy itself whether or not a decree is a nullity for some such reason as improper representation. JACKSON J. has come to a contrary decision in the third case and in our judgment the opinions which he expressed are supported by the greater weight of authority, especially the two Calcutta cases, *Kalipada Sarkar v. Hari Mohan Dalal*(2) and *Gora Chand Haldar v. Prafulla Kumar Roy*(3), and appear to us in other respects to be more acceptable. We should therefore hold, if it were necessary, that the executing Court was not entitled to enquire into the validity of the appellate decree passed against the deceased eighth respondent.

We dismiss the appeal with costs.

A.S.V.

(1) (1931) 61 M.L.J. 520. (2) (1916) I.L.R. 44 Calc. 627.
(3) (1925) I.L.R. 53 Calc. 166 (F.B.).

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CURGENVEN J.

APPELLATE CIVIL.

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

1934,
November 8.

THE PRESIDENT OF THE BOARD OF COMMISSIONERS
FOR THE HINDU RELIGIOUS ENDOWMENTS,
MADRAS (PETITIONER), APPELLANT,

v.

THE SHIRUR MUTT BY ITS TRUSTEE LAKSHMINDRA
THIRTHASWAMIAR (RESPONDENT), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 70
(2)—Application under, for recovery of amount of contri-
bution—Limitation—Indian Limitation Act (IX of 1908),
art. 182—Applicability—District Judge to whom applica-
tion under sec. 70 (2) made—Legality of demand—Juris-
diction to consider.

An application under section 70 (2) of the Madras Hindu
Religious Endowments Act (II of 1927) for the recovery of the
amount of contribution is governed by article 182 of the Indian
Limitation Act.

Re: Belvedere Jute Mills, Ltd. (Chaitram Sagormull v.
Hardwarimull & Co.), (1927) 31 C.W.N. 1097, applied.
Lakshmindra Tirtu Swamiyar v. H.R.E. Board, Madras, (1933)
I.L.R. 56 Mad. 712, referred to.

When an application is made under section 70 (2) the
District Judge would be in the same position as any other exe-
cuting Court and would be precluded from deciding whether
the demand was right or wrong.

Mathura Prasad v. Sheobalak Ram, (1917) I.L.R. 40 All. 89,
applied.

APPEALS against the orders of the District Court
of South Kanara dated 28th February 1931 and
passed respectively in R.E.P. Nos. 1 and 2 of
1931.

* Appeals against Orders Nos. 359 and 360 of 1931.

*K. Subba Rao for Government Pleader (P. H.R.E. BOARD,
Venkataramana Rao) for appellant. MADRAS*

*T. Krishna Rao for B. Sitarama Rao and K. THE SHIRUR
Srinivasa Rao for respondent. MUTT.*

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
KING J.—The appellant in these appeals is the
President of the Board of Commissioners for
Hindu Religious Endowments, Madras. In May
1930 the Board made a demand under section 70
of the Madras Hindu Religious Endowments Act
upon the respondent, the trustee of two mutts in
Udipi, for contributions for several years begin-
ning with the fasli ending with 30th June 1925.
The contributions were not paid, and in due
course the Board applied (November 1930) under
section 70 (2) to the learned District Judge of
South Kanara to recover the amount of the contri-
butions. The Board's applications were allowed
in so far as the period subsequent to 30th June
1926 was concerned but the demands for the two
faslies ending with that date were held to be
barred by limitation. Against this part of the
District Judge's order the Board has appealed.

The clause in section 70 (2) of the Act which
regulates the Court's proceedings is the follow-
ing:

"The Court shall, on the application of the President of
the Board . . . recover the amount as if a decree had
been passed for the amount by the Court against the religious
endowment concerned."

Now it is contended for the appellant that
such an application is governed by article 182 of
the Limitation Act. For this position there is no
direct authority, but we think the appellant is

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entitled to rely upon the ruling reported as *Re : Belvedere Jute Mills, Ltd. (Chaitram Sagormull v. Hardwarimull & Co.)* (1). In that case, the article of the Limitation Act applicable to the enforcing of an award under section 15 of the Indian Arbitration Act was being considered, and it was held that article 182 applied. The words of section 15 are quoted in the headnote, "shall be enforceable as if it were a decree of that Court", and it will be seen that these words are precisely similar in significance to the words in section 70 (2) of the present Act: "The Court shall . . . recover the amount as if a decree had been passed." This position also receives support, though the question of limitation did not there arise, from the ruling of a Bench of the Madras High Court in *Lakshmindra Tirta Swamiyar v. H.R.E. Board, Madras*(2). It was there held that an appeal lay under section 47, Civil Procedure Code, from an order of the Court passed under section 70 (2) of the Act as the words "as if a decree had been passed" attract to the order the whole procedure in execution and with it "the right of appeal". No ruling to any effect contrary to these authorities has been brought to our notice, and we accordingly hold that article 182 applies to the present cases. That being so, the applications of the Board could not have been made until three months had elapsed from the date of the Board's demand (i.e., until August 1930) and being made in November 1930 were clearly in time.

The only question which remains is whether the District Judge, even if he had held the applications to be in time, could yet have examined

(1) (1927) 31 C.W.N. 1097.

(2) (1932) I.L.R. 56 Mad. 712.

the demand of the Board on its merits and come to the conclusion that no demand should be made for more than three years' arrears of contribution. We do not think the District Judge would have this power. On the principles laid down in *Lakshmindra Tirta Swamiyar v. H.R.E. Board, Madras*(1), we think the District Judge would be in the same position as any other executing Court and would be precluded from deciding whether the demand was right or wrong, just as in execution it is forbidden to the executing Court to go behind the plain words of a decree. On this point, too, there is clear authority derived from the construction of the terms of a similar section in another Act. In section 42 (5) of the Co-operative Societies Act (II of 1912) it is provided that

"orders made under this section shall, on application, be enforced as follows:—(a) when made by a liquidator, by any civil Court having local jurisdiction in the same manner as a decree of such Court."

Mathura Prasad v. Sheobalak Ram(2) deals with an instance of such a liquidator's order and it was held that the Court could not consider whether that order was right or wrong but was bound to enforce it.

We are therefore of opinion that the present order of the learned District Judge in so far as it is appealed against cannot be supported in any manner and must be set aside and the Board's applications restored to file and disposed of according to law. We are not unmindful of the possible injustice which might result from this interpretation of section 70 (2), as the learned District Judge has pointed out in the sixth

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(1) (1932) I.L.R. 56 Mad. 712.

(2) (1917) I.L.R. 40 All. 89.

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paragraph of his order, but that is a matter which can be remedied only by the Legislature and not by the Courts. The appeals are thus allowed with costs throughout of one appeal.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1934,
November 23.

LANKA RAMIAH AND ANOTHER (RESPONDENTS 2 AND 3),
APPELLANTS,

v.

THE HINDU RELIGIOUS ENDOWMENTS BOARD,
MADRAS, AND ANOTHER (PETITIONER AND FIRST
RESPONDENT), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 70
(2)—Court making an order under—Jurisdiction of—
Validity or propriety of demand—Merits of decision upon
which demand made—Enquiry into—Jurisdiction—Execut-
ing Court—Decree under execution—Questioning of—
Jurisdiction.*

A Court in making an order under section 70 (2) of the Madras Hindu Religious Endowments Act (II of 1927) has the same powers, and is subject to the same limitations, as would be a Court executing an ordinary civil decree. It must execute the demand made by the Board as it stands and cannot enter into questions of its validity or propriety. In particular, no inquiry can be made into the merits of the decision upon which the demand is made. It is open to the Court to decide in any disputed case whether the property out of which it is proposed to realise the amount is a religious endowment within the meaning of the Act.

The trend of recent decisions is to incapacitate an executing Court from questioning the decree in any respect

* Appeals against Orders Nos. 322, 323 and 324 of 1932.

whatever, certainly in so far as the merits of the subject-matter of the suit are concerned.

Lakshmanan Chettiar v. Chidambaram Chettiar, (1934) I.L.R. 58 Mad. 752, considered.

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APPEALS against the orders of the District Court of Kistna at Masulipatam, dated 28th March 1932 and made in Execution Petition No. 98 of 1931, Original Petition No. 14 of 1930 and Execution Petition No. 97 of 1931 respectively.

B. T. M. Raghavachari for appellants.

Government Pleader (P. Venkataramana Rao)
and *Y. Govindarajulu* for respondents.

The JUDGMENT of the Court was delivered by CURGENVEN J.—These three civil miscellaneous CURGENVEN J. appeals arise out of three of a large number of applications made by the Hindu Religious Endowments Board to the District Court of Kistna to enforce the payment of certain contributions leviable under sections 69 and 70 of the Madras Hindu Religious Endowments Act. The District Court, proceeding under sub-section 2 of section 70 of the Act, has ordered that the properties specified in the schedules to the applications should be proceeded against for the realization of these amounts. The appellants, who are persons in possession of these properties, raised a large number of objections in the Court below as to the validity of the Act itself and of the action of the Board, as well as a number of specific objections on the merits of each case. Some of these have been given up, including those relating to the validity of the Act.

Before turning to those which are still pressed we have to consider what are the limits of the powers of a Court in making an order under

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section 70 (2) for the recovery of a contribution. The section provides:

"The Court shall, on the application of the President of the Board or committee, recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned."

It is accordingly reasonable to hold that the Court has the same powers, and is subject to the same limitations, as would be a Court executing an ordinary civil decree. The general principle is of course that the Court cannot go behind the decree into the merits of the claim; whether it is good or bad in law or in fact, the Court must take it at its face value. How far this principle extends in the case of an ordinary decree has been the subject of a good many judicial decisions. We ourselves had occasion recently in *Lakshmanan Chettiar v. Chidambaram Chettiar*(1) to consider, it is true *obiter*, the question and we approved a judgment of JACKSON J. in *Govindan Nadar v. Natesa Pillai*(2) accepting the principle laid down by the Full Bench case of *Gora Chand Haldar v. Prafulla Kumar Roy*(3), namely, that it is only where the decree is made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree that the executing Court is entitled to refuse to execute it. Our attention has now been drawn to a Full Bench case of the Rangoon High Court, *S. A. Nathan v. S. R. Samson*(4), which we do not think was brought to our notice in the previous case and which goes a good deal further and considers that an executing Court is not entitled to

question the validity of a decree even upon the grounds specified in the Calcutta decision. And a single Judge of the Calcutta High Court itself in *Kalicharan Singha v. Bibhutibhushan Singha*(1) has followed this decision. It is, we think, clear that the trend of recent decisions is to incapacitate an executing Court from questioning the decree in any respect whatever, certainly in so far as the merits of the subject-matter of the suit are concerned. The views expressed in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(2) and *Sami Mudaliar v. Muthiah Chetti*(3) are not in conflict with this principle. In *Venkatasomeswara Rao v. Lakshmanaswami*(4) the referring Judges differed on this question and the Full Bench to which it was referred found it unnecessary to decide it.

Our attention has then been drawn to certain other circumstances in which a Court has to enforce an order by some outside authority for the payment of money as if it were due under a decree. There are English cases, for instance, dealing with the powers of Justices in enforcing the collection of poor rates, such as *Cheney v. Tallowin*(5) and *Churchwardens of St. Stephen v. Great Northern and City Railway Company*(6). We find that in those cases the Justices recognized that their powers to question the correctness of the claim which they were asked to enforce were not unqualified. But it is impossible to say that the procedure in such cases is in any strict sense comparable with that of a Court executing a decree in this country and, accordingly, we cannot

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(1) (1934) I.L.R. 58 Mad. 752.

(3) (1925) I.L.R. 53 Calc. 166 (F.B.).

(2) (1931) 61 M.L.J. 520.

(4) (1931) I.L.R. 9 Rang. 480 (F.B.).

(1) (1932) I.L.R. 60 Calc. 191.

(3) (1922) 43 M.L.J. 293.

(5) [1904] 2 K.B. 763.

(2) (1920) I.L.R. 43 Mad. 675 (F.B.).

(4) (1928) I.L.R. 52 Mad. 275 (F.B.).

(6) (1902) 86 L.T. Rep. 390.

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find that the analogy suggested is of much assistance. Another class of cases relates to the enforcement of demands under the Co-operative Societies Act (II of 1912) in this country which a Court is empowered to execute as if they were embodied in a decree. Here, again, we think it is unnecessary to examine the several cases, for there is no doubt that the principle has been distinctly recognized that the limitations of a Court's power are similar to those of a Court executing an ordinary decree. In respect of the Religious Endowments Act itself a case has recently been decided by BEASLEY C.J. and KING J., *H. R. E. Board, Madras v. The Shirur Mutt*(1), in which this same point of a Court's powers arose, the specific question being whether the District Judge could examine the demand made by the Board upon its merits and could decide that no demand should have been made for more than three years' arrears of contribution. It was held that the District Judge would be in the same position as any other executing Court and would be precluded from deciding whether the demand was right or wrong. There is thus ample justification for the view that the Court must execute the demand made by the Board as it stands and cannot enter into questions of its validity or propriety. In particular, no inquiry can be made into the merits of the decision upon which the demand is based.

The application of this principle is, we think, sufficient to dispose of the only objections before us which might otherwise deserve serious consideration—whether the Board has claimed contributions for periods for which it has no right to

make such a claim. It is said that a demand for a period before the present Act came into force would not be legal inasmuch as section 7 of the Act does not retrospectively validate such a demand. We do not think this is a question which, in enforcing the demand, the Court can go into, nor can it go into other similar questions of the same character, as, for instance, whether it is open to the Board at any time to assess arrears or whether it must assess for each year in the succeeding year itself.

The only further questions then are whether the Court can satisfy itself that the person to whom the notice has been addressed is a trustee and, further, whether the property which it is proposed to proceed against in the execution proceedings is trust property. On this latter point, we have no doubt that it is open to the Court to decide in any disputed case whether the property out of which it is proposed to realise the amount is a religious endowment within the meaning of the Act, because that clearly is a question which arises in execution itself, just as the liability of any property alleged to be that of a judgment-debtor for the satisfaction of a money-decree would be a question arising in ordinary execution.

With regard to Civil Miscellaneous Appeals Nos. 322 and 324, the trustees were served with notice of demand in each case and they failed to pay. An execution petition was then filed before the Court embracing the archakas as well as the trustees, and it is the archakas who are the appellants before us. If the Court in those cases finds that the property in the schedule to these execution petitions is part of the religious endowment,

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it may clearly be proceeded against to satisfy the demand, and any person who may be interested in the property, such as these archakas may be, may bring into issue the question whether or not it is trust property. Of course, if it is trust property, they cannot resist the enforcement of the demand against it.

With regard to the remaining appeal, Civil Miscellaneous Appeal No. 323, it appears that notice was served upon the two archakas who are the appellants and it is stated that notice was not served upon any other person as trustee. Here, again, inquiry must be made, if the fact is disputed, whether the schedule property is part of the religious endowment and the archakas, if in possession of it, may be allowed to contest the issue; but we do not think that they have any right to dispute the validity of the notice served by the Board on the ground that it was not served upon the trustee. If, in fact, there is some other trustee of the religious institution who should have received notice to pay, it was for him, and may still be for him if he elects to intervene, to object on this score, and not for persons who, if the property is trust property, have no right to resist the proceedings if, as they assert, they are not the trustees. This case, therefore, we consider, cannot on this ground be distinguished from the other two cases, and the procedure will be the same in all. Accordingly we think that the correct course will be to set aside the orders passed by the learned District Judge in each of these three cases and direct the Court to inquire whether the property forms part of the religious endowments of the specified temple and, if so,

what steps should be taken to enforce the demand against it.

We observe from the B Diary that attachment of the immovable property has been ordered. It may be objectionable to effect sales of any portion of this property to meet these demands if they can be satisfied in any other way, as by the appointment of a receiver. We commend this point to the consideration of the Court below in making its final orders.

The costs in this Court will abide and follow the result.

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APPELLATE CIVIL.

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

HIS HOLINESS SRI LA SRI VYTHILINGA PANDARA
SANNADHI, ADHINAKARTAR, THIRUVADUTHURAI MUTT
(SECOND DEFENDANT), PETITIONER,

1934,
October 30.

v.

SANKARALINGA THAMBIRAN AND ANOTHER
(PLAINTIFFS 2 AND 5), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 115—Issues in suit
—Decision of one of several—Revision against—Compet-
ency of—Interference in—Conditions—Practice—Appeal
and revision—Memoranda of—Contents of.*

Where one of the issues in a suit was whether the suit was maintainable under section 92 of the Code of Civil Procedure and the Court below decided that it was,

* Civil Revision Petition No. 924 of 1933.

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held that a revision petition from its decision was competent but that the High Court ought not to interfere in revision unless the point could be shortly and conveniently disposed of by way of a revision petition.

Balakrishna Odayar v. Jagannada Ohariar, (1924) 48 M.L.J. 534, and *Ranganayaki Bai Ammal v. Shivarama Dubay*, (1929) 58 M.L.J. 104, relied upon.

Grounds of revision petition or memorandum of appeal to the High Court should only contain very briefly and concisely the grounds upon which it is contended the lower Court's decision is wrong. To set out legal arguments therein is an entire misconception of what is right and proper, and is contrary to the provisions of Order XLI, rule 1(2), of the Code of Civil Procedure.

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 (Additional) of Tanjore, dated 22nd December 1932 and passed in Original Suit No. 50 of 1931 (Original Suit No. 71 of 1918 on the file of the Court of the Subordinate Judge of Kumbakonam).

K. S. Krishnaswami Ayyangar, V. N. Venkata-varadachariar and R. Gopalachari for petitioner.

T. R. Venkatarama Sastri for *P. N. Marthan-dam Pillai* for the first respondent.

M. Balasubramania Mudaliar and T. M. Ramaswami Ayyar for the second respondent.

Cur. adv. vult.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—This civil revision petition is presented against a decision of the Additional Subordinate Judge of Tanjore upon issue No. 1 in the suit which was :

"Is the Thiruvaduthurai Mutt a public, charitable or religious institution within the meaning of section 92, Civil Procedure Code, and is the suit sustainable under the said section?"

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BEASLEY C.J.

The Additional Subordinate Judge gave his decision upon this issue on the 22nd December 1932, finding that the mutt was a public and charitable religious institution within the meaning of section 92, Civil Procedure Code, and that the suit was therefore sustainable under that section. The objection taken to this decision is that the Judge has failed to distinguish between an endowment for the general support of the mutt and a specific endowment for a specific purpose and that the former purpose is not one which makes the mutt a charitable or religious institution within the meaning of section 92, Civil Procedure Code. A preliminary objection to the maintainability of this revision petition was taken by the respondents, it being contended that an appeal from the decree in the suit lies to the High Court, that the question before us is one which has to be decided in such an appeal and that a decision upon one of several issues in the suit is not a decision upon the case, and therefore no civil revision petition can be entertained. In support of this contention a decision of a Full Bench of the Allahabad High Court in *Buddhu Lal v. Mewa Ram*(1) was relied upon. This decision certainly supports the preliminary objection but it was not the unanimous decision of the Full Bench of five because two of its number dissented from the majority view and held that the High Court had jurisdiction to entertain an application in revision, WALSH J. one of the dissenting Judges stating that in the Allahabad High Court there were pronounced and irreconcilable differences of principle in the practice followed by different Judges. Apart

(1) (1921) I.L.R. 43 All. 564 (F.B.).

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from the fact that in this case the decision was not unanimous, there are decisions of this High Court taking a contrary view to that taken by the majority of the Full Bench in that case; and we see no reason why we should therefore seek authority from elsewhere. One of the Madras decisions is *Balakrishna Odayar v. Jagannada Chariar*(1), a decision of WALLACE and MADHAVAN NAIR JJ. In that case the Court had to consider issue No. 1 in the suit which, as in the present case, raised the question of the maintainability of the suit under section 92 of the Civil Procedure Code. The Court decided that it was a fit matter for revision, holding that, if the suit is not maintainable at all, interference by the High Court in revision would prevent further waste of time and money; and it was on that account that the revision petition was entertained, though it was stated that interference in revision with findings in a pending suit is not a matter which the High Court will view with favour and it will require a very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference. Another case is the decision of CURGENVEN J. in *Ranganayaki Bai Ammal v. Shivarama Dubay*(2) to the same effect and in the course of his judgment reference is made to other reported cases of this High Court, CURGENVEN J. stating:

"I think it must be said that there is now a course of decisions in favour of interference sufficiently marked to render it undesirable that a single Judge should take the opposite view."

(1) (1924) 48 M.L.J. 534.

(2) (1929) 58 M.L.J. 104.

In our opinion, it is clear that it has been the practice of this High Court to exercise its revisional powers in such cases and therefore the preliminary objection must be overruled. But it by no means follows that, because the High Court has the power to interfere in revision in such cases, it must necessarily do so. On the contrary, we are definitely of the view that the High Court ought not to do so unless the particular point can be shortly and conveniently disposed of by way of a civil revision petition; and it seems to us that this is certainly not such a case. We may usefully refer to two decisions of the Privy Council, viz., *Mahomed Solaiman v. Birendra Chandra Singh*(1) and *Jagannath Rao Dani v. Rambharsa*(2), where it is stated that it is the duty of the Courts in India to pronounce upon all important points in an appealable case. It is conceded that some of the endowments in question were for a specific purpose. Hence it follows that, to the extent of those endowments at least, the lower Court must frame a scheme. The petitioner, however, is unable to tell us the extent of those endowments and the position is that he is unable to urge anything more than an objection to the framing of a scheme with regard to the endowments for the general purposes of the mutt and is unable to say whether these endowments form the larger part of the endowments of the mutt or what the extent of them is. Both sides are here with a large mass of authorities upon this question and it may be necessary also to examine some of the evidence given in the case, and in this connection we must observe that a large number of witnesses

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(1) (1922) I.L.R. 50 Calc. 243 (P.C.).

(2) (1932) L.R. 60 I.A. 49.

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were called in the lower Court and a mass of documents considered and the Additional Subordinate Judge has dealt with this matter in a judgment which consists of 114 paragraphs covering 114 pages of the printed record. Whilst giving all credit to the learned Judge for his great care, it is, in our opinion, a judgment of quite unnecessary length. Not to be outdone in prolixity, the petitioner here has presented a memorandum of civil revision petition which consists of 51 paragraphs covering 11 pages of the printed record. Most of these paragraphs cover the same objection; and many of them quote reported decisions of Benches and Full Benches of this High Court and decisions of the Privy Council and contain legal arguments upon them and contentions that the trial Judge has erroneously misapplied them and as to how he has misapplied them and has failed to note distinguishing features in them. We feel bound to register our strong protest against such a gross misuse of grounds of petition or memorandum of appeal to the High Court. These should only contain very briefly and concisely the grounds upon which it is contended the Court's decision is wrong. To state the same ground or grounds again in different language, besides being a waste of time, can serve no useful purpose. It should be unnecessary to add further that, in the grounds of revision and appeals to the High Court, to set out legal arguments is an entire misconception of what is right and proper, and is contrary to the provisions of Order XLI, rule 1 (2), of the Civil Procedure Code. We decline to deal with this

matter by way of revision; and this petition must accordingly be dismissed with costs.

We cannot leave this case without saying that it is a glaring example of protracted litigation. The suit was filed in 1918 and in 1932, fourteen years afterwards, the issue as to its maintainability was first decided. This seems to us to be nothing short of a scandal. The suit must now be disposed of without further delay. Issues 2 and 3 have already been decided, and the other issues as yet undecided must be pronounced upon as soon as possible. In order to save any delay should there be an appeal against the decree upon this point, the Subordinate Judge is directed to frame a scheme for the general endowments, and another for those for specific purposes.

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APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and
Mr. Justice Cornish.*

MOWLAVI HAJI MAHOMED ABDUL BAQI
(SECOND RESPONDENT), APPELLANT,

1934,
October 26.

v.

KANURU SUNDARARAMAYYA AND ANOTHER (PETITIONER
AND FIRST RESPONDENT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 145—Applicability of—Contract of suretyship imposing personal liability for performance of a decree.

Section 145 of the Code of Civil Procedure is not restricted to suretyships undertaken through the Court. The language

* Appeal against Order No. 82 of 1933.

ABDUL BAQI v. SUNDARA-RAMAYYA. of section 145 (a) is wide enough to apply to any contract of suretyship whereby a personal liability has been undertaken for the performance of a decree.

Subbaraya Pillai v. Sathanatha Pandaram, 1918 M.W.N. 764, dissented from.

Joyma Bewa and others v. Easin Sarkar, (1926) I.L.R. 53 Calc. 515, followed.

Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) I.L.R. 42 All. 158; L.R. 46 I.A. 228, referred to.

APPEAL against the order of the Court of the Subordinate Judge of Nellore, dated 7th September 1932 and made in Execution Petition No. 48 of 1931 in Original Suit No. 44 of 1929 on the file of the Court of the Subordinate Judge of Bezwada.

K. Kuppuswami for appellant.

P. Satyanarayana Rao for respondents.

Cur. adv. vult.

CORNISH J. The JUDGMENT of the Court was delivered by CORNISH J.—The appellant by a letter (Exhibit A), dated 7th October 1930, undertook to be surety for the payment of a decree debt due by his brother. The letter recited that the decree-holder had agreed not to execute his decree against the brother on the representation that it would be fully satisfied before the end of April 1931, and it concluded with these words :

“If we fail to so pay the amount to you, not only will my younger brother be liable therefor, but you can take proceedings against our properties and against us and we shall not raise any objection thereto.”

It is clear from the terms of Exhibit A that the appellant had made himself personally liable to the decree-holder as surety for the payment of the decree against his brother. The learned Subordinate Judge has ordered execution to issue against the appellant as surety, and it is from this

order that he has appealed. The question turns upon the construction of section 145 of the Civil Procedure Code, of which the material portion runs as follows :

“Where any person has become liable as surety—(a) for the performance of any decree or any part thereof, . . . the decree . . . may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees. . . . Provided that such notice as the Court in each case thinks sufficient has been given to the surety.”

This apparently means that where a person has made himself personally liable as surety for the performance of a decree it can be executed against him as though he were a party to the suit and the judgment-debtor.

The appellant relies on *Subbaraya Pillai v. Sathanatha Pandaram*(1), which is certainly a decision in his favour. In that case it was held that section 145 was limited to surety bonds taken through the Court and was inapplicable to suretyships undertaken for the performance of decrees entered into outside the Court. NAPIER J., who delivered the leading judgment, thought that, inasmuch as clauses (a), (b) and (c) of section 145 could be referred to specific provisions of the Code, e.g., Order XLI, rule 5, clause 3 (c), Order XLI, rule 6, and Order XXXVIII, rule 2, clause 2, the section should be confined to cases where the surety had entered into his liability “in the face of the Court”. But the learned Judge stated that he found it impossible to express a confident opinion on the matter. We also find from a reference to the record in that case that permission to report it in the Indian Law Reports was refused

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for the reason that the learned Judges were doubtful of the correctness of the decision.

In these circumstances we should in any event feel justified in regarding the case as of doubtful authority. But we think that its *ratio decidendi* has been negatived by the subsequent ruling of the Judicial Committee in *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1) that the Court has an inherent power, apart from section 145, to enforce a security which has been given in pursuance of the order of the Court. In the particular case section 145 had no application, because the security was in the form of a charge upon property and was not a bond imposing a personal liability. Similarly, in *Sankunni Variar v. Vasudevan Nambudripad*(2), where sureties had executed a bond to the Court undertaking to produce the property of a judgment-debtor which had been released from attachment upon that undertaking, it was held that section 145 would be inapplicable but that the bond could be enforced by execution.

In our opinion this recognised power of the Court to enforce execution against a surety independently of section 145 deprives of any further force the reason in *Subbaraya Pillai v. Sathanatha Pandaram*(3) for restricting section 145 to suretyships undertaken through the Court.

Furthermore, there is the direct decision in *Joyma Bewa and others v. Easin Sarkar*(4) that it is not essential for the purpose of executing a decree against a surety under the provision of section 145 (a) that the contract of suretyship

(1) (1919) I.L.R. 42 All. 158; L.R. 46 I.A. 228.

(2) (1926) 51 M.L.J. 239.

(3) 1918 M.W.N. 764.

(4) (1926) I.L.R. 53 Cal. 515.

should be in the form of a bond or that it should be in favour of the Court.

We think that the language of section 145 (a) is wide enough to apply to any contract of suretyship whereby a personal liability has been undertaken for the performance of a decree. The order of the Subordinate Judge directing execution to issue against the appellant was correct, and the appeal must be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

GOVINDASWAMI MUDALIAR (RESPONDENT-
DECREE-HOLDER), PETITIONER,

1934,
November 19.

v.

RASU MUDALIAR (PETITIONER), RESPONDENT.*

Indian Registration Act (XVI of 1908), sec. 17 (2) (vi) as amended by the Transfer of Property (Amendment) Supplementary Act, 1929, sec. 10—Application for attachment before judgment—Whether a “proceeding” within the meaning of—Consent order thereon—Exempt from registration.

An application for attachment before judgment is a “proceeding” within the meaning of section 17 (2) (vi) of the Indian Registration Act (XVI of 1908) as amended by section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929; and a consent order thereon is excepted from registration.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Shiyali, dated

* Civil Revision Petition No. 490 of 1934.

19th January 1934 and made in Miscellaneous Application No. 1000 of 1933 (Small Cause Suit No. 18 of 1933, Sub-Court, Mayavaram).

V. Ratnam for petitioner.

K. Bhashyam Ayyangar for *K. Venkataramani* for respondent.

Cur. adv. vult.

JUDGMENT.

The question raised in this case relates to the construction of section 17 (2) (vi) of the Indian Registration Act. Under the clause as it originally stood, "decrees and orders of Courts and awards" were excepted from registration; but by an amendment made by section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, the following clause was substituted:

"Any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding."

In *Hemanta Kumari Debi v. Midnapur Zamindari Company*(1), the Judicial Committee held, having regard to the wording of Order XXIII, rule 3, of the Code of Civil Procedure, that where a suit is adjusted by a lawful agreement between the parties, the proper course is to recite the agreement in the decree or to annex it as a schedule to the decree, but in either case the operative part of the decree should be confined to the actual subject-matter of the suit; then, turning to the Indian Registration Act of 1908 and considering the meaning of the word "decree" in section 17 (2) (vi), they further held that there was no reason

why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree, adding:

"It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents." (Page 496.)

The result of this decision is that the entire decree was excepted from registration, that is to say, that part of it which related to the suit as well as that which was extraneous to it; in other words, for the purpose of the Registration Act, in the case of a consent decree, the expression "decree" meant the whole of it—both the operative part and the part relating to matters outside the suit. It was while the law was in this state that the amendment was made.

The first question that arises is, does the consent decree in question comprise immovable property which is the "subject-matter of the suit"? To answer this question, I must first briefly state the facts. Rasu Mudaliar (the respondent) filed Original Suit No. 6 of 1931 for the recovery of a sum of money from the defendants in that suit. On his application certain properties were attached before judgment and notice was directed to the defendants. Both the application and the suit came on for hearing on the 30th January 1931. On that day the parties entered into a compromise and a decree was made embodying its terms. The compromise decree provided for the payment of the amount claimed in three months and created a charge for the sum decreed over the properties that had already been attached. As regards the application, an order was simultaneously made, which ran thus: "Petition is dismissed."

(1) (1919) I.L.R. 47 Calc. 485; L.R. 46 I.A. 240.

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About two years later, Govindaswami Mudaliar (the petitioner) obtained a money decree against the same defendants in Small Cause Suit No. 18 of 1933 and attached the properties already mentioned. Rasu Mudaliar (the respondent) preferred a claim under Order XXI, rule 58, of the Civil Procedure Code, asserting that, by virtue of his compromise decree, he obtained a valid charge over the properties and that his opponent could bring them to sale only subject to his own charge. This contention was upheld by the lower Court.

The first question that arises on these facts, as I have said, is, can it be held that the properties in question are the "subject-matter" of the suit, Original Suit No. 6 of 1931? The respondent's Counsel, in support of his contention that they are, relies upon the decisions that have construed the words "relates to the suit" occurring in Order XXIII, rule 3, of the Civil Procedure Code. In *Joti Kuruvetappa v. Izari Sirusappa*(1), where the relief claimed was for a money decree only but the compromise decree made the amount a charge on the defendant's property, it was held that the compromise was "lawful" within the meaning of section 375 of the Civil Procedure Code of 1882 (corresponding to the present Order XXIII, rule 3) and "related to the suit". In that view, in a subsequent suit filed to enforce the charge, the plaintiff was given a decree. In *Gobinda Chandra Pal v. Dwarka Nath Pal*(2), when in similar circumstances a suit was filed upon a charge, the contention that the compromise decree was void for want of registration was negatived on the ground that it did not offend against the

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terms of section 375. These and similar decisions proceeded upon the principle that all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, *become related to the suit*. The questions that arise therefore are, is it permissible to construe the words "the subject-matter of the suit" in the Registration Act in the light of the decisions which have interpreted words altogether different, namely, "relates to the suit" occurring in a statute like the Civil Procedure Code? Again, is it a far-fetched inference that the amendment was made with a view to alter the law as laid down in *Hemanta Kumari Debi v. Midnapur Zamindari Company*(1) referred to above? I prefer to leave the questions unanswered, for I think I can rest my judgment on another ground urged in the alternative for the respondent.

The section of the Registration Act refers to both decrees and orders by consent. The order in question must be deemed to have been made both in the suit as well as in the petition for attachment before judgment. The properties had been attached *ex parte* and notice went to the defendants on the petition. Both the suit and the petition were heard together. The defendants could have not only opposed the attachment but could have also claimed compensation, alleging that the attachment was wrongful; but the parties chose to compromise both the suit and the petition. The consent decree made must be deemed to have been as much a decree in the suit as an order in the petition; the use of the word "dismissed" conveys

(1) (1907) I.L.R. 30 Mad. 478.

(2) (1908) I.L.R. 35 Calc. 837.

(1) (1919) I.L.R. 47 Calc. 485; L.R. 46 I.A. 240.

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no more than that the petition was disposed of by the decree made in the suit.

The question then arises, is an application for attachment a "proceeding" within section 17 (2) (vi) of the Registration Act? That question must, in my opinion, be answered in the affirmative. There is no reason why the word should be understood in the restricted sense, as referring only to proceedings in original matters in the nature of suits, such as proceedings in probate and guardianship. It is relevant to note that the Civil Procedure Code treats an attachment before judgment as a "supplemental proceeding" (see the *heading* of Part VI of the Civil Procedure Code). The word "proceeding" is thus defined in Black's Law Dictionary (2nd Edn., page 947) :

"Any application to a Court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object."

Stroud points out that the word "proceeding" may mean, according to the context, either "any action" or "any proceeding in the action". (See Stroud's Judicial Dictionary, Vol. III, page 1561). The old section referred to "any decree or order of a Court and any award"; there was nothing to indicate that the word "order" was not intended to apply to interim proceedings.

I am therefore of the opinion that the property in question was the "subject-matter" of a "proceeding" within section 17 (2) (vi) and that the consent order (which, as I have shown, is also, in the circumstances, a consent decree) is excepted from registration. The civil revision petition therefore fails and is dismissed with costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenvin and Mr. Justice King.

PICHAJ PILLAI AND OTHERS (ACCUSED), PETITIONERS,

v.

BALASUNDARA MUDALY AND OTHERS (COMPLAINANTS),
RESPONDENTS.*

1935,
January 31.

Criminal Procedure Code (Act V of 1898), sec. 197 (1)—"Public servants"—Distinction between, for purposes of sanction of Local Government to prosecute.

The expression "any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority" in section 197 (1) of the Code of Criminal Procedure will not include public servants whom some lower authority has by law or rule or order been empowered to remove. The section clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the Local Government to their prosecution be necessary.

A police constable being removable by the District Superintendent of Police and a Sub-Inspector by the Deputy Inspector-General of Police, the previous sanction of the Local Government for their prosecution is not necessary under section 197 of the Criminal Procedure Code.

Sheik Abdul Kadir Saheb v. Emperor, 1916 M.W.N. 384, and *Narayana v. Emperor*, 1934 M.W.N. 370, dissented from.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Town Sub-Magistrate of Trichinopoly, dated 20th July 1934 and made in Calendar Case No. 1051 of 1932 ;

the order of the Court of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, in Calendar Case No. 418 of 1934 ;

*Criminal Revision Cases Nos. 584, 628, 765, 773 and 829 of 1934 (Criminal Revision Petitions Nos. 539, 582, 706, 714 and 766 of 1934).

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MUDALIY. the order of the Court of the Subdivisional Magistrate of Trichinopoly, dated 1st September 1934 and made in Preliminary Register Case No. 1 of 1934 ;

the order of the Court of the Second-class Magistrate of Turaiyur, dated 30th August 1934 and made in Calendar Case No. 234 of 1934 ;

and the order of the Court of the Subdivisional Magistrate of Trichinopoly in Calendar Case No. 19 of 1934.

K. S. Jayarama Ayyar for G. Gopalaswami Ayyar, N. Suryanarayana, V. Sankaran and C. M. J. Ernest for petitioners.

A. V. Narayanaswami Ayyar and M. A. T. Coelho for respondents.

A. Narasimha Ayyar for Public Prosecutor (L. H. Bewes) and K. V. Ramaseshan for Crown Prosecutor (T. S. Anantaraman) for the Crown.

Cur. adv. vult.

CURGENVEN J. The ORDER of the Court was delivered by CURGENVEN J.—These five criminal revision petitions relate to prosecutions instituted against police officers for offences alleged to have been committed while acting or purporting to act in the discharge of their official duty, and they raise the general question whether the previous sanction of the Local Government should have been obtained under section 197 of the Criminal Procedure Code. We have to decide what is the correct construction to be placed upon the words

“any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority”.

In *Sheik Abdul Kadir Saheb v. Emperor*(1) COUTTS TROTTER J. (afterwards CHIEF JUSTICE)

(1) 1916 M.W.N. 384.

had to deal with this point in a case in which the chairman of a Union Panchayat was prosecuted for the offence of criminal breach of trust. The learned Judge found that

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“the power of removal was vested in the Local Government by section 126 of the Madras Local Boards Act and that by section 160 of the same Act the Local Government were empowered to delegate this power and in fact by notification had delegated it to the President of the District Board.”

Upon this he observes :

“Now it is argued in the first place that by that act of delegation on the part of the Government the accused became *ipso facto* removed from the category of persons who are not removable from office without the sanction of the Government of India or the Local Government ; because it is argued that by the act of delegation he becomes removable by a third authority, namely, the President of the District Board. To my mind that argument is unsound and, in my opinion, the delegation by the Local Government of its power to a special officer only means that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done ; and it is an ordinary case of *qui facit per alium facit per se*. It is no doubt done in accordance with the delegation, but nevertheless it remains the act of the Local Government. I am therefore of opinion that the accused has established that he is within the meaning of this section a public servant not removable from his office without the sanction of the Local Government.”

This case was followed by BARDSWELL J. in *Narayana v. Emperor*(1). Only one other case directly in point has been cited to us and it supports the opposite view. In *Emperor v. Jalal-ud-din*(2) the learned Judges think that the obvious intention of the language of the section which, as they point out, makes no reference to delegated authority, was to simplify the law regarding sanction and to narrow the circle of public servants for whose prosecution sanction

(1) 1934 M.W.N. 370.

(2) (1925) I.L.R. 48 All. 264.

PICHAU PILLAI WAS necessary under the previous Code. They confess themselves unable to follow the judgment of COUTTS TROTTER J.

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In several cases in which this question might have been raised it appears to have been taken for granted that the section will not apply to public servants who are by delegation of powers removable by some authority other than and not superior to the Local Government; see, for instance, *Reddy Venkayya*(1), *Imperatrix v. Bhagwan Devraj*(2), *Venkatesalu Naidu v. Heeraman Chetty*(3) and *Abboy Naidu v. Kannappa*(4).

We do not think that the general principle expressed by the phrase *qui facit per alium facit per se* should necessarily be acted upon if it appears that its application would involve the breach of another legal principle more specifically applying to the case in point. It is an elementary rule in construing a statute to give due meaning to every part of the language which it employs, and a construction which fails to do this *prima facie* fails to give effect to the intention with which the provision was drafted. Sub-section 1 of section 197, Criminal Procedure Code, runs thus :

“When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.”

(1) (1912) 12 M.L.T. 351.
(3) (1898) 2 Weir. 226.

(2) (1879) I.L.R. 4 Bom. 357.
(4) (1928) 2 Mad. Crl. C. 143.

Now, if we adopt the construction accepted by PICHAI PILLAI COUTTS TROTTER J., the result would be that all servants of Government, as that expression is commonly understood, will come within the section, because the power to remove them is in every case derived either from the Local Government or from some higher authority—the Government of India or the Secretary of State. It is true that if the expression “public servant” had been used without any qualification, it would have had to bear the meaning attached to it by section 21 of the Indian Penal Code and extended to the Criminal Procedure Code by section 4 of the latter Code; and it would thus have included such persons as jurors, arbitrators and others not ordinarily comprehended within the term. It may thus be argued that it was the purpose of the framers of the section to exclude “public servants” of this kind and that the section does so. We do not think that this accounts for the particularity of the language used. If the notion of delegation was present to the minds of the drafters of the section, there was nothing to prevent them from indicating this. Even so, to frame a section on such lines would have been a very unnatural and a very misleading way of expressing the intention that all Government servants, in the usual acceptation of that phrase, were to be included. How misleading it would be is shown by the cases we have cited in which the alternative view has been taken for granted.

We think that the section clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the Local Government to

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their prosecution be necessary. This intention appears to us to be so clear from the terms of the section that, while we agree that a protective provision of this nature should be construed as widely as possible, we do not feel called upon to enter into the merits of a policy which thus distinguishes between public servants who may be prosecuted and those who may not be prosecuted without the sanction prescribed. Nor do we think that any valid ground of distinction is to be found in the means adopted to empower the officer beneath the rank of the Local Government to pass an order of removal. Mr. Jayarama Ayyar has endeavoured to distinguish between an act of delegation and an act of empowerment, and between statutory provisions and executive orders. It may be conceded that all such means to achieve the end proposed are nothing more nor less than acts of delegation, and that while so delegating its power the delegating authority does not divest itself of a corresponding power. It is not reasonable to suppose that in framing the section it was intended that any such fine-drawn distinctions should be observed, and we conclude accordingly that the expression

"any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority"

will not include public servants whom some lower authority has by law or rule or order been empowered to remove. In the cases now in point, admittedly the police officers are removable by such authorities—the police constable involved in Criminal Revision Case No. 584 by the District Superintendent of Police and the Sub-Inspectors

involved in the other cases by the Deputy Inspector-General of Police.

The result is that, so far as this point is concerned, the criminal revision petitions fail, and since it is the only point raised in Criminal Revision Petitions Nos. 584, 765, 773 and 829 of 1934 we dismiss these petitions. In Criminal Revision Petition No. 628 the accused, who is a Sub-Inspector of the Madras City Police, has been convicted under sections 323 and 355, Indian Penal Code. He has been awarded non-appealable sentences under these sections and we could only interfere, if at all, in revision. The questions involved are no more than questions of fact and after carefully considering the evidence and the learned Third Presidency Magistrate's judgment we are clearly of opinion that there is no ground for such interference. We have been asked as an alternative course to permit a composition of the offences under sub-section 5 A of section 345, Criminal Procedure Code. We do not think that we ought to exercise this power in the circumstances of the case. The Sub-Inspector has been convicted of what must for an officer in his position be regarded as serious offences against a member of the public and the conviction accordingly has an aspect quite other than as it stands between himself and the complainant. In this case too we must accordingly dismiss the revision petition.

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APPELLATE CIVIL—FULL BENCH.

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

KAKU CHENCHURAMANA REDDI (PETITIONER),
APPELLANT,

v.

PALAPU ARUNACHALAM (RESPONDENT), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), sec. 9 (1) (c)—Period of
three months mentioned in—If, a period of limitation or a
condition—General Clauses Act (X of 1897), sec. 10.*

On 29th June 1931, the re-opening day after the Court's
vacation, a petition for adjudication was presented basing the
same on an act of insolvency alleged to have occurred on 28th
February 1931. The three months' period expired on 28th
May 1931, when the Court was closed.

Held, that the period of three months fixed in section 9
(1) (c) of the Provincial Insolvency Act is not a period of limita-
tion but is a condition to an adjudication, and accordingly an
act of insolvency which has occurred more than three months
prior to the presentation of the petition is not available as a
ground of adjudication.

Narayana Ayyar v. Official Receiver, South Malabar, Calicut,
(1933) 39 L.W. 449, overruled. *Ex parte Games. In re Bam-*
ford, (1879) 12 Ch. D. 314, followed.

APPEAL against the order of the District Court
of Nellore, dated 27th September 1932, and made
in Insolvency Petition No. 20 of 1931.

K. Kuppuswami for appellant.

P. Chandra Reddi for respondent.

Cur. adv. vult.

JUDGMENT.

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BEASLEY C.J.—This civil miscellaneous appeal
raises an important and interesting question of

law. The appellant here presented a petition
praying that the respondent should be adjudicated
an insolvent under the Provincial Insolvency Act.
The chief act of insolvency alleged in the petition
was the execution of a sale deed on 28th February
1931 in favour of a close relative of the respon-
dent. This act of insolvency admittedly occurred
more than three months before the date of the
presentation of the petition which was dated 29th
June 1931. The three months' period ended on
28th May 1931, but that was during the lower
Court's vacation and the petition was accordingly
presented on the re-opening day. The question is
whether the period of three months stated in
section 9 (1) (c) of the Provincial Insolvency Act
is a period of limitation or a condition precedent.
The learned District Judge rightly states that this
is a question which is not easy of solution. He,
however, felt himself bound by the judgment of
SPENCER J. in *Aiyapparaju v. Venkatakrish-*
nayya(1), and held that the three months stated is
a condition precedent to the filing of a petition
and is not a period of limitation. The section in
question, namely, section 9 of the Provincial
Insolvency Act reads as follows:—

“(1) A creditor shall not be entitled to present an insol-
vency petition against a debtor unless . . . (c) the act of
insolvency on which the petition is grounded has occurred
within three months before the presentation of the petition.”

It was contended here and in the lower Court
by the petitioner that sub-clause (c) provides a
period of three months from the occurrence of the
act of insolvency relied upon within which the
petitioner can present a petition and therefore

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(1) (1922) 44 M.L.J. 303.

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that period is a period of limitation. Much reliance was placed by the appellant's counsel on a decision of KRISHNAN PANDALAI J. in *Narayana Ayyar v. Official Receiver, South Malabar, Calicut*(1). There, the respondent, the Official Receiver, filed a petition under sections 4, 53 and 54 of the Provincial Insolvency Act against the appellant to declare his mortgage invalid as a fraudulent preference. The mortgage was executed on 13th March 1924 and the insolvency petition was presented on 16th June 1924 on the re-opening of the Court after vacation, i.e., more than three months from the date of the mortgage. The Subordinate Judge held that section 10 of the General Clauses Act applied to extend the time given by section 54. The District Judge held that there was no warrant for such extension as the three months mentioned in section 54 is not a period of limitation. In second appeal, KRISHNAN PANDALAI J. held: (i) that section 10 of the General Clauses Act would not, by the proviso to that section, apply to provincial insolvency proceedings after the amendment of the Limitation Act in 1922 by the insertion of section 29 (2); (ii) that section 4 of the Limitation Act applies though the effect is the same as if section 10 of the General Clauses Act applied; (iii) that an insolvency petition which by section 9 (1) (c) of the Act should be presented within three months of the act of insolvency—in that case the mortgage—would, if three months expired as it did there during the vacation of the Court, be validly presented on the re-opening of the Court; (iv) that the period of three months mentioned in section 54 is a period

of limitation and not a condition precedent incapable of extension and a valid presentation under section 9 of the Act is valid for the purposes of the whole Act; and (v) that the appellant's mortgage was hence made within three months before the presentation of the petition and therefore it had to be considered whether in other respects it amounted to a fraudulent preference. With great respect to the learned Judge, I am unable to agree with his conclusion that section 54 provides a period of limitation. A transfer which is a fraudulent preference is also an act of insolvency upon which a petition for adjudication can be founded and section 54 is, as regards the period of three months, in my view, quite definite. It means that, if, within three months from the date of the transfer, a petition for adjudication is presented upon which the debtor is subsequently adjudicated an insolvent, the transfer is liable to be impeached as a fraudulent preference. As such, it is also an act of insolvency. A debtor making such a transfer knows that he is, within three months from the date of his transfer, liable to have a petition in insolvency presented against him; the transferee-creditor knows that he is running a risk within those three months of having the transfer set aside thereafter as a fraudulent preference under the Insolvency Act; and I see no warrant for supposing that after the expiry of the three months the debtor and the creditor are to be subject any longer to their respective risks. As soon as the three months' period had expired, the transaction ceases to be impeachable under the Insolvency Act, and in my view therefore the transfer ceases on that day to be an act of

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insolvency. The object of the Act is to prevent a debtor on the eve of his insolvency from intentionally preferring a creditor to his other creditors. The Act specifies a period of three months. KRISHNAN PANDALAI J., however, is of the opinion that it can be more than three months, namely, that it can be some period just short of three months, *plus* the vacation of the Court in whose jurisdiction the debtor is. He thinks that any other view would lead to an impossible result because in certain cases it would cut down the period of three months from the date of insolvency beyond which period no insolvency petition could be presented. He regards this as unreasonable. I do not see that it is as unreasonable as extending the period beyond that stated in the Act which would have the result of extending the risk of the debtor and of the transferee-creditor beyond that stated in section 54. The conclusion reached by KRISHNAN PANDALAI J. can only be reached by looking forward from the date of the act of insolvency and giving a creditor three months' time from that date in which to present his insolvency petition. On the other hand, I am of the view that section 9 (1) (c) is a condition precedent to the filing of the petition, that is to say, the petitioning creditor must, on the day when he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months. He has to see on that date, and on that only, what acts of insolvency are available to him; and he cannot make use of any act of insolvency which has been committed outside the period of three months, as that ceased to be an act of insolvency.

The English case of *Ex parte Games. In re Bamford*(1) appears to me to be in point. There, THESIGER L.J. on page 324 says :

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"With regard to the other point, I will assume with *Mr. Winslow* that the execution of the deed was an act of bankruptcy and might have been set aside as an act of bankruptcy if any creditor had availed himself of it in sufficient time. But no creditor did avail himself of it, and the time for doing so has passed by. What, then, is the position of things under the bankruptcy law? It appears to me that no consequence whatever can follow from an act of bankruptcy of which the creditors might have availed themselves if they had applied in time, but of which they did not avail themselves as an act of bankruptcy within the time limited by the *Bankruptcy Act*. This point was really decided by *Lord Justice Giffard* in *Allen v. Bonnett*(2), where he said (at page 582): 'It appears to me to follow from this section. . . that where there is a deed which cannot be set aside under the statute of *Elizabeth*, or generally as fraudulent—including in the term a fraudulent preference—but solely and only as being an act of bankruptcy, the lapse of twelve months before any fiat issues validates that which would otherwise be impeachable; and that, if a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose.'

The view there expressed is that the act of the debtor and his transaction are validated as soon as the period stated has expired. Taking a fraudulent preference as an act of insolvency, for the reasons I have already stated, section 9 (1) (c) does not provide a period of limitation. If it does not do so in the case of one act of insolvency, it cannot do so in relation to any act of insolvency. I am not impressed with another argument addressed to us, namely, that, where a person is under any Act in force entitled to do something, that person is not to be prevented from exercising that

(1) (1879) 12 Ch. D. 314.

(2) (1870) L.R. 5 Ch. 577.

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act by, as in this case, the closing of the Court for the vacation, because, in my opinion, general principles such as this cannot alter an act which by statute is defined as an act of insolvency, namely, a fraudulent preference of a creditor within three months of the presentation of an insolvency petition. For these reasons, I am of the opinion that the lower Court's decision was correct, and this civil miscellaneous appeal must be dismissed with costs.

CORNISH J.

CORNISH J.—I agree. I think the language of the Act itself makes it clear that section 9 fixes the conditions and not a period of limitation to a creditor's right to present an insolvency petition. Section 7 provides that, "subject to the conditions specified in this Act", if a debtor commits an act of insolvency, an insolvency petition may be presented by a creditor and the Court may on such petition adjudicate the debtor insolvent. The conditions are specified in section 9, which says, in sub-section 1 (c), that a creditor shall not be entitled to present a petition against a debtor

"unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition".

So that, according to the terms of the Act, the debtor's act of insolvency is the foundation of the creditor's right to present a petition to have the debtor adjudicated; and unless the act of insolvency took place within three months before the presentation of the petition it will not serve to support the petition. This is the effect of the ruling in *Ex parte Games*. *In re Bamford*(1). Again, in *In re Maund*. *Ex parte Maund*(2), where it was sought to amend a petition by adding

creditors after more than three months from the date of the act of bankruptcy, it was held that the amendment could not be made, because the Court had no power to make a person a petitioning creditor on any other ground than was prescribed by the Act itself, viz., by section 6 (c) of the Bankruptcy Act, 1883. This section, it may be observed, is similar to section 9 (1) (c) of the Provincial Insolvency Act. Then, if, as these authorities decide, an act of insolvency ceases after the lapse of three months to be a valid ground of adjudication, it cannot be made so by section 10 of the General Clauses Act. This section adopts and declares the equitable rule that, when a fixed period is given for doing a certain act and the party bound to do it within that time is prevented by the act of the Court itself in being closed on the crucial date, the party may do the act on the Court's re-opening day. But no period is fixed by the Insolvency Act for presenting an insolvency petition. What the Act provides is that a creditor shall not be entitled to present a petition grounded upon an act of insolvency which occurred more than three months before, which is quite a different thing from saying that a petition may be presented within three months from, the commission of an act of insolvency.

PANDRANG ROW J.—I agree with my Lord the CHIEF JUSTICE.

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(1) (1879) 12 Ch. D. 314.

(2) [1895] I.Q.B. 194.

APPELLATE CIVIL.

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

1935,
March 6.

MANDAPAKA SUDARSANA RAO (FIRST DEFENDANT),
APPELLANT,

v.

VARADA KAMESWARA RAO NAIDU AND ANOTHER
(TRANSFEREE DECREE-HOLDER AND ORIGINAL DECREE-HOLDER),
RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXII, r. 11—
Guardian ad litem—Termination of appointment of—
Appointment of another guardian in other proceedings, if
by itself results in.*

A guardian *ad litem* once validly appointed continues to exercise his functions as such until he has ceased to be so, and he only ceases to be so by his retirement with the permission of the Court or by his death or by his removal by an order of the Court. The mere appointment of another guardian in other proceedings does not by itself divest the guardian *ad litem* of his position as such.

Samarendranath Mitra v. Pyareecharan Laha, (1934) I.L.R. 61 Calc. 1023, followed.

APPEAL against the order of the Court of the Subordinate Judge of Berhampore, dated 16th November 1932 and made in Execution Petition No. 78 of 1931 in Original Suit No. 8 of 1928.

D. Ramaswami Ayyar for *H. Suryanarayana* for appellant.

Government Pleader (P. Venkataramana Rao) and *P. V. Rajamannar* for respondents.

The JUDGMENT of the Court was delivered by BEASLEY C.J. BEASLEY C.J.—The question arising in this appeal is whether, when a person has been validly

appointed guardian *ad litem* of a minor defendant and subsequent to the date of the appointment of that person as guardian *ad litem* the natural guardian is appointed by another Court in other proceedings as guardian of the person and property of the minor and the guardian *ad litem* is removed, *ipso facto* the two latter orders the guardian *ad litem*'s appointment ceases to have any legality and thereafter he is disentitled to continue the proceedings in the suit as the guardian *ad litem* of the minor. The learned Subordinate Judge held that the appointment of the guardian *ad litem* was not *ipso facto* the subsequent appointment terminated and that consequently the minor was properly represented in the suit. Upon this question there is no direct authority except a decision of the Calcutta High Court, viz., *Samarendranath Mitra v. Pyareecharan Laha*(1). There, it was held that a certificated guardian of minors who has been properly appointed guardian *ad litem* does not *ipso facto* cease to be the guardian *ad litem* because some other person has been appointed certificated guardian in his stead during the pendency of the suit. The facts in this case are exactly similar to those in that case and I agree with the reasons put forward by COSTELLO J. in support of that ruling. If a guardian *ad litem* has once been validly appointed, he continues to exercise his functions as guardian *ad litem* until he has ceased to be so, and he only ceases to be so by his retirement with the permission of the Court or by his death or by his removal by an order of the Court. Those are the only ways in which the guardian *ad litem* can cease to function as such

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* Appeal Against Order No. 148 of 1933.

(1) (1934) I.L.R. 61 Calc. 1023.

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RAO.

during the pendency of a suit. None of those conditions are present here. The mere appointment of another guardian in other proceedings does not by itself divest the guardian *ad litem* of his position as guardian *ad litem*. He still continues to function. For these reasons, the order under appeal was right and this appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenvén and Mr. Justice King.

PERIYAKKAL (APPLICANT), APPELLANT,

v.

THE AGENT, SOUTH INDIAN RAILWAY Co., LIMITED,
TRICHINOPOLY (OPPOSITE PARTY), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), sec. 2 (n)—
"Workman"—Definition of—Exclusion of a person from
—Conditions—Sec. 12 (1)—Railway company—Ordinary
business of—Maintenance of its line, if part of.

A person, to be excluded from the definition of "workman" in section 2, clause (n), of the Workmen's Compensation Act, must not only be one "whose employment is of a casual nature" but also one "who is employed otherwise than for the purposes of the employer's trade or business". Both these qualifications must be present together. The mere fact that the injured man had been employed only for a few days at a time will not of itself remove him from the category of "workman".

The maintenance of its line is part of the ordinary business of a railway company in India within the meaning of section 12 (1) of the Workmen's Compensation Act.

* Appeal Against Order No. 507 of 1932.

APPEAL against the order of the Court of the PERIYAKKAL
Commissioner for Workmen's Compensation, AGENT, S.I.R.Y.
Madras, dated 13th May 1932 and made in Case Co., LTD.
No. 121 of 1931.

A. S. Srinivasa Ayyar for appellant.

S. S. Ramachandra Ayyar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—This appeal is preferred by the CURGENVEN J.
widow of one Nanjappa Goundan against an order of the Commissioner for Workmen's Compensation disallowing her claim to compensation against the South Indian Railway Company in respect of the death of her husband.

Nanjappa Goundan was a coolie working under a contractor employed by the Railway Company in the construction of a bridge on the Nilgiri Railway. For the purposes of this work, a trolley was loaded with stones and was in the charge of an employee of the South Indian Railway Company named Venkatarama Ayyar. The evidence of this man shows that at the place of loading three coolies got on to the trolley as well as himself. This, he says, was one in excess of the permitted number; nevertheless, when the trolley had proceeded a certain distance, another man got on, making four coolies as well as the driver. What then happened has not been clearly elucidated, but the driver was unable to apply the brake, perhaps because it got jammed by the stones, and lost control. He managed to jump off, but the coolies were thrown out, two were killed, of whom one was Nanjappa Goundan, and one received a severe injury to the leg.

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The learned Commissioner has dismissed the appellant's claim to compensation upon two grounds. He has found that the accident occurred owing to the wilful disobedience of the workman to an order expressly given. He has further found that the deceased man was a casual worker under the contractor, so that the claim cannot be enforced under the Act.

Section 3 (1) of the Workmen's Compensation Act contains a proviso that the employer shall not be liable in respect of an accident which is directly attributable to

"the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen."

Among the rules regulating the driving of trollys is one which fixes the maximum human complement at a driver and two coolies. The driver says that, after two coolies had got on, he warned the third man not to do so, as it was against the rules, and gave the same warning to the fourth man. They got on in spite of this. It has been objected that the plea of disobedience to orders has not been set up in the written statement filed by the Railway Company and, further, that it has not been proved that the accident is "directly attributable" to the alleged disobedience. Apart from these objections, it is fatal to the success of this plea that no proof has been given that the deceased man was either the third or the fourth to get on to the trolley. The driver had no information to give upon this point. If he was one of the two coolies who first got on, plainly he was not guilty of any disobedience.

Secondly, the learned Commissioner, in dismissing the claims because the workmen were

"casual workers", has, we think, not correctly appreciated the definition of "workman" contained in section 2, clause (n), of the Act. A person, to be excluded from the definition, must not only be one "whose employment is of a casual nature" but also one "who is employed otherwise than for the purposes of the employer's trade or business". Both these qualifications must be present together. The mere fact relied upon by the Commissioner, therefore, that the injured men had been employed only for a few days at a time will not of itself remove them from the category of "workmen". That this is so has not been contested before us.

Thus upon the two points found against her by the learned Commissioner we think that the appellant must succeed. A third point, and so far as appears a new one, has been advanced before us on behalf of the Railway Company. We have been in some doubt whether we ought to allow it to be argued, but have decided that, as it is in the main a question of the construction of the Act, it will not be unfair to the appellant if we entertain it in appeal.

Sub-section 1 of section 12 provides that, where the principal—here the Railway Company—employs a contractor to execute any work "which is ordinarily part of the trade or business of the principal", he shall be liable in respect of a workman employed by the contractor as if the workman had been immediately employed by him. This raises the question whether the work which was being done in this case was "ordinarily" part of the trade or business of the principal. For the purpose of deciding this point we have to take it,

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in the absence of any evidence to the contrary, that the work being done to the bridge was in the nature, not of an original work, but of the maintenance or upkeep of the line. Is the maintenance of the line ordinarily part of the business of the Railway Company? For a negative answer to this question reliance has been placed upon the case of *Rabia v. The Agent, G.I.P. Railway*(1). The fatal injury dealt with in that case was caused to a workman employed by contractors working under the G.I.P. Railway, the work being the construction of a transmission line to carry electric power to various sub-stations on the railway. The workman was employed as a fitter to assist in the erection of the steel towers which would carry the overhead cable. The learned CHIEF JUSTICE expressed the view that the construction of these original works was not part of the ordinary trade or business of the G.I.P. Railway :

" Their ordinary business is that of public carriers of passengers and goods, and not that of electrical engineers or of contractors for power stations or towers or cables or the general electrification of a railway line."

The other member of the Bench, MURPHY J., concurred in this opinion, adding that

" the ordinary trade or business of the railway administration is the carriage of passengers and goods, and the maintenance of the line necessary for this purpose."

It will be seen that this case is far from deciding that the maintenance of its line is not part of the ordinary business of a railway company; nor do we think that the two English cases referred to by the learned Chief Justice, and which we have examined, lead us to that conclusion.

(1) (1928) I.L.R. 53 Bom. 203.

The English Act (section 4) contained a proviso which excluded

" any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on "

In *Pearce v. London and South Western Railway*(1) it was held that alterations, repairs and paintings of suburban railway station buildings was work which could be so described. A similar view was expressed in *Wrigley v. Bagley & Wright* (2), where the operation consisted in putting a new driving wheel into the steam-engine belonging to a cotton-spinning factory. In the former case, it is true that upkeep as well as construction appears to have been involved, though both the learned Judges of the Court of Appeal who delivered judgments seem to have regarded the work as substantially one of construction. In the latter case, ROMER L.J. said:

" Putting a new driving wheel into an engine cannot be said to be part of, or a process in, the business of cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of, or process in, that business."

This observation, we think, would remain true under the terms of the Indian Act. But it does not answer the question whether the maintenance of the line is part of the ordinary business of a railway company in India. It is common knowledge that railway companies in this country maintain a permanent staff of engineers, whose most indispensable duty it is to preserve the line and the rolling stock in serviceable condition, and who carry out, where necessary with the help of contractors, all operations necessary to

(1) [1900] 2 Q.B. 100.

(2) [1901] 1 K.B. 780.

PERIYAKKAL v. AGENT, S. I. RY. CO., LTD. CURGENVEN J. that end. In the present case the driver of the trolley was an Assistant Inspector of the Railway, and doubtless the trolley itself was railway property. In such circumstances, it does not seem to us reasonable to hold, merely because the purpose for which a railway company exists is to carry passengers and goods, and not to undertake engineering works for their own sake, that where the invariable rule is for the company itself to keep its system in order, such work is not ordinarily part of its business. It is work which has to be done if the primary functions of the railway are to be performed, and it is work which constantly needs doing. Indeed, the business of keeping the line in order appears to us as normal and as essential a feature of the running of a railway as the issue of tickets or the handling of goods. This objection therefore fails.

We allow the appeal, set aside the Commissioner's order so far as it relates to the case of Nanjappa Goundan, and award to the appellant the sum of Rs. 630 which is the compensation payable under Schedule IV for the death of an adult in receipt of a monthly wage of Rupees 20. The respondent company will pay the appellant's costs in both Courts.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

PUZHAKKATTOORAKAYIL KARUVAYUR RAMAN MOOSAD'S
SON, KARNAVAN AND MANAGER STANAM
NARAYANAN MOOSAD (FIRST RESPONDENT),
PETITIONER,

1935.
January 16.

v.

PUZHAKKATTOORAKAYIL KARUVAYUR RAMAN MOOSAD'S SON
RAMAN MOOSAD AND FOUR OTHERS (PETITIONER
AND RESPONDENTS NOS. 2 TO 5), RESPONDENTS.*

Madras Nambudri Act (XXI of 1933), sec. 26—Previous law affecting Nambudri Brahmans—Applicability of, in cases where existing law has not been expressly altered—Right to sue for removal of karnavan not taken away by the Act.

The provisions of the Madras Nambudri Act (XXI of 1933) make it clear that except where the law has been expressly altered the previous law applies. Under the law previous to that Act, a Nambudri Brahman had the right to sue for the removal of the karnavan of his illom. There being no express provision in the Act abrogating that rule of "law, custom or usage," that right exists in spite of the Act.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Ottapalam dated 28th August 1933 and made in Original Petition No. 12 of 1931.

S. Venkatachella Sastri for petitioner.

B. Sitarama Rao as *amicus curiae*.

Cur. adv. vult.

JUDGMENT.

The respondent, a Nambudri Brahman, applied to the lower Court for leave to file the suit in

* Civil Revision Petition No. 1789 of 1933.

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question in *forma pauperis*, the object of the suit being the removal of the karnavan of his illom. The leave having been granted, the lower Court's order is attacked by the first defendant, the karnavan. The plaintiff (the respondent) is not represented in this Court, but at my request Mr. B. Sitarama Rao has argued the case as *amicus curiae* and I am indebted to him for his lucid and careful argument.

The karnavan objects that the plaint does not disclose a cause of action and that therefore under Order XXXIII, rule 5, of the Civil Procedure Code the lower Court ought not to have permitted the plaintiff to sue as a pauper. His learned Counsel's contention is that the right to demand partition, which a Nambudri Brahman possesses in virtue of the recent Madras Nambudri Act (XXI of 1933), is inconsistent with the continued existence of a right to bring a suit for the removal of a karnavan. He rests his argument on the well-known maxim, "The reason of the law ceasing, the law also ceases." True, the right to demand the removal of a karnavan was consequent upon, and resulted from, the incident of impartibility which attached to the property of a Nambudri illom. Says Mr. (Justice) Sundara Ayyar in his Treatise on the Malabar and Aliyasantana Law :

"At the same time it ought not to be forgotten that the junior members not being entitled to partition or even to call upon the karnavan to account, it is but right they should be entitled at least to see that the tarwad affairs are managed by a proper person. Courts should not hesitate to exercise their jurisdiction, when it is clear that the interests of the tarwad require the removal of the karnavan." (Page 104).

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MOOSAD.

But the question depends not upon any abstract principle but on the definite provisions of the Nambudri Act, which make it clear beyond doubt that except where the law has been expressly altered, the previous law applies. First, the preamble shows that only "in certain respects" the law has been amended, and it makes mention of the five topics with which the Act deals, viz : (i) family management, (ii) marriage, (iii) guardianship, (iv) intestate succession and (v) partition ; it is in regard to each of these matters that the preamble says that the law has been defined and amended "in certain respects" only. Secondly, section 26 provides :

"Nothing contained in this Act shall be deemed to affect any law, custom or usage applicable to Nambudri Brahmans except to the extent expressly laid down in this Act."

Under the law previous to the enactment, the right to demand partition was non-existent, but there existed a right to sue for the removal of a karnavan, there thus being a deviation in both these respects from the Mitakshara law. The argument that, because the new Act restores one incident of the Mitakshara law, therefore it should follow that that law should be applied in its entirety, ignores the express provisions of the statute, and must be rejected. A perusal of the Act will show that the Legislature, far from applying bodily the Mitakshara law to the Nambudris, has preserved the many peculiar incidents of the Nambudri system in the case of each of the topics referred to above and dealt with by the Act. The very conception of an illom as consisting of both males and females, each of whom is entitled to a share in the family property, is repugnant to the notion of a joint family

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under the Mitakshara system. Each Chapter abounds in instances where the law under the Act is a deviation from the ordinary Mitakshara law and it is unnecessary to refer to them in any detail. I must therefore hold that, in the absence of an express provision abrogating the rule of "law, custom or usage" (by whatever name it may be called), which enabled a Nambudri Brahman to sue for the removal of a karnavan, that right exists in spite of the Act, and that the lower Court's order is right.

In the result the civil revision petition is dismissed.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice King.

1935,
January 31. SADAYA PADAYACHI AND ANOTHER (DEFENDANTS 1 AND 2),
APPELLANTS,

v.

CHINNASWAMI NAIDU (PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. IX, r. 13—Ex parte decree—Application to set aside—Dismissal for default of—Application to set aside order of, and for restoration of original application—Order dismissing, on merits—Appeal from—Competency of—O. XLIII, r. 1 (c), and sec. 141 of Code—Applicability and effect of.

An application under Order IX, rule 13, of the Code of Civil Procedure to have an *ex parte* decree set aside was dismissed for default and an application made thereafter to have that order set aside and the original application restored was dismissed upon the merits.

Held that no appeal lay from the order made on the subsequent application.

* Appeal Against Order No. 347 of 1932.

APPEAL against the order of the Court of the Subordinate Judge of Cuddalore, dated 9th February 1931 and made in Interlocutory Application No. 215 of 1930 in Original Suit No. 53 of 1929.

M. S. Venkatarama Ayyar for appellants.

T. K. Sundararaman for *M. Patanjali Sastri* for respondent.

The JUDGMENT of the Court was delivered by CURGENVEN J.—We think that the preliminary objection taken by the respondent that no appeal will lie in this case must prevail. An *ex parte* decree was passed against the appellants and they applied under Order IX, rule 13, Civil Procedure Code, to have it set aside. This application was dismissed for their default. They then applied to have that order set aside and their application restored and this has been dismissed upon the merits. It is from this order that the appeal is preferred, and it is urged that it will lie under Order XLIII, rule 1 (c), Civil Procedure Code, by force of the application of section 141 of the Code. That section provides that

"the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction", and it has been invoked as sufficient warrant for the view held in two Madras cases, *Venkatanarasimha v. Suryanarayana*(1) and *Salar Beg v. Kotayya*(2), that the provisions of Order IX, rule 9, Civil Procedure Code, will apply to applications made under the same rule as well as to applications to set aside a dismissal of a suit. That however is not to say that the same section will avail to confer a right of appeal. It deals only

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(1) A.I.R. 1926 Mad. 325.

(2) A.I.R. 1926 Mad. 654.

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with procedure, whereas a right of appeal is a substantive right. Under section 104 of the Code such a right is enjoyed only in respect of orders specified in that section or in Order XLIII, rule 1. There is ample authority for this position; see *Chandar Sahai v. Durga Prasad*(1), *Sharif Husain v. Haidar Hussin and others*(2) and *Hara Kumar Mitter v. Murari Mohan Bose*(3). The case of *Jagdish Narain Prasad Singh v. Harbans Narain Singh*(4) is, we think, a decision in the same sense though the headnote is clearly wrong and the judgment is not very clearly expressed. The analogous question whether an appeal will lie against an application to set aside a dismissal not of a suit but of another application under the Code has been decided in *Jung Bahadur v. Mahadeo Prasad*(5), which related to the old Code and dealt with an application under what is now Order XXI, rule 90.

We must hold therefore that no appeal lies in cases of this nature and dismiss the appeal with costs.

A.S.V.

(1) (1924) I.L.R. 46 All. 538.

(2) A.I.R. 1922 All. 337.

(3) (1922) 69 I.C. 1003.

(4) (1917) 2 Pat. L.J. 720.

(5) (1903) I.L.R. 31 Cal. 207.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

N. GOVINDARAJULU NAIDU (PETITIONER—FIRST
DEFENDANT), APPELLANT,

1934,
November 2.

v.

THE IMPERIAL BANK OF INDIA, VELLORE,
BY AGENT MR. D. STEWART (PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XVII, rr. 2 & 3
—Appearance of defendant—Suit posted for trial after first
hearing—Additional written statement filed by defendant's
pleader on date of, and application for framing of additional
issue made by him—Adjournment applied for by him after
framing of additional issue and, on its refusal, pleader re-
porting no instructions—Defendant, if *ex parte* in case of—
Application by him under O. IX, r. 13, to set aside decree
—Competency of.

A suit was posted to 3rd February 1931 for trial. Issues had been framed some months earlier, and one of the issues had been determined on 16th January. On 3rd February the first defendant's pleader filed an additional written statement, and on the application of his pleader the Court framed a fresh issue. When that had been done, the pleader applied for an adjournment. When the Court refused that application, the pleader stated that he had no instructions, and the trial proceeded and ended in a decree against the first defendant.

Held that the first defendant was not *ex parte* and was not entitled to apply under Order IX, rule 13, of the Code of Civil Procedure, to set aside the decree.

The acts of the pleader in filing an additional written statement and in applying to the Court for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing. Those acts constituted an appearance.

Arunachallam Chettiar v. Sivalingam Chettiar, (1927) 26 L.W. 76, approved.

*Appeal Against Order No. 283 of 1931.

Pichamma v. Sreeramulu, (1917) I.L.R. 41 Mad. 286, referred to.

APPEAL against the order of the Court of the Subordinate Judge of Vellore dated 14th July 1931 and made in Interlocutory Application No. 262 of 1931 in Original Suit No. 84 of 1930.

V. C. Gopalaratnam and *K. Subrahmanyam* for appellant.

T. D. Srinivasachari and *C. Vaidyanatha Rao* for respondent.

CORNISH J.—The JUDGMENT of the Court was delivered by CORNISH J.—The appeal is by the first defendant against the order of the Subordinate Judge dismissing his application under Order IX, rule 13, to set aside a decree. The application was made on the ground that the first defendant's illness was a sufficient cause for his not being present when the case was called on for hearing. The Subordinate Judge was not satisfied with the *bona fides* of this excuse or with the medical certificate with which it was supported, and dismissed the application. We are not now concerned with the merits of the first defendant's application, because we think that the objection raised by the respondent's learned Advocate that no petition lay under Order IX, rule 13, is a good one. Order IX, rule 13, has reference to decrees made *ex parte*, and it has to be seen whether the first defendant was, when the decree was made against him, *ex parte*. In our opinion he was not. The suit had been posted to 3rd February 1931 for trial. We are told that issues had been framed some months earlier, and it appears from the judgment that one of the issues had been determined on the 16th January. The first hearing

stage therefore was past on the 3rd February. On that day the first defendant's pleader filed an additional written statement, and on the application of his pleader the Court framed a fresh issue. When that had been done, the pleader applied for an adjournment, alleging that the first defendant was not able to be present on account of illness. When the Court refused that application, the pleader stated that he had no instructions, and the trial proceeded. On these facts a question arises whether rule 2, or rule 3 of Order XVII governs the position. If what happened on the 3rd February amounted to a failure of the first defendant to appear, he would be *ex parte* and would be entitled to apply under Order IX to set aside the decree. But if the first defendant is to be regarded as having appeared and to have made default in doing any of the acts mentioned in rule 3, then the rule enabled the Court to proceed to decide the case on the materials before it, and the first defendant's only remedy against the decree would be by way of appeal; see *Pichamma v. Sreeramulu*(1). We think that the first defendant did appear by his pleader on the 3rd February. The acts of the pleader in filing an additional written statement and in applying to the Court for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing. In our judgment these acts constituted an appearance. The position is quite different when, as in *Latta Prasad v. Nand Kishore*(2) and *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee*(3)

(1) (1917) I.L.R. 41 Mad. 286. (2) (1899) I.L.R. 22 All. 66 (F.B.).

(3) (1907) I.L.R. 34 Calc. 403 (F.B.).

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the vakil had been merely instructed to apply for an adjournment. In such a case it has been held that there has been no appearance. It has been suggested here that the only instruction given by the first defendant to his pleader was to apply for an adjournment. But the evidence in our view gives no support to the suggestion. We concur in the opinion of WALLACE J. in *Arunachallam Chettiar v. Sivalingam Chettiar*(1) that a party who has appeared by his pleader cannot be allowed to claim to be *ex parte* from the moment that his pleader when called upon to enter upon his defence, or, we may add, in anticipation of that stage of the trial, has reported to the Court that he has no instructions. Consequently the first defendant was not *ex parte*, and therefore an application under Order IX to set aside the decree was not available to him. His application was dismissed on the merits. It ought to have been dismissed as misconceived. His appeal against the order must be dismissed with costs.

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(1) (1927) 26 L.W. 76.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

PINDIPROLU PERRAJU AND TWO OTHERS (PLAINTIFFS),
PETITIONERS,

1934,
December 13.

v.

PINDIPROLU SUBBARAO AND TWENTY-EIGHT OTHERS
(DEFENDANTS 1 TO 29), RESPONDENTS.*

Court Fees Act (VII of 1870) (as amended by Madras Act V of 1922), Sch. II, art. 17-A (i)—Hindu joint family—Partition—Suit for—Creditors made parties to—Debts due to—Declaration of non-binding nature against plaintiff of—Prayer in plaint for—Separate court-fee in respect of each debt as upon a declaration—Necessity.

Where, in a suit for partition of joint family property, certain creditors were made parties on the ground that the debts alleged to be due to them were not binding on the plaintiffs and the plaint prayed for the delivery to the plaintiffs of their share free of the specified debts,

held that in respect of each debt a separate fixed court-fee was payable as upon a declaration under article 17-A (i) of Schedule II of the Court Fees Act.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Cocanada dated 9th January 1934 and made on Court-fee Examiner Check Slip No. 74 of 1933 in Original Suit No. 198 of 1933.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Bapatla dated 6th December 1933 in Original Suit No. 54 of 1931.

* Civil Revision Petitions Nos. 133, 561 and 758 of 1934.

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PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Tenali dated 2nd December 1933 and made in Check Slip No. 3127, Guntur of 1933 in Original Suit No. 470 of 1932.

V. Subramaniam and *V. Satyanarayana* for petitioners.

P. V. Rajamannar for Government Pleader (*P. Venkataramana Rao*) for respondents.

JUDGMENT.

These civil revision petitions raise a question of court-fee. The suits are for partition of the joint family property, but certain creditors have been made parties on the ground that the debts, alleged to be due to them, are not binding on the plaintiffs. There is a prayer that their share should be delivered to them free of the specified debts. The lower Court has held that, in respect of each debt, a separate fixed court-fee of rupees fifteen should be paid as upon a declaration under article 17-A (i) of Schedule II of the Court Fees Act. It is contended for the petitioners that the order of the lower Court is wrong and that they are not liable to pay any additional court-fee in respect of the debts mentioned.

Mr. Subramaniam puts his argument thus: It is within the proper scope of a partition suit that the debts should be ascertained and discharged. The Civil Rules of Practice expressly provide that at the hearing of a suit the Court shall determine whether there are any outstanding debts and liabilities of the family; they also contemplate the bringing in of claims by third

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parties on a notice issued by the Court. It is contended that, inasmuch as such claims should therefore be adjudicated upon, there is no reason why the plaintiff, who in the first instance, making the creditors parties, seeks a declaration, should be penalised by being required to pay a separate court-fee. It seems to me that this argument, though plausible, is not sound. In such a suit as this, where the creditors have been impleaded, any decision rendered is necessarily binding upon them. Though no doubt the deciding of the claims of third parties would conduce to the proper disposal of a partition suit, there is no procedure by which they, not being originally impleaded, can be compelled to bring in their claims for adjudication. There is a provision in the Civil Rules of Practice which says that, where a co-owner has alienated any portion of the joint property for other than family purposes, the alienee shall be made a party and the plaint shall set out the particulars of the alleged alienation. Supposing the unauthorised alienation was made by the plaintiff, in such a case the plaint would naturally not set it out, but it would be to the interest of the defendant to refer to it and apply that the alienee should be impleaded. No court-fee would in that event be payable, although the propriety of the alienation has been made the subject of enquiry. Does it follow from this that the plaintiff should escape the payment of court-fee when he himself attacks in his plaint the alienation and impleads the alienee? The analogy relied on by the petitioners seems therefore to be misleading. Take a case again, where a co-sharer other than the plaintiff makes the

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alienation, but the plaintiff does not choose to attack it in his plaint. If in such a case a defendant co-sharer, impeaching the alienation, gets the alienee added, no liability to pay a court-fee arises. Merely therefore on the ground that to decide such matters falls within the scope of a partition suit, the plaintiff cannot be absolved from the payment of court-fee, if, in the plaint itself, such questions are expressly raised and he prays for suitable reliefs. If the petitioners' argument were sound, it would equally follow that when decree debts are attacked in the plaint, no court-fee would be leviable, nor even when the plaintiff seeks to set aside attachments, such as are referred to in section 7 (viii) of the Court Fees Act. It has been no doubt held that creditors are proper parties to a partition suit, *Shanmuka Nadan v. Arunachalam Chetty*(1), *Balusami Ayyar, In re*(2) and *Ramaswami Chettiar v. Vellayappa Chettiar*(3), but that has no bearing on the present point; for, in their absence, the adjudication regarding the debts is binding only upon the parties to the partition suit; see *Tara Chand v. Reeb Ram*(4).

It has been held by BEASLEY C.J. and CURGENVEN J. that even where, as against a member of a family, relief is claimed in the partition suit on the ground that he is in adverse possession of a particular item, a separate court-fee in regard to it, as on a claim for possession, should be paid; *Kandunni Nair v. Raman Nair*(5). Again, where, in addition to partition, rendition

(1) (1921) I.L.R. 45 Mad. 194.
(2) (1928) I.L.R. 51 Mad. 417, 439 (F.B.).
(3) (1930) 60 M.L.J. 229.
(4) (1866) 3 M.H.C.R. 177, 180, 181.
(5) (1930) I.L.R. 53 Mad. 540.

of accounts is prayed for, an additional court-fee has been levied; *Manikkam Pillai v. Murugesam Pillai*(1).

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I am therefore of the opinion that the lower Court has correctly decided the point; and the civil revision petitions accordingly fail and are dismissed with costs—one set to be paid in equal moieties by the petitioners in Civil Revision Petitions Nos. 561 and 758 of 1934.

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APPELLATE CIVIL.

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

A. VENKATASAMI CHETTIAR (FIRST DEFENDANT),
APPELLANT,

v.

SANKARANARAYANAN CHETTIAR AND SIX OTHERS
(SECOND DEFENDANT, PLAINTIFF AND DEFENDANTS 3, 8 AND 9),
RESPONDENTS.*

1934,
September 10.

Mortgage—Prior and subsequent mortgagees—Suit by each without impleading the other—Sales in execution of decrees in, and purchases thereat by strangers—Suit on prior mortgage and sale under decree therein subsequent respectively to suit on subsequent mortgage and sale under decree therein—Purchaser under decree on prior mortgage resisted in getting possession by purchaser under decree on subsequent mortgage—Suit for sale on prior mortgage by—Maintainability.

In a case in which property was subject to a prior and a subsequent mortgage in favour of different persons, each of the mortgagees sued upon his mortgage without impleading the other

(1) (1933) 64 M.L.J. 576.
* Second Appeal No. 576 of 1932.

VENKATASAMI and obtained a decree in execution of which the mortgaged property was sold and was purchased by strangers. The suit upon the prior mortgage and the sale under the decree therein were respectively subsequent to the suit upon the subsequent mortgage and the sale under the decree therein. The purchase price paid by the purchaser under the decree on the prior mortgage was more than sufficient to pay off the debt due under the prior mortgage. He attempted to get delivery of possession but was obstructed by the purchaser under the decree on the subsequent mortgage and failed to get possession through the Court. The purchaser under the decree on the prior mortgage then filed a suit for sale on the prior mortgage asserting that he had acquired the rights of the prior mortgagee. The subsequent mortgagee and the purchaser under the decree on his mortgage contended that the suit was not maintainable as the prior mortgage had already been discharged.

Held that the suit was maintainable.

The prior mortgage did not become extinguished with the decree for sale in the suit thereon, and there is no reason why it should not be used as a weapon of attack. The rights of the subsequent mortgagee and of the purchaser under the decree on his mortgage were not affected by the suit on the prior mortgage to which they were not parties, and they could not be heard to say that by virtue of that suit a second suit against them was not maintainable.

Venkat Reddy v. Kunjappa Goundan, (1923) I.L.R. 47 Mad. 551, and *Chandramma v. Seethan Naidu*, (1930) 61 M.L.J. 316, followed.

Muthukumaraswami Pillai v. Muthuswami Thevan, (1926) I.L.R. 50 Mad. 639, and *Jagannadha Rao v. Basavayya*, (1927) 53 M.L.J. 255, held not to have overruled or impaired the authority of *Venkat Reddy v. Kunjappa Goundan*, (1923) I.L.R. 47 Mad. 551.

Sukhi v. Ghulam Safdar Khan, (1921) I.L.R. 43 All. 469 (P.C.), relied upon.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 20 of 1931 preferred against the decree of the Court of the District Munsif of Periyakulam in Original Suit No. 375 of 1929.

T. M. Krishnaswami Ayyar and *N. Sivarama-krishna Ayyar* for appellant.

T. P. Gopalakrishna Ayyar for second respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This second appeal has been placed before a Bench because of a contention by the appellant's Advocate that the Bench decisions in *Muthukumaraswami Pillai v. Muthuswami Thevan*(1) and *Jagannadha Rao v. Basavayya*(2) throw doubt on the observations in *Venkat Reddy v. Kunjappa Goundan*(3) on which the two lower Courts have relied.

The suit was really a controversy between two rival purchasers of the same mortgaged property. The plaintiff was the purchaser in execution of a decree passed on a prior mortgage which I will call Mortgage No. 1 whilst the first defendant was the purchaser in execution of a decree passed on a puisne mortgage which I will call Mortgage No. 2. No. 2 mortgagee brought his suit first and obtained a decree in 1922. Afterwards No. 1 mortgagee brought her suit and obtained her decree in 1924. To No. 2 mortgage suit No. 1 mortgagee was not made a party. To No. 1 mortgage suit No. 2 mortgagee was not made a party. The plaintiff in the suit was the purchaser in execution of No. 1 mortgage decree. It is conceded that the purchase price paid by the plaintiff was more than sufficient to pay off the No. 1 mortgage debt. The plaintiff attempted to get delivery of possession but was obstructed by the purchaser in No. 2 mortgage suit

(1) (1926) I.L.R. 50 Mad. 639.

(2) (1927) 53 M.L.J. 255.

(3) (1923) I.L.R. 47 Mad. 551.

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and failed to get possession through the Court. The plaintiff then filed the present suit on No. 1 mortgage for a sale of the mortgaged property giving an opportunity to the purchaser under No. 2 mortgage to redeem it. Both Courts found that the plaintiff was entitled to bring the suit and gave a decree accordingly. In both Courts the decision in *Venkat Reddy v. Kunjappa Goundan*(1) was relied upon as showing that such a suit as this is maintainable. It is conceded here very fairly by Mr. T. M. Krishnaswami Ayyar on behalf of the appellant that he is unable to distinguish the facts of this case from those in *Venkat Reddy v. Kunjappa Goundan*(1) and that, if that decision is correct, this appeal must fail. This admission simplifies matters very much and we have now only to see how far, if at all, that decision has been approved of or followed, or whether doubts have been thrown upon it by other decisions. I propose, in deciding this question, to consider only decisions of this High Court. Mr. T. M. Krishnaswami Ayyar's contention is that the plaintiff is not entitled to file his suit on No. 1 mortgage because such a suit cannot lie unless the Court auction sale in No. 2 mortgage suit has been set aside and that, as a period of thirty days alone is allowed for the setting aside of a Court auction sale and the Court auction sale has not been set aside within that period, this suit is not maintainable. In support of this contention he refers to *Muthukumaraswami Pillai v. Muthuswami Thevan*(2). There, a decree-holder got the properties of some one other than the judgment-debtor sold in execution of his decree, purchased

them himself and entered up satisfaction. More than thirty days after the sale, he found out his mistake and applied for further execution by setting aside the sale, and it was held that the application for further execution was unsustainable as the sale though of a stranger's property was not void and as the prayer for setting it aside under Order XXI, rule 91, Civil Procedure Code, which was a necessary preliminary for further execution, could not be granted being barred by article 166 of the Limitation Act. In this case, the principle of *caveat emptor* was applied, it being pointed out that a Court sale carries no guarantee that the property is the property of the judgment-debtor, and that the auction purchaser takes the risk and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor, and that there is no warrant for the proposition that a sale by the Court of property which subsequently turns out not to belong to the judgment-debtor is void. The sale not being void was voidable and could only be avoided by steps being taken under Order XXI, rule 91, within the period provided, namely, thirty days, to get the sale set aside, and until the sale is set aside the auction purchaser cannot apply to execute the decree. One passage amongst others in that judgment relied upon by the appellant here reads as follows:—

"In the present case we are concerned with the processual law which obviously prohibits execution being taken out for a satisfied decree unless the proceedings which resulted in the record of satisfaction are set aside and the same law says that such proceedings can only be set aside by an application within thirty days of the sale." (Page 644.)

From this it is argued that, the No. 1 mortgage debt having been fully satisfied, the plaintiff

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(1) (1923) I.L.R. 47 Mad. 551.

(2) (1926) I.L.R. 50 Mad. 639.

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cannot sue on that satisfied mortgage and that he has first of all to get that satisfaction set aside by getting the sale set aside which he has not done. Another case is *Jagannadha Rao v. Basavayya*(1). There, a decree-holder who had obtained a mortgage decree brought to sale some only of the mortgaged items in execution of his decree and purchased them in Court auction. As the price fetched was enough to satisfy the decree, satisfaction was entered. After the sale was confirmed, when he went to take possession of the property purchased he was obstructed by a stranger and his petition to remove the obstruction was dismissed. Thereupon he filed a petition to set aside the satisfaction that had been entered up and to bring to sale other items included in the decree. Following *Muthukumaraswami Pillai v. Muthuswami Thevan*(2), it was held that he was not entitled to execute the decree without having the Court sale set aside and that, not having done that within the period of limitation provided by article 166 of the Limitation Act, his petition was not maintainable. In neither of these cases, it must be observed, was it a case between rival purchasers of the same mortgaged property but merely the ordinary case of property, after its purchase in Court auction, being claimed by another person, a complete stranger, not in pursuance of a mortgage decree at all but on some entirely different ground such as ownership. In my view, this is an important distinction to be borne in mind here as showing that there is really no conflict between the two before-mentioned decisions and that in *Venkat Reddy v. Kunjappa*

Goundan(1). In the latter case, no question arose as to the application of Order XXI, rule 91, Civil Procedure Code, the question there being whether an auction purchaser in execution of a mortgage decree in a suit for sale on a mortgage to which the purchaser of a portion of the mortgaged property in execution of a money decree against one of the mortgagors was not joined as a party is entitled to institute a subsequent suit for sale against the latter, the mortgagor and the mortgagee, whether or not the mortgagee had, at the time of the previous suit, notice of the interest of the latter purchaser who had not been joined as a party, and KUMARASWAMI SASTRI and WALLER JJ. were of the opinion that it was open to the purchaser as the assignee in law of the rights of the original mortgagee by virtue of his purchase in Court sale to institute a second suit as against persons who were not parties to the prior suit, and that it followed that he had got the same rights as the original mortgagee would have had if he had filed a suit and the defendant could not be in a better position than he would have been in if he had been made a party to the original mortgage decree in execution of which the property was sold. It was not even faintly suggested in argument that the plaintiff's claim stood to be defeated by any rule of *caveat emptor*. It is true that the judgment at page 563 is, with respect to the learned Judges who pronounced it, not happily worded. Indeed it would appear to proceed on somewhat inconsistent reasoning. But that it definitely lays down the law upon this point admits of no doubt whatever and, as far as we have been able to

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(1) (1927) 53 M.L.J. 255.

(2) (1926) I.L.R. 50 Mad. 639.

(1) (1923) I.L.R. 47 Mad. 551.

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discover, this decision has not really been doubted in subsequent decisions to which we were referred. A very recent decision of RAMESAM and STONE JJ. in Appeal No. 65 of 1932 has been brought to our notice in which the decision in *Venkat Reddy v. Kunjappa Goundan*(1) was noticed. In the judgment of STONE J., that case is referred to as follows :

"We must not be understood as saying that upon decree the cause of action upon the mortgage has gone. Under the Transfer of Property Act, as it stood before its amendment by the Code of Civil Procedure, this would have occurred but it is now decided that the mortgage is not wholly merged in the decree. It can at least be used as a shield; *Sukhi v. Ghulam Safdar Khan*(2). It may indeed be sued on despite the decree according to the decision in *Venkat Reddy v. Kunjappa Goundan*(1) as to which we express no opinion though we observe it purports to follow *Sukhi v. Ghulam Safdar Khan*(2) wherein the Judicial Committee use very guarded language in expressing the extent to which the mortgage remains available after decree. We proceed on the view that a mortgagee, circumstanced as here, might, according to *Venkat Reddy v. Kunjappa Goundan*(1), sue on the mortgage (which in most cases would give him the fullest remedy) or he might proceed on the cause of action derived from his title as auction purchaser."

RAMESAM J., referring to *Chandramma v. Seethan Naidu*(3), says :

"The Court then, following *Venkat Reddy v. Kunjappa Goundan*(1), took the view that the mortgage decree does not extinguish the mortgage and the mortgagee or a purchaser from him can bring a suit on the mortgage against a purchaser of the equity not made a party to the mortgage suit even though that person was known to exist at the time the mortgage suit was brought. It is then laid down that if such a suit is brought, i.e., a suit on the mortgage, time runs not from the date of the mortgage decree but from the date the money is due. We respectfully agree."

(1) (1923) I.L.R. 47 Mad. 551. (2) (1921) I.L.R. 43 All. 469, 475 (P.C.).
(3) (1930) 61 M.L.J. 316.

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The latter sentence must be taken as applying to the question of limitation, of course. It cannot be said that these judgments cast doubt upon the correctness of *Venkat Reddy v. Kunjappa Goundan*(1). In *Chandramma v. Seethan Naidu*(2), *Venkat Reddy v. Kunjappa Goundan*(1) was also considered by REILLY and ANANTAKRISHNA AYYAR JJ. In that case, it was held that a mortgagee or transferee of his interest cannot acquire higher rights by reason of litigation, to which owners of the equity of redemption were not made parties and that, that being so, if the puisne mortgagee or owner of the equity of redemption be entitled to other rights and remedies over and above the right of redemption, such other rights and remedies would not be lost to them and the plaintiff cannot be heard to say that those remedies were lost to them as a result of the suit to which they were not parties, and, following *Venkat Reddy v. Kunjappa Goundan*(1), it was held that the only remedy for the plaintiff is that he can bring another suit against the owners of the equity of redemption for sale. On page 326, ANANTAKRISHNA AYYAR J. deals with *Venkat Reddy v. Kunjappa Goundan*(1) and states his opinion that that case was correctly decided and in doing so gives very clear reasons in support of that opinion. He says :

"This leads to the consideration of the question as to what exactly are the remedies open to an auction purchaser in the position of the plaintiff. SADASIVA AYYAR J. in the case reported as *Lakshmanan Chetty and another v. Muthaya Chetty and others*(3) would seem to have been of opinion—I say 'opinion' because it was not necessary for the decision of

(1) (1923) I.L.R. 47 Mad. 551.

(2) (1930) 61 M.L.J. 316.

(3) (1919) 40 M.L.J. 126.

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the case—that a second suit based upon the original mortgage was not available in the circumstances. That question had to be considered in a later case by a Bench of this Court, KUMARASWAMI SASTRI and WALLER JJ., in *Venkat Reddy v. Kunjappa Goundan*(1). After referring to the observations of SADASIVA AYYAR J. in the case already mentioned, the learned Judges proceeded to consider whether there is anything in the Code or any other provision of law which would disentitle the plaintiff from maintaining a second suit based upon the original mortgage. They came to the conclusion that he could do so, and, if I may say so with respect, quite correctly. The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that, by virtue of the prior suit, which admittedly does not affect them, a (second) suit against them is not maintainable. So far as they are concerned the second is the only suit against them and the first suit and the proceedings connected with the same must be taken to be 'non est' in the eye of the law. . . . It being therefore clear that a second suit is maintainable to recover money due on the mortgage after making the necessary persons interested in the equity of redemption parties to the suit, the question will then arise as to the exact remedy that they would be entitled to in such a suit."

In this judgment reference is also made to *Chinnu Pillai v. Venkatasamy Chettiar*(2) and to the observations of COUTTS TROTTER J. (as he then was) and K. SRINIVASA AYYANGAR J.; and, as those observations have been set out in the judgment, it is unnecessary to repeat them here and it is sufficient to say that I entirely agree with the opinion of ANANTAKRISHNA AYYAR J. that those observations lend strong support to the view expressed in *Venkat Reddy v. Kunjappa Goundan*(1) where *Chinnu Pillai v. Venkatasamy Chettiar*(2) is one of the cases relied upon. In

(1) (1923) I.L.R. 47 Mad. 551.

(2) (1915) I.L.R. 40 Mad. 77.

view of the decisions to which I have just made reference, I am of the opinion that *Venkat Reddy v. Kunjappa Goundan*(1) was correctly decided. That being so, the suit under appeal was maintainable and both the lower Courts were correct in so holding. This second appeal must therefore fail and be dismissed with costs of the second respondent.

KING J.—This appeal raises interesting questions of law in regard to the rights of successive mortgagees of the same property and of auction purchasers of that property in execution of decrees obtained in suits upon the mortgages in which the provisions of Order XXXIV, rule 1, Civil Procedure Code, have not been observed. The facts of the present case are as follows: The property was mortgaged first to one Balammal by Exhibit A in 1910 and subsequently to the second defendant by Exhibit II in 1916. In 1922 the second defendant brought a suit upon his mortgage without impleading Balammal and obtained a decree for sale in execution of which the first defendant purchased the mortgaged property obtaining his sale-certificate on 30th November 1927. In 1924 Balammal brought a suit on her mortgage without impleading the second defendant, and in execution of her decree for sale the property was purchased by the plaintiff on 16th December 1927. In 1928 plaintiff applied for delivery and was obstructed by the first defendant who by that time was in possession of the property. An application in the same year to remove the obstruction was unsuccessful, and in 1929 plaintiff filed the present suit asserting that

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(1) (1923) I.L.R. 47 Mad. 551.

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he had acquired the rights of the first mortgagee, and basing his claim on the first mortgage. The suit was resisted by the first and second defendants on two main grounds, firstly, that it was not maintainable as the first mortgage had already been discharged, and secondly, that it was barred by limitation. Both these grounds were found against by the District Munsif of Periyakulam and upon appeal by the Subordinate Judge of Dindigul and plaintiff's suit was decreed. Defendants 1 and 2 have accordingly filed this second appeal. At the hearing of the appeal the contention on the question of limitation was abandoned, and the sole point for decision is therefore whether plaintiff's suit was maintainable.

Now, there is direct authority in this Court for the view which the Courts below have taken in a case reported as *Venkat Reddy v. Kunjappa Goundan*(1). There are some superficial differences, no doubt, between that case and the one we are now considering. In *Venkat Reddy v. Kunjappa Goundan*(1) there was no second mortgagee, the suit on the mortgage being brought without impleading a purchaser of the equity of redemption in part of the mortgaged property, but, when the auction purchaser of the mortgaged property attempted to take possession, he was obstructed by the aforesaid purchaser of the equity of redemption, and when he brought a suit against him *on the mortgage* that suit was held to be maintainable. Both in that case and in this the sale held by the Court had realised enough for the complete discharge of the mortgage, and the learned Advocate for the appellant has frankly

(1) (1923) I.L.R. 47 Mad. 551.

admitted that *Venkat Reddy v. Kunjappa Goundan*(1) is a direct authority against him.

The sole ground therefore on which the appellant can succeed is by convincing us that *Venkat Reddy v. Kunjappa Goundan*(1) is no longer good law, and this has been attempted partly by a reference to two subsequent decisions and partly by an intrinsic examination of *Venkat Reddy v. Kunjappa Goundan*(1) itself. The two subsequent decisions are *Muthukumaraswami Pillai v. Muthuswami Thevan*(2) and *Jagannadha Rao v. Basavayya*(3). *Muthukumaraswami Pillai v. Muthuswami Thevan*(2) is a case which has nothing to do with mortgages. There, a decree-holder brought to sale certain properties which he believed to belong to his judgment-debtor but which eventually turned out to belong to another person of the same name. He had himself purchased the property and on discovering his mistake applied for further execution. It was held that this could not be allowed as the sale though voidable was not void; he was barred by article 166 of the Limitation Act from applying to have it set aside; and without its being set aside further execution could not go on. *Jagannadha Rao v. Basavayya*(3) is a case of a mortgagee-decree-holder bringing to sale only some and not all of the items of property mortgaged to him. He purchased them himself and as the sum realised met his decree amount in full, satisfaction was entered. He then found himself obstructed in attempting to take delivery, and, failing in an application to have the obstruction removed,

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(1) (1923) I.L.R. 47 Mad. 551.

(2) (1926) I.L.R. 50 Mad. 639.

(3) (1927) 53 M.L.J. 255.

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applied to proceed in execution against the other items not included in the sale. It was held that he could not do so without first having the sale set aside, which the law of limitation prevented his doing.

It will be seen at once that neither of those cases bears any very close resemblance to the present case. The principle on which they were decided was that of "*caveat emptor*". The Court gives no warranty of title at a sale in execution, and, if it should happen that the auction purchaser has purchased something in which the judgment-debtor had no interest, well, Order XXI, rule 91, is enacted for his benefit, and, if he does not discover his mistake in time, that is his misfortune and the law can do nothing more for him. The learned Advocate for the appellant seeks to apply this principle to the present case, but there is this fundamental difference between the present case and the two cases on which he relies. There, the persons found to be entitled to the property sold in Court auction were complete strangers, and therefore there could be no doubt that the respective judgment-debtors had no interest in the property. Here the matter is not so simple. The first defendant is not a stranger. He derives his title as the representative of the second defendant, the puisne mortgagee, and the mortgagor, and it is impossible to say that plaintiff, the auction purchaser, has purchased property in which the first mortgagee's judgment-debtor (the mortgagor) and the first defendant, as his successor in interest, has no interest. Plaintiff therefore could never have made the assertions necessary to file an application under Order XXI, rule 91. Indeed to establish

the fact that plaintiff has obtained no rights by his purchase, appellant can succeed only by another line of approach, viz., by showing that with the decree for sale in the suit by the prior mortgagee the prior mortgage had become extinguished, and therefore plaintiff can have no right of further suit.

Now, that the prior mortgage is not extinguished for all purposes is laid down by the Privy Council in *Sukhi v. Ghulam Safdar Khan*(1) on an examination of the difference between the old law (as enacted in section 89 of the Transfer of Property Act) and the present law (as enacted in rules 3 and 5 of Order XXXIV of the Code of Civil Procedure). In that case, a prior mortgagee who had failed to implead a puisne mortgagee in his mortgage suit was held to be entitled to set up his prior mortgage as a shield in a suit against him by the puisne mortgagee, so that he could not be dislodged from the property which he had purchased in execution of his own decree without his mortgage debt being discharged. It is true that *Sukhi v. Ghulam Safdar Khan*(1) was not dealing with a case like the present in which it is the purchaser under the *puisne* mortgagee's suit who is the first in the field, but there seems no logical reason why, if it be once held that the mortgage is not extinguished, it should not also be used, as in the present case, as a weapon of attack. It is true that the language in which this extension of the principle is upheld on page 565 of *Venkat Reddy v. Kunjappa Goundan*(2) is not, if I may say so with great respect, as clearly or as happily expressed as it might be, but

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(1) (1921) I.L.R. 43 All. 469 (P.C.). (2) (1923) I.L.R. 47 Mad. 551.

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Venkat Reddy v. Kunjappa Goundan(1) also relies upon the distinction between the old and the existing law in regard to the extinction of mortgages and it points out (on page 558) :

“ It is difficult to see how a second suit against a person not impleaded in the previous suit would be barred under any of the provisions of the Civil Procedure Code . . . The cause of action is not the same as in the previous suit nor would the points to be decided necessarily be the same.”

I am thus unable to hold that the two later rulings relied upon by the appellant, dealing as they do with different facts, making no reference to *Venkat Reddy v. Kunjappa Goundan*(1) and enunciating a principle which is no new principle but one which might easily have been put forward during the hearing of *Venkat Reddy v. Kunjappa Goundan*(1) itself, can be held to overrule or impair the authority of *Venkat Reddy v. Kunjappa Goundan*(1).

It remains only to point out that *Venkat Reddy v. Kunjappa Goundan*(1) is no isolated authority. The decision therein is based partly upon the discussion of the law by SRINIVASA AYYANGAR J. in *Chinnu Pillai v. Venkatasamy Chettiar*(2). No doubt what is there said is *obiter*, but the reasoning is clear and the decision unqualified that a suit by an auction purchaser, situated as the plaintiff is here, will lie. Again, *Venkat Reddy v. Kunjappa Goundan*(1) has been referred to with approval by both the learned Judges who decided *Chandramma v. Seethan Naidu*(3) and the situation has, I think, been put very clearly and

(1) (1923) I.L.R. 47 Mad. 551.

(2) (1915) I.L.R. 40 Mad. 77, 88.

(3) (1930) 61 M.L.J. 316.

convincingly in the following passage by ANANTAKRISHNA AYYAR J.

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“ The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that by virtue of the prior suit, which admittedly does not affect them, a (second) suit against them is not maintainable.” (Page 326.)

For these reasons I agree with my Lord that this appeal should be dismissed with costs of the second respondent.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

MALLAVARAPU NARASAMMA (PLAINTIFF), APPELLANT,

v.

BOGGAVARAPU BULLI VEERRAJU (DEFENDANT),
RESPONDENT.*

1934,
October 18.

Negotiable Instruments Act (XXVI of 1881), sec. 118—Expectant heir—Promissory note by—Suit to enforce—Amount advanced under note—Proof of—Onus on plaintiff—Presumption as to quantum of consideration, if arises under sec. 118 of Negotiable Instruments Act or sec. 114 of Indian Evidence Act (I of 1872)—Effect of explanation to ill. (c) of sec. 114 of Evidence Act—Onus of Proof—Question as to—Materiality of—Evidence let in by both sides and finding based on whole evidence.

In suits instituted by different plaintiffs against the same defendant for sums of money claimed to be due under promissory notes executed by the defendant, it appeared from the defence evidence that the defendant was a junior member of a rich family but not in possession or management of its properties, that he had got into bad ways and had begun to borrow

* Appeals Nos. 250 and 321 of 1930 and 16 and 17 of 1931.

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recklessly, under the influence of bad companions, when he was aged only nineteen years and a few months, that the suit notes had been executed by him during that period and that the plaintiffs, to whom the elder members of the defendant's family were well known, had dealt with him without making any enquiries of those elder members and with knowledge of the kind of life that the defendant was leading and the purposes for which he required moneys.

Held that though, under section 118 of the Negotiable Instruments Act, there was a presumption that the suit notes were for consideration, there was no presumption as to the quantum of consideration for the notes and that, in the circumstances of the case, the onus was on the plaintiffs to prove the amounts actually advanced by them under the suit notes.

The principle underlying the decisions in *Moti Gulabchand v. Mahomed Mehdi Tharia Topan*, (1895) I.L.R. 20 Bom. 367, *Sundarammal alias Sowbhagiammal v. Subramania Chettiar*, (1914) 29 M.L.J. 236, and *Sami Sah v. Parthasarathy Chetty*, (1915) 31 I.C. 739, approved.

Scope and applicability of section 118 of the Negotiable Instruments Act and section 114, illustration (c), of the Indian Evidence Act, explained.

Effect of the explanation to illustration (c) of section 114 of the Evidence Act stated.

The question of onus of proof is of subordinate importance in appeal, when both sides have let in evidence and the appellate Court has to come to a conclusion on the whole evidence.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 42, 49 and 51 of 1927 and 9 of 1928 respectively.

B. Satyanarayana, K. Rajagopala Ayyar, K. Bhimasankaran, K. Rajah Ayyar and V. Satyanarayana for appellant.

S. Srinivasa Ayyangar for *C. Rama Row* for respondent

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—These appeals arise out of suits instituted by different plaintiffs against the same defendant, for varying sums of money claimed to be due under promissory notes executed by the defendant. As the defence was to a certain extent common to all the suits, they were tried together and the whole evidence for the defendant was recorded in Original Suit No. 42 of 1927 (Appeal Suit No. 250 of 1930). In two of the suits, the defendant admitted receipt of small sums and to that extent those suits were decreed; the other two suits were dismissed.

The defendant is the youngest son of a rich Vysia family of Cocanada. Born in July 1907, he was married in 1921 into a rich family of Akkiveedu and his wife joined him early in 1925. Nevertheless, in the course of 1926, he seems to have taken to bad ways, with the help and under the evil influence of two of his father's dismissed clerks—Bhaskara Row and Majeti Venkatramana—and one Immidi Sooryam, the husband of a deceased sister. The transactions which led to these suits took place between September 1926 and May 1927, and, as the lower Court points out, the defendant must, according to the tenor of these promissory notes, have borrowed more than Rupees Twenty-three thousand in the course of about eight months. The father and the brothers of the defendant had been doing their best to wean him from his bad ways and the defence to the present suits is admittedly conducted by them.

The issues as originally framed threw the burden of proof on the defendant, as his plea

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amounted to a denial of consideration ; but, at a later stage, an additional issue was framed in the following terms :

“ Whether there are circumstances in the case which in law would shift the burden of proving consideration for the pro-notes, on the plaintiffs.”

There was some further discussion before the trial commenced, and the learned Judge ruled that

“ the defendant should adduce evidence on the whole case and then the plaintiff will be allowed to adduce his evidence. The defendant will not be allowed to adduce further evidence after the plaintiff closes his case . . . (but he may) ask the Court that from the circumstances that may be proved in the case, the plaintiffs should bear the burden of establishing the consideration for the suit notes.”

An issue of “ fraud and undue influence ” was also raised but, at an early stage of the case, Counsel for the defendant seems to have intimated that he relied on fraud and undue influence only as reasons for executing the suit promissory notes and that his main plea was that the defendant received little or no consideration for the promissory notes.

A mass of evidence, oral and documentary, has been produced, on behalf of the defendant, to prove the course of life led by him during these eight months and the attempts of the elder members of the family to get at him and save him. Though some remarks have been made before us against the genuineness or reliability of portions of this documentary evidence, nothing seems to have been said against them in the Court below and such portions of the correspondence as consist of post cards are absolutely above criticism. It does not seem to us necessary to examine this part of the evidence in detail, as we find no

difficulty in accepting the summary of its result, as set out in paragraph twenty-one of the lower Court's judgment in Original Suit No. 42 of 1927. We therefore proceed to deal with the case on the footing that the defendant, who was a junior member of a rich family but not in possession or management of its properties, got into bad ways and began to borrow recklessly, under the influence of bad companions, when he was aged only nineteen years and a few months. During portions of this period of eight months, he was away from his house and people, on at least three occasions—(i) between 16th February 1927 and 7th March 1927, at Madras, Tirupati, etc., (ii) between 7th March 1927 and 22nd March 1927 at Calcutta, Bombay, Hyderabad and (iii) between 30th March 1927 and 30th April 1927 at Calcutta, Benares, etc. During the first two of these trips, the members of the defendant's family were unable, in spite of their best efforts, to get at him, but on the third trip they managed to keep one of their men with him and were gradually able to re-assert their influence over him. There can be little doubt that it was under the advice of his father and brothers that the defendant (while still in Calcutta) declined to receive the notice of demand sent on 30th March 1927 by the Vakil for the plaintiff in Original Suit No. 42. That suit was filed on 30th April 1927 (i.e., immediately after the defendant's return to Cocanada). The defendant's father, now that he regained control over his son, got notices issued on 8th May 1927 to the plaintiffs in the other three suits, repudiating defendant's liability to them on grounds similar to those raised in the present written statement.

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As regards the alleged associates of the defendant, we see no reason to differ from the conclusion of the learned Subordinate Judge that they were bad people, that Bhaskara Row and Majeti Venkatramana were possessed of no property, that Imidi Sooryam was addicted to drink and had lost all his property by leading an extravagant and immoral life and that the defendant was under their influence and control during 1926 and up to 30th March 1927.

[His Lordship referred to the case of the appellants as to the necessity for the loans taken by the defendant and to the evidence bearing on the same and proceeded:—]

But he (the trial Judge) held that all the transactions had been entered into under very suspicious circumstances and without making any enquiries of the elder members of the defendant's family, though they were well known to the lenders, that they could not have been *bona fide* loans as the lenders were or must have been aware of the kind of life that defendant was leading and the purposes for which he required moneys, that in the circumstances they were not likely to have advanced the full amounts shown in the various promissory notes, that the facts proved by the defendant sufficed to throw on the plaintiffs the burden of proving the amounts actually advanced by them and this onus they had not discharged by the production of reliable evidence. On the question of burden of proof, he relied on *Moti Gulabchand v. Mahomed Mehdi Tharia Topan*(1), *Sundarammal alias Sowbhagiammal v. Subramania Chettiar*(2) and *Sami Sah*

(1) (1895) I.L.R. 20 Bom. 367.

(2) (1914) 29 M.L.J. 236.

v. Parthasarathy Chetty(1), which undoubtedly support his view. The correctness of these decisions has been questioned before us as also their applicability to the circumstances proved in the present suits. It has also been contended that the lenders were not dealing with a "limited owner" or pardanashin lady and were under no obligation to satisfy themselves as to the propriety of the purposes for which the loans were taken or to communicate with the defendant's father or his brothers.

The last argument may be briefly disposed of. The learned Judge does not rely on these considerations as part of a precaution which the lenders were bound under law to take but only as throwing light on the circumstances under which the defendant incurred these debts and the probability or otherwise of the plaintiffs having lent such large sums to one circumstanced like the defendant in the manner in which they say they have done. We do not think the learned Judge has fallen into any error in taking such considerations into account, though opinions may differ as to the weight to be given to them.

On the question of burden of proof, reliance has been mainly placed by the appellants on section 118 of the Negotiable Instruments Act and it has been argued that the decision in *Moti Gulabchand v. Mahomed Mehdi Tharia Topan*(2), which has been followed in *Sundarammal alias Sowbhagiammal v. Subramania Chettiar*(3) and *Sami Sah v. Parthasarathy Chetty*(1), practically ignores the marked difference in language between

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(1) (1915) 31 I.C. 739.

(2) (1895) I.L.R. 20 Bom. 367.

(3) (1914) 29 M.L.J. 236.

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that section and section 114 of the Indian Evidence Act and illustration (c) thereto. Whatever comment may be made upon the way in which the learned Judges have expressed themselves in these cases, the principle underlying these decisions seems to us unexceptionable; and in dealing with rebuttable presumptions, it is common knowledge that the Court is often obliged to rely more upon circumstances than upon direct or definite evidence negating the fact presumed [cf. *Singar Kunwar v. Basdeo*(1) and *T. M. Ramaswamy Iyer v. Ganapathia Pillai*(2); see also *Tatam v. Haslar*(3).].

The appellant's arguments seem to us to read a great deal into section 118 of the Negotiable Instruments Act; that section must be understood in the light of the reason of the rule and the history of the law as to the presumption in favour of negotiable instruments. From the definitions and from the illustrations in the Act, it will be seen that it is not required or even expected that the "consideration" should be stated in the instrument itself. So, no presumption can ordinarily arise in such cases of "recitals" in the document. At one time, it was a matter of doubt in England whether a statement, in the bill, of the transaction which gave rise to the bill, might not detract from its character as an "unconditional" order or promise to pay and clause 3 of section 3 of the Bills of Exchange Act was put in to remove this apprehension. Having regard to mercantile usage and the interests of business, it had been developed as a rule of practice and pleading in

(1) A.I.R. 1930 All. 568.

(2) (1913) 24 I.C. 709.

(3) (1889) 23 Q.B.D. 345.

the English law that in the case of bills and notes there need be no reference either in the document itself or in the plaintiff's pleading to "value received" or to payment of consideration; see *Hatch v. Traves*(1) and *Foster v. Dawber*(2). In later cases, this idea came to be embodied in the rule that a bill or note *prima facie* imports consideration or value [*Southall v. Rigg*(3) and *Jones v. Gordon*(4)] and the same is reproduced in section 30 of the Bills of Exchange Act in the words:

"Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value."

There is no reason to think that section 118 of the Indian Act lays down anything more than this. Neither the earlier case-law nor the language of the section justifies any presumption being made as to the *quantum* of consideration. The English Act merely states that any consideration sufficient to support a simple contract may constitute "valuable consideration" for a bill or note (see section 27). Though there is no corresponding provision in the Indian Act, the principle must be the same here [see *Samuel v. Ananthanatha*(5)]. In clause (a) of section 118, the same language covers cases both of "making or drawing" and of "negotiation" and, in the latter case, the presumption can only be of a transfer *for value* and not in favour of any *particular amount* as "consideration" for the transfer. It may also be noticed in passing that in illustration (c) to section 114 of the Evidence Act the presumption is only stated to be

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(1) (1840) 11 AD. & E. 702; 113 E.R. 581.

(2) (1851) 6 Ex. 839, 853; 155 E.R. 785, 791.

(3) (1851) 11 C.B. 481, 492; 138 E.R. 560, 565.

(4) (1877) 2 App. Cas. 616, 627.

(5) (1883) I.L.R. 6 Mad. 351, 353.

that the bill was accepted or endorsed "for good consideration".

As a corollary to the above rule of pleading, it was recognised in England that it is

"not enough in a plea of want of consideration merely to say that the defendant never had any value or consideration—the plea must go on to aver the circumstances which show that there was no consideration"; *Southall v. Rigg*(1).

In Byles on Bills (at page 125), the rule is stated in the following terms :

"Consideration is presumed until the contrary appears or at least appears probable." (the italics are ours).

The expression "until the contrary is proved" in section 118 of the Indian Negotiable Instruments Act must also be read in this expanded sense, having regard to the definitions of the word "disproved" and of the expression "shall presume" in sections 3 and 4 of the Evidence Act. The difference between section 114 of the Evidence Act and section 118 of the Negotiable Instruments Act consists only in this, that, under the first, the Court has a discretion to make the presumption or not, whereas, under the second, the Court is bound to start with the presumption; but once the presumption is made, there is no difference between the two cases, in the manner of displacing the presumption or disproving the "presumed" fact.

Any presumption as to *quantum* of consideration, as distinguished from the mere existence of consideration, has accordingly to be drawn, not by virtue of section 118 of the Negotiable Instruments Act or even under section 114 of the Evidence Act, but only from the recitals, if any, that the instrument may contain. As to such

(1) (1851) 11 C.B. 481, 492; 138 E.R. 560, 565.

recitals, it has long been established that being *prima facie* evidence against the parties to the instrument, they may operate to shift on to the party pleading the contrary the burden of rebutting the inference raised by them; see *Zamindar S.G.R.V. Bomaya Nayik v. Virappa Chetti*(1). But the *weight* due to recitals may vary according to circumstances and, in particular circumstances, the burden of rebutting them may become very light, especially when the Court is not satisfied that the transaction was honest and *bona fide*; see *Brajeshware Peshakar v. Budhanuddi*(2); see also *Zohra Jan v. Rajan Bibi*(3).

In applying the principles above adverted to, Courts have in course of time come to regard certain types of cases as specially calling for scrutiny from the debtor's point of view. It is immaterial whether or not "fraud" in the sense of "deceit" or "undue influence" as defined in section 16 of the Indian Contract Act is made out; the grounds in favour of a wide exercise of equitable jurisdiction in certain types of cases were explained by Lord HARDWICKE in *Chesterfield (Earl of) v. Janssen*(4). (See also Story's Equity Jurisprudence, section 348). One of these well-known types is represented by the category of transactions between money-lenders and expectant heirs. As early as in *Freeman v. Bishop*(5), the reason of the rule governing such cases was stated to be the "necessity" that young heirs are in, for the most part, which naturally lays them open to imposition; and in *O' Rorke v. Bolingbroke*(6) it was

(1) (1864) 2 M.H.C.R. 174. (2) (1880) I.L.R. 6 Calc. 268, 277, 278.

(3) (1915) 28 I.C. 402.

(4) (1750) 2 Ves. Sen. 125, 155; 28 E.R. 82, 99.

(5) (1740) 2 Atk. 39; 26 E.R. 420.

(6) (1877) 2 App. Cas. 814.

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pointed out that in such cases the parties do not really meet on equal terms and the opportunity for the one party to take advantage of the weakness or necessity of the other raises a presumption of "fraud" in the sense of improper use of the power arising out of the circumstances. In *Smith v. Kay*(1) Lord CRANWORTH strongly condemned the practice of getting hold of a young man of fortune, supplying him with means and pandering to his extravagance. The young man who has gone through a course of wilful and culpable folly and extravagance is, in such cases, relieved from its consequences, not because he has any "merits of his own to plead" but that "there is a principle of public policy in restraining" such conduct on the part of lenders, that "this system of undermining and blasting, as it were, in the bud, the fortunes of families is a public as well as a private mischief."; *per* Lord SELBORNE in *Earl of Aylesford v. Morris*(2). It must not be forgotten that in such cases the prodigal is by the very circumstances of the situation drawn away from the help and advice of his natural guardians and protectors and delivered into the hands of persons interested in taking advantage of his weakness (*ibid*). In *Croft v. Graham*(3) KNIGHT BRUCE L.J. used very strong language, observing that "it would be a disgrace to the Court" if securities given in such circumstances were allowed to stand for more than the moneys really advanced and a reasonable rate of interest. In the application of these principles, the mere form of the

(1) (1859) 7 H.L.C. 750, 771.

(2) (1873) L.R. 8 Ch. 484.

(3) (1863) 2 DeG.J. & S. 155, 160; 46 E.R. 334, 336.

transaction cannot defeat the power of the Court and promissory notes form no exception to the rule; cf. *Nevill v. Snelling*(1).

Considerations like those adverted to above have led the Indian Legislature to add to illustration (c) of section 114 of the Evidence Act an explanation stating that, in deciding whether the presumption in favour of consideration is to be drawn or not, the Court shall have regard to the fact that the drawer of the bill of exchange was a man of business and the acceptor a young and ignorant person under his influence. The explanation only indicates the principle and is not meant to be exhaustive of its application. Its operation is not necessarily limited to cases where the creditor is a professional money-lender or excluded in cases where the borrower has a vested right in property as distinguished from a mere *spes*. The presumed or proved necessity of the borrower and the inequality of position between the lender and the borrower constitute the reason of the rule. If such considerations can justify the Court in *refusing to draw the presumption*, they must equally operate to help to *rebut* the presumption drawn under section 118 of the Negotiable Instruments Act.

It is well established in England that, in cases where the Court examines a transaction in the light of the foregoing principles, the creditor is only entitled to get what he can prove to have lent, "by affirmative evidence, beyond the production of the note itself"; *per* ALDERSON B. in *Jones v. Thomas*(2). See also *Bill v. Price*(3). It

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(1) (1880) 15 Ch. D. 679.

(2) (1837) 2 Y. & C. Ex. 498.

(3) (1687) 1 Vern. 467; 23 E. R. 592.

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is in accordance with this principle that in *Moti Gulabchand v. Mahomed Mehdi Tharia Topan*(1), *Sundarammal alias Sowbhagiammal v. Subramania Chettiar*(2) and *Sami Sah v. Parthasarathy Chetty*(3) the Court refused to give a decree to the plaintiff for more than what he proved to have lent, even when it strongly suspected that the defendant must have received more than he admitted; see also *Barkat Ullah v. Muhammad Hayat Ali Khan*(4); cf. *Kishen Ballabh v. Ghure Mal*(5).

Reference was made, in passing, to the decision in Appeal Suit No. 26 of 1927, apparently with a view to suggest that even on receipt of a smaller amount there might be a valid promise to repay a larger amount. But that is not the plaintiffs' case here—and for obvious reasons too; for, in the circumstances, any serious disparity between the amount received and the amount promised to be repaid may go to support the defendant's plea of "undue influence". The plaintiffs have insisted that they have advanced the full amount shown in the promissory notes and, if the evidence establishes payment only of smaller amounts, the case will be clearly governed by section 44 of the Negotiable Instruments Act.

It only remains to add that the question of onus is of subordinate importance at this stage, when both sides have let in evidence and the appellate Court has to come to a conclusion on the whole evidence; see *Sime, Darby and Company, Limited v. The Official Assignee of the Estate of Lee*

(1) (1895) I.L.R. 20 Bom. 367.

(3) (1915) 31 I.C. 739.

(2) (1914) 29 M.L.J. 236.

(4) (1922) 84 I.C. 866.

(5) (1915) 13 A.L.J.R. 322.

Pang Seng(1) following *Robins v. National Trust Co.*(2). The decision of the Allahabad High Court in *Ram Nath v. Ram Chandra Mal*(3) must be understood to relate to a case where, in the words of Lord DUNEDIN, the evidence *pro* and *con* was so evenly balanced that the onus had to determine the conclusion of the Court. Even in suits on negotiable instruments, it has been recognised that the debtor can press into his service facts and circumstances disclosed by the plaintiff's evidence as well; *Bishambar Das v. Ismail*(4) and *Muhammad Shafi Khan v. Muhammad Moazzam Ali Khan*(5); cf. *Makund v. Bahori Lal*(6) and *Raghavulu Chetty v. Sabapathy Chetty*(7).

With these general observations, we proceed to consider the evidence in each of the suits.

* * * *

A.S.V.

(1) (1927) 54 M.L.J. 339 (P.C.).

(3) A.L.R. 1934 All. 350; A.I.R. 1935 All. 154.

(4) A.I.R. 1933 Lah. 1029.

(6) (1881) I.L.R. 3 All. 824.

(2) [1927] A.C. 515.

(5) (1922) 67 I.C. 684.

(7) (1911) 21 M.L.J. 1013.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

KILLUR RAMAKRISHNA RAO (PLAINTIFF), APPELLANT

v.

KOCHI MAHADEVA BHATTA AND ANOTHER
(DEFENDANTS), RESPONDENTS.**Lease—Permanent lease of land—Covenant restraining alienation by lessee—Breach of covenant—Right of lessor to claim enhanced rent upon.*

A permanent lease of lands contained a covenant restraining the lessees from alienating their interest therein, and provided, in the event of such breach of the covenant, for payment of rent at an enhanced rate. The lessees alienated their interest in breach of the covenant, and the lessor with knowledge of such breach, received rent at the original rate; but subsequently sued to recover enhanced rent.

Held, that, though the lessor could not claim the enhanced rent for the period covered by his receipt of rent at the original rate, he was not precluded from claiming the enhanced rent for future periods.

Denton v. Richmond, (1833) 1 C. & M. 735; 149 E.R. 595, followed.

Krishna Shetti v. Gilbert Pinto, (1919) I.L.R. 42 Mad. 654, referred to.

APPEAL against the decree of the District Court of South Kanara in Appeal Suit No. 154 of 1928, preferred against the decree of the Court of the District Munsif of Puthur in Original Suit No. 1027 of 1926.

B. Sitarama Rao for appellant.

K. Srinivasa Rao for respondents.

Cur. adv. vult.

* Second Appeal No. 190 of 1931.

JUDGMENT.

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The plaintiff is the appellant. This second appeal arises out of a suit by the plaintiff for the recovery of enhanced rent in the following circumstances.

In 1905 the plaintiff's father granted a permanent mulgeni lease under Exhibit A of certain lands to the defendants. The lease stipulated that the defendants were not to alienate their mulgeni interest in the lands. In case of alienation the rent payable was enhanced from Rs. 137-12-0 to Rs. 250. The restraint against alienation and the increase in rent in case of alienation are mentioned in the following provision of the lease deed :

"In case we do not require the said plot, we shall hand it over to you only; but we shall have no right to alienate this mulgeni right to any one else by way of mortgage, arwar (usufructuary mortgage), sale, etc. If in contravention thereof we alienate it to others, we shall pay geni at Rs. 250 per year from that time."

On 28th January 1910, under Exhibit B, the defendants sold their mulgeni right in the lands to their divided brother, Ramachandra Bhatta, and made over possession of the holding to him. Within a short time, on 8th March 1910, Ramachandra Bhatta reconveyed the mulgeni interest to the defendants under Exhibit XV. It is admitted that though the lands were reconveyed they are still in the exclusive possession and enjoyment of Ramachandra Bhatta. Both the plaintiff and the plaintiff's father received, after alienation, the rent from the lands at the original rate. The plaintiff's case is that as soon as he came to know of the alienation he demanded rent at the enhanced rate and registered notices

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were exchanged between the parties. The District Munsif says that it is not proved on the evidence that till 1922 the plaintiff was aware of the alienation as per Exhibit B. On this point the learned District Judge observes :

"I do not for a moment believe that plaintiff was ever ignorant of the temporary alienation in 1910 or of the fact that Ramachandra Bhatta was actually cultivating the land with the permission of the defendants."

The District Munsif also says that it is very likely that the defendants took Exhibit XV because the plaintiff's father threatened to enforce the clause for enhanced rent in the mulgeni. This is very probable ; and this is also the opinion of the District Munsif. These latter facts were relied on in the first Court, only to prove that the plaintiff is estopped from enforcing the stipulation contained in Exhibit A. This plea was specifically overruled by the District Munsif. The District Judge does not definitely say that the plaintiff is estopped from claiming the enhanced rent, but he says, referring to the conduct of the plaintiff :

"Such conduct is clearly inequitable and I decline to permit plaintiff to go back on a course of action and a policy which both his father and he himself have adopted since 1910."

It is clear that no case of estoppel has been made out and in this Court the respondents' case was rightly not sought to be supported on the plea of estoppel. I may state here that the appellant has argued the case on the assumption that the plaintiff knew of the alienation when he received for some time the rent from the defendants. The question is whether in these circumstances the plaintiff is entitled to claim the enhanced rent asked for in the plaint.

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The above question was answered in the affirmative by the learned District Munsif and in the negative by the learned District Judge, and in the result the plaintiff's suit was dismissed with costs. In the last paragraph of his judgment where he gives the reason for his decision, the learned District Judge, after stating that the conduct of the plaintiff is inequitable and that he cannot believe that the plaintiff was ignorant of the temporary alienation, says :

"The mulgeni interest was only alienated for a little more than a month, and this temporary alienation occurred sixteen years before suit, and was clearly condoned at the time. In the result, plaintiff's suit is dismissed with costs."

It is not clear whether the learned Judge passed his judgment on estoppel or waiver of his rights by the plaintiff ; but it is clear that he thought that the case was an extremely inequitable one.

The question I have to decide is one of law. No decision of any Indian Court directly bearing on the point has been brought to my notice ; but there are decisions in England which support the appellant's case. Instances of cases where an increased rent is reserved in case the lessee commits a breach of a covenant are collected in Foa on Landlord and Tenant. At page 179 of his book (sixth edition), the learned author says :

"In certain leases (especially agricultural leases) where the lessee is, *prima facie*, to refrain from certain acts,—e.g., ploughing up pasture, or converting land into tillage, removing produce from the premises, cultivating the lands on any other than a particular system, sowing more than a certain quantity of them with a given seed, or taking from them more than a certain number of successive crops of a specified kind, mowing for hay without manuring, *parting with the possession of land included in the demise*, etc. (the italics are mine)—a stipulation is often met with for the payment of an additional rent

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proportioned in amount to the extent to which the obligation is disregarded."

The levy of an increased rent on parting with the possession of land—which is the present case—is illustrated by the case of *Greenslade v. Tapscott*(1). In Halsbury's Laws of England, Vol. XVIII, paragraph 944, it is stated :

"An increased rent may be reserved in case the lessee commits a breach of the covenants of his lease. Such a rent is commonly known as a penal rent; in general, however, it is not in the nature of a penalty, but is a liquidated sum or succession of sums payable by way of satisfaction."

And in the last sentence of the paragraph it is stated :

"A receipt of the original rent is not a waiver of the landlord's claim to the additional rent."

In *Denton v. Richmond*(2) a higher rent was made payable on breach of a condition mentioned in the lease deed. On the breach of the condition when rent was claimed at the higher rate, it was first pleaded that after the breach of the covenant the plaintiff with full knowledge of it received the lower rate without demanding the additional rent; and secondly, that after the committing of the breach the plaintiff with full knowledge, etc., gave up and dispensed with his claim to receive the additional rent. Both pleas were in effect similar, as pointed out by Lord LYNDHURST O.B., and amounted to pleas of waiver. It was held that there was no case of waiver and the plaintiff was entitled to receive the additional rent claimed. In my opinion this case meets all the objections raised by the defendants. The proposition illus-

(1) (1834) 1 O.M. & R. 55; 149 E.R. 991.
(2) (1833) 1 Q. & M. 735; 149 E.R. 595.

trated by this case is thus stated in Foa on Landlord and Tenant, page 181 :

"Nor does the lessor lose his right to recover it by accepting the original rent only, even if such acceptance be with the knowledge that his right to the increased rent has accrued."

It is argued that the increased rent which the plaintiff is thus entitled to get is in the nature of a penalty and the Court can relieve against it. As pointed out in the extract quoted from Halsbury, the increased rent is not a penalty but is in the nature of liquidated damages. Foa in his book makes a statement to the same effect. He says, at page 180 :

"In accordance with the principles already stated," referring to an earlier portion of his book where the distinction between penalty and liquidated damages is pointed out,

"additional rent (or single sums), payable under the above circumstances, is payable as liquidated or ascertained damages in full; unless of course, also in accordance with those principles, such additional rent is made payable upon the breach of any one of several stipulations of an unequal degree of importance."

—which is not the case here. Even if we assume that the provision contained in the deed is in the nature of a penalty, I do not think that Courts can give relief against it. It was held in *Krishna Shetti v. Gilbert Pinto*(1), with reference to forfeiture of a lease and re-entry on breach of a covenant, that Courts have no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant.

For the period for which lower rent has been received, no doubt the plaintiff cannot claim the

(1) (1919) I.L.R. 42 Mad. 654.

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higher rent provided in the deed in case of breach of a covenant; but for future periods he is certainly entitled to claim the enhanced rent for the reasons given above. I would therefore set aside the decision of the lower Court and restore that of the District Munsif with costs here and in the Court below.

K.W.R.

APPELLATE CIVIL.

*Before Mr. Justice Pakenham Walsh and
Mr. Justice Varadachariar.*

1934,
December 12.

GUNDA NARANNA NAIDU (PLAINTIFF), APPELLANT,

v.

BHAIRI VENKATARAMAYYA BHUKTHA GARU
AND TWO OTHERS (DEFENDANTS), RESPONDENTS*.

*Madras Hindu Religious Endowments Act (I of 1925), ch. VI and
sec. 59 (1) and (2)—Excepted temple under sec. 5 (5) (a)—
Powers of the Hindu Religious Endowments Board—Code
of Civil Procedure (Act V of 1908), sec. 92—Powers
of Court under—Restrictions on the powers of the Board
under Chapter VI.*

In the case of "excepted temples" the Hindu Religious Endowments Board does not possess the powers which the Court has under section 92 of the Code of Civil Procedure except with regard to the framing of a scheme and calling for accounts as provided for in section 59 (1) of the Madras Hindu Religious Endowments Act (I of 1925), and there is clear indication in the Act that the powers in Chapter VI are restricted and do not go beyond those given to the Board under that chapter.

APPEAL against the decree of the District Court of Ganjam in Original Suit No. 55 of 1927.

* Appeal No. 120 of 1930.

H. Suryanarayana for appellant.

D. Ramaswami Ayyangar for Government
Pleader (P. Venkataramana Rao) for respondents.

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The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—The appellant brought this suit to set aside a scheme framed by the Hindu Religious Endowments Board with regard to the temple of Sri Hatakeswaraswami at Bhairi Singupuram. The scheme briefly was that the temple was to be administered by a body of trustees, three in number, who were appointed for a period of three years. The plaintiff, stating that he was the hereditary trustee, that he had not been guilty of mismanagement and that the scheme framed is unnecessary and *ultra vires*, brought the suit for setting aside the same. The Court held that the scheme was not *ultra vires*, and that it was not inadvisable, and upheld it with a small alteration that, though the plaintiff was not a hereditary trustee, he could not be turned out except by a suit at the end of three years. The finding was that the suit temple was an "excepted temple" under section 5 (5) (a) of the Act of 1925 and for the purpose of this appeal we propose to confine ourselves to that Act.

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This being an "excepted temple", the power of the Board to frame a scheme is under Chapter VI; and section 59 (2) of that chapter says:

"If in settling a scheme for the administration of the endowments connected with a math, the Board considers it necessary to associate any person with, or constitute any separate body for participating or assisting in, the administration of such endowments, such person shall be a person having interest and such body shall consist exclusively of persons having interest in such math."

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The learned District Judge has overlooked the important fact that it is only a math which is here spoken of and not an "excepted temple"; and the question at issue is whether the Board has, in settling a scheme for an excepted temple, power to appoint such body as is contemplated under section 59 (2). The answer to this question will have to be looked for in the general scheme of the Act.

The definition of an "excepted temple"—this being one such—is as follows :—

Section 5 (5) (a).—"A temple which before 1801 was, and since 1863 has continued to be, under the sole management of a trustee whose nomination did not vest in, nor was exercised by, the Government nor was subject to the confirmation of the Government or of any public officer,".

We need not deal with the second clause (b) because the Court has found that the trustee here is not a hereditary trustee. Therefore, *ex hypothesi*, this is a temple in which the Government did not exercise the right of appointment of the trustee. Turning to section 69 of the Act, we find :

"The Board or Committee having jurisdiction over any math or temple . . . may institute a suit in the Court to obtain a decree—(a) appointing or removing the trustee of a math or excepted temple,".

Then follow further matters about which a suit may be brought, and it has to be noticed that clauses (a) to (d) correspond with section 92 of the Civil Procedure Code with the exception of the framing of a scheme and calling for accounts. When we find that the framing of a scheme and calling for accounts are the two matters specially provided for in section 59 (1) in the case of excepted temples, it seems quite clear that the Board does not possess the powers which the Court has under section 92 except with regard to

these two matters. This is clear indication that the powers in Chapter VI are restricted and do not go beyond those given to the Board under that chapter.

Virtually the argument which has been addressed to us for the respondents is to show that section 59 (2) was not intended to confer special power on the Board in the case of a math but merely to make a special restriction when the power under section 59 (1) is exercised with reference to maths. That view we cannot accept, looking to the general scheme of the Act. Similar arguments were adduced before one of us in Civil Miscellaneous Petition No. 3053 of 1934 where the question of the right of the Board to appoint a receiver to an excepted temple was under discussion. It was there argued that such rights were implied in the general powers of management which were conferred upon them. It was even argued that the provisions in section 73 of the Act of 1927 which correspond to section 69 of the Act of 1925 were merely to enable the Board *if they chose* to bring a suit for the purpose of appointing or removing a trustee. If the argument urged before us, that the general power of administration presumed to be given under section 14 covers everything which is not expressly forbidden, be correct it would follow that the methods prescribed for appointing or removing a trustee, as well as other reliefs for which section 69 expressly states the Board may go to the Court, are really superfluous. It is beside the point that the Court acting under section 92 of the Code of Civil Procedure or the Board or Committee when dealing with non-excepted

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temples can appoint *additional* trustees, because here we are dealing with the powers of the Board in respect of an "excepted temple" which is clearly differentiated throughout the Act.

In this view, it is clear that the first three clauses of the scheme, (a), (b) and (c), are *ultra vires*. Clause (d) of the scheme states that the trustee shall take immediate possession of all the temple properties and lease them out by public auction. This is apparently intended to refer to property in the possession of the number of persons mentioned and referred to in issue No. 3. The whole extent of the temple properties appears to be about forty-eight acres, of which sixteen acres and odd are in the possession of the plaintiff. The lower Court says that he is one of the alienees, but that is clearly wrong. His possession is evidently on behalf of the temple. As regards the other properties they admittedly have been held for a long time by those in possession, and there are no materials available on the record as to the terms of the grant and whether the property was granted to them or to the temple. Therefore the direction that the trustees shall take immediate possession of all the temple properties and lease the same appears inadvisable without further enquiry. Malfeasance with regard to the land was the only charge which the Board found established against the plaintiff and in our opinion it has not been proved that he was at fault in this matter. There is no evidence which would justify us in saying that he was necessarily remiss in this matter or that this is a wise direction to give to him. We therefore consider that the whole scheme should be set

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aside and this appeal allowed. The plaintiff will be well advised in his own interest to take proper advice as to whether any of these lands in the possession of the alienees can be recovered for the temple and if so to take the necessary steps.

In the circumstances of the case, as there is a question of law and as the appeal is partly due to the fact that the lower Court did not at all notice that section 59 (2) mentions only maths and not excepted temples, we direct that each side shall bear its own costs both here and in the lower Court.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Cornish.

IN RE P. R. SUBBIER AND SIX OTHERS (ACCUSED),
PETITIONERS.*

1934,
September 5.

*Madras City Police Act (III of 1888), secs. 6, 42, and 47—
Search warrant issued by Deputy Commissioner—Validity
of, in absence of proof that power to issue same has been
deputed by Commissioner—Sworn information not required
—Faulty description of premises not fatal to validity of
warrant, if description sufficient to identify—Forfeiture
under sec. 47.*

By virtue of section 6 of the Madras City Police Act (III of 1888), a Deputy Commissioner of Police has power to issue a warrant under section 42 of that Act. The power is conferred on the Deputy Commissioner by the Act and not by an order of the Commissioner. Such a warrant issued by the Deputy Commissioner is therefore valid even in the absence of proof that the power to issue the same had been deputed to him by the Commissioner.

Forsyth v. Wilson, (1893) I.L.R. 20 Cal. 670, followed.

* Criminal Revision Case No. 965 of 1933.

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Section 42 of the Madras City Police Act (III of 1838) does not require a sworn information as a condition to the issue of a warrant. It is sufficient that the warrant should state that the officer who issued it has done so on information laid before him. It is not necessary for him to state that he had reason to believe the information.

Walvekar v. Emperor, (1926) I.L.R. 53 Calc. 718, distinguished.

A faulty description of the premises by number or locality is not fatal to the validity of a warrant issued under section 42 of the Act, if the description is nevertheless sufficient to identify the premises named in the warrant.

Emperor v. Krishna Rutna Dalvi, (1904) 6 Bom. L.R. 52; *Emperor v. Abasbhai*, (1925) I.L.R. 50 Bom. 344; and *Emperor v. Jhunni*, (1905) 2 CrL. L.J. 243, referred to.

Before ordering forfeiture under section 47 of the Madras City Police Act (III of 1888), the Magistrate must be satisfied that the money or other articles seized were used or intended to be used for gaming purposes.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Second Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 19681 of 1932.

C. Brooke Elliott, S. V. Shenoy, and K. V. Raghavan for petitioners.

K. V. Ramaseshan for Crown Prosecutor (*T. S. Anantaraman*) for the Crown.

Cur. adv. vult.

ORDER.

The petitioners were convicted of offences under the Madras City Police Act, sections 45 and 46: accused 1 of keeping or permitting to be kept and accused 2, 3, 4 and 5 of using a common gaming house, and accused 6 and 7 of being found gaming or present for the purpose of gaming in a common gaming house.

SUBBIE
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The premises in question were occupied by accused 1 who conducted a printing business there, known as the All India Printing Works, and in the course of his business printed race books and other racing intelligence. Accused 4 and 5 were clerks employed by him.

The evidence is that on the day when the premises were raided by the police a number of persons were found on and around the pial of the building; that accused 2 and 3 were on the pial taking betting slips from accused 6 and 7; and that betting slips were found on these accused persons. These betting slips were pieces of paper with the names of race horses written thereon and against these names were written sums of money, obviously indicating that these sums had been betted upon the particular horses. Immediately within the building, in a room used as an office of accused 1, were discovered accused 4 and 5 seated at two tables on which were found some more betting slips and some lists of acceptances for the Mysore races which were in progress on that day. In the unlocked drawer of the table at which accused 4 was seated was found a sum of Rs. 187. The drawer of the table at which accused 5 was sitting was locked. As the key was not forthcoming the drawer was forced open and a sum of Rs. 416-1-0 was found therein. These moneys, as well as the betting slips, lists of acceptances, and some other papers were seized by the police. Mahazars were drawn up and attested by two witnesses who had been taken to the premises for that purpose by the police. The point was raised whether the provisions of section 103, Criminal Procedure Code, governed a

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search and seizure of property made in pursuance of a warrant issued under section 42 of the Madras City Police Act. It is not necessary for the purpose of this case to decide it, because I am satisfied that, assuming section 103 applied, the requirements of that section were substantially fulfilled.

The principal arguments of the learned Counsel for the petitioners have been directed against the validity of the warrant.

The warrant which was issued on 11th June 1932 is dated 11th June 1933. That, however, is a mere slip of the pen. It states :

"Whereas information has this day been laid before the undersigned Deputy Commissioner of Police and Justice of the Peace for the Town of Madras, that a common gaming house is kept on the premises occupied by Subbayer, Proprietor, All India Printing Works, at No. 239, Ayya Pillai Street, George-town, Madras, etc."

The warrant is signed by Mr. Wilkes, a Deputy Commissioner of Police.

The authority of the Deputy Commissioner to issue the warrant has been contested. It was contended that the power to issue a warrant is vested by section 42 of the Police Act in the Commissioner of Police, and that there must be proof, which is wanting here, that the power has been deputed by the Commissioner to the Deputy Commissioner. The question depends on the construction of section 6 of the Act. This provides that the Government may from time to time appoint one or more Deputies or Assistants to the Commissioner, who shall be competent to perform any of the duties or exercise any of the powers assigned to that officer as Commissioner under his orders. I think that the section

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authorizes a Deputy Commissioner to exercise the powers given to the Commissioner by the Act, but that the Deputy must exercise those powers subject to the orders of the Commissioner. The powers are conferred on the Deputy by the Act and not by an order of the Commissioner, though the Deputy is subject to the control of the Commissioner. This was the construction put on substantially the same provision of the Calcutta Police Act in *Forsyth v. Wilson*(1). I accordingly hold that it was competent to the Deputy Commissioner to issue the warrant in the present instance.

It was next contended that the warrant is bad because it does not on the face of it show a legal foundation for its issue. Section 42 of the Police Act says :

"If the Commissioner has reason to believe that any enclosed place or building is used as a common gaming house he may issue his warrant."

The warrant in the present instance does not state that the Deputy Commissioner had "reason to believe", but that "information has been laid" before him, that the premises were used as a common gaming house. Apparently the warrant follows the form prescribed by Schedule V of the Code of Criminal Procedure for a search warrant issued by a Court under section 96 of the Code. Section 96 has nothing to do with the power exercisable by a Deputy Commissioner under section 42 of the Police Act. But a Deputy Commissioner is *ex officio* a Justice of the Peace, by virtue of section 8 of the Act, for the prevention of offences and for the performance of the

(1) (1893) I.L.R. 20 Calc. 670.

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duties assigned to the Commissioner by the Act. And it is established that no Justice of the Peace can proceed without an information ; but, unless the statute so requires, the information need not be in writing nor upon oath : see *Reg v. Thomas Millard and Henry Millard*(1). Section 42 of the Madras Police Act does not require a sworn information as a condition to the issue of a warrant. It is sufficient, therefore, in my opinion, that the warrant should state, as in the present instance, that the Deputy Commissioner has issued the warrant on information laid before him. It is not necessary for him to state that he had reason to believe the information. The decision in *Walvekar v. Emperor*(2), on which Mr. Brooke Elliott relied, rests on the special facts of the case. The warrant there was held to be defective because it appeared on the face of it that the Commissioner had not complied with the formalities required by section 46 of the Calcutta Police Act for the issue of a warrant. There is no apparent defect on the face of the warrant before me.

Lastly, it has been objected to the validity of the warrant that it was misdirected. The warrant authorizes the entry of the premises occupied by the first accused "at No. 239, Ayya Pillai Street, Georgetown, Madras". It is contended that this is a thoroughly erroneous description of the premises wherein the first accused carries on the All India Printing Works, the business being carried on at No. 19/3, Venkatachalla Mudali Street, Park Town, Madras. A warrant will, of course, only authorize the entry

(1) (1853) 6 Cox. Cr. C. 150.

(2) (1926) I.L.R. 53 Calc. 718.

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of the premises named in the warrant. Some cases have been cited. The principle to be deduced from them is that a faulty description of the premises by number or locality is not fatal if the description is nevertheless sufficient to identify the premises named in the warrant : see *Emperor v. Krishna Rutna Dalvi*(1), *Emperor v. Abasbhai*(2) and *Emperor v. Jhunni*(3). The question is whether the description in the warrant sufficiently identified the building to be entered. It is proved by the evidence that the door of the particular premises bears two numbers, of which 19/3 is the Municipal number and 239 the Census number. It is also proved that though the street in which the premises are situate has been named Venkatachalla Mudali Street by the Municipality, it is popularly known as Ayya Pillai Street. In fact, the alternative name is recognized by the Post Office, and arrangements have been made in the Postal sorting department for the delivery of letters addressed to Ayya Pillai Street in Venkatachalla Mudali Street. In these circumstances I think that the premises are sufficiently described in the warrant. Georgetown and Park Town are adjoining districts, and nothing turns on the warrant placing the premises in the one rather than in the other. In my judgment there is no substance in the objection to the warrant on the ground of misdescription.

The warrant and the seizure being good, the presumption arises, under section 43 of the Police Act, from the discovery of the instruments of gaming, viz., the betting slips, on the premises and

(1) (1904) 6 Bom. L.R. 52.

(2) (1925) I.L.R. 50 Bom. 344.

(3) (1905) 2 Cr. L.J. 243.

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on the persons of accused 2, 3, 6 and 7, that the place was being used as a common gaming place and that the persons found therein were present for the purpose of gaming. "Gaming", it should be observed, is made by Madras Act XIII of 1929 to include betting on a horse-race, and "instruments of gaming" to include any documents used as a record or evidence of gaming. The learned Counsel has argued that there was no evidence to support the conviction of accused 1 who was not in the premises when they were raided. But I think that the facts that his clerks were found in his office with betting slips and money, and that people were engaged in betting on the pial of the building, afforded evidence on which the Magistrate could find that the first accused was keeping the place or permitting it to be kept as a common gaming house.

I have already referred to the fact that when the office room was raided a sum of Rs. 187-4-1 was found in the open drawer of the table at which the fourth accused was seated, and that Rs. 416-1-0 were found on forcing open the locked drawer of the other table. All this money has been declared forfeited by the Magistrate under section 47 of the Act. A warrant authorizes the seizure of all monies "reasonably suspected to have been used or intended to be used for the purpose of gaming" which are found on the premises. I think that the Police were quite justified in seizing the money. But the Act does not contemplate forfeiture following seizure as a matter of course. Section 47 says that on conviction the Magistrate may order all instruments of gaming to be destroyed, and all or any of the

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other articles seized (which would include money), to be forfeited. But before ordering forfeiture the Magistrate must be satisfied that the money or other articles seized were used or intended to be used for gaming. In *Lachmi Narain v. Emperor*(1) BUCKNILL J. expressed the opinion that private property of an individual found in a common gaming house should not be forfeited unless there were clear grounds for thinking that it was used or intended to be used for gaming purposes. I agree with that view. The learned Magistrate was evidently impressed by the fact that on the tables were found publications of racing intelligence and betting slips. But it does not seem to have been brought to his notice that the bets covered by the betting slips found on the two tables only amounted to Rs. 100, a sum far below the amount of money found in the two drawers. This circumstance, taken with the fact that the sum of Rs. 416 was kept in a separate locked drawer in the office where the first accused carried on the legitimate business of printer, raises a fair inference that this particular money was not money used for betting. I think that the sum of Rs. 416-1-0 ought not to have been forfeited, and I direct that it be refunded to the first accused. Otherwise, this petition fails and is dismissed.

K.W.R.

(1) A.I.R. 1924 Pat. 42.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenven and Mr. Justice King.

1935,
January 22.

SETHU KARUPPAN AMBALAM alias PASUKALAKKI
AND THREE OTHERS (Nos. 1, 2, 4 AND 8 of B PARTY)—
PETITIONERS,

v.

PEER MAHAMMAD SAMMATTI AND THREE OTHERS
(Nos. 1 TO 4 OF A PARTY) RESPONDENTS.*

*Criminal Procedure Code (Act V of 1898), sec. 147 (2)—Fishing
in open sea—Order restraining one section of public from,
except in manner specified—Maintainability of.*

None can acquire a right, exclusive against the public or any other person, to fish in any particular area of the open sea, or in that part of it within three miles of the shore, known as territorial waters; and where the right cannot form the subject-matter of property or be enjoyed as an easement, an essential condition for an order by a Magistrate under section 147 (2), Criminal Procedure Code (Act V of 1898), does not exist; and an order under it directing one section of the public to fish in the sea only in accordance with certain long-established usages and not at all on certain specified days, cannot be maintained.

Baban Mayacha v. Nagu Shrivachha and others, (1876) I.L.R. 2 Bom. 19, 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 the Joint Magistrate of Ramnad, dated 23rd March 1934 and passed in Miscellaneous Case No. 1 of 1934.

K. S. Jayarama Ayyar for *R. Ramasubba Ayyar* for petitioners.

V. L. Ethiraj for *S. K. Ahmed Meeran* and *C. A. Mohamad Ibrahim* for respondents.

* Criminal Revision Case No. 438 of 1934.

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

Cur. adv. vult.

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The ORDER of the Court was delivered by CURGENVEN J.—This criminal revision petition is presented against an order of the Joint Magistrate of Ramnad under section 147 of the Criminal Procedure Code, passed in the following circumstances. There is a system of fishing, well-known upon this coast, whereby a long net is hung like a curtain in the sea, being supported by floats and kept vertical by weights. This net is laid parallel to, and at some distance from, the shore, and is then pulled in by means of ropes fixed to the two ends. In this way a catch of fish is landed. In the case now under reference, the system embraced the use of successive nets, and further particulars of it are given in the learned Joint Magistrate's order. It was worked by seven fishing-boats, which were originally owned by Muhammadans; but sometime ago Hindus acquired what is described as a $2\frac{5}{8}$ share in the seven boats—in other words the shares enjoyed by the Muhammadans and the Hindus were in the ratio of 5 to 3. Disputes subsequently arose between these two sets of owners due, it has been found, to the Hindus refusing to conform to the customary method of working the boats in laying and drawing the nets, and insisting upon fishing on Fridays and Muhammadan holidays. This naturally provoked the Muhammadans, being, it is said, in breach of the understanding upon which the Hindus acquired their interest; and the Joint Magistrate has found that the dispute is likely to cause a breach of the peace. He has accordingly passed an order under section 147 of the Criminal Procedure Code directing the

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Hindus to fish only in accordance with the long-established custom of each boat taking its turn, and not to fish at all on Fridays and Muhammadan holidays.

This order has been attacked before us upon two grounds. It is argued in the first place that for the purposes of section 147 the open sea is beyond the Magistrate's territorial jurisdiction. Secondly, that the Muhammadans have no legal right to restrain the Hindus from fishing in any manner they please.

The first point turns upon the question whether the sea, regarding the alleged right of user of which the dispute exists, is within the local limits of the Joint Magistrate's jurisdiction; because that is one of the conditions necessary for the application of the section. We have heard a very interesting argument upon this question, which is undoubtedly a question of great difficulty. There is no authority directly in point in this country, and indeed very little in any reported Indian decision which would assist us to a right conclusion. The contention that the ordinary criminal jurisdiction of a Magistrate extends only to the water's edge has been urged before us by citation of English law, particularly of the leading case, *The Queen v. Keyn*(1). We are reluctant to leave the point undecided having regard to the labour which has been expended in presenting it to us. But on the second point taken in this petition we think that no such obscurity or scope for difference of opinion exists, and our decision upon it will suffice for the disposal of the case. In these circumstances, and as the question of territorial jurisdiction is not likely to arise frequently in practice, we think it preferable that a

pronouncement upon it should await an occasion when its decision is unavoidable.

Turning then to the second point, a reference to the section will show that there must not only be a dispute regarding an alleged right of user of any land or water but that, under sub-section 2, it must appear to the Magistrate that such right exists. By "right" is meant, of course, legal right, and the purpose of the section, there can be no doubt, is, by an order following a summary inquiry, to prohibit interference with the exercise of a legal right. Sub-section 4 makes such an order subject to any subsequent decision of a civil Court. Now in the present case the learned Joint Magistrate, while accepting the evidence of the custom regulating the fishing, has deliberately abstained from entering into the question whether such a custom gives rise to any rights legally enforceable. He has not put to himself the question whether the petitioners before him would be able, by process of law, to restrain the respondents from doing the things which he has directed them not to do.

If we were satisfied that such a right did in fact exist, such an omission would not justify us in interfering with an order which, in other respects, appears to be unexceptionable. But if the right to fish in the sea, which every man enjoys, cannot be taken away from him by contract, custom, prescription, or otherwise, it is evident that no such "right" can be found as will afford the Court ground for action under the section. It appears to be indisputable that in general none can acquire a right, exclusive against the public or any other person, to fish in any particular area of the open sea, or in that

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part of it, within three miles of the shore, known as territorial waters.

"The right of fishing in the sea being common to all subjects of the realm, a prescription for such a right annexed to a tenement is bad." [*Ward v. Cresswell*(1), cited at page 376 of Coulson and Forbes on Waters and Land Drainage, 5th Edn.].

Further quotations from the same case are to be found in a judgment by WESTROPP J. in *Baban Mayacha v. Nagu Shravucha and others*(2), and in particular:—

"This prescription, therefore, for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he, and all whose estate he has, have a right to travel on the King's highway as appurtenant to his estate."

It follows, we think, that as the right to fish in the sea cannot form the subject-matter of property, or be enjoyed as an easement, so no one can, by contract or otherwise, relinquish to another his right or any part of it. If any such contract has been made, the civil Court will not enforce it, whatever other remedies may be open to the aggrieved party to the contract. Accordingly in the present case we are unable to hold, in the terms of sub-section 2 to section 147, "that such right exists", i.e., a right to restrain the petitioners before us from fishing except in a certain manner. That being so, an essential condition for an order under the section fails, and the order cannot be maintained. It is much to be hoped that, however the law may stand, the parties will have the good sense to come to an understanding with each other, and compose this regrettable dispute.

We allow the petition and set aside the order.

K.W.R.

(1) (1741) Willes. 265.

(2) (1876) I.L.R. 2 Bom. 19, 48.

PRIVY COUNCIL.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
APPELLANT,

J.C.*
1935,
May 24.

v.

P. R. A. L. MUTHUKARUPPAN CHETTIAR,
RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Indian Income-tax Act (XI of 1922), sec. 4 (2)—Partnership—
Profits on dissolution—Assessment on profits.*

On the dissolution of a partnership business in Ceylon, a portion of the capital of one of the partners resident in British India, and his share of the profits, were remitted to and received by him in British India.

Held, that the profits received in British India were assessable under section 4 (2) of the Indian Income-tax Act (XI of 1922).

Inland Revenue Commissioners v. Burrell, [1924] 2 K.B. 52, discussed. *Commissioner of Income-tax, Madras v. Siddha Gowder and Sons*, (1932) I.L.R. 55 Mad. 818 (S.B.), referred to.

APPEAL (No. 5 of 1935) from an order of the High Court (April 27, 1934) upon a reference by the Commissioner of Income-tax (November 19, 1932).

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

DeGruyther K.C. and *Pringle* for appellant.—Profits received in British India by a partner on the dissolution of a partnership are assessable as profits of a business under sec. 4 (2) of the Indian Income-tax Act. The observation in *Commissioner of Income-tax, Madras v. Siddha Gowder and Sons*(1) to the contrary is erroneous. *Inland Revenue Commissioners v. Burrell*(2), relied on in that case, is a case relating to the winding-up of a company. The rule that the assets of a

* Present: Lord ATKIN, Sir JOHN WALLIS and Sir SHADI LAL.
(1) (1932) I.L.R. 55 Mad. 818 (S.B.). (2) [1924] 2 K.B. 52.

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company distributed to shareholders on a winding-up is capital is inapplicable to a dissolution of a partnership. It is the property of the company that is distributed. There are no profits. In a dissolution of a partnership, the profits are ascertained before distribution and remain profits thereafter.

Chinna Durai and Miss Miles for the respondent referred to *Suleman v. Abdul Latif* (1) and the admission of Counsel for the Commissioner of Income-tax in *Commissioner of Income-tax, Madras v. Siddha Gowder and Sons* (2).

Appellant was not called on to reply.

LORD ATKIN. The JUDGMENT of their Lordships was delivered by LORD ATKIN.—This is an appeal from the High Court at Madras on a reference under section 66 of the Indian Income-tax Act, 1922. The question is whether a sum of Rs. 38,305 was a receipt of capital or a receipt of profit assessable under section 4 (2) of the Income-tax Act. The facts are simple. The respondent is a Chetti carrying on business in Madras where he resides and in various other places within and without British India. He was up to May 1930 one of three partners in a money-lending business, S.P.K.A.A.M., at Colombo in which he had a six and three-fourths share. On 31st May 1930, he severed his connection with that firm, and an account was taken of the amounts due to him by way of capital, surplus capital, share of profit and interest thereon: and a sum of Rs. 2,09,670 was found due to him which included Rs. 23,500, share of profits from 26th October 1926 to 31st May 1930, and Rs. 38,305 interest on capital. The Rs. 23,500 was paid to him by hundis drawn by the remaining partners and cashed at Colombo. The Rs. 38,305 together with the greater part of the capital sum due was remitted to him in Madras

(1) (1930) I.L.R. 58 Calc. 208; L.R. 57 I.A. 245.

(2) (1932) I.L.R. 55 Mad. 818 (S.B.).

by the promissory note of a debtor of the firm made out in the respondent's favour. No question of fact arises on the reference which can only raise a question of law. The only question for the Court is whether the sum of Rs. 38,305 received by the respondent in Madras in respect of interest on capital employed in business in Ceylon is assessable under section 4 (2) of the Income-tax Act. No dispute arises as to the sum being derived from business: the only question is whether the effect of the dissolution was to make payment of all the sums due on dissolution payments by way of capital and not payments of income or profits. The High Court, following a decision of their own in *Commissioner of Income-tax, Madras v. Siddha Gowder and Sons* (1), held that the principles laid down in the English case of *Inland Revenue Commissioners v. Burrell* (2) governed the case and decided in favour of the respondent. But that case involved what appears to their Lordships quite a different set of facts, the receipt by a shareholder of his share of the assets of a company upon a winding-up. It was pointed out in the judgments of the Court of Appeal that a company is a separate entity to the shareholders; that during the continuance of the company the latter have no right to the profits except so far as they are distributed on a regular declaration of dividend; and that on winding-up their sole right is to share in the assets available after winding-up; and that for the purpose of ascertaining such assets it is quite immaterial whether the company originally

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possessed them by way of capital or profits. The liquidator may apply sums earned as profits in paying capital liabilities and capital assets in paying revenue liabilities. What he distributes is a lump sum, and no reconstruction into a division of capital and profits is necessary or in many cases possible. The position in respect of a partnership is different. The profits are the profits of the partners, joint in the first instance, and if the appropriate statute so provides assessable as joint ; but in fact representing an interest of each partner, and as soon as declared constituting an obligation from the firm to each partner. If the Ceylon Ordinance be analogous to the English Act there would be no doubt that up to May 1930 the respondent would have been assessable to income-tax jointly and to surtax severally on the amount of the profits in question. And if in fact, instead of being left in Colombo undrawn, the sums in question had before May 1930 been remitted to the respondent in India no question would have arisen as to his having been assessable under the Indian Act on those sums. Being profits of the respondent up to 31st May 1930 how did they alter their character by dissolution ? The account taken on dissolution ascertains what is due to the partners for profits, and what is due for capital. It can hardly be suggested that the partners share according to their capital proportions in the whole assets of the partnership. The sum due for undrawn profits was and remains a sum due by the partners to each partner, and necessarily ranks first before the sums due for capital can be distributed. In other

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words, on dissolution of a partnership an outgoing partner has the right to receive not, as in the case of a shareholder in winding-up a company only a share of the assets, but to receive payment of his profits, profits which were his before dissolution and do not cease to be his on dissolution. In their Lordships' opinion the respondent received this payment in India as a payment of profits and was properly assessed. Counsel for the respondent pointed out that the contention of the Commissioner in this case was the contrary of that made by him in the previous case in Madras which was successful in the High Court. He protested strongly against the Commissioner in successive cases blowing hot and cold. But that is a privilege not confined to Commissioners of Income-tax and its exercise cannot influence judicial determination of the law. Their Lordships think it desirable to point out that their decision does not cover cases where undrawn profits have with the consent of all parties been invested in the business so as to increase the capital account, a position which does not arise here. Nor have they had to consider any special provisions of partnership articles which might affect the matter, for there were none in this case. For the reasons given they are of opinion that this appeal should be allowed, the order of the High Court dated 27th April 1934 should be set aside and the question referred to the Court by the Commissioner should be answered that the sum of Rs. 38,305 is receipt of profits assessable under section 4 (2) of the Income-tax Act. The respondent must pay the costs here and in the High Court.

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Their Lordships will so humbly advise His Majesty.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondent: *Douglas Grant & Dold.*

A. M.T.

APPELLATE CIVIL—FULL BENCH.

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

1934,
December 21.

1935,
February 20.

T. R. B. RANGANATHA REDDI (PLAINTIFF), APPELLANT,

v.

RAMASWAMI MUDALI AND SIX OTHERS (DEFENDANTS
TWO AND FOUR AND TWENTY TO TWENTY-FOUR),
RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 6—Child en ventre sa mere—Applicability of section to.

A Hindu father alienated the joint family properties at a time when his son was a child *en ventre sa mere*. The son filed a suit to set aside the alienations on the day before the three years' period of limitation from the date of his attaining majority had expired. A question arose as to whether the plaintiff could take advantage of section 6 of the Indian Limitation Act.

Held, that section 6 of the Indian Limitation Act was applicable and that the suit was not barred by limitation.

Muhammad Khan v. Ahmad Khan, (1928) I.L.R. 10 Lah. 713, dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 65 of 1924.

* Appeal No. 30 of 1932.

This appeal came on for hearing before RAMESAM and STONE JJ. and the Court made the following

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ORDER OF REFERENCE TO A FULL BENCH:—

RAMESAM J.—This appeal arises out of a suit by a son to set aside various alienations by his father. There are several appeals against the decree of the Subordinate Judge and one of them is the present appeal. In this appeal one of the alienations sought to be set aside was effected on 12th August 1902 and the other alienation was made on 5th June 1902. It is now found by the Subordinate Judge that the plaintiff was born on 31st December 1902 and therefore he was a child *en ventre sa mere* at the time of the alienations.

The suit was filed on 3rd January 1924. The plaintiff would have attained majority on 31st December 1920 and the three years after his attaining majority would have elapsed by 31st December 1923. The suit was filed in *forma pauperis* and was filed before that date. The question that arose in the lower Court, and arises here, is whether section 6 of the Limitation Act can be taken advantage of by the plaintiff.

The Subordinate Judge relying on *Muhammad Khan v. Ahmad Khan*(1) held that the plaintiff is not entitled to get the help of section 6 of the Limitation Act and dismissed the suit as barred by limitation. The plaintiff appeals.

In appeal our attention has been drawn to a judgment of this Court decided by a single Judge in *Venkatarama Aiyar v. Mirthinjaya Aiyar*(2) where he follows the decision of the Punjab High Court and also refers to other cases. The Punjab decision itself relies on two earlier decisions of that Court, one as High Court and one as Chief Court, but the reasoning in all the decisions is practically the same; and of the decisions mentioned in *Venkatarama Aiyar v. Mirthinjaya Aiyar*(2) we may observe that the two decisions of the Allahabad High Court, *Sanket Narain Pande v. Ram Bharos*(3) and *Dhanraj Rai v. Ram Naresh Rai*(4), do not support the conclusion in *Venkatarama Aiyar v. Mirthinjaya Aiyar*(2). In the first of these cases the alienation was in April 1901 and

(1) (1928) I.L.R. 10 Lah. 713.
(3) (1924) 79 I.C. 1010.

(2) (1930) 60 M.L.J. 521.
(4) (1924) 79 I.C. 1019.

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the suit was brought in 1922. It was not stated when the plaintiff was born. There is no suggestion that the plaintiff was a child *en ventre sa mere* in April 1901, no argument addressed on that basis and no refutation of such an argument. The only point decided in it is that the plaintiff's birth does not "give a fresh start to limitation", a view with which I agree. In the second case (the alienation was in 1904) a minor named Sitaram, on whose behalf a suit could have been filed to set aside the alienation, was in existence. He died in 1912. Other minor plaintiffs filed the suit in August 1920. The contention accepted in the Courts below was that, if within three years after Sitaram's attaining majority, other minors are born, they will get a fresh start. As the learned Judge pointed out, if it was so, limitation might run on for ever. This case was not a case of a child *en ventre sa mere* on the date of alienation. The Punjab case cited in it is not the Punjab case to which I referred, but a case reported as *Lachman Das v. Sundar Das*(1) where the alienation was in 1900, and the plaintiffs about whom the question arose were born in 1904, 1908 and 1911, respectively. They were not children *en ventre sa mere* and this case was rightly applied in *Dhanraj Rai v. Ram Naresh Rai*(2). I agree with the Allahabad view, but those cases do not support the conclusion in *Venkatarama Aiyar v. Mirthinjaya Aiyar*(3) as no question about a child *en ventre sa mere* was raised or decided in them. In any view they are cases to which section 6 did not apply.

It is true, as the learned CHIEF JUSTICE of the Punjab High Court has pointed out, that if a person is not in existence he cannot well be described as a minor and for many purposes a foetus, i.e., a being in embryo, cannot be described to be a person in existence. In all such cases, no doubt, he cannot be described as a minor. But the law does recognize that in certain cases a child in the womb of his mother should be regarded as a person in existence; vide *Sabapathi v. Soma-sundaram*(4), where all the authorities are referred to, and *Deo Narain Singh v. Ganga Singh*(5). It seems to us that this view is not peculiar to the Hindu Law, but for some purposes a similar doctrine seems to prevail in the English Law. In *Wilmer's Trusts, In re Moore v. Wingfield*(6) VAUGHAN

(1) (1920) I.L.R. 1 Lah. 558.

(3) (1930) 60 M.L.J. 521.

(5) (1914) I.L.R. 37 All. 162.

(2) (1924) 79 I.C. 1019.

(4) (1882) I.L.R. 16 Mad. 76.

(6) [1903] 2 Ch. 411.

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WILLIAMS L.J. points out that, though there cannot be the murder of a foetus, foetus can be a person in existence for other purposes, and he relies on Blackstone's Commentaries where it was observed that a guardian can be appointed of a child in the womb of his mother. In *Hale v. Hale*(1) mention was made of an earlier case where a bill was filed on behalf of an infant *en ventre sa mere* for the purpose of restraining waste. Similar view was also adverted to in *Villar v. Gilbey*(2) where it was observed that a child *en ventre sa mere* may be a party to an action. Therefore the net result of these authorities seems to be this: while for certain purposes a child in the womb of his mother cannot be regarded as a person in existence, for certain other purposes he may be regarded as a person in existence. In the cases in which he should be regarded as a person in existence, the question arises whether he should not have the benefit of section 6 of the Limitation Act. Section 6 says that a minor will be entitled to institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule, which period is cut down to three years under section 8 where it is more than three years. For the purpose of ascertaining when a disability of a person has ceased, we have to go to the Indian Majority Act which says a person becomes a major after the lapse of eighteen years after his birth and until that period he is a minor. I do not see any logical objection to holding that a child *en ventre sa mere*, in cases when he is regarded as a person, should be regarded as a minor until eighteen years after his actual birth. Certainly he is not a major. The objection that he is not really a person cannot stand in the way of holding him to be a minor, for we are dealing only with the cases when the law treats him as a person in existence. It is true that the cause of action arises only at the time of the alienation and he does not get a second cause of action on the date of his birth. But no such difficulty arises in this case. As we entertain some doubt about the correctness of the decisions above referred to, we refer the matter in question to a Full Bench.

STONE J.—I agree as to the desirability of a reference. My difficulty arises from the fact that, when one is construing a word used in section 6 of the Limitation Act, according to the

(1) (1692) Prec. Ch. 50; 24 E.R. 25.

(2) [1907] A.C. 139, 144.

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ordinary rule applicable in the construction of statutes one has to give that word *prima facie* its ordinary grammatical meaning and I feel very much pressed by the fact that in English the term "minor" does not mean the same as one means by the term "a child *en ventre sa mere*".

ON THE REFERENCE :—

N. Srinivasa Ayyangar for appellant.

Ch. Raghava Rao for second respondent.

K. Rajah Ayyar for sixth and seventh respondents.

Respondents one, three and four were unrepresented.

Cur. adv. vult.

OPINION.

BEASLEY C.J.

BEASLEY C.J.—The question under reference arises out of a suit by a son to set aside various alienations by his father. One of the alienations sought to be set aside was effected on 12th August 1902 and the other on 5th June 1902. The Subordinate Judge found that the plaintiff was born on 31st December 1902 and was therefore a child *en ventre sa mere* at the time of the alienations. The suit was filed in *forma pauperis* on the day before the three years' period of limitation from the date of the plaintiff's attaining majority had expired. The question that arose in the lower Court, and arises before us, is whether section 6 of the Limitation Act can be taken advantage of by the plaintiff. The Subordinate Judge dismissed the suit as barred by limitation, relying on *Muhammad Khan v. Ahmad Khan*(1). The learned CHIEF JUSTICE of the Punjab High Court expressed the opinion that, if a person is not in existence, he cannot well be described as a minor. But

(1) (1928) I.L.R. 10 Lah. 713.

Hindu Law does recognize that in certain cases a child in the womb of his mother should be regarded as a person in existence; *Sabapathi v. Somasundaram*(1) and *Deo Narain Singh v. Ganga Singh*(2). That being recognized, it is difficult to see why he should not have the benefit of section 6 of the Limitation Act, as the Indian Majority Act says that a person becomes a major after the lapse of eighteen years after his birth and is until that time a minor. A person in existence must be either a minor or a major, and obviously an infant *en ventre sa mere* cannot be a major and must therefore be a minor. The view that an infant *en ventre sa mere* is for certain purposes a person in existence is not peculiar to the Hindu Law as our learned brother RAMESAM J. correctly points out in his order of reference in which he refers to some English decisions, namely, *Wilmer's Trusts, In re Moore v. Wingfield*(3) and *Villar v. Gilbey*(4). In addition to these, we were referred to *Schofield v. Orrell Colliery Company*(5), where the Court of Appeal held that a posthumous illegitimate child of a workman may be a dependant within the Workmen's Compensation Act, 1906. There, the workman was killed by an accident arising out of and in the course of his employment some months before the birth of an illegitimate child, the paternity of which he admitted, and it was proved that he was engaged to be married to the mother and intended to provide for the maintenance of the child, and the accident occurred very shortly before the date fixed for the solemnization of the marriage. In

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(1) (1882) I.L.R. 16 Mad. 76. (2) (1914) I.L.R. 37 All. 162.
(3) [1903] 2 Ch. 411. (4) [1907] A.C. 139.
(5) [1909] 1 K.B. 178.

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the course of the judgment reference was made by COZENS HARDY M.R. to *Williams v. Ocean Coal Company, Limited*(1), and on page 181 he says in speaking of that decision :

"The view of the Court was that the posthumous child had an independent right of its own, the principle being that a child *en ventre sa mere* is to be deemed to be born so far as is necessary for the benefit of that unborn child."

This was also the view expressed by the House of Lords in *Villar v. Gilbey*(2), to which reference has already been made. Another case cited was *Athey v. Pickerings, Ltd.*(3), also a case under the Workmen's Compensation Act, in which the facts were identical with those in *Schofield v. Orrell Colliery Company*(4), except that the posthumous child was a legitimate one. The child was held to be entitled to a sum calculated by taking fifteen per cent of £2 a week over a period from the death of the workman to the date when the child in fact would attain the age of fifteen, which under the Act was the *terminus ad quem*, which, in the case of this posthumous child, was some ten weeks more than fifteen years, the *terminus a quo* being the date of the death of the workman. LAWRENCE L.J., in his judgment on page 253, says :

"It seems to me to be a fallacy to suppose that, because a child is to be deemed to be born at a certain period, therefore, that child attains its age of twenty-one, or in this case fifteen, or is deemed to attain that age, before it actually attains that age. There is no requirement at all in the Act or in any of the circumstances to introduce the fiction into the actual facts of the ascertainment of the age of that child."

This disposes of SHADI LAL C.J.'s objection in *Muhammad Khan v. Ahmad Khan*(5), where he

(1) [1907] 2 K.B. 422.

(2) [1907] A.C. 139.

(3) [1926] 96 L.J.K.B. 250.

(4) [1909] 1 K.B. 178.

(5) [1928] I.L.R. 10 Lah. 713.

states that there can be little doubt that a person cannot be held to be a minor until he is born. He therefore considers that, if a child in embryo is deemed to be a minor in existence on the date of the conception, the period of eighteen years' minority, which would determine the disability, would run from that date. In my view, therefore, section 6 of the Limitation Act can be taken advantage of by the plaintiff. The case must, therefore, be sent back to the referring Court to be disposed of in accordance with this answer. The costs of the reference will be costs in the appeal.

RAMESAM J.—I agree.

KING J.—I agree.

[Final orders were accordingly passed by the Bench on 20th February 1935.]

G.R.

APPELLATE CIVIL—FULL BENCH.

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

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APPELLANTS,

v.

CHOKKAN CHETTIAR AND ANOTHER (PLAINTIFF
AND NIL), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 180—*Decree-holder-auction-purchaser—Application by, for delivery of possession—Applicability of article 180.*

An application by a decree-holder-auction-purchaser for delivery of possession of property purchased by him is governed

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by article 180 and not article 182, clause (5), of the Indian Limitation Act, 1908.

Muttia v. Appasami, (1890) I.L.R. 13 Mad. 504, *Sultan Sahib Marakayar v. Chidambaram Chettiar*, (1908) I.L.R. 32 Mad. 136, *Ramaswami Aiyar v. Abdul Aziz Saib*, (1916) 3 L.W. 191, *Lakshmanan Chettiar v. Kannammal*, (1900) I.L.R. 24 Mad. 185, and *Kannan v. Arvulla Haji*, (1926) I.L.R. 50 Mad. 403, considered.

The procedure to be followed when a decree-holder-auction-purchaser seeks delivery of possession of the property purchased by him pointed out.

APPEAL against the order of the District Court of North Arcot at Vellore, dated 15th December 1931, and made in Appeal No. 193 of 1931 preferred against the order of the Court of the District Munsif of Tiruppattur, dated 22nd July 1931, in Miscellaneous Petition No. 371 of 1931 in Original Suit No. 128 of 1921, District Munsif's Court, Salem.

The facts and the arguments appear fully in the order of reference by MADHAVAN NAIR J. and in the opinion of the Full Bench delivered by RAMESAM J.

This appeal came on for hearing and the Court (MADHAVAN NAIR J.) made the following

ORDER :—

The judgment-debtors are the appellants. The appeal is against an order of remand passed by the learned District Judge of North Arcot at Vellore remanding to the District Munsif's Court Miscellaneous Petition No. 378 of 1931 in Original Suit No. 128 of 1921 (Salem District Munsif's Court).

The facts are these. In execution of the decree in Original Suit No. 128 of 1921, the decree-holder (respondent) purchased the suit property and the sale in his favour was confirmed on 14th March 1924 after the dismissal of an application by the judgment-debtors to set aside the sale. The judgment-debtors preferred an appeal against the order disallowing their

application, and, when this was dismissed, filed a civil revision petition to the High Court, which was also dismissed on 12th October 1927. It is conceded before me that, for the purpose of this appeal, 12th October 1927 may be taken to be the date when the sale may be deemed to have become absolute. Within three years of the High Court's order, that is 1st September 1930, the decree-holder-purchaser (respondent) applied by Miscellaneous Petition No. 561 of 1930 for delivery of possession of the property. This petition was dismissed on 26th September 1930, as delivery could not be given on account of obstruction by third parties; whereupon he again applied on 13th October 1930, that is, within three years of his previous application, by Miscellaneous Petition No. 769 of 1930 for delivery of the property free from obstruction. This petition was also dismissed on the preliminary objection taken by the objectors that the petition was filed more than thirty days after the date of the obstruction. Then the decree-holder-purchaser filed on 13th March 1931, under Order XXI, rule 95, Miscellaneous Petition No. 378 of 1931, out of which this civil miscellaneous appeal arises, for delivery of the property purchased by him in execution of the decree. One of the contentions of the judgment-debtors is that this petition is barred by limitation under article 180 of the Limitation Act—the petition having been filed more than three years after the sale had become absolute on 12th October 1927. Article 180 of the Limitation Act prescribes three years from the time “when the sale becomes absolute” as the period of limitation for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession. In reply, the respondent relies on article 182, clause (5), of the Limitation Act and argues that the petition is not barred by limitation, as the previous applications (Miscellaneous Petitions Nos. 561 of 1930 and 769 of 1930) should be construed to be steps taken by him in aid of the execution of the decree, and that the present application is within three years of the last application. Article 182 provides for the execution of a decree a period of three years from the date of the decree or order (Clause 1) or (“where the application next hereinafter mentioned has been made”) the date of applying in accordance with law or to take some step in aid of execution of the decree or order (Clause 5). This argument is met with the reply that article 182, clause (5), does not apply to the present case, as the application

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in question is not one for the execution of a decree and, that the proper article is article 180 under which there is no provision for regarding any prior application for possession as a step in aid of execution. If article 180 applies, which seems *prima facie* to be the article applicable having regard to the nature of the present application which is one by a purchaser of an immovable property for delivery of property, then the present application is clearly barred by limitation; on the other hand, if article 182, clause (5) can be applied, then it is not barred by limitation. The question for determination is which view is correct.

There are decisions in this Court supporting either view. In *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1) it was held by MILLER and SANKARAN NAIR JJ. that "an application by a decree-holder (who was, as in the present case, himself also the purchaser of the property) under section 318 of the Civil Procedure Code of 1882 (Order XXI, rule 95, of the present Code) to be put in possession of the property purchased by him at a sale in execution of the decree is not an application for the execution of the decree and for purposes of limitation falls within article 178 and not within article 179 of Schedule 2 of the Limitation Act of 1877 (article 182 of the present Act) and that such application is barred when presented more than three years after the grant of a certificate of sale.

It will be observed that article 180 of the present Limitation Act did not exist in the previous Act and the question for consideration in *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1) was whether article 179 would apply, and if it did not, whether the case would fall under the residuary article 178 which corresponds to the present article 181 which provides three years from the time "when the right to apply accrues" as the period of limitation for "applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure, 1908." However, the learned Judges held distinctly that the application for delivery of possession is not one for execution of a decree. This decision was followed by SADASIYA AYYAR and MOORE JJ. in *Ramaswami Aiyar v. Abdul Aziz Saib*(2). It may be stated that by the time this decision was given the Limitation Act had been amended by the introduction in it of

(1) (1908) I.L.R. 32 Mad. 136.

(2) (1916) 3 L.W. 191.

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article 180 specifically dealing with applications for delivery of possession by a decree-holder. The learned Judges held, following *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1), that "an application for possession by a decree-holder-purchaser is not an application to execute a decree, that article 182 of the Limitation Act cannot therefore apply, and that the question of the saving of limitation by steps taken in aid of execution does not arise in respect of such applications." They therefore held that "article 180 of the new Limitation Act expressly applied to such an application and no other article could therefore be applied." All the points urged by the appellants are fully supported by these two decisions, the latter of which specially supports the appellants.

As against these above-mentioned decisions, the respondent strongly relies on *Kannan v. Arvulla Haji*(2) and *Appathurai Aiyar v. Panayappan Servai*(3). In *Kannan v. Arvulla Haji*(2) it was held that "an application by a decree-holder-purchaser for delivery of property purchased by him in execution is a step in aid of execution within article 182, clause (5), of the Limitation Act." This decision fully supports the respondent and is directly opposed to the decision in *Ramaswami Aiyar v. Abdul Aziz Saib*(4). It may be observed that in this decision the two decisions just mentioned, namely, *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1) and *Ramaswami Aiyar v. Abdul Aziz Saib*(4), have not been noticed at all, while in those cases the previous decision of our Court, *Lakshmanan Chettiar v. Kannammal*(5) followed in *Kannan v. Arvulla Haji*(2), has not been noticed. In *Lakshmanan Chettiar v. Kannammal*(5) it was held that "the execution was not complete so long as the purchaser had not secured possession and that the execution petition (dealt with in that case) might fairly be called an application to take a step in aid of execution." In *Appathurai Aiyar v. Panayappan Servai*(3) I held, following *Kannan v. Arvulla Haji*(2), that an application to obtain delivery of possession of property by the decree-holder who has himself purchased the property in execution of his decree is a step in aid of execution within the meaning of article 182, clause (5), of the Limitation Act. It may be pointed out that the respondent was not represented in this case and my judgment

(1) (1908) I.L.R. 32 Mad. 136. (2) (1926) I.L.R. 50 Mad. 403.
(3) (1929) 57 M.L.J. 468. (4) (1916) 3 L.W. 191.
(5) (1900) I.L.R. 24 Mad. 185.

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was based solely on the decision in *Kannan v. Arvulla Haji*(1). The two previous decisions, *Sultan Sahib Marakayar v. Chidambaram Chettiar*(2) and *Ramaswami Aiyar v. Abdul Aziz Saib*(3), are not referred to in the judgment, nor is there in it any discussion of the question on its intrinsic merits. In all these cases the applicant for the delivery of possession of property was the decree-holder-purchaser. These above cases exhaust the decisions of this Court which have a direct bearing on the question under consideration. The respondents' learned Counsel brought to my notice another decision of this Court, *Apparao Nainar v. Lakshmana Reddi*(4). But it is not disputed that the question, whether the application was barred by limitation or not in that case, was based upon the construction which the Court put upon one of the previous orders passed in the course of the proceedings in execution. This appears to be clear from the following sentence appearing in the judgment: "I am of opinion that the order 'closed' was not a proper disposal of the petition on 22nd September 1921 and all the subsequent petitions for delivery must be taken to be simply reminders to the Court that this petition was pending."

Having regard to the conflict of authorities in this Court, *Ramaswami Aiyar v. Abdul Aziz Saib*(3) and *Kannan v. Arvulla Haji*(1), on the question whether article 182, clause (5), can be applied to an application made by a decree-holder-auction-purchaser for delivery of possession of property, I refer to the decision of a Full Bench the question whether the petition (Miscellaneous Petition No. 378 of 1931) in this case is barred by limitation.

This appeal came on for hearing before a Bench and the Court (MADHAVAN NAIR and CORNISH JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

After hearing arguments, we think that the question in dispute can only be satisfactorily determined by a Full Bench. Two Benches of this High Court in *Lakshmanan Chettiar v. Kannammal*(5) and *Kannan v. Arvulla Haji*(1) have decided the question in one way and two other Benches in *Sultan Sahib*

(1) (1926) I.L.R. 50 Mad. 403.

(3) (1916) 3 L.W. 191.

(2) (1908) I.L.R. 32 Mad. 136.

(4) (1933) 65 M.L.J. 305.

(5) (1900) I.L.R. 24 Mad. 185.

Marakayar v. Chidambaram Chettiar(1) and *Ramaswami Aiyar v. Abdul Aziz Saib*(2) have decided it in the opposite way. The decision in *Lakshmanan Chettiar v. Kannammal*(3) which was followed in *Kannan v. Arvulla Haji*(4) does not appear to have been brought to the notice of the Court in *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1) or in *Ramaswami Aiyar v. Abdul Aziz Saib*(2); nor does it appear that *Sultan Sahib Marakayar v. Chidambaram Chettiar*(1) or *Ramaswami Aiyar v. Abdul Aziz Saib*(2) was cited to the Court in *Kannan v. Arvulla Haji*(4). In these circumstances the decision of another Bench would only add to the existing conflict of decision. We would therefore place the matter before His Lordship the CHIEF JUSTICE to consider whether the question in dispute should not be referred to a Full Bench. The order dated 5th April 1934 by MADHAVAN NAIR J. may be accepted as the Order of Reference by this Bench.

ON THE REFERENCE:—

A. Sundara Ayyar for B. C. Seshachella Ayyar for appellants.

A. Viswanatha Ayyar and A. Ramaswami Ayyar for respondents.

Cur. adv. vult.

OPINION.

RAMESAM J.—The facts out of which this reference to a Full Bench arises may be shortly stated. The respondent in the High Court obtained a decree in Original Suit No. 128 of 1921 and in execution of the decree brought certain properties of the judgment-debtors to sale and purchased the properties. The sale was confirmed in his favour on 14th March 1924 after the dismissal of an application by the judgment-debtors to set aside the sale.

(1) (1908) I.L.R. 32 Mad. 136.

(3) (1900) I.L.R. 24 Mad. 185.

(2) (1916) 3 L. W. 191.

(4) (1926) I.L.R. 50 Mad. 403.

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There was an appeal and also a revision to the High Court. The revision petition was dismissed on 12th October 1927. It is conceded by all the parties that 12th October 1927 may be taken to be the date when the sale became absolute. Within three years of the High Court's order, i.e., 1st September 1930, the decree-holder, by Miscellaneous Petition No. 561 of 1930, applied for delivery of possession of the properties purchased. The properties purchased comprised a house and certain lands. The house was item 2 of the application. When the amin proceeded to deliver possession of the house, one Abdul Gaffar Sahib, claiming that his wife Amina Bi had a share in the house, bolted the outer door from inside and locked the same and prevented the amin and the auction-purchaser from going inside. Afraid of a disturbance, the amin returned and sent his report on the 11th September 1930. Nothing is stated by the amin as to the delivery of possession of the lands. When the matter came up before the District Munsif, he passed the following order: "possession was not given on account of obstruction. Petition dismissed." This is dated 26th September 1930, i.e., four days before the end of the quarter.

It is our duty to point out that this order is a very improper order. In the first place nothing was done by the amin as to the other item, viz., the lands. Even as to the house, the obstruction was by a person claiming a share in it. It is true that the house is probably not divided by metes and bounds and it is difficult to deliver physical possession of the remaining share, as to which there was no obstruction. But in such a case the

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Court ought to deliver such possession as the intangible interest may be capable of. Instead of doing this the District Munsif simply says that the petition is dismissed. One thing is noticeable that throughout, i.e., at the time of the attempted delivery and at the time of the order, there was no obstruction or opposition on the part of the judgment-debtors. When there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, there is no reason why the portion, as to which there was no obstruction by the third person and no opposition by the judgment-debtors, should not be delivered. And it is also clear that the District Munsif never meant to refuse such a relief. The order is passed in a mechanical way without adverting to the details of the matter before him, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter. It has again and again been held that such a disposal is not a judicial disposal on the merits. It cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an appellate Court.

The decree-holder again filed a petition on the 13th October 1930, obviously under Order XXI, rule 97. The third person who made the obstruction on the former occasion objected to this petition on the ground that it was filed more than thirty days after the date of the obstruction. The petition was accordingly dismissed.

So far as the obstructor is concerned, the decree-holder's remedy is only by a regular suit.

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But again it is noticeable that there was no objection by the judgment-debtors and the obstructor's objection was always only as to a share. The decree-holder then filed the present petition on 13th March 1931 against the judgment-debtors for delivery of possession. This petition can be regarded as a petition for the delivery of only the remaining share in the house, as to which there never was an obstruction, and also for possession of the lands. Nothing was said about the lands up to now, there was no obstruction, nor opposition by the judgment-debtors, nor even an attempt to deliver. So far therefore as the lands and the share of the house as to which there was no obstruction are concerned, this is merely a continuation of the first petition which was never legally disposed of on the merits but only closed for statistical purposes. Objection is now taken that this is barred by limitation as being more than three years after the right to delivery accrued. The District Munsif dismissed the petition. On appeal the District Judge held that it was not barred by limitation or *res judicata* and sent back the petition for disposal according to law. The judgment-debtors have filed this appeal. The matter originally came on before our brother MADHAVAN NAIR J. Before him the objection that the decree-holder's petition was barred under article 180 was repeated. The respondent relied on article 182. After noticing the conflict in the decisions, our brother referred the matter to a Bench of two Judges, who then referred to a Full Bench the question whether the present application by the decree-holder is barred by limitation.

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On the bare question whether article 180 or article 182 of the Limitation Act applies to this case, the matter admits of very little difficulty. In *Muttia v. Appasami*(1) it was held that an application by a decree-holder purchaser for delivery of possession was governed by article 179 which corresponds to article 182 of the present Act. In *Lakshmanan Chettiar v. Kannammal*(2) a decree-holder-purchaser applied for delivery. Some of the properties purchased were delivered. He afterwards applied for the delivery of the remaining properties. It was held that the second application was an application taken as a step in aid of execution and was not barred though it was more than three years after the purchase. In *Sultan Sahib Marakayar v. Chidambaram Chettiar*(3) it was held that an application by a decree-holder-purchaser for delivery of property does not fall within article 179 but within article 178 which was the residuary article in the old Act corresponding to article 181 in the present Act. There is no need to differ from the reasoning in these cases at the present day, for, under the present Act, besides article 182 which provides for applications for execution and article 181 which is the residuary article providing for applications not otherwise provided for, we have got a new article—article 180—providing for application for possession by a purchaser. No such article existed under the old Act. The meaning of this article is plain because the word “purchaser” in this article includes cases of a

(1) (1890) I.L.R. 13 Mad. 504. (2) (1900) I.L.R. 24 Mad. 185.
(3) (1908) I.L.R. 32 Mad. 136.

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decree-holder-purchaser and a purchaser who is not a decree-holder.

The respondent refers to article 138, as to which it has been held by Court that the word "purchaser" means only a non-decree-holder-purchaser, for a decree-holder-purchaser cannot bring such a suit according to the decisions of some of the High Courts. In such cases, the word "purchaser" is to be confined to non-decree-holder-purchaser. But there is no analogy between that article and article 180, for it has never been held that a decree-holder-purchaser cannot apply for delivery of possession. Article 180 therefore applies to both kinds of purchasers. The attempt of the respondent to confine article 180 to non-decree-holder-purchasers therefore fails. And if article 180 applies, the residuary article 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So article 182 cannot apply. Article 180 being the more specific article must therefore apply.

But this conclusion does not dispose of this case. We have yet to decide whether the petition of 13th March 1931 is barred by limitation, that being the question referred to us. I have already observed in the opening of this judgment that the decree-holder's application, so far as the items other than the house are concerned, has never been considered and has never been decided against him, and it is impossible to regard the order on the first petition of September 1930 as an order refusing to deliver the properties to him in such a way as to make it incumbent on him to appeal. It was an order passed only for statistical

purposes. The present application of March 1931 must therefore be regarded in the circumstances of the case as a continuation of the petition of September 1930 for delivery of possession of the lands. Similar considerations apply so far as the share of the house, as to which there was no obstruction, is concerned. As to both these items, there never having been any objection by the judgment-debtors and there never having been any adverse order against the decree-holder and there never having been any valid disposal of the petition, the present petition must be regarded either as a continuation of the petition of September 1930 or as a reminder to the Court to take up that matter again. In this view the application of the decree-holder for delivery of possession of such items as are still with the judgment-debtors and have got to be delivered is not barred by limitation. So far as the obstructor's share is concerned, the execution is complete and the decree-holder has no remedy in execution. His only remedy is by a regular suit.

At this stage it would be desirable to make some remarks as to the procedure to be observed when a decree-holder-purchaser seeks delivery of possession of the properties purchased. Unless the executing Courts do their work very carefully, there is great danger of serious miscarriage of justice in such cases. Where a decree-holder-purchaser seeks delivery of possession of an item of property and the judgment-debtor obstructs, the decree-holder should make a complaint under Order XXI, rule 97, Civil Procedure Code, and the matter must be disposed of in execution. If the judgment-debtor and a third party both obstruct,

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the decree-holder-purchaser has to complain against the judgment-debtor and, if he chooses, against the third party also, under Order XXI, rule 97, and the complaint can then be disposed of. But if the judgment-debtor is quiescent, raises no objection and makes no opposition either before the *amin* or before the Court, it is clear that, so far as he is concerned, there is no objection to the delivery. But in such a case the third party may object and on account of the third party's objection physical possession of the property cannot be given. In such a case it is the duty of the Court to note the fact and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned. It is always better that this formal procedure is observed; otherwise, in a regular suit which the purchaser has to bring against the obstructor, the suit being necessitated by his obstruction only, the judgment-debtor may have to be made a formal party and then objection may be raised that so far as he is concerned a regular suit does not lie, execution not being complete against him. The obvious reply is that delivery could not be completed not on account of any obstruction by him but on account of the obstruction by the third party. So far as he is concerned, there is nothing more remaining with him to be delivered and therefore the execution proceedings are complete and there is no bar to a regular suit. This is what myself and CORNISH J. held in Appeal No. 372 of 1926. But, lest it should be said that such a conclusion can only be arrived at after a certain amount of straining in favour of the decree-holder, the proper thing is for the Courts to record

that, there being no obstruction by the judgment-debtor, delivery is completed so far as he is concerned and leave the purchaser to take proceedings against the obstructor. On such a view, in the present case it may be said that so far as the other share of the house is concerned there was a delivery so far as the judgment-debtor is concerned. But, even if it is so, one ought to make a note of it in that form. But, on the view we take of the nature of the present petition of September and the manner in which it was disposed of, it is unnecessary to resort to this. The lower Courts will now proceed to make a note that, so far as the share of the house to which objection is raised is concerned, the delivery is complete as against the judgment-debtors and also direct delivery of the share, as to which there is no obstruction, i.e., such delivery as it is capable of, unless there is some other matter to be considered. And, so far as the lands are concerned, another order for actual delivery should be made provided there is no further matter to be considered.

I am therefore of the opinion that the present petition is not barred by limitation and the order of the District Judge directing a remand should stand. The case will go back to the Bench with this opinion.

BEASLEY C.J.—I agree.

KING J.—I agree.

[Final Orders were accordingly passed by the Bench on 8th February 1935.]

G.R.

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APPELLATE CIVIL—FULL BENCH.

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

1934,
December 19.

1935,
January 29.

MOTURI VEERAYYA (RESPONDENT No. 11), APPELLANT,

v.

RAO BAHADUR P. V. SREENIVASA RAO AND TWELVE
OTHERS (PETITIONER, RESPONDENTS 1 TO 3, 5 TO 10,
AND 12 TO 14), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sec. 43—Annulment of
adjudication under—Vesting of property of quondam
insolvent in an appointee under section 37 of Act—Effect of
—Difference, if any, if appointee is Official Receiver or
any other person—Insolvency Court—Powers of, in such a
case—Appointee—Powers of—Appointee Official Receiver—
Powers of, to originate and, or to continue proceedings
under sections 53 and 54 of the Act.*

Where an Insolvency Court annuls an adjudication under section 43 of the Provincial Insolvency Act (V of 1920) and also passes an order under section 37 of the Act vesting the properties of the quondam insolvent in an appointee (Official Receiver or any other person),

held, that (1) the Insolvency Court retains full power to give directions under section 37 as to the realization and disposal of the debtor's assets, (2) the power should not be used arbitrarily, but should be used in the interests, not of this or that individual creditor, but of the whole body of creditors, which means, in other words, that the only proper order for the Court to pass is that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Insolvency Act, (3) the order under section 37 has not the effect of continuing the insolvency proceedings for all purposes, (4) the person appointed under section 37 has not by the mere fact of appointment the powers which a Receiver has under the Act but has only such powers as are necessarily

* Appeal Against Appellate Order No. 135 of 1931 and Civil Revision Petition No. 1194 of 1931.

implied by the vesting order, which are to carry out the directions of the Court in connection with the realization and distribution of the debtor's property in accordance with the Insolvency Act.

Obiter.—In a case where the appointee under section 37 is the Official Receiver, his powers in respect of applications under sections 53 and 54 of the Act depend upon two separate situations: (1) Where such an application is already pending when the order of annulment is passed under section 43 of the Act, and (2) where such an application is sought to be made after that order is passed. In the former case he can continue to pursue his remedy. *Semble.*—In the latter case he has no power of initiating proceedings under sections 53 and 54 of the Act.

APPEAL against and petition under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of Guntur, dated 8th November 1930, and passed in Civil Miscellaneous Appeal No. 31 of 1929 preferred against the order of the Court of the Subordinate Judge of Bapatla, dated 2nd February 1929, and made in Interlocutory Application No. 726 of 1928 in Insolvency Petition No. 29 of 1925.

The facts are set out in the order of reference to the Full Bench by SUNDARAM CHETTI J. and the arguments on the points of law arising in the case are fully discussed in the order of reference and in the opinion of the Full Bench delivered by KING J.

The appeal against order and the civil revision petition came on for hearing, and the Court consisting of SUNDARAM CHETTI and PAKENHAM WALSH JJ. made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The ORDER of the Court was delivered by SUNDARAM CHETTI J.—This appeal and the revision petition have

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been filed by one of the creditors of Gavini Nayudamma who was adjudged an insolvent in Insolvency Petition No. 29 of 1925 on the file of the Subordinate Judge, Bapatla. The time fixed for the application for discharge expired in 1926. By reason of the failure of the insolvent to apply for discharge within the prescribed time, the Court passed an order under section 43 of the Provincial Insolvency Act (V of 1920) on 22nd September 1927 annulling the order of adjudication. At the same time it passed an order under section 37 of the Act, that the properties of the *quondam* insolvent should vest in the Official Receiver. Thereupon, the present appellant who was one of the creditors filed Original Suit No. 119 of 1927 against the debtor upon two promissory notes and obtained a decree. The Official Receiver was not made a party to that suit. In execution of the decree obtained in that suit some of the immovable properties of the debtor were attached. At that juncture, the Official Receiver filed a claim under Order XXI, rule 58, Civil Procedure Code, for raising the attachment, as the properties had vested in him under section 37 of the Provincial Insolvency Act (V of 1920). That petition was dismissed on 27th August 1928 by the Subordinate Judge. He held that the Official Receiver had no *locus standi* to maintain the claim petition, by reason of the annulment of the adjudication order. His view is to the effect, that, if the Official Receiver by reason of the vesting order under section 37 should be allowed to exercise all the rights which he had during the pendency of the insolvency proceedings, the position would be just the same as if there was no annulment of adjudication at all. Following the decision of this High Court in *Arunagiri Mudaliar v. Official Receiver of North Arcot*(1), he held that the Official Receiver must be deemed to be in possession in trust for or for the benefit of the judgment-debtor. Subsequently the Official Receiver filed Interlocutory Application No. 726 of 1928 on 18th December 1928 under sections 4, 5 and 37 of the Provincial Insolvency Act (V of 1920), in which he asked for an order that the properties of the debtor should be sold by him and the proceeds distributed to proved creditors after asking a schedule for such debts. The Subordinate Judge held that the effect of passing an order as required would be to virtually set aside the order of annulment of adjudication. He accordingly dismissed the application. An appeal was

(1) 1926 M.W.N. 950.

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filed by the Official Receiver against that order, and the learned District Judge, after some discussion of the authorities bearing on the questions, preferred to follow a later decision of our High Court reported as *Somasundaram Chettiar v. Periakaruppan Chettiar*(1), and reversing the order of the Subordinate Judge passed an order authorising the Official Receiver to receive the net proceeds of the properties sold in execution of the decree in Original Suit No. 119 of 1927, for the purpose of distribution among the creditors legally entitled under the insolvency law. Against that order the present civil miscellaneous second appeal and civil revision petition have been filed by a creditor who was the decree-holder in the aforesaid suit and was added as the eleventh respondent in the petition filed by the Official Receiver. It may be here mentioned that, before the annulment of the adjudication, the debts of the eleventh respondent (the present appellant) and some others were rejected by the Official Receiver as not proved. The petitions filed by them to the Court by way of appeal were simply dismissed as having abated on account of the annulment of the adjudication.

The main question involved in this appeal is one upon which there is divergence of judicial opinion. On behalf of the appellant, it is contended that the scope of the order vesting the properties in the Official Receiver under section 37 of the Act after annulling the adjudication under section 43 for the failure of the insolvent to apply for discharge within the time prescribed should not be unduly extended so as to virtually turn the order of annulment into a dead letter. Whereas, on behalf of the Official Receiver (first respondent), it is urged that, by reason of the vesting order under section 37, the Official Receiver must be deemed to have all his original powers for the realization and distribution of the assets as if the state of insolvency continues even after the annulment of the adjudication. The failure of the insolvent to apply for discharge within the period specified by the Court entails a punishment in the form of annulment of the adjudication. But section 43 declares also that the provisions of section 37 shall apply to the case of such annulment. Section 37 declares that, when an adjudication is annulled, all sales and dispositions of property and payments duly made and all acts theretofore done

(1) (1929) 58 M.L.J. 658.

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by the Court or the Receiver shall be valid. This section enables the Court to pass an order vesting the properties of the debtor in such person as the Court may appoint, but, in default of any such appointment, the properties should revert to the debtor on such conditions (if any) as the Court may, by order in writing, declare. It is clear from the wording of this section that the Court may or may not vest the properties in a particular person. It may choose the Official Receiver himself as the appointee or choose any other person. In default of any such appointment, the properties should revert to the debtor either unconditionally or on any conditions which the Court may think fit to impose. The real difficulty lies in finding out the true scope of the vesting order under section 37, so as to make it consistent with the order of annulment of adjudication passed under section 43. If the contention put forward on behalf of the Official Receiver is to be accepted, we should hold that the Official Receiver in whom the properties became vested by an order under section 37 could continue the administration in insolvency, despite the annulment. He must have all the powers for the realization and distribution of the assets which he would have under the special provisions of the Insolvency Act. For the purpose of distribution of the assets he will have to call for proof of the claims of the several creditors and adjudicate on those claims. After the determination of the claims he should prepare a schedule of creditors who have proved debts (section 33). He should also have the right to check the proceedings in execution of decrees obtained by one or more of the creditors and get delivery of possession of the attached properties so as to enable him to effect a sale thereof for the realisation of the assets (*Vide* sections 51 and 52). He should exercise the functions set forth in section 59 for the purpose of realising the properties of the debtor and distribute dividends among the creditors entitled thereto. In the distribution of the property of the debtor, the priority of certain debts as mentioned in section 61 should be given effect to. If any of the properties of the debtor is found to have been fraudulently alienated to a third party, he should have the power to apply for the annulment of such transfers by filing applications under sections 53 and 54 in order to realize fully all the assets to which the debtor is legally entitled. All the aforesaid powers are incidental to and would even be necessary for the realization of the assets and distribution of the same among

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the creditors. If the scope of the vesting order under section 37 is deemed to confer on the Official Receiver the power of distributing the assets according to the insolvency law, he has to exercise all the special powers under the several sections set forth above for a proper realization and distribution of the assets. If an administration in insolvency should continue by reason of such a vesting order, it would be illogical, when he invokes any of the special powers aforementioned to say, "you can go thus far and no farther." The result should be that, despite the order of annulment of adjudication, the assets of the debtor are subject to the jurisdiction of the Insolvency Court in the same manner as if the proceedings in insolvency subsist. The only effect of the annulment under section 43, if at all, would be the deprivation of the immunity from arrest which the debtor might have obtained by a protection order. However, the creditors of the *quondam* insolvent would still be subject to all the limitations imposed by the insolvency law on their exercise of the remedies open to them under the general civil law for the realization of their debts. The question for consideration is whether the Legislature could have meant to give such a wide and unrestricted scope for a vesting order passed under section 37, after the annulment of the adjudication order under section 43.

The contention put forward by the appellant is that the annulment of adjudication under section 43 has the effect of terminating the insolvency jurisdiction of the Court, and all the powers which the Official Receiver had under the Act before the annulment cannot be deemed to have revived by reason of the vesting order under section 37. It is argued that, by reason of such vesting, the Official Receiver or any other appointee would only be a trustee holding the property for the debtor, and the creditors are at liberty to proceed against those properties in enforcement of their rights according to the ordinary civil law. The special powers conferred on the Official Receiver by the Insolvency Act could not be invoked by such an appointee after the annulment of the adjudication.

Coming now to the authorities bearing on the question, we shall first advert to the decision of a Bench of this High Court reported as *Arunagiri Mudaliar v. Official Receiver of North Arcot*(1). After the annulment of adjudication there was a

(1) 1926 M.W.N. 950.

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vesting order under section 37 in respect of a certain amount in Court deposit for distribution among all the creditors who had proved their debts. The legality of such an order was questioned in the appeal preferred to the High Court. It was held that, the adjudication having been annulled, the property of the *quondam* insolvent could not be distributed by the Official Receiver amongst the creditors. Such distribution could only take place in insolvency, but after the annulment of the adjudication, the Official Receiver should simply hold the amount for the benefit of the debtor and as the property of such person. The view taken in this decision seems to be that the vesting order is primarily to prevent the debtor after the annulment of the adjudication from disposing of his properties, and for placing them beyond the reach of his creditors, and that the creditors should be in a position to proceed according to the general civil law against the properties vested in the appointee as trustee. In one sense, such a vesting order is for the benefit of the creditors also. That should not however be extended so as to give the creditors all the privileges conferred on them by the special provisions of the Insolvency Act. There is, however, no elaborate discussion in the aforesaid decision of the *pros* and *cons* of the question. The view expressed in that decision is also the one taken by the Allahabad High Court in a later decision reported as *Panna Lal v. Official Receiver*(1). That was also a case of annulment of adjudication under section 43 coupled with an order under section 37. The learned Judges have held that section 37 does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among the creditors. They state that the distribution of assets is a proceeding in insolvency, and by annulling the insolvency the Court comes to the conclusion that it will not proceed with the insolvency. They hold that the vesting under section 37 is only for the purpose of apparently making the properties available to the creditors to proceed through the ordinary civil Courts. The conclusion arrived at in that decision is that any order passed by the Court under section 37 for the purpose of distributing the assets among the creditors would be one passed without jurisdiction.

(1) (1930) I.L.R. 53 All. 313.

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Coming now to the decision of a division Bench of our High Court, *Jethaji Peraji Firm v. Krishnayya*(1), it should be stated that the view taken in *Arunagiri Mudaliar v. Official Receiver of North Arcot*(2) did not meet with acceptance. In that case the question which directly arose for determination was whether an application by the Official Receiver for setting aside a mortgage under section 54 of the Act made during the pendency of the insolvency proceedings could be continued and prosecuted by him subsequent to the annulment of the adjudication under section 43. For this purpose the scope of section 37 had to be considered at some length. In so far as the power of the Official Receiver in whom the properties became vested for the distribution of the assets is concerned, it would appear that such a power was not disputed in that case and the existence of such a power was conceded. This has to be gathered from the following observations of REILLY J. at page 666: "In a case such as the present one, the obvious course is that the Court should order the property to vest in the Official Receiver. It has not been contended before us for the respondents that that would not be a proper order in this case, or that, when the debtor's property has so vested in the Official Receiver, he would not be able to realise it by sale and suit and to distribute it rateably among the creditors." The view taken in that case is that, if the Court passes an order under section 37 that the property of the debtor shall vest in a Receiver, the insolvency proceedings will continue during the period of the Receiver's work for realization and distribution of the assets. In this view the Receiver was held to be competent to continue an application under section 54 of the Act even after the adjudication was annulled under section 43. The presentation of such an application by the Receiver before the annulment of adjudication was also deemed to be an act done by him prior to the annulment, and as such, it must be deemed to be valid according to section 37. The question regarding the power of the Receiver for the realisation and distribution of assets among the creditors of the *quondam* insolvent by reason of the vesting order under section 37 came directly for consideration in a later case reported as *Soma-sundaram Chettiar v. Periakaruppan Chettiar*(3). VENKATASUBBA RAO J. was a party to both the aforesaid decisions. The

(1) (1929) I.L.R. 52 Mad. 648.

(2) 1926 M.W.N. 950.

(3) (1929) 58 M.L.J. 658.

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question was considered in the light of the corresponding provisions of the English Bankruptcy Act, and on a comparison of the wording of sections 35 to 40 and 43 of the Provincial Insolvency Act. Referring to the decision of a Bench of this Court in *Arunagiri Mudaliar v. Official Receiver of North Arcot*(1), VENKATASUBBA RAO J. expresses his dissent in the following terms at page 666: "In that, there is no discussion of the cases or the points involved; and the distinction is ignored between unconditional annulments and those made subject to stated terms. With very great respect, I feel constrained to dissent from that decision, which, in my opinion, is opposed to all authority, both English and Indian." There is no provision in the English Bankruptcy Act corresponding to section 43 of the Provincial Insolvency Act (V of 1920), whereby the adjudication can be annulled on account of the failure of the insolvent to apply for discharge within the prescribed time. But, in the case of compositions and schemes of arrangement, the Court can after approving those proposals annul the order of adjudication and still carry on the administration of the estate in another form for the purpose of carrying out the terms of the composition or scheme of arrangement. This is clear from section 39 of the Provincial Insolvency Act and also from the corresponding section in the English Bankruptcy Act. The provisions of section 37 are made applicable even to a case of annulment of adjudication after approving the composition or scheme of arrangement. It must be remembered that, besides declaring that the provisions of section 37 shall apply, section 39 directs that the Court shall frame a schedule in accordance with the provisions of section 33 and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as it relates to any of the debts entered therein. If any default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the debtor may be re-adjudged an insolvent, annulling the composition or scheme (*vide* section 40). In the face of these sections, it is a point for consideration whether, in the case of an annulment of adjudication, after approving a composition, the continuance of the proceedings by way of framing

(1) 1926 M.W.N. 950.

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a schedule and distribution of assets among the creditors as per the composition scheme is in accordance with the special provisions of section 39 rather than as a necessary consequence of the mere vesting order under section 37. That being so, the mere fact that, in cases of compositions and schemes of arrangement approved by the Court, the distribution of assets after framing a schedule can be exercised by the Official Receiver in spite of the annulment of the adjudication may not be taken to be a criterion for determining the scope of the vesting order under section 37 in case of an annulment of adjudication under section 43. It has been held in the aforesaid decision that the Court has ample jurisdiction to make an order vesting the properties of the insolvent in the Official Receiver or any other person for distributing the assets among the creditors of the insolvent. According to the view taken in this decision, it must be deemed that there is a continuance of the bankruptcy in another form which enables the Insolvency Court to pass all the necessary orders in respect of the assets in favour of the creditors. To the same effect is an earlier decision of another Bench of this High Court reported as *Kamireddi Timmappa v. Devasi Harpal*(1). That was a case of a composition scheme approved by the Court. It was held that, although the annulment of adjudication puts an end to the state of insolvency, it does not, in cases such as are contemplated by section 37 where the Court still retains control of the insolvent's assets, put an end to the insolvency proceedings within the meaning of section 28 of the Act. If by reason of the vesting order under section 37 such a consequence should follow, it may be argued that there would be no need for the special provisions of sections 39 and 40 in the case of compositions. In a later decision reported as *Bhadramma v. Parvateesam Ayyavaru*(2) WALLACE J., sitting as a single Judge, had to consider some of the previous decisions of this High Court. That learned Judge is of opinion that the original vesting in the Official Receiver before the annulment does not continue after the annulment, but automatically comes to an end. Therefore, it has to be renewed by a direct order under section 37 if the Court wishes it to continue. He expresses a doubt as to whether the fresh order vesting the property in the Official Receiver implied a direction to him to continue any proceeding to avoid a fraudulent alienation on

(1) (1928) 56 M.L.J. 458.

(2) (1932) 63 M.L.J. 414.

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which he had already embarked. He is of opinion that an express direction for the continuance of that proceeding by the Official Receiver would be more satisfactory.

Turning now to the decisions of other High Courts, we should refer to a Full Bench decision of the Rangoon High Court reported as *Jaing Bir Singh v. The Official Receiver*(1). The decisions, *Jethaji Peraji Firm v. Krishnayya*(2), *Somasundaram Chettiar v. Periakaruppan Chettiar*(3) and *Bhadramma v. Parvateesam Ayyavaru*(4), have been dissented from. The difficulty in dealing with this question has been felt, as would appear from the following passage in the judgment of PAGE C.J. : "Now, the language in which sections 43 and 37 of the Act are couched is neither clear nor free from difficulty, and different views have been expressed by the various High Courts in India as to the conditions which the Court may impose when it vests the property of the debtor in an appointee under section 37." (*Vide* page 300). Dissent is expressed from the opinion stated in *Jethaji Peraji Firm v. Krishnayya*(2) that, because on the insolvency being annulled under section 43 an order was passed vesting the property in the person who during the subsistence of the insolvency had been the Receiver of the debtor's estate in insolvency, the Receiver after the property was vested in him under section 37 retained the right to function as a Receiver in insolvency. The conclusion arrived at by the Full Bench of the Rangoon High Court is that, after an order of annulment under section 43, the Insolvency Court ceases to have jurisdiction to entertain, hear, or determine an application by the receiver under section 53 or section 54 of the Act, whether such an application was presented before or after the order of annulment. It has also been held that, in making a vesting order under section 37, the Court cannot order that the Receiver should continue the liquidation of the debtor's assets on the same terms and conditions as those on which the Receiver in insolvency would have been entitled to carry out the liquidation. The view taken by the Allahabad High Court in *Panna Lal v. Official Receiver*(5) appears to have been followed in the Full Bench decision. A different view appears to have been taken by the Patna High Court in the case reported as *Chouthmal Bhagirath v. Jokhiram Surajmal*(6).

(1) (1933) I.L.R. 11 Rang. 287 (F.B.).

(3) (1929) 58 M.L.J. 658.

(5) (1930) I.L.R. 53 All. 313.

(2) (1929) I.L.R. 52 Mad. 648.

(4) (1932) 63 M.L.J. 414.

(6) (1932) I.L.R. 12 Pat. 163.

It is stated that, even subsequent to the order of annulment of adjudication under section 43, a vesting order may be passed under section 37. By reason of such vesting order the insolvency proceedings should be deemed to continue and it is open to the Receiver to proceed to realise the assets vested in him. The decision in *Jethaji Peraji Firm v. Krishnayya*(1) has been followed by the Calcutta High Court in a decision reported as *In re, Keshab Lal Dhar*(2). It is a decision of a single Judge. It was held that the fund so vested in the Official Assignee was for the benefit of the creditors and could be dealt with as if the fund was being dealt with in the insolvency. The view taken by the Lahore High Court in *Bagi Ram v. Channan Mal*(3) is to the same effect.

The scope and effect of the vesting order under section 37 on the annulment of adjudication under section 43 are enshrouded in obscurity owing to the use of the mere expression "vest" in section 37, without the addition of any words or expressions throwing clearer light on the intention of the Legislature as to all that is implied in such a vesting order. There is also a good deal of conflict of judicial opinion on the interpretation of section 37. The matter is in our opinion one of general importance and of frequent occurrence in Courts of law. We have therefore thought it necessary to refer the following questions for the decision of a Full Bench for an authoritative ruling on the points involved in them.

Question No. 1.—Where the Insolvency Court annuls an adjudication under section 43 of the Provincial Insolvency Act (V of 1920) and chooses to pass an order under section 37 vesting the properties of the *quondam* insolvent in an appointee (Official Receiver or any other person), is the administration in insolvency to continue for the realisation and distribution of the assets by such a person, despite the annulment of the adjudication itself?

Question No. 2.—If not, what is the scope of his functions as a trustee by reason of the vesting order under section 37?

ON THE REFERENCE :—

V. Suryanarayana and B. V. Srinivasa Rao
for appellant.

(1) (1929) I.L.R. 52 Mad. 648.

(2) (1932) I.L.R. 60 Calc. 259.

(3) (1928) 10 L.L.J. 180.

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N. Rama Rao for first respondent.

T. V. Ramanathan and *Kasturi Seshagiri Rao*
for eighth and thirteenth respondents.

Respondents two to seven were unrepresented.

Cur. adv. vult.

OPINION.

KING J. The OPINION of the Court was delivered by
KING J.—The following two questions have been
referred to us :—

(i) Where the Insolvency Court annuls an adjudication under section 43 of the Provincial Insolvency Act (V of 1920) and chooses to pass an order under section 37 vesting the properties of the *quondam* insolvent in an appointee (Official Receiver or any other person), is the administration in insolvency to continue for the realisation and distribution of the assets of such a person despite the annulment of the adjudication itself? and

(ii) if not, what is the scope of his functions as a trustee by reason of the vesting order under section 37?

The two sections referred to in these questions run as follows :—

Section 43 (1).—"If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is so re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication has been made."

Section 37 (1).—"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the local Official Gazettee and in such other manner as may be prescribed."

What then is the situation when an Insolvency Court annuls an adjudication under section 43 and also vests the insolvent's property in an appointee under section 37?

Three points of view are possible. The first is that with the annulment the insolvency proceedings come to an abrupt and final conclusion. The Insolvency Court has no longer any power to pass any orders in regard to the insolvent's property, its order vesting that property in the appointee being its last expiring act. The appointee is a mere custodian of the insolvent's property. No doubt he should carry on the ordinary work of administering and preserving the property in his hands, but he has no further control over it, and must merely hold it subject to any orders as to attachment and sale which he may receive from any Court entertaining an application in execution against the insolvent. The insolvent's creditors, subject to anything which may have been validated by section 37, are restored to the position in which they found themselves before the insolvency proceedings began, and all must pursue afresh their remedies by execution or by suit in the ordinary way, which will mean in

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practice that the insolvent's property will go to some and some only of his creditors. The second view is that if a vesting order is made the insolvency proceedings are continued for all purposes. The third view is one intermediate between these two, and, we think, is the view which must prevail. It is this, that the appointee continues to be subject to the directions of the Insolvency Court which appointed him, that these directions relate to the property of the insolvent, and that they should be given in accordance with the policy and provisions of the Insolvency Act. It will be found on our further examination that this is not in all respects equivalent to the actual continuation of the insolvency proceedings.

For the first point of view authority is meagre. Only two cases can be cited in its support. The first, *Arunagiri Mudaliar v. Official Receiver of North Arcot*(1), goes to the extreme length of saying that the insolvent's property should remain in the hands of the appointee for the insolvent's own benefit. The second, *Panna Lal v. Official Receiver*(2), lays it down that the vesting order is

"only for the purpose *apparently* of making the property available to creditors to proceed through the Civil Court."

Neither of these rulings makes the slightest reference to any authority in support of any different view. They seem to us to concentrate unduly upon the meaning of the word "annul", and not to consider adequately those provisions in the Insolvency Act, including that under section 37 itself, which indicate that annulment

cannot be equivalent to a complete cessation of all insolvency proceedings.

In the first place such an interpretation seems to us clearly against the principle underlying the provisions of section 43 itself. It is obvious that the only reason for the annulment under that section is the conduct of the insolvent himself, and, from sub-section 2 of that section, that its primary object is to punish the insolvent by depriving him of any protection which he may hitherto have been enjoying under the insolvency law. Why should the negligence of the insolvent have the necessary effect of upsetting the rights of his creditors *inter se*, for if this first view is to be upheld these creditors can no longer expect the fair and equal treatment which had been assured to them by the insolvency. Those who have got no decree will be hopelessly handicapped as against those who may proceed immediately to execution, and those who are aware of the annulment will have an advantage over those who are not.

Again, as has been pointed out by the learned Judges who decided *Somasundaram Chettiar v. Periakaruppan Chettiar*(1), an insolvency can also be annulled under section 39 of the Act when the Court has approved a proposal for composition, and yet in spite of the annulment the Court still retains power under section 40 to re-adjudge the debtor insolvent if certain facts are proved. Clearly then an annulment under section 39 does not terminate for all purposes the proceedings of the Insolvency Court.

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(1) 1926 M.W.N. 950.

(2) (1930) I.L.R. 53 All. 313.

(1) (1929) 58 M.L.J. 658.

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Then we come to section 37 itself, and the first point to be noticed is the antithesis between the vesting order and the reversion of the debtor's property to himself. Now it is true that, under the first view according to which the appointee is a trustee or custodian of the debtor's property, the debtor's freedom to dispose of it as he wishes after the annulment is restricted, but in every other respect the legal effect of the vesting order will be no different from the legal effect of the reversion of the property to the debtor. Surely this can never have been intended. The whole significance of the Court's action in vesting the insolvent's property in someone else seems to us to be that the Court is intended to preserve its control over that property, just as a similar control is always retained when a Receiver is appointed to administer the property which is the subject-matter of a suit. The truth of this proposition, it is interesting incidentally to find, was so self-evident when the case reported as *Jethaji Peraji Firm v. Krishnayya*(1) was being heard that no argument was put forward against it (see page 666). The learned Judges who decided *Somasundaram Chettiar v. Periakaruppan Chettiar*(2) also hold that the Insolvency Court has jurisdiction to direct that the debtor's property shall be sold by the appointee and the sale proceeds distributed proportionately amongst all the creditors. Even in *Jaing Bir Singh v. The Official Receiver*(3) which is strongly relied upon by the appellant's learned Advocate it is not held that the Insolvency Court has no power to give

(1) (1929) I.L.R. 52 Mad. 648.

(2) (1929) 58 M.L.J. 658.

(3) (1933) I.L.R. 11 Rang. 287 (F.B.).

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directions to the appointee under section 37. We think therefore that the Insolvency Court retains full power to give directions under section 37 as to the realization and disposal of the debtor's assets. That power should not, of course, be used arbitrarily, but should be used in the interests not of this or that individual creditor, but of the whole body of creditors, which means in other words that the only proper order for the Court to pass is that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Insolvency Act.

This opinion however does not involve our acceptance of the second view, for that view clearly ignores altogether the meaning of the word "annul". The fact that not only the Official Receiver but any other person may be appointed under section 37 is against the view that an order under section 37 continues the insolvency proceedings for all purposes. The person appointed under section 37 has no longer by the mere fact of his appointment the powers which a Receiver has under the Act. He has only such powers as are necessarily implied by the vesting order which are, as we understand them, to carry out the directions of the Court, and those directions, as we have said, should, so far as the realization and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act. To this extent then we would answer the first question in the affirmative.

A second matter however falls, we think, to be decided by the terms of the reference to us, even though on the facts of this particular case it does

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not directly arise. It might be argued that the "assets" of the debtor, and "assets" is the word used in Question 1, include property which though nominally alienated by him is property to which he is really entitled. The question then arises as to the powers of the person appointed under section 37 in respect of applications under sections 53 and 54. We must consider two separate situations: (i) where such an application is already pending when the order of annulment is passed under section 43, and (ii) where it is sought to be made after that order is passed. And in considering these situations we must presume that the person appointed under section 37 is the Official Receiver who was Receiver under the Act before the annulment.

On the first of these situations there are two important rulings; *Jethaji Peraji Firm v. Krishnayya*(1) and *Jaing Bir Singh v. The Official Receiver*(2). They approach the matter so far as section 37 is concerned from two distinct points of view. *Jaing Bir Singh v. The Official Receiver*(2) considers the terms of the vesting order and holds that it cannot possibly apply to the property of a person other than the debtor. The property concerned in applications under sections 53 and 54 is the property of an alienee and therefore, once the Court has annulled the adjudication, it has no power to vest this property in anyone. In *Jethaji Peraji Firm v. Krishnayya*(1) reference is made to that portion of section 37 which validates all previous acts done by the Receiver, and includes his application under either of these sections among the acts which are validated. It is then said that if

this act remains valid after the annulment it is unreasonable to suppose that the Receiver cannot continue to pursue his remedy. We agree with this view. If once the making of a claim by the Receiver to certain property as being in essence the property of the insolvent has been validated, we can see no logic in the view that would prevent the adjudication of that claim.

Finally there is the case of the initiation of proceedings under section 53 or 54 after the annulment. No authority has laid it down specifically that the appointee under section 37 has any such power, and we think that under the terms of the vesting order he clearly could not have it. There is no question here of the validation of any act, and the property alienated by the insolvent cannot be his property within the meaning of section 37.

We accordingly answer the first question in the affirmative subject to the qualifications which we have made. No answer is required to the second question.

[After the above expression of opinion by the Full Bench, the appeal against appellate order and the civil revision petition came on for final hearing before PAKENHAM WALSH and VARADACHARIAR JJ. and the following Judgment was delivered on 29th January 1935 :—]

The JUDGMENT of the Court was delivered by PAKENHAM WALSH J.—An objection has been raised before us that under Schedule I of the Act no appeal lay to the District Judge, but Schedule I deals with appeals under section 75 (2) and the section which governs this appeal is section 75, clause 1, which says that an appeal is competent.

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As regards the merits, the main argument was that the learned District Judge misconceived the discretion he had in the matter of passing an order, but the Full Bench ruling since delivered shows that he could pass no other order than that which he did. The learned Judges say: "The only proper order for the Court to pass is that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Insolvency Act." They also say that "the power should not of course be used arbitrarily but should be used in the interests not of this or that individual creditor, but of the whole body of creditors." They also repel, in another portion of the judgment, the view that the annulment of the insolvency under section 43 puts a total end to the insolvency proceedings and say: "If this view is to be upheld those creditors can no longer expect the fair and equal treatment which had been assured to them by the insolvency. Those who have got no decree will be hopelessly handicapped as against those who may proceed immediately to execution and those who are aware of the annulment will have an advantage over those who are not." In the light of these remarks, it is clear that the learned District Judge could have passed no other order than the one he did. The appeal therefore fails and is dismissed with costs.

The civil revision petition is dismissed but without costs.

G.R.

APPELLATE CIVIL.

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

MAJETI VENKATASURYA SUBBARAYUDU SOWCAR,
BEING MINOR BY MOTHER AND NEXT FRIEND VENKATASURYA
SATYAPARVATAMBA NOW DECLARED A MAJOR AND THE
GUARDIAN DISCHARGED
(PLAINTIFF-PETITIONER), APPELLANT,

1935,
January 30.

v.

MAJETI BAPANNARAO SOWCAR AND THIRTY-THREE
OTHERS (DEFENDANTS-COUNTER-PETITIONERS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. IX, rr. 9 and 13—
Minor plaintiff or defendant—Non-appearance of next
friend or guardian ad litem—Dismissal of suit for default
or passing of ex parte decree in case of—Restoration of suit
or setting aside of ex-parte decree—Minor's right of—Non-
appearance of next friend or guardian deliberate and in
pursuance of a plan to obstruct litigation or not bona fide.*

A minor is not entitled to have a suit which has been dismissed for default restored to the file or to have an *ex parte* decree set aside where it is shown that the next friend or guardian absented himself or herself deliberately in pursuance of a plan to obstruct the litigation, or that the absence was not *bona fide*. To such cases the principle of the decisions in *Venkataratnam v. Nagappa*, (1934) 67 M.L.J. 387, *Kesho Pershad v. Hirday Narain*, (1880) 6 C.L.R. 69, and *Kathaswamy Chettiar v. Ramachandran*, (1934) I.L.R. 57 Mad. 1069, is inapplicable.

APPEAL against the order of the Court of the Subordinate Judge of Masulipatam, dated 14th August 1931 and passed in Civil Miscellaneous Petition No. 77 of 1931 in Original Suit No. 144 of 1925.

* Appeal Against Order No. 147 of 1932.

SUBBARAYUDU *K. Ramamurthi* for *K. Kameswara Rao* and
BAPANNA RAO. *C. K. Chandra Mouleswar* for appellant.

G. Lakshman and *G. Chandrasekhara Sastri*
for respondents.

BEASLEY C.J. BEASLEY O.J.—The JUDGMENT of the Court was delivered by
of the Additional Subordinate Judge of Masulipatam refusing, on the appellant's application under Order IX, rule 9, of the Code of Civil Procedure, to set aside a previous order dismissing the suit and to restore the suit to the file. The appellant is the plaintiff's next friend and the plaintiff is the son of the first defendant. There are a large number of defendants most of them alienees of property from the first defendant, the father of the plaintiff. The suit was filed in 1925 ; and various reliefs were claimed in it, one relief of course being to set aside the alienations as not binding on the joint family. The other matters in the suit as between the father and the plaintiff, his son, were compromised in 1927 and the matters remaining, namely, the questions relating to these alienations, stood over and the suit did not come up for final hearing until 21st January 1931 nearly four years after the compromise, which fructified into an interlocutory decree, had been come to. Some explanation is required for this very long pendency and the learned Subordinate Judge, who had all the records in the case including the B diary before him which we have not, was in a better position than ourselves to arrive at a conclusion as to whether this long pendency was due to the plaintiff's act or the action of the defendants ; and this is a matter which has a somewhat strong bearing upon the

question of the *bona fides* of the petition which he had before him to set aside the order dismissing the suit and to restore the suit to the file. The next friend of the plaintiff was the plaintiff's mother. She, being a woman, was not taking an active part in the litigation and that part was being taken by the plaintiff's maternal grandfather and he seems to have been in charge of the litigation. On the date in question, namely, 21st January 1931, the pleader for the plaintiff was unfortunately called away to another place. Owing to a sudden death in the family he left Masulipatam and, before going away, does not appear to have taken the necessary steps to get somebody else to represent him. He accordingly did not appear. The maternal grandfather of the plaintiff did not appear either, although according to him he made an effort to get to the Court which effort was frustrated by an accident to the vehicle in which he was travelling. It is one of those accidents which always seems to happen to persons who are going to Courts and who fail to arrive there in time and whose suits are accordingly dismissed in their absence and who seek thereafter to have the *ex parte* order set aside. The learned Subordinate Judge appears to accept as reasonable the explanation put forward with regard to the pleader. He did not appear and the suit was dismissed. Then a petition was filed nine days later to set aside the *ex parte* order. The Subordinate Judge is not satisfied with the *bona fides* of the petition and he observes that the other matters in the suit had been compromised between the plaintiff, the son, and his father, the first defendant. He thinks that the suit was

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allowed to be dismissed for default purposely leaving the minor plaintiff to reopen the question of alienations by the first defendant within three years of his becoming a major. He is, therefore, not unfamiliar with the tactics which minor litigants so frequently pursue. He thinks that it was to the advantage of the plaintiff to put off a final decision on this issue and he might possibly rightly have come to the conclusion that the plaintiff was not anxious to get a decision upon that question at that moment and thought that it was better to have the pending litigation hanging over the heads of the alienees with the object—and this is one of the allegations made in the counter-affidavit—of forcing them to a compromise. This case of course is not so strong a one as the cases where minor members of a family are seeking to set aside mortgages executed by the managing member. In such cases they are in possession of the property and nothing is to be gained by a speedy decision of the issues which they themselves have raised. They are prepared to remain in possession for as long a time as they possibly can and there is therefore no incentive to have the case speedily disposed of. In the present case most of the alienations were sales. However, there is something to be said for the view expressed by the Subordinate Judge here that it was possibly to the advantage of the plaintiff to postpone a decision of this issue and to keep the litigation hanging over the heads of the other defendants. He doubts the *bona fides* of the petition. He had before him the records and the B diary which neither party has thought necessary to produce here and he was able, on an examination of the

B diary, to see who was to blame for the long pendency of the suit; and he says: "the plaintiff took no steps in the matter". That, Mr. Lakshmananna argues, means that the plaintiff had not taken any steps in the matter up to that time. If that was so and if the records before the Subordinate Judge supported that view, that certainly was a very material consideration in coming to the conclusion that the petition was not *bona fide* in that the plaintiff was not really ready to go on with his case and that, even if his pleader had turned up, he would only have asked for an adjournment and, if it had been refused, would have reported no instructions. In my opinion, there is no reason for thinking that the view taken by the learned Subordinate Judge with regard to the *bona fides* of the petition is incorrect.

I think it necessary, however, to say something with regard to some decisions which were relied upon in the course of the argument of the learned Counsel for the appellant. He referred to *Venkataratnam v. Nagappa*(1), a decision of mine. In that case, I held that if there are minor plaintiffs and defendants who are represented, as they must be, by a next friend or guardian, and the next friend or guardian is absent through whatever cause it may be at the trial, then that fact alone is a sufficient reason for setting aside an *ex parte* decree passed against minor defendants or for setting aside an order of dismissal of the suit in the case of minor plaintiffs. In the course of my judgment and in support of it, I relied upon a decision of the Calcutta High

(1) (1934) 67 M.L.J. 387.

SUBBARAYUDU v. BAPANNA RAO. BEASLEY C.J. Court, namely, *Kesho Pershad v. Hirday Narain*(1) and the decision of CURGENVEN J. in *Kathaswamy Chettiar v. Ramachandran*(2). I see no reason for thinking that I wrongly decided that case or that the cases on which I relied were wrongly decided. I think indeed that they were all correct; but this decision of mine has been quoted recently in other cases in support of the argument that, whenever a minor is a plaintiff or a defendant and is represented by a next friend or a guardian *ad litem* and that next friend or guardian *ad litem* is absent and the suit is dismissed or decreed *ex parte* on account of that absence, the Court is bound to restore the suit to the file or set aside the *ex parte* decree because the minor has not been represented in the suit. It is argued that, it does not matter what the cause of the absence may be, these decisions are to be taken as decisions that whenever the next friend or the guardian *ad litem* is absent, the minor is entitled to have the suit restored to the file or the *ex parte* decree set aside irrespective of other considerations. That is not so. The three cases to which I have referred are cases in which there was *bona fides*. They cannot be taken to apply to cases where, as a manoeuvre or in pursuance of tactics agreed upon between the plaintiff and the defendant or between the defendants themselves, the next friend or guardian *ad litem* deliberately absents himself or herself in order to gain some advantage in the litigation. Cases like those are not cases of *bona fide* negligence. They are cases where for ulterior and improper motive and as part of a deliberate plan this manoeuvre is resorted to. I wish it to be

(1) (1880) 6 C.L.R. 69.

(2) (1934) I.L.R. 57 Mad. 1069.

clearly understood that the three cases to which reference has been made are cases which deal with *bona fide* conditions and none other. I think it necessary to say this about this decision because, as I have said before, this is not the first time in which it has been relied upon in support of a contention that, whatever happens, whenever there is an absence of a next friend or guardian, the minor is entitled to have the case restored to the list or the *ex parte* decree set aside. This would of course lead to manifest injustice. Take, for example, the case of an alienation made by a father of a joint Hindu family. The mortgagee files a suit making the father the first defendant and the other members of the family the other defendants. These other members of the family are very often represented by the father or if not by somebody else and the father remains *ex parte* and an *ex parte* decree is passed against him. Colluding with the father the guardian of the minor is absent. If an *ex parte* decree is passed in the absence of the guardian, then it is liable to be set aside because the minor was not represented at the trial; and such a decree is rightly set aside where the absence of the guardian is *bona fide*; but the guardian cannot be permitted to go on absenting himself time after time. If such a thing as that were to be allowed, it would mean that an *ex parte* decree could never be passed against a minor during the minor's minority. Every time the guardian was absent the minor would be able to say that he was not represented by his guardian and his guardian was absent through neglect, illness or otherwise. There must be some limitation to the rule stated in those cases

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This appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

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

1934,
December 21.

KARRI SEETARAMAYYA (COUNTER-PETITIONER),
PETITIONER,

v.

PAPPU SUBRAHMANYAM (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 58—Claim petition under—Permanent occupancy rights in lands attached set up by claimant in—Investigation of—Permissible under r. 58, if—Order against claimant on petition—Order stating that claimant's interests will not be affected by sale and directing that a note to that effect shall be made in sale list and that sale shall be held subject to that note, if an—O. XXI, r. 97—Obstructor found to be entitled to permanent occupancy rights in land possession of which sought—Proper order to be made in case of—Failure to go into merits of claim to permanent occupancy rights in application under r. 97 by reason of misconstruction of order on claim petition—Failure to exercise jurisdiction, if—Interference in revision under sec. 115 in case of.

A claim petition put in by the petitioner under Order XXI, rule 58, of the Code of Civil Procedure, alleging that he had

* Civil Revision Petition No. 1473 of 1928.

permanent rights of occupancy in the lands attached in execution and that the judgment-debtor's right therein was confined to the collecting of an annual cist and praying either that the attachment should be cancelled and the sale stopped or the sale restricted to the judgment-debtor's right to collect the cist, was dismissed by an order which stated: "Whatever interest the defendant has in the lands put to auction will be sold and this petitioner's rights are not prejudiced thereby. A note shall be made to that effect in the sale list and the sale shall be held subject to that note."

Held that the order had not the effect of conclusively negating the petitioner's permanent rights of occupancy and that he was not precluded by that order from pleading that he was entitled to permanent occupancy rights in answer to an application filed under Order XXI, rule 97, of the Code of Civil Procedure by the execution purchaser or his representative.

Where, in the application filed under Order XXI, rule 97, the Court below declined to go into the merits of the case, namely, whether or not the petitioner had permanent occupancy rights, by reason of its misconstruction of the order on the claim petition,

held further that there was a failure to exercise jurisdiction justifying interference in revision.

Where, in the application filed under Order XXI, rule 97, the party obstructing is found to be entitled to permanent occupancy rights in the land possession of which is sought, the proper order to make is that the applicant shall be put in possession only of the melwaram right; in other words, that he shall have symbolical possession of the land.

Per RAMESAM J.—The possession of a tenant paying rent to the judgment-debtor (whether the tenant is a tenant at will or from year to year or occupancy tenant) is regarded as the judgment-debtor's possession. A claim by such a tenant is not a claim intended by the Legislature to be investigated into by a petition under Order XXI, rule 58, of the Code.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Kovvur in Civil Miscellaneous Petition No. 132 of 1928 dated 23rd April 1928 in Original Suit No. 512 of 1922 on the

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file of the Court of the District Munsif of Cocanada.

P. Venkataramana Rao for *V. Viyyanna* for petitioner.

G. Lakshmana and *G. Chandrasekhara Sastri* for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The facts out of which this civil revision petition arises are fully stated by my learned brother. There are two stages in this matter. The first is the claim petition, Execution Application No. 3433 of 1924, purported to be filed under Order XXI, rule 58, Civil Procedure Code—Exhibit A dated 21st November 1924. The order upon this is Exhibit B dated 16th December 1924. The second stage is in 1928 the obstruction by the petitioner before us to the decree-holder in delivery proceedings followed by the application of the decree-holder under Order XXI, rule 97. The order on this petition is the order against which this revision petition has been filed. In this order the District Munsif held that the obstructor, that is the tenant on the land, is precluded by the order Exhibit B from setting up his tenancy; he therefore directed delivery free of the tenant's claim.

On the first matter, my learned brother has fully considered the decisions and the construction to be placed upon Exhibit B and the effect to be given to it. I agree with him in thinking that it is not such an order as to compel the claimant to file a regular suit within one year under Order XXI, rule 63. But apart from this, it seems

to me that there is another reason why Exhibit B should not have such an effect. When a claim petition is filed under Order XXI, rule 58, where the claimant sets up some interest adverse to the judgment-debtor so as to entitle him to ask the Court to raise the attachment in respect of the whole of the property or a portion of the interest in the property attached, the Court may refuse to investigate and dismiss the petition on the ground of delay (Proviso to rule 58) or may proceed to investigate. Then the claimant should adduce evidence to show that he had some interest in, or was possessed of, the property which was attached (rule 59). If the Court then comes to the conclusion that the property was not in the possession of the judgment-debtor or some trustee for him or a tenant paying rent to him, the Court allows the claim to raise the attachment wholly or partially (rule 60). But if all that the claimant has established is a mortgage or charge, the attachment may continue subject to the mortgage or charge (rule 62). But if the Court comes to the conclusion that the property is in the possession of the judgment-debtor or a trustee for him or his tenant, the Court has not got to raise the attachment wholly or partially but proceed to sell the property. There is no claim to be allowed (rule 61). Reading rules 60 and 61, we see that where all that the claimant has is merely the interest of a tenant paying rent to the judgment-debtor (whether the tenant is a tenant at will or from year to year or occupancy tenant), such a person's possession is regarded as the judgment-debtor's possession and there is no attachment to be released. That is, for the purpose of investigating

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into the objections to attachment and the raising of the attachment wholly or partially, the possession of a tenant under the judgment-debtor is not regarded as antagonistic to the judgment-debtor, however substantial the question whether the tenant is an occupancy tenant may be for other purposes; his possession is regarded as that of the judgment-debtor and if this is all the claim that is set up, on the face of it, it is no objection to the attachment even if fully made out. Therefore, the Court should always reject such a petition on the ground that the tenant's claim is not a kind of claim, enquiry of which is contemplated in a claim petition under Order XXI, rule 58. This is absolutely clear from the conclusion at which the Court has to arrive in rules 60 and 61 and the consequence of such conclusions. I am therefore of opinion that a claim by a tenant of the judgment-debtor is not a claim intended by the Legislature to be investigated into by a petition under Order XXI, rule 58. Therefore it is not an order upon which a suit within one year should be filed by the party against whom the order is made.

On the second point, if the obstruction is caused by a person claiming to be an occupancy tenant and therefore entitled to be in physical possession, the Court should investigate into the matter and, if it finds that the claim is a *bona fide* claim, the Court should dismiss the application of the decree-holder-purchaser in so far as it seeks to get physical delivery. The Court should not dismiss the petition totally; it should order delivery under Order XXI, rule 96, though the purchaser seeks delivery under Order XXI,

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rule 95. In such a case, some form of delivery is necessary to make the proceedings complete as against the judgment-debtor, so that in a regular suit against the obstructor by the purchaser there should be no further objection by the judgment-debtor that the execution proceedings are not complete and that the suit does not lie under section 47 of the Code of Civil Procedure [*Vide* the remarks and the procedure indicated in the Full Bench judgment delivered to-day in *Abdul Azim Sahib v. Chokkan Chettiar*(1).] If the Court finds against the occupancy tenant, then delivery of physical possession can be ordered (Order XXI, rule 95): the Court ought to investigate the matter. The Court disallowing the objection on the ground that the tenant was precluded by the former order on the claim petition is not one of the courses indicated in the Code and is therefore irregular and the irregularity is so material and of such serious consequences that we should interfere in revision. Apart from the order on the claim petition, it is possible that the tenant might show his occupancy rights otherwise than by what he adduced in the claim petition. He may show that the village is an estate within the meaning of section 3 (2) (d) of the Madras Estates Land Act. This is another reason why the District Munsif's order is irregular. I concur with the order proposed by my learned brother.

VENKATASUBBA RAO J.—This case has been referred to a Bench by KRISHNAN PANDALAI J. and the question raised is as regards the effect of an order made upon a claim petition. In execution of a decree obtained against one Damojipurapu

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Sithamma, the decree-holder attached certain lands and applied for sale thereof. A claim petition was then put in under Order XXI, rule 58, of the Civil Procedure Code by Karri Sitaramayya (the petitioner before us), wherein he alleged that he had permanent rights of occupancy in the lands in question and that the judgment-debtor's right was confined to the collecting of an annual cist of Rs. 300, and went on to say that the decree-holder was not entitled to bring the lands to sale but should be directed to sell the judgment-debtor's right, which, as above mentioned, was limited to the collecting of the cist. On those allegations, he prayed in the alternative, either that the attachment should be cancelled and the sale stopped or the sale restricted to the judgment-debtor's right to collect the cist. The Court made the following order :

" This application was filed late and the sale is going on. Whatever interest the defendant has in the lands put to auction will be sold and this petitioner's rights are not prejudiced thereby. A note shall be made to that effect in the sale list and the sale shall be held subject to that note. This petition is dismissed."

It is the effect of this order, dated 23rd December 1924, that has now to be considered.

The sale was held ; the lands were purchased by the decree-holder himself, who transferred his right to Pappu Subrahmanyam (the respondent). The present application was filed under Order XXI, rule 97, in 1928 (that is, four years from the date of the order on the claim petition) by Subrahmanyam, who complained that he was obstructed by the petitioner in obtaining possession and prayed for the removal of the obstruction. The petitioner pleaded that he was entitled to

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permanent occupancy rights and sought to rely upon a judgment of the High Court delivered in 1919 recognizing those rights. But the lower Court, upholding the respondent's preliminary objection that the order on the claim petition became conclusive under Order XXI, rule 63, as against the petitioner, refused to go into the merits of the case. The question is, has that order the effect of conclusively negating the petitioner's permanent rights of occupancy ?

Order XXI, rule 63, says that where an order is made against a party, it shall be conclusive subject to the result of a regular suit which under the rule he is entitled to bring, and under article 11 of the Limitation Act such a suit should be brought within one year from the date of the adverse order. As has been pointed out in the referring order of NAPIER J. in *Venkataratnam v. Ranganayakamma*(1) and again in the judgment in *Saharabi v. Ali*(2), the result of holding that the order has become conclusive under Order XXI, rule 63, is to reduce very often the period of limitation from twelve years to one year, and the question becomes therefore very important in each case, whether the order to be considered is in substance hostile to the party and he is bound to get rid of it by filing a regular suit ; for, under the provision, the order must be one made "against" the party. The question is one of construction of the order made in each case and I must remark, in view of the numerous cases cited before us, that to attempt to construe one order in the light of the observations made in respect of a totally different order is hardly a safe or proper method of dealing

(1) (1918) I.L.R. 41 Mad. 985 (F.B.). (2) (1922) 44 M.L.J. 141.

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with the point ; and it should be observed that in not a single case cited by Mr. Lakshmanan for the respondent was the order construed worded in the way in which the present order is. To say that the petitioner is adversely affected by an order which expressly recites that his rights are not to be prejudiced involves an obvious contradiction. The order, after reciting that the petitioner's rights are not to be prejudiced by the sale, goes on to provide that a note to that effect shall be made in the sale list and that the sale shall be held subject to this note. There is an important distinction between the terms of this order and of many other orders which have been construed by the Courts in the cases to which our attention has been drawn. In those orders what invariably the Judge said was, "Let the claimant's objection be noted in the sale proclamation", whereas the present order is of quite a different nature ; it is not the mere objection of the claimant that is to be noted (that is worth very little), but it is the Judge's observation that the petitioner's rights are not to be affected by the sale. Had the order been carried out, and, we must presume it was, the bidders would have been informed that the proposed sale was not to affect the permanent occupancy rights claimed by the petitioner—which rights the order in distinct terms safeguards. The reason for the order having been worded in this way is not far to seek. In support of his alleged right, the petitioner relied not upon some vague evidence but upon a definite adjudication by the High Court. The Munsif, in the face of this, was not prepared to summarily reject his claim, nor was he disposed on the last working

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day of the Court (it is significant that the order bears the date 23rd December 1924) to enter upon a minute investigation. Therefore, on the one hand, he refrained from giving a positive decision in favour of the claimant and, on the other, he was careful enough to preserve and safeguard such rights as he possessed. There was need for caution, for the Munsif could not have lost sight of the fact that the land in dispute was a large tract comprising an area of one hundred acres. It seems to me impossible to construe the order in question as having negatived the petitioner's rights, for nothing short of a clearly hostile order can operate to produce the result contended for. The decision so much relied upon by the respondent, *Venkataratnam v. Ranganayakamma*(1), scarcely supports him. It decided what till then was doubtful that, even where a case fell within the proviso to rule 58 which reads thus :

"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed",

the order should be held to be conclusive. In some later cases it has been held that this and no more is the effect of that decision. KUMARASWAMI SASTRI and DEVADOSS JJ. in *Lingama Naidu v. Official Receiver, Madura*(2), after pointing out that the Full Bench ruling must be regarded as a decision on the facts of that particular case, observe that it is confined to cases where the disposal has been either on investigation or on refusal to investigate upon the ground that the claim is filed too late. Similarly, on a difference of opinion between SPENCER J. and

(1) (1918) I.L.R. 41 Mad. 985 (F.B.).

(2) (1928) 110 I.C. 511.

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KRISHNAN J., it was held by SCHWABE C.J. in *Abdul Kadir v. Somasundaram Chettiar*(1) that

“the Full Bench held, and held only, that where a decision is given on the ground that the matter has been designedly or unnecessarily delayed, that is a decision and an order against the applicant under Order XXI, rule 63, to which article 11 applies.”

Notwithstanding the doubts expressed in these two cases regarding the correctness of the principle laid down by the learned Judges of the Full Bench, we are bound by that decision; but does it necessarily follow that it should be treated as an authority in construing the present order? In the report of that case the whole of the relevant order has not been fully quoted. After referring to certain matters in regard to which the zamindarini was in default, the Judge remarked:

“The petitioner’s prayer that the sale should be held subject to this claim for cist, which has not yet been proved, is inadmissible. The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months.”

First, it must be noted that there is a clear statement here that the zamindarini is not entitled to an order that the sale should be held subject to her claim; secondly, what is to be notified to the bidders is the assertion of the zamindarini, which in the previous sentence has been found not proved. What happened in the present case is the exact opposite of this: it is not the claimant’s assertion that is to be notified but the Judge’s decision that by the sale the petitioner’s right is not to be affected.

(1) (1922) I.L.R. 45 Mad. 827.

Since the Full Bench decision, in numerous cases the orders were construed as not having negatived the rights of the claimant; *Ayya Pattar v. Attupurath Mankkal Karnavan*(1), *Lakshmi Ammal v. Kadiresan Chettiar*(2), *Saharabi v. Ali*(3), *Kumara Goundan v. Thevaraya Reddi*(4), *Lakshminarasamma v. Navugotla Pydanna*(5), *Abdul Kadir v. Somasundaram Chettiar*(6) and *Lingama Naidu v. Official Receiver, Madura*(7). Neither these cases nor those on which Mr. Lakshmanan relies [*Narasimha Chetti v. Vijapala Nainar*(8), *Ponnusami Pillai v. Samu Ammal*(9), *Lakshmanan Chettiar v. Parasivan Pillai*(10), *Arsamma v. Moidin*(11) and *Ramalingayya v. Narayanappa*(12)] do, in my opinion, afford us the slightest help, but I cannot help remarking that in no case where the claimant’s contention prevailed, was the order so favourably worded as in the present.

On the question whether the revision petition lies (the respondent, I must say, has not taken the objection), the case presents no difficulty. Here, there was a failure to exercise jurisdiction, as the lower Court, by reason of its misconstruing the order on the claim petition, declined to go into the merits of the case, namely, whether or not the claimant had permanent occupancy rights. *Birj Mohun Thakoor v. Rai Uma Nath Chowdhry*(13), a decision of the Judicial Committee, is a parallel case. There, where the Court refused to confirm

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| (1) 1919 M.W.N. 805. | (2) (1921) 41 M.L.J. 198. |
| (3) (1922) 44 M.L.J. 141. | (4) (1924) 48 M.L.J. 616. |
| (5) A.I.R. 1925 Mad. 265. | (6) (1922) I.L.R. 45 Mad. 827. |
| (7) (1928) 110 I.C. 511. | (8) (1914) 2 L.W. 206. |
| (9) (1916) 31 M.L.J. 247. | (10) (1919) 37 M.L.J. 159. |
| (11) (1923) I.L.R. 47 Mad. 160. | (12) A.I.R. 1926 Mad. 593. |
| (13) (1892) L.R. 19 I.A. 154 (P.C.). | |

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a sale under section 312 of the Code of 1882 believing that it had no power to do so on a wrong construction of the section, their Lordships held that there was a failure to exercise jurisdiction and that the decision was subject to revision. Similarly, where the lower Court on a wrong construction of Order XXI, rule 89, dismissed an application made under that rule, it was held by a Full Bench of this Court that the order was subject to revision; *Sundaram v. Mause Mavuthar*(1).

In the result, the civil revision petition is allowed and the order of the lower Court is set aside, and it is directed to deal with the petition on its merits.

It need hardly be pointed out that, should the petitioner be found entitled to permanent occupancy rights, the proper order to make is (an order binding as much upon the parties here as upon the judgment-debtor) that the respondent shall be put in possession only of the melvaram right; in other words, that he shall have symbolical possession of the land.

The respondent shall pay the petitioner's costs of the civil revision petition.

A.S.V.

(1) (1921) I.L.R. 44 Mad. 554 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

SREE RAJA MALRAJU VENKATA NARASIMHA
RAO BAHADUR, ZAMINDAR (PLAINTIFF), PETITIONER

1934,
November 5.

v.

THE CHAIRMAN, MUNICIPAL COUNCIL,
NARASARAOPET (DEFENDANT), RESPONDENT.*

Madras District Municipalities Act (V of 1920), as amended by Madras Act X of 1930, ss. 93 and 354, proviso—Profession-tax—Levy of—Dividends received by a shareholder from a company—Disregard of provisions of Act within proviso to sec. 354, if.

Dividends received by a shareholder from a company cannot be treated as a source of income for the purpose of levying the profession-tax under the Madras District Municipalities Act. The levying of such a tax on a shareholder in respect of such dividends is a substantial disregard of the provisions of that Act within the meaning of the proviso to section 354 thereof.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Narasaraopet, dated the 20th day of February 1933, and passed in Small Cause Suit No. 437 of 1932.

B. T. M. Raghavachari for petitioner.

Y. Govindarajulu Naidu and *K. Ramamurthi* for respondent.

JUDGMENT.

The question that arises is whether the dividends received by a person from a company can be treated as a source of income for the purpose of levying the profession-tax under the Madras

* Civil Revision Petition No. 789 of 1933.

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District Municipalities Act. For the petitioner, it is contended that to levy a tax on a shareholder would amount to "taxing twice over", the company having been already assessed in respect of its profits which in effect belong to the shareholders. The Income-tax Acts, as is pointed out in *Purshottamdas Harkisondas v. The Central India Spinning, Weaving and Manufacturing Company*(1), proceed upon the footing that the entire profits are subject to the common burden of income-tax, which in truth is paid by the shareholders, although the payment is made by the company (see page 588). That this is the true view appears also from the following passage in the judgment of ROMER L.J.:

"If such a company as we have to deal with pays income-tax on its profits, the income-tax, as has been pointed out, is payable out of the profits, and is part of the profits; and if the profits, after deducting the income-tax, have subsequently to be distributed amongst the members of the company, that income-tax is not payable again by those members so far as they receive their share of the profits, because the income-tax is to be taken as having been paid out of their profits, and on their behalf." *Attorney-General v. Ashton Gas Company*(2).

Although no doubt, as the petitioner's Counsel contends, this principle is recognized for the purpose of the levying of the income-tax, I do not think I shall be justified, while dealing with this case, in relying upon any such general principle. Different considerations may apply to the levy of the profession-tax and therefore I shall base my judgment on a construction of the sections of the Act in question.

First, section 92 of Act V of 1920, which provided for the levy of a company's tax, was by the

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Amendment Act (Madras Act X of 1930) deleted and section 93 is by the same new Act so amended as to take in companies also. The result is, that companies as well as individuals are now liable to pay profession-tax, the distinction between companies' tax and profession-tax having been abolished. But what is important to note is, that when companies were before the present amendment liable for what was then termed "companies' tax", section 93 expressly exempted individual members from taxation in respect of their interest in the company. That result was achieved by the qualifying phrase "not liable to the companies' tax" being inserted after the words "every person". I do not think that in enacting the present section (section 93 as it now stands) the Legislature has shown any intention to depart from that rule.

Secondly, the definition of "Company" has been by the Amendment Act (Madras Act X of 1930) so altered as to make it comprise or include a firm, i.e., a partnership. Under section 93 a firm (the word "Company" including thus a firm also) has to pay profession-tax in respect of its profits and the scheme of the Act shows that when profession-tax is levied on a firm, the individual members thereof are not in respect of those same profits again liable. Section 94 enacts *inter alia* that the profession-tax leviable from a firm may be levied from any adult member thereof. A Bench of this Court held, construing provisions similar to these, though of a different Act (Madras City Municipal Act I of 1884), that a partnership trade is a single trade or business for the purpose of taxation and that there can be but one tax

(1) (1917) I.L.R. 42 Bom. 579, 588.

(2) [1904] 2 Ch. 621.

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levied as profession-tax when several persons jointly carry on one trade or business. As is observed in that judgment :—

“It would hardly be reasonable that the profits and extent of a business remaining unchanged, the amount leviable from the firm should vary with the number of the members.”
Davies v. President of the Madras Municipal Commission(1).

This principle, which has been held applicable to partnerships, must equally apply to companies also—the reason being that, as in the case of partnerships, so in the case of companies, the profits belong to the entire body of persons composing it.

Thirdly, the construction of the various sets of words shown as sources of income in section 93 leads me to the same conclusion, namely, that as regards dividends received by a person, he is exempt from taxation. The notion that every share-holder “transacts the business” of his company is, in my opinion, clearly wrong. To hold that a person by reason of possessing shares, say, in ten different companies, transacts the business of each of those companies, would lead to obvious anomalies. Nor do I think that dividends, which represent a share of the profits, can appropriately be termed as “income from investments”. That being so, it seems to me that the very structure of the section excludes dividends from its ambit.

There remains another point to deal with, namely, that of jurisdiction. Mr. Ramamurti for the respondent contends that the assessment was final and could not be impeached in a Court of law. Section 354 lays down that no proceeding under the Act shall merely for defect in form be

(1) (1890) I.L.R. 14 Mad. 140.

quashed or set aside by any Court of justice ; but this rule is subject to the proviso which runs thus :

“provided that the provisions of this Act have been, in substance and effect, complied with.”

It was held by a Bench of this Court that where a company not liable to the tax had been taxed, there was a substantial disregard of the provisions of the Act ; *Municipal Council, Cocanada v. The Standard Life Assurance Company*(1). Again, where the Municipality wrongly took the gross income instead of the net income as the basis for determining the class in which a person was to be placed, it was held that the provisions of the Act were not, in substance and effect, complied with ; *Municipal Council of Mangalore v. The Codial Bail Press*(2). The words in section 354 (of Act V of 1920) were similarly construed in *Municipal Council, Cuddalore v. Krishnan Nambiar*(3). Nor does the use of the word “final” in rule 28 of Schedule IV (Taxation and Finance Rules) operate as a bar to the filing of a suit. As has been pointed out in *Valli Ammal v. The Corporation of Madras*(4), the word “final” must be taken to refer to the proceedings before the Municipality and could not have been intended to shut out the jurisdiction of the Courts.

In the result, I must hold that the petitioner is entitled to a refund of Rs. 140. The lower Court's decree is accordingly modified to that extent. Each party shall bear his costs here as well as in the Court below.

K.W.R.

(1) (1900) I.L.R. 24 Mad. 205.
(3) (1927) I.L.R. 50 Mad. 987.

(2) (1903) I.L.R. 27 Mad. 547.
(4) (1912) I.L.R. 38 Mad. 41.

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APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1935,
January 15.

Y. MAHABALESWARAPPA (PETITIONER), APPELLANT,

v.

M. GOPALASWAMI MUDALIAR (COUNTER-PETITIONER),
RESPONDENT.*

*Criminal Procedure Code (Act V of 1898), ss. 476 and 195—
“Civil Court”—Meaning of—Includes Election Commis-
sioner—Appeal from order of District Judge refusing to
prefer complaint lies to High Court.*

An Election Commissioner is a “Court” and a “Civil Court” within the meaning of sections 476 and 195, Criminal Procedure Code. He is a “Civil Court” in the sense that he is deciding on purely civil questions between persons seeking their civil rights. He is only not a Civil Court as that expression is used to denote the Courts of ordinary civil jurisdiction. The expression “Civil Court” is used in sections 476 and 195, Criminal Procedure Code, not in this restricted sense, but as denoting a Court which is exercising powers, and dealing with matters, of a civil nature.

Nilmoni Singh Deo v. Taranath Mukerjee, (1882) I.L.R. 9 Cal. 295 (P.C.), followed.

A Subordinate Judge *qua* Election Commissioner is competent to complain of an offence committed in, or in relation to, a proceeding in his Court.

A District Judge is competent to prefer a complaint in respect of an offence committed in, or in relation to, a proceeding before a Subordinate Judge as Election Commissioner, after the Court of the Subordinate Judge is closed. The District Judge can do so either as successor to the Subordinate Judge in the office of Election Commissioner, because the office of Election Commissioner is continuous, although the incumbent changes, or under section 476-A, Criminal Procedure Code, as the Court to which the Subordinate Judge, as Election

* Criminal Appeal No. 441 of 1934.

Commissioner, is subordinate within the meaning of section 195 (3), Criminal Procedure Code.

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An appeal lies to the High Court, under sections 195 (3) and 476-B, Criminal Procedure Code, against the order of the District Judge refusing to prefer a complaint.

APPEAL against the order of the District Court of Bellary, dated 13th February 1934, and made in Original Petition No. 3 of 1934.

K. S. Jayarama Ayyar and *V. Sankaran* for appellant.

Nugent Grant and *K. S. Krishnaswami Ayyan-
gar* for *T. M. Venugopala Mudaliar* for respondent.

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

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—This is an appeal against an order of the District Judge of Bellary refusing to prefer a criminal complaint of forgery against the respondent, Mr. M. Gopalaswami Mudaliar. Up to 10 a.m. on the 1st November 1932, Mr. Gopalaswami Mudaliar was President of the District Board of Bellary. He was succeeded in that office by the petitioner before the District Judge, one Mr. Mahabaleswarappa. In an election petition, which Mr. M. Gopalaswami Mudaliar filed in the Court of the Election Commissioner to unseat Mr. Mahabaleswarappa, the document now in question was produced. We are not at the present stage concerned with the merits of the case, and it is sufficient to remark that the document, which embodies an order of appointment, is alleged to have been ante-dated to make it appear that the order originated while Mr. Gopalaswami Mudaliar was still President of the District Board.

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The election petition was heard and decided by Mr. P. Rajagopalan, at the time Subordinate Judge of Bellary, as Election Commissioner. Subsequently his Court was closed. The rules for the decision of disputes as to the validity of elections held under the Local Boards Act (hereinafter referred to as the Rules) provide that, if there be no Subordinate Judge, the District Judge shall be the Election Commissioner. Application was accordingly made to the District Judge,—whether as such or as successor to Mr. Rajagopalan in the office of Election Commissioner we will discuss presently—to prefer a complaint. The ground upon which the application was dismissed was that proceedings could only be instituted “on the complaint of the Election Commissioner’s Court”, and that “the new Commissioner does not exercise jurisdiction in continuation of his predecessor’s jurisdiction”. In other words, the learned District Judge found that he was without jurisdiction to make a complaint.

In considering the correctness of this finding the two questions we have to decide are, firstly, whether the District Judge, *qua* District Judge or *qua* Election Commissioner, is competent under section 476, Criminal Procedure Code, to make a complaint and, secondly, whether an appeal lies to this Court under section 476-B from his order. The former question requires in the first instance a decision on the point whether an Election Commissioner can complain of an offence “committed in or in relation to a proceeding in his Court”; because it necessarily follows that if he cannot complain neither can his successor (if he have one) nor the Court to which he is subordinate

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within the meaning of section 195, sub-section 3, Criminal Procedure Code (see section 476-A). Thus we have to determine whether the Subordinate Judge, as Election Commissioner, could have made a complaint.

Section 476 confers this power upon “any Civil, Revenue or Criminal Court”. Was the Subordinate Judge, *qua* Election Commissioner, such a Court? Was he, to begin with, a “Court” at all? We are invited to return an answer in the negative upon the language of rule 1 (3), which runs as follows:—

“An Election Commissioner exercising jurisdiction under these rules shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a Judge or other officer of Government as the case may be.”

Are the terms “*persona designata*” and “Court” mutually exclusive? There can be no doubt that if by “Court” we understand the normal Civil, Revenue or Criminal Court which forms a unit of the hierarchy of Courts constituted for the ordinary dispensation of justice, the question must receive an affirmative answer. The rule, it is acknowledged, owes its origin to a resolve to exclude the revisional jurisdiction of the High Court, exercisable under section 115 of the Civil Procedure Code or other similar provision. A Full Bench of this Court, in *Parthasaradhi Naidu v. Koteswara Rao*(1), had held that a District or Subordinate Judge, in deciding an election petition, acts not merely as a *persona designata* but as a Court in the exercise of its ordinary jurisdiction extended for that purpose; so that the High Court can exercise its powers of revision over such decisions. It is essential to

(1) (1923) I.L.R. 47 Mad. 369 (F.B.).

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grasp the scope of this ruling if we are to understand certain observations of SCHWABE C.J., which ran as follows (pages 373, 374) :—

“ A preliminary point is taken that this Court has no power of revision, under section 115 of the Code of Civil Procedure, over the decision of a District or Subordinate Judge when acting under that rule. That depends on whether the Judges therein referred to are acting as Courts, or acting merely as *personae designatae*, that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. There has been considerable conflict of opinion on this point since the coming into force of this Act, and I do not think that the decisions that have been given on the matter are of great assistance to us in arriving at the proper conclusion, and we have to look at the Act and the rules and the law as it stands. The law is, I think, quite definitely established by the decision in *National Telephone Company, Limited v. Postmaster-General*(1) in the words of Lord Parker at page 562, that ‘where by statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.’ If this matter had been referred to the District Court or Subordinate Judge’s Court in terms, in my judgment, no question could arise, because, following the words of the judgment just quoted, the matter would be determined by the Court as a Court, it being given jurisdiction for this particular purpose, and all the incidents, which include the incident of being liable to revision, must follow, although no appeal would lie in this particular case because an appeal has been expressly precluded, for by section 57 (2) of the Act, and by the rules, this ‘decision is to be final’. But as the word ‘Judge’ is used and not the word ‘Court’, one has to look carefully to see whether the word ‘Judge’ was used of him in his capacity as Judge or in his personal capacity, and I think great light is thrown upon this by two other rules. Rule 12 (2) of the rules for election refers to ‘an election or other competent Court’ and it is quite clear that it is there referring to a Court of a District Judge or

Subordinate Judge; and, by Rule 4 (3) of the rules for the conduct of inquiries, power is given to the District or Subordinate Judge in certain cases ‘to direct any Court subordinate to him to hold the inquiry’. I find it impossible to hold that a reference to a Judge with power to refer to a Court subordinate to him can mean anything else than reference to a Judge sitting as a Judge in the exercise of his ordinary jurisdiction extended for that purpose. For these reasons, in my judgment, the power of revision lies.”

The tests applied were no doubt conclusive for the determination of the matter then in issue. But, although the amendment of the rules has succeeded in excluding the power of revision, it is not equally clear that it has divested the Election Commissioner of his standing as a “Court”. As soon as we come to examine the exact meaning of the new rule perplexities arise. A *persona designata*, as the phrase implies, is a person pointed out by name or other personal description in contra-distinction to one whose identity is to be ascertained by the office which he holds. To qualify the phrase by stipulating that the Election Commissioner is to be the Subordinate Judge or, if there be no Subordinate Judge, the District Judge, is to deprive it of all real significance, and to grant to and withdraw from the Local Government, at one stroke, the power of designating the person who is to exercise these functions. We take the meaning to be simply this, that the selected Judge is to act not in virtue of his jurisdiction as such Judge but in virtue of a species of extra jurisdiction, specially conferred. The work has no connexion with his ordinary duties; but so far from being done by him as *persona designata* it attaches to him by virtue of his office, and he does it *ex officio*.

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This construction of the rule suffices to secure the object with which it was drafted and, as we shall show, averts certain consequences which we cannot but think would be unforeseen and undesigned. The object was to remove the Election Commissioner from among the ranks of those Courts which are subject to the revisional jurisdiction of the High Court. He has been placed in a position apart, outside "the Civil Courts of the Presidency of Madras" referred to in Clause 16 of the Letters Patent. This results from the manner of his appointment and the sources from which he derives his authority. Although the powers may be exercisable by one of the ordinary judicial officers, they are in all respects exercised independently of the ordinary judicial powers. In this sense it may be said that the Commissioner is *persona designata*, working in isolation from other judicial authorities.

But the possession of these characteristics, it will be seen, in no way necessarily decides what are the powers which the Commissioner is to exercise and what is the procedure he is to follow. It does not serve in any way to distinguish in kind his activities from those, say, of his *alter ego*, the Subordinate or District Judge. While therefore the circumstances of his appointment hold him aloof from the ordinary Civil Courts, it by no means follows that, if to be a "Court" means to satisfy certain general tests which may apply independently of specific statutory provisions, he is not a Court merely because the rule provides that he should exercise his functions as *persona designata*. We can discover no reason why a

persona designata should be incapacitated from functioning as a Court. And we think that the question whether he is not a "Court", as that word is used in sections 476 and 195 of the Criminal Procedure Code, is not to be decided otherwise than upon a consideration, firstly, of any definitions which that word, or words allied to it, has received in any Act regulating judicial procedure, and, secondly, upon the answer to be given to the question whether an Election Commissioner, in respect of the subject-matter of his inquiry, and of his general behaviour in relation to it, is distinguishable from a Court.

Definitions are of limited scope, being framed only for the purposes of the Act in which they occur, unless specially extended. Such are the definitions of "Court" in section 3 of the Evidence Act, and of "Court of Justice" in section 20 of the Indian Penal Code. By section 4 of the Criminal Procedure Code the latter phrase is to be understood in the same sense in that Code. The definition in the Evidence Act requires that the person constituting the "Court" shall be legally authorized to take evidence. The Penal Code defines a "Court of Justice" as a Judge acting judicially, and a "Judge" as every person "who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive". It is not disputed that an Election Commissioner trying an election petition would fall within these definitions. This brings us to the second and more general test, that of the nature of the subject-matter and of the

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Commissioner's action in relation to it. We take it to be clear that all matters which may form the subject of an election inquiry relate to rights of a civil nature. These rights have been created by statute, or statutory rule, and are enforceable under section 42 of the Specific Relief Act. Under section 9 of the Civil Procedure Code the ordinary Civil Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Such a bar is created by Rule 1, which provides that an election may only be called in question by an election petition. But for this, the ordinary Courts would have jurisdiction to try these disputes as ordinary suits. See *Sabhapat Singh v. Abdul Gaffur*(1), *Gur Charan Das v. Har Sarup*(2), *Mahamed Maijaddin Khan v. Janakiballav Dutt*(3) and *Sarvothama Rao v. Chairman, Municipal Council, Saidapet*(4). It would be somewhat difficult to accept the proposition that the mere transfer of the cause to a special tribunal altered its character. Next, does the manner in which it is dealt with accord with the procedure of a "Court"? It is laid down in Rule 6 that an election petition shall be inquired into "as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits." The device of assimilating the procedure to be followed in special inquiries to the ordinary civil procedure is usual—for other instances, see section 192 of the Madras Estates Land Act and section 17 of the Provincial Small Cause Courts Act. In all such

(1) (1896) I.L.R. 24 Calc. 107.

(3) (1932) 37 C.W.N. 122.

(2) (1912) I.L.R. 34 All. 391.

(4) (1923) 45 M.L.J. 23.

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cases the procedure is, we think it will be found, judicial in character, though the mere application of such procedure may not necessarily suffice to create a "Court". It is, for instance, an essential feature of the power of a Court that it should be able to give "a definitive judgment" upon the matter in hand, and this power is not conferred merely by extending the provisions of the Procedure Code. This was recognized in *Bilas Singh v. Emperor*(1) where the function of the Election Commissioners was found to be not to decide but to report. This was a fatal objection to holding that they constituted a "Civil Court", as that expression is used in section 476. In *Shell Co. of Australia v. Federal Commissioner of Taxation*(2) the Judicial Committee had to decide whether a "Board of Review", created by the Income-tax Assessment Act of the Commonwealth of Australia, was a Court, and it was found instructive to compare its powers with those of the tribunal which it had succeeded, the Board of Appeal. The orders of the Board of Appeal, it was pointed out, on questions of fact were expressly declared to be final and conclusive on all parties, whereas the orders of the Board of Review were not to be conclusive for any purpose whatsoever. We may also quote the following passage from the judgment:

"What is 'judicial power'? Their Lordships are of opinion that one of the best definitions is that given by GRIFFITH C.J. in *Huddart, Parker & Co. v. Moorehead*(3), where he says: 'I am of opinion that the words "judicial power" as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide

(1) (1925) I.L.R. 47 All. 934.

(2) [1931] A.C. 275.

(3) (1909) 8 C.L.R. 330, 357 (Aus.).

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After observing that there may be tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power, and enumerating a number of "negative propositions" on the subject, Their Lordships held that the Board of Review was an administrative tribunal, not a Court, emphasis being laid, as we have said, upon the test as to the conclusive character of the orders passed. Judged by this test, an Election Commissioner equally with a Subordinate or a District Judge appears to exercise the functions of a Court.

A case which deals with the subject on broad lines, and which has been approved in later cases, is *Raghoobuns Sahoy v. Kokil Singh* alias *Gopal Singh*(1). The question was whether a Collector, acting in appraisal proceedings under the Bengal Tenancy Act, was a Court. These general observations are made (see headnote) :

"The word 'Court', used in section 195 of the Criminal Procedure Code, without the previous sanction of which, offences therein referred to, committed before it, cannot be taken cognizance of, has a wider meaning than the words 'Court of Justice' as defined in section 20 of the Penal Code. It includes a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter, in order to enable it to arrive at a determination."

This was followed in *Nanda Lal Ganguli v. Khetra Mohan Ghose*(2), which decided that the President of the Tribunal constituted under the

Calcutta Improvement Act was a "Court" within the meaning of section 195, Criminal Procedure Code. Here, as elsewhere, the learned Judges were impressed by the mischief which would ensue if "any private person, who alleged that false evidence had been given before the Tribunal, might institute a prosecution without any control on his action by the Tribunal before whom the evidence was given". In Madras it has been held by a Full Bench, *Atchayya v. Gangayya*(1), that a Registrar is a Court for the purposes of section 195, Criminal Procedure Code. PARKER J. thought that the word "Court" in that section had the same meaning as that assigned to it in section 3 of the Evidence Act. SHEPHARD J. analysed the Registrar's procedure, and found that it was on the lines which are to be followed in the adjudication of an ordinary civil suit. In the Order of Reference, to which the third Judge, MUTTUSAMI AIYAR J. was a party, stress is laid upon this aspect of the matter and upon the need for the restrictive provisions of section 195. Another decision—that a Tahsildar, holding an inquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court—was upon the same lines; *Queen-Empress v. Munda Shetti*(2). It was followed in *In re Nataraja Iyer*(3), where it was held that a Divisional Officer hearing appeals under the Income-tax Act is a Court.

In England, too, the question what is a "Court" has been answered, not by reference to any formal definitions or hard and fast system of classification, but by analysing the functions and

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(1) (1890) I.L.R. 17 Calc. 872, 875.

(2) (1918) I.L.R. 45 Calc. 585.

(1) (1892) I.L.R. 15 Mad. 138 (F.B.). (2) (1900) I.L.R. 24 Mad. 121.
(3) (1912) I.L.R. 36 Mad. 72.

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procedure of the tribunal under scrutiny. The term is restricted to "such tribunals as exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to such jurisdiction" (Halsbury's Laws of England, 2nd Edn., Vol. VIII, paragraph 1166). Hence arbitrators do not constitute a Court. We have already referred to the Privy Council case, *Shell Co. of Australia v. Federal Commissioner of Taxation*(1). Another instructive discussion of the subject is to be found in *Copartnership Farms v. Harvey-Smith*(2), where SANKEY J. (as he then was) had to decide whether a military tribunal constituted under the Military Service Regulations Order, 1916, to deal with questions of exemption was a Court of Justice. The learned Judge applied the tests of (i) the constitution, (ii) the functions and (iii) the procedure of the tribunal. As to (i) the mere method of appointment was not a deciding factor. (ii) The functions were found to include the power to interfere with the status of a man, in other words, a civil right was involved. (iii) The proceedings were ordinarily to take place in public, and the fact that the chairman possessed a casting vote did not make the tribunal non-judicial. Certainly the tribunal then in question was of a far more equivocal nature than is an Election Commissioner.

To summarize the effect of these decisions, it would seem that we have to look not to the source of a tribunal's authority, or to any peculiarity in the method adopted of creating it (though it is undoubtedly a consideration that it derives its

(1) [1931] A.C. 275.

(2) [1918] 2 K.B. 405.

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powers mediately or immediately from the Crown) but to the general character of its powers and activities. If it has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a "Court". Not only do the powers and procedure of an Election Commissioner respond to these tests, but there is no other test applicable to an undoubted Court which they fail to satisfy. In all these respects the one Court is indistinguishable from the other.

It is then contended that although an Election Commissioner may be a "Court", still he is not a Civil, Revenue or Criminal Court, within the meaning of section 476. The corresponding interpretation clause to section 195 runs thus :

"In clauses (b) and (c) of sub-section (1) the term 'Court' includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877 [1908]."

It must be found, therefore, that an Election Commissioner is a "Civil Court" as here understood. We find some confusion created by the use of this term in two different senses. It is used in the narrower sense of a Court established under the Civil Courts Act and governed by the provisions of the Procedure Code. Section 3 of the Code makes the District Court subordinate to the High Court, and "every Civil Court of a grade inferior to that of a District Court . . . subordinate to the High Court and District Court". Such Civil Courts are amenable to the revisional powers of the High Court under section 115 of the

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Civil Procedure Code and to its powers of superintendence and control under Clause 16 of the Letters Patent and section 106 of the Government of India Act. We have already found that an Election Commissioner is no longer a "Civil Court" in this sense, and it seems to us that such decisions as *Lakshmanan Chetty v. Kannappar*(1) and *The Municipal Corporation of Rangoon v. M. A. Shakur*(2) do not intend to go further than this. If certain observations in the latter judgment are read in this context we do not think that the view we propose to take runs counter to them. The judgment of MUKERJI J. in *Masoon Ali Khan v. Ali Ahmad Khan*(3) appears to hold that a *persona designata* and a "Court" are two mutually exclusive positions. As we have already pointed out, this is true of a *persona designata* and a "Civil Court" in the narrower sense, and that was enough in that case to decide that the High Court could not exercise revisional jurisdiction.

If an Election Commissioner is a Court at all, it would seem indisputable that he must be a "Civil Court", because he settles disputes which, but for the existence of this special jurisdiction, would fall to be decided by the ordinary Civil Court. To adopt the language of the Privy Council in *Nilmoni Singh Deo v. Taranath Mukerjee*(4), his Court is a Civil Court "in the sense that it is deciding on purely civil questions between persons seeking their civil rights". He is only not a Civil Court as that expression is used to denote the Courts of ordinary civil jurisdiction.

(1) (1926) I.L.R. 50 Mad. 121.
(3) A.I.R. 1933 All. 764.

(2) (1925) I.L.R. 3 Rang. 560 (F.B.).
(4) (1882) I.L.R. 9 Calc. 295 (P.C.).

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There seems to be no doubt that the expression "Civil Court" is used in sections 476 and 195 of the Criminal Procedure Code not in this restricted sense, but as denoting a Court which is exercising powers, and dealing with matters of a civil nature. We have already extracted from *Raghoobuns Sahoy v. Kokil Singh alias Gopal Singh*(1) the opinion that, for the purposes of section 195, Criminal Procedure Code, the expression should be given the widest possible meaning.

In the Full Bench case, *Empress of India v. Sabsukh*(2), the question arose whether the Court of a Deputy Collector was a Civil Court for the purposes of the corresponding sections of the Code of 1872. This question would no longer arise under the present Code, because Revenue Courts are expressly included, but the decision contains some expressions of opinion as to the meaning of "Civil Court". Thus STUART C.J. says :

"By 'Civil Court' here I understand any Court established for the administration of civil justice as distinguishable from a Criminal Court. To hold otherwise would be to give to Revenue Courts and their suitors unlimited powers of prosecution in such cases, for which no intelligible reason has been attempted to be offered, or could possibly be given, the essence of such offences being the perjury or false swearing and falsehood common to all Courts which act upon written or spoken evidence, and it could not for a moment be contended that a Revenue Court is not such a Court."

According to PEARSON J., in these sections Civil Courts are broadly distinguished from Criminal Courts :

"There is no reason to suppose that by the terms 'any Civil Court' only the ordinary Civil Court is meant. The object in view is to prevent wanton, groundless or malicious prosecutions of the offences therein mentioned, by requiring

(1) (1890) I.L.R. 17 Calc. 872.

(2) (1879) I.L.R. 2 All. 533 (F.B.).

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the sanction of the Courts in or before or against which those offences may be committed to the prosecution of them. It is impossible to suppose that the restriction thereby imposed on such prosecutions is applicable only to such offences committed in or before or against the ordinary Civil Courts, and not equally to similar offences committed in or before or against the Revenue Courts which, not less than the ordinary Civil Courts, try and determine suits of a civil nature."

STRAIGHT J. considers that the expression "Civil or Criminal Courts" is intended to include "all tribunals concerned in the administration of civil or criminal Justice". A case directly in point, being that of the District Judge hearing an Election petition, is in *Nanchand Shivchand, In re*(1). The learned Judges, after putting aside as inapplicable a ruling that the District Judge would not be a Civil Court amenable to revisionary jurisdiction, adopt the test proposed in *Raghoobuns Sahoy v. Kokil Singh alias Gopal Singh*(2), adding:

"We think that the same reasons which necessitate the precautions imposed on a prosecution in respect of offences committed in regard to an ordinary Civil or Criminal Court equally require that those precautions be observed where the alleged offences have occurred in connexion with proceedings held by the District Judge acting under the Municipal Act."

There is thus clear authority for giving a wide construction to the expression "Civil Court" in the sections of the Criminal Procedure Code now under reference—such a construction as found favour with the Privy Council in *Nilmoni Singh Deo v. Taranath Mukerjee*(3). All agree that an Election Commissioner ought to be able to control the institution of criminal proceedings in respect of offences committed in his Court and this cannot be the less necessary for the reason that he may

(1) (1912) I.L.R. 37 Bom. 365.

(2) (1890) I.L.R. 17 Calc. 872.

(3) (1882) I.L.R. 9 Calc. 295 (P.C.).

be styled *persona designata*. He should also receive the protection afforded by sections 480 to 482 of the Code. We consider that he is a "Civil Court" for these purposes.

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Two minor points remain. The learned District Judge was unable to regard himself as exercising jurisdiction in continuation of that of his predecessor, before whom the alleged offence was committed. This position has not been taken up before us, and seems untenable in face of the terms of section 14 of the Madras General Clauses Act. The office of Election Commissioner was continuous, although the incumbent changed. Apart from this, under section 476-A the power which the Subordinate Judge, as Election Commissioner, could have exercised was exercisable by the Court to which he was subordinate within the meaning of section 195, sub-section (3), i.e., by the District Judge as the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction the Election Court was situate. Accordingly it was open to the District Judge, in that capacity and not as Election Commissioner, to file a complaint. This consideration settles the other question, that of the appealability of his order; for under sections 195 (3) and 476-B it will be appealable to the Court to which appeals ordinarily lie from the Court of the District Judge, i.e., the High Court.

We conclude accordingly that the District Judge had jurisdiction to make a complaint under section 476, Criminal Procedure Code, in this case. We must therefore set aside his order dismissing the petition and direct him to dispose of it according to law.

K.W.R.

APPELLATE CIVIL—FULL BENCH.

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

1935,
April 12.

L. A. KRISHNA AYYAR (FIRST RESPONDENT AND PETITIONER),
APPELLANT,

v.

ARUNACHALAM CHETTIAR (PETITIONER AND THIRD
RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 89 and 90—Conditional deposit under r. 89—If valid—Proper deposit made under r. 89—Pending application under r. 90—Competency to proceed with the trial of—Effect of order on pending application under r. 90—Entertainment of application under r. 90 after proper deposit under r. 89—Competency of.

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under Order XXI, rule 89, of the Code of Civil Procedure, and the Court cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application the Court has no power to entertain or proceed with the trial of an application under Order XXI, rule 90, of the Code but has got to set aside the sale under Order XXI, rule 89, and the fact that an order was in fact made under Order XXI, rule 90, prior to the order under Order XXI, rule 89, would not make the earlier order a valid one.

Kummakutty v. Neelakandan Nambudri, (1930) I.L.R. 58 Mad. 943, and *Tuhi Ram v. Izzat Ali*, (1908) I.L.R. 30 All. 192, followed.

Kotla Satyam v. Thammana Perraju, (1931) 34 L.W. 399, distinguished.

APPEALS converted into revision petitions to revise the orders of the Court of the Subordinate

* Appeal Against Orders Nos. 303 and 304 of 1933 converted into Civil Revision Petitions Nos. 535 and 536 of 1935 respectively.

Judge of Coimbatore, dated 9th December 1932 and made in Execution Application Nos. 196 of 1931 and 15 of 1931 respectively in Original Suit No. 117 of 1918.

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B. Sitarama Rao (with him *S. V. Venugopalachari*) for respondent.—In this appeal there is no adverse interest between the judgment-debtor and decree-holder as contemplated by *Jainulabdin Sahib v. Krishna Chettiar*(1) so as to give a right of appeal. The judgment-debtor is interested in upholding the transaction since his decree would be *pro tanto* discharged and the decree-holder is also interested since he gets paid to that extent. No revision would lie since there is no question of want of jurisdiction.

[BEASLEY C.J.—If the appellant's contention is correct, viz., that the payment was made for a specific purpose and the Court applied it for a different purpose, then the order would be one passed without jurisdiction.]

T. M. Krishnaswami Ayyar (with him *P. R. Ramakrishna Ayyar*) for appellant.—The cases dealing with the right of appeal are collected under the heading "appeal" in the commentary to section 47 in Mulla's Civil Procedure Code.

The Full Bench, agreeing with the submission of Counsel for respondent that there was no right of appeal, converted the appeals into civil revision petitions.

The facts and the other questions of law arising in the appeal are fully dealt with in the judgment of his Lordship the CHIEF JUSTICE.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The facts in these appeals are BEASLEY C.J. that the appellant, L. A. Krishna Ayyar, obtained a decree against one S. R. Subramania Ayyar and his mother on 20th January 1919, the suit being

(1) (1921) 41 M.L.J. 120.

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upon two promissory notes. Previously he had got an attachment of S. R. Subramania Ayyar's immovable property on 18th October 1918. Whilst this attachment was in force, Subramania Ayyar executed a mortgage of his immovable properties on 7th November 1918 for Rs. 50,000 directing the mortgagee to pay Rs. 4,000 to the plaintiff-appellant and this sum was allowed as a credit when the decree in the suit was passed. On the date of the decree the decree-holder, the appellant here, applied for the arrest of Subramania Ayyar, but that petition was dismissed. He then filed a second execution petition for the sale of the properties attached before judgment. That petition was also dismissed, this time for the decree-holder's default, on 19th April 1922. He filed a third execution petition (Execution Petition No. 35 of 1924) for the sale of the properties. No fresh attachment was effected. S. R. Subramania Ayyar filed an objection petition saying that execution should not be allowed without fresh attachment. His objection was disallowed and the sale was held on 9th February 1935 and the appellant, the decree-holder, became the purchaser of the property in Court auction. S. R. Subramania Ayyar appealed to the High Court against the order disallowing his objection to the execution. He also applied in Execution Application No. 115 of 1925 under Order XXI, rule 90, Civil Procedure Code, to set aside the sale. A few days later, namely, on 4th March 1925, the assignee from the mortgagee, Arunachalam Chettiar, applied by Execution Application No. 181 of 1925 to set aside the sale under Order XXI, rule 89, Civil Procedure

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Code, depositing Rs. 3,961-3-0 in Court. Meanwhile the High Court held that the attachment before judgment fell with the dismissal of the decree-holder's petition for default on 19th April 1922 and that the property sold was not under attachment, but dismissed the appeal leaving the matter to await the decision in Execution Application No. 115 of 1925. Then the assignee-mortgagee, Arunachalam Chettiar, filed Original Suit No. 22 of 1924 in the Subordinate Judge's Court of Coimbatore on the assigned mortgage and got a decree on 28th August 1925; and, while the two petitions, already referred to, to set aside the sale were pending, Arunachalam Chettiar filed Original Suit No. 2134 of 1925 in the District Munsif's Court, Coimbatore, for a declaration that he had priority over the rights acquired by the auction-purchaser and for stopping the execution proceedings and preventing the decree-holder from drawing the money, and on 27th June 1927 got a decree only in respect of the priority claimed, the claim for the injunction and other consequential prayers being disallowed. There was an appeal against that decree by the appellant here but that was dismissed. Meanwhile, on 19th July 1926, Execution Application No. 115 of 1925, the application under Order XXI, rule 90, Civil Procedure Code, was allowed and the sale was set aside; and on the same day Execution Application No. 181 of 1925, the application under Order XXI, rule 89, Civil Procedure Code, was ordered, the following order being made:

"This third party is entitled to deposit as he is interested in the property sold. Correct amount has been deposited in time. Sale set aside."

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As regards the third execution petition, Execution Petition No. 35 of 1924, the following order was made :

" Sale set aside as per Execution Application No. 115 of 1925 and Execution Application No. 181 of 1925. Sale held without proper proclamation is not valid. Petition dismissed. See separate order."

The decree-holder, the appellant, eventually filed Execution Application No. 15 of 1931 for the issue of a cheque for Rs. 3,961-3-0, the amount deposited in Court under Order XXI, rule 89, Civil Procedure Code ; but Arunachalam Chettiar, the holder of the decree in the mortgage suit and the depositor of the amount under Order XXI, rule 89, Civil Procedure Code, filed a similar petition for the payment back of the amount deposited by him alleging that the sale was set aside under Order XXI, rule 90, Civil Procedure Code, and that he was therefore entitled to get back the amount deposited by him. The learned Principal Subordinate Judge held that the appellant, the decree-holder-auction-purchaser, had no right to the money and that Arunachalam Chettiar had the right to withdraw the money deposited by him. Hence these appeals.

The case put forward in the lower Court and here on behalf of Arunachalam Chettiar, the respondent, was that he deposited the money in Court subject to a condition or under protest and that it was not meant to be there to be taken by the decree-holder unconditionally. In his affidavit in support of the petition he stated that he had got an interest in respect of the property sold in auction but that, as there had been no fresh attachment after the dismissal of the appellant's

execution petition and the auction sale was without any fresh attachment, it was not legally valid. He further stated :

" The said legal objection is always valid in my case and I can act upon it. Yet I have paid the amount now in connection with the said auction sale."

The learned Subordinate Judge has dismissed the appellant's execution petition because, when the respondent's petition under Order XXI, rule 89, Civil Procedure Code, was filed, the first judgment-debtor had already filed a petition under Order XXI, rule 90, Civil Procedure Code, and he adds :

" If that petition was ultimately allowed, there will be no scope for a petition or order under Order XXI, rule 89. That petition was ultimately allowed and the sale was set aside under Order XXI, rule 90. It appears that the orders on both the petitions for setting aside the sale were passed on the same day, i.e., 19th July 1926, and both the petitions were granted but it seems to me that, after the petition under Order XXI, rule 90, was allowed, there was no sale which should be set aside by the depositing of money and that the order in Execution Application No. 181 of 1925 was a surplusage and was unnecessary. Hence, it may be taken that the matters will stand as if there was no petition at all under Order XXI, rule 89, filed by Arunachalam Chettiar and no deposit made by him under that section."

He disallows the petition also upon the ground that the deposit made by Arunachalam Chettiar was not a voluntary deposit but an involuntary one under protest and says that there were indications that Arunachalam Chettiar paid the money not with a view to its being drawn by the decree-holder, and so the money must be considered to have been paid only under protest and that

" it cannot be said that there was any real setting aside of the sale under Order XXI, rule 89, Civil Procedure Code."

The first question to be considered is whether the lower Court was right in thinking (i) that the

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money was paid in under protest by Arunachalam Chettiar and (ii) that he was entitled on that account thereafter to get a refund of the money so deposited. With regard to (i) I do not understand Arunachalam Chettiar's affidavit to amount to more than a reservation of his rights to impeach the validity of the sale elsewhere, but I am prepared to deal with the case on the assumption that there was a deposit under protest. Under Order XXI, rule 89, the applicant may apply to have the sale set aside on his depositing in Court (a) for payment to the purchaser a sum equal to five per cent of the purchase-money and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. There is nothing in that rule which appears to permit any conditional deposit, and it is very fairly conceded by Mr. Sitarama Rao that the deposit must be unconditional. This question has been very clearly and fully dealt with in a very interesting judgment of VENKATASUBBA RAO J. in *Kummakutty v. Neelakandan Nambudri*(1). The head-note is as follows :

"Where a person, other than the judgment-debtor, entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside a sale in execution of a decree, applies and pays the amount specified in the rule, the Court has no jurisdiction to direct the decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in a suit instituted by him to establish his right to the property sold in execution; and the security bond is not legally enforceable in a suit by the applicant against the executant; *Narayan v. Amgauda*(2) followed."

(1) (1930) I.L.R. 53 Mad. 943.

(2) (1920) I.L.R. 45 Bom. 1094.

On page 947 VENKATASUBBA RAO J. says :

"The first question that arises is, was it competent to the Court to have taken the bond in question? To answer this question, one must have regard to the object and scope of Order XXI, rule 89. The Code, in various sections, lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly, there are sections under which a person claiming adversely to a judgment-debtor may object to attachment and sale. But Order XXI, rule 89, enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause (2) of rule 89 enacts :—'Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.' This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally."

He further points out that, on such an application and on the deposit required by that rule being made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. That is by reason of Order XXI, rule 92. He is also of the opinion that, supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. Reference is made in that judgment to *Narayan v. Amgauda*(1). There it was held that a person who applies and makes

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the deposit under Order XXI, rule 89, cannot obtain a refund of the amount deposited on the plea of its having been involuntarily paid. The view taken there was that the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit would lie for its recovery. On page 1102, MACLEOD C.J. says :

"The auction-purchaser is entitled to the benefit of his purchase whatever it may amount to, and it is only under certain conditions that he can be deprived of that benefit, namely, that he gets five per cent for the loss of his bargain, and the decree-holder gets the benefit of his execution sale. If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so."

He also says :

"It seems to me that, when it is expressly provided that the money should be paid for any particular purpose, i.e., under Order XXI, rule 89, such money could not be treated as assets held by a Court."

And SHAH J. says that, upon such an application and the payment of the deposit of the amount required by the rule, it is obligatory upon the Court to set aside the sale as provided by rule 92 (2). *Raghu Ram Pandey v. Deokali Pande*(1) decides that, where a property has been sold in execution of a money decree and a payment is made under Order XXI, rule 89, Civil Procedure Code, the person making such payment must accept the validity of the sale and cannot, therefore, maintain a suit for the setting aside of the sale and a refund of the money deposited by him. On page 33, KULWANT SAHAY J. says :

"He cannot make a payment under Order XXI, rule 89, and at the same time challenge the validity of the sale. A

payment under rule 89 must be an unconditional payment with the object of the money being paid to the decree-holder. Once a payment is made under Order XXI, rule 89, it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-holder. The judgment-debtor or the person interested is under no compulsion to make the deposit under Order XXI, rule 89."

It is contended on the other side that *Kotla Satyam v. Thammana Perraju*(1), a decision of REILLY and ANANTAKRISHNA AYYAR JJ., is against the appellant. There, a certain house was attached in execution as that of the judgment-debtor, and a third party who had purchased it from the judgment-debtor in a private sale prior to attachment brought, on his claim being disallowed, a claim suit, and, on the property having been sold during the pendency of that suit, he had the sale set aside by depositing under protest the amount required by Order XXI, rule 89, Civil Procedure Code, and subsequently succeeded in his claim suit and brought a suit against the decree-holder and the auction-purchaser, who was merely the decree-holder's benamidar, for recovery of the amount which was paid by him into Court and withdrawn by them. It was held that he was entitled to get back the sale-price as an involuntary payment made under coercion within the meaning of section 72 of the Contract Act. The plaintiff's application there stated that

"money has been paid into Court under protest and the first defendant-counter-petitioner may take money for the present",

and the sale was accordingly stopped and the decree-holder drew out the money and in doing

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so must be assumed to have done so on those terms. ANANTAKRISHNA AYYAR J. says on page 407 :

"As I have already said, the petition filed by the present plaintiff when depositing the amount stated in so many words that it was deposited under protest and it also gave clear information to the present first defendant of the steps that the person depositing the money was proposing to take in respect of the matter."

A number of authorities are discussed in the judgments of REILLY and ANANTAKRISHNA AYYAR JJ., most of them relating to payments made to prevent sales or attachments. The Bench decided the case upon the view that, although the deposit was made and the application purported to be filed under Order XXI, rule 89, Civil Procedure Code, it was not really an application under that order and rule, and that the decree-holder chose to accept the money on the terms upon which it was deposited and did not choose to object to the application on the ground that it contained conditions which were not agreeable to him or open to the petitioner. They therefore held that it was not a voluntary payment and could be recovered. The deposit in that case was treated as being entirely outside Order XXI, rule 89, and the Bench under those circumstances did not consider whether a deposit made under Order XXI, rule 89, under protest could be recovered by the depositor. In the present case the application certainly purported to be one under Order XXI, rule 89, and the order made upon it by the Court was clearly an order made on such an application. It reads as follows :

"This third party is entitled to deposit as he is interested in the property sold. Correct amount has been deposited in time. Sale set aside."

That is shown by the reference to the correct amount as having been deposited and its having been deposited in time, namely, thirty days under article 166 of the Limitation Act which applies to such an application, and the statement that the petitioner is interested in the property sold. There is nothing in the order which indicates that the Court accepted the deposit as a conditional one even if the Court had power to do so. In my opinion, the application must clearly be taken as one under Order XXI, rule 89, and that distinguishes the present case from *Kolla Satyam v. Thammana Perraju*(1). *Shankerrao Keshavrao v. Vadhilal Mulchand*(2) is another case of a deposit made under Order XXI, rule 89. There, a suit was filed for the amount which the plaintiffs had deposited in order to set aside the sale. The payment by the plaintiffs was a payment made to save the property and get it back from the mortgagee-decree-holder who had wrongly allowed it to be sold in execution of the mortgage decree; but, following *Narayan v. Amgauda*(3), it was held that the amount paid must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and that therefore no suit would lie for its recovery and that a person cannot be allowed to go back on his own act and claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside. *Kanhaya Lal v. National Bank of India, Ltd.*(4), a decision of the Privy Council, is of no assistance to the respondent. In that case, the plaintiff was the proprietor of the Delhi

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(1) (1931) 34 L.W. 399.

(2) (1932) I.L.R. 57 Bom. 601.

(3) (1920) I.L.R. 45 Bom. 1094.

(4) (1913) I.L.R. 40 Calc. 598 (P.C.).

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Cotton Mills against which the defendant bank had an unsatisfied decree. The latter applied for attachment of the property and premises of the Delhi Cotton Mills Company, attached the property, knowing it to belong to the plaintiff, and dispossessed him. The plaintiff, in order to get rid of the attachment, was compelled to pay the balance due to the defendant under the decree against the Delhi Cotton Mills Company and did so under protest. It was held that the plaintiff was entitled to recover the money so paid as being an involuntary payment produced by coercion, namely, the wrongful interference of the defendants with his full and free enjoyment of his own property. It was held that the plaintiff was clearly entitled to rid himself of that unlawful interference with the lawful enjoyment of his property by any lawful means without thereby affecting his right to hold the defendants liable for that which they had thus caused him to do, although the paying under protest was not the only course open to him. At page 609 it is stated:

"He might have taken legal proceedings, by which sooner or later he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong."

That case, therefore, was a case of an owner of property in possession of it being dispossessed and making an involuntary payment to prevent dispossession. In *Valpy v. Manley*(1) a judgment had been obtained against a firm which subsequently became bankrupt, and a writ of *fi fa* issued upon that judgment. A warrant was

granted and the Sheriff's officer proceeded to the premises of the judgment-debtors. They, however, had previously on the same day executed a deed conveying all their property and effects to trustees in trust for the benefit of their creditors. The Sheriff's officer, therefore, did not make any actual seizure but said that he considered himself in possession. Later on, a fiat in bankruptcy issued against the judgment-debtors and a messenger entered and remained in possession. The next day an inventory of the property was made under the Sheriff's warrant and a cart-shed was broken open and a waggon taken out. The assignees of the bankrupts on learning that the Sheriff intended to sell paid through a clerk the amount claimed on the writ under protest. They were held entitled to recover the money so paid in an action for money had and received to their use on the ground that the payment was not voluntary but was made for the purpose of averting a threatened evil and the money was paid not in satisfaction of the writ but to induce the Sheriff's officer to refrain from putting into execution his threat to sell the property. That case also, in my opinion, is distinguishable by reason of the order in question here. The deposit is made on the footing that there has been a valid sale and is made in satisfaction of the decree. In my view, the reported cases where claimants made payments to avert sales of property and the payments were therefore payments made under coercion are of no real assistance in this case. The judgment-debtor or a person interested in the property cannot attach any condition to his deposit under Order XXI, rule 89, and the Court

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(1) (1845) 1 C.B. 594; 135 E.R. 673.

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cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application, the Court has no option but at once to make the order setting aside the sale; and the fact that another application has been made by the judgment-debtor under rule 90 and an order setting aside the sale was made thereon does not make any difference, though the contention put before us was that it did because we were invited to assume that the order made on the application under rule 90 was made before the order under rule 89; but there is nothing to show which was prior in time, and certainly no inference that the former was can be drawn. On the contrary, in *Tuhi Ram v. Izzat Ali*(1), in the opinion of STANLEY C.J. and BURKITT J., as soon as the application was made and the money deposited in Court under the rule (the old rule which is similar to the present), it was the duty of the Collector to pass an order setting aside the sale, and he ought not, after the deposit was made, to have entertained the application put in to set aside the sale on the ground of material irregularity. I agree with that opinion, which I think is obviously right, because rule 89 involves no enquiry at all but rule 90 does, and that enquiry may result in the dismissal of the application, whereas the former rule gives no option to the Court but to set aside the sale. The respondent allowed the order to be made. He did not ask for his deposit back and it was an advantage to him to retain the order on his application because, in the event of an appeal against the order made on

(1) (1908) I.L.R. 30 All. 192.

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the application under rule 90 being successful, he would still retain the benefit of his order against which there could be no appeal. In my view, the lower Court's order was, therefore, wrong.

But it was contended that no appeal lies against the lower Court's order as it is not an appealable one as it does not come within the terms of section 47 of the Code of Civil Procedure. In my view, that contention is sound, but the appellant asks to be allowed to convert the appeals into civil revision petitions and that, in my view, he ought to be allowed to do, because, in view of my opinion on the main question, the lower Court had no jurisdiction to entertain the respondent's application for the payment out of the money to him, in which view a civil revision petition would clearly lie. The appeals will accordingly be converted into civil revision petitions which will be allowed; and on them the order will be made setting aside the order of the lower Court and giving a direction to the lower Court to order repayment of the money in question into Court, the respondent having taken it out, and to pay it out to the appellant. As this is a case of restitution the amount will be repaid with interest at six per cent. The appellant will get his costs in the lower Court in both the appeals and his costs here in Civil Miscellaneous Appeal No. 303 of 1933 and there will be no order as to costs here in Civil Miscellaneous Appeal No. 304 of 1933. The appellant will pay court-fees in respect of the civil revision petitions.

CORNISH J.—I agree.

PANDRANG ROW J.—I also agree.

G.R.

APPELLATE CIVIL—FULL BENCH.

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

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APPELLANT,

v.

SRI THIRUCHITRAMBALA VINAYAKAR OF THE TEMPLE
AT MELMANDAI BY GANAPATHY ODUVAR, MINOR BY GUARDIAN,
VELLIAMMAI (PLAINTIFF-APPELLANT), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), sec. 92—Suit under—
Test—Whether it depends upon the character in which the
plaintiff sues or nature of the reliefs sought—Public chari-
table or religious trust—Breach of—Suit in respect of—
Reliefs prayed for, specified in sub-sec. 1 of sec. 92—
Sanction of Advocate-General—If necessary.*

The question whether a suit falls within section 92 of the Code of Civil Procedure depends, not upon the character in which the plaintiff sues, but upon the nature of the reliefs sought. If the suit is in respect of an alleged breach of a public charitable or religious trust and for any of the reliefs specified in sub-section 1 of section 92, the Advocate-General's sanction is necessary to its institution.

The opinion of SUNDARAM CHETTI J. in *Krishna Aiyangar v. Alwarappa Aiyangar*, (1932) 63 M.L.J. 703, approved. *Appanna Poricha v. Narasinga Poricha*, (1921) I.L.R. 45 Mad. 113 (F.B.), distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Tuticorin, dated 30th September 1931, and made in Appeal Suit No. 78 of 1930 (Original Suit No. 65 of 1929, District Munsif's Court, Kovilpatti).

K. R. Rama Aiyar for appellant.—The suit is stated to be filed by the idol. It alleges breaches of a public religious or charitable trust and prays for reliefs mentioned in section 92

* Appeal Against Order No. 437 of 1931.

of the Code of Civil Procedure. The suit is really one by the general trustee against a special trustee. Such a suit could not be brought without the sanction of the Advocate-General; see *Saminatha Pillai v. Sundaresa Pillai*(1). This decision is followed by the Full Bench in *Appanna Poricha v. Narasinga Poricha*(2). In *Abdur Rahim v. Mahomed Barkat Ali*(3) it is laid down that the applicability of section 92 is not determined by the character of the parties who bring the suit but by the nature of the reliefs sought. This is followed by SUNDARAM CHETTI J. in *Krishna Aiyangar v. Alwarappa Aiyangar*(4), and the tests for the applicability of section 92 are therein laid down.

K. V. Sesha Ayyangar for respondent.—It has been held that an idol is a juristic person; see *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*(5). The pujari is only its next friend. The suit is in form and substance one by the idol as beneficiary. To such a suit section 92 does not apply; see *Madhavrao v. Shri Omkareshwar Ghat*(6). The decision in *Saminatha Pillai v. Sundaresa Pillai*(1) does not apply to the facts of the present case and it must be deemed to be overruled by *Appanna Poricha v. Narasinga Poricha*(2). The decision in *Nellaiyappa Pillai v. Thangama Nachiyar*(7) is still good law and the decision in *Krishna Aiyangar v. Alwarappa Aiyangar*(4) requires reconsideration and is opposed to *Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle*(8).

K. R. Rama Aiyar replied.

Cur. adv. vult.

JUDGMENT.

CORNISH J.—The plaintiff in the suit from which this appeal arises is an idol represented by its manager or kariasthar.

The defendant, the widow of the late zamindar of Melmandai, was sued as trustee of a fund established for meeting the expenses of public worship and other duties, including repairs, connected with the temple in which the idol is installed.

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| (1) (1920) 14 L.W. 238 (F.B.). | (2) (1921) I.L.R. 45 Mad. 113 (F.B.). |
| (3) (1927) I.L.R. 55 Calc. 519 (P.C.). | (4) (1932) 63 M.L.J. 703. |
| (5) (1925) I.L.R. 52 Calc. 809 (P.C.). | (6) (1928) 31 Bom. L.R. 192. |
| (7) (1897) I.L.R. 21 Mad. 405. | (8) (1931) I.L.R. 54 Mad. 1011. |

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Admittedly this is a public charitable or religious trust. The short question is whether the suit is one to which section 92 of the Code of Civil Procedure is applicable. The District Munsif held that it was, and dismissed the suit as it had not been instituted with the sanction of the Advocate-General. The Subordinate Judge held otherwise and restored the suit. The defendant has appealed from this decision.

The plaintiff alleges that a fund called the "pilliarvari", representing a tax on the villagers in the zamin, has been collected by the zamindars for the abovementioned purposes of the temple, under an arrangement that the zamindar on request by the kariasthar should pay to the kariasthar the money so collected. And it is further stated that the defendant and previous zamindars have been paying the plaintiff's kariasthar and his predecessors at the rate of Rs. 35-2-8 per annum. The cause of action is that there is an accumulated balance of the collections in the hands of the defendant which the defendant has refused to pay to the plaintiff. This appears from paragraph 10 of the plaint which alleges :

"Though plaintiff's kariasthar had been asking the defendant several times that an account should be taken of the plaintiff's moneys in the defendant's hands and the same should be handed over to him since the plaintiff's temple for the past several years has deteriorated and is in a very dangerous state and that more amount should be given to him and that the amount collected every year as 'pilliarvari' should be handed over to him since the amount paid by the defendant was insufficient for conducting the plaintiff's temple affairs owing to difference in the prices of the past and of the present, the defendant has been putting off with vain words."

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This paragraph imputes to the defendant a breach of trust. And among the reliefs for which the plaint prays is that an account be taken and that the defendant be directed to pay to the plaintiff such sum as may thereby be found due. From the frame of the plaint, therefore, it appears that this is a suit founded upon an alleged breach of trust in respect of a public religious trust, claiming one of the reliefs specified in section 92 (1). If such be the nature of the suit it can only be instituted with the sanction of the Advocate-General. Section 92 is clear in its terms, although the many cases cited in the argument show that the section is not always easy of application.

It has been contended before us that the suit is in reality a dispute between two trustees ; and the Full Bench decision in *Appanna Poricha v. Narasinga Poricha*(1) has been relied on. But that was quite a different case. The plaintiff there was suing for a declaration that he was entitled to joint possession of the suit property as a co-trustee and for an account from the defendants. The Full Bench ruled that the suit did not come within the scope of section 92. KUMARASWAMI SASTRI J. approved of the opinion expressed by WALLIS C.J. in an unreported case that the section governed suits for the vindication of the rights of the public in public charitable trusts and had no application to suits for the vindication of the rights of management by hereditary trustees or to disputes *inter se* as to their terms of management. And the learned Judge himself emphasised this view by pointing out that the public had no interest in the assertion of personal claims by one

(1) (1921) I.L.R. 45 Mad. 113 (F.B.).

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trustee against another. Indeed, section 92 reflects the principle upon which the Attorney-General's right in England to interpose on behalf of charitable trusts is founded. It is that the Crown as *parens patriae* superintends the administration of public charities, and for that purpose acts by the Attorney-General; see Tudor on Charities, 5th edition, page 187.

Mr. Sesha Ayyangar has also sought assistance for his contention from the order of reference made by WALLIS C.J. in *Saminatha Pillai v. Sundaresa Pillai*(1). That was a suit in which a temple trustee sued a kattalaidar to enforce the performance of his duties under a trust. The learned CHIEF JUSTICE expressed the opinion that section 92 was applicable to the suit, and his opinion was upheld by a Full Bench. But he suggested that the section would not deprive the plaintiff of any separate cause of action he might have. That suggestion conforms with what was said by KUMARASWAMI SASTRI J. in the later Full Bench case to which reference has already been made. It does not assist the plaintiff in the present case, who has founded his suit upon an alleged breach of trust by the trustee of a public religious trust and seeks as a consequent relief the taking of an account. This brings it within the scope of section 92 as interpreted by their Lordships of the Privy Council in *Abdur Rahim v. Mahomed Barkat Ali*(2). Their Lordships said:—

“It is urged broadly on behalf of the respondents that all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92, Code of Civil Procedure.

(1) (1920) 14 L.W. 238 (F.B.).

(2) (1927) I.L.R. 55 Calc. 519 (P.C.).

The short answer to that argument is that the Legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in sub-section 1 shall be instituted in conformity with the provisions of section 92, sub-section 1.”

And their Lordships laid it down that the effect of the amendment introduced into the section by sub-section 2 was that a suit, founded upon a breach of such public trust, which prayed for any of the reliefs mentioned in sub-section 1, could only be instituted in conformity with its provisions.

The question, therefore, whether a suit falls within section 92 depends, not upon the character in which the plaintiff sues, but upon the nature of the reliefs sought. This view is supported by the opinion of SUNDARAM CHETTI J. in *Krishna Aiyangar v. Alwarappa Aiyangar*(1). If the suit is in respect of an alleged breach of a public charitable or religious trust and for any of the reliefs specified in sub-section 1 of section 92, the Advocate-General's sanction is necessary to its institution.

Applying this test to the case before us there is no doubt that it could not be instituted without that sanction, and that it was on that account properly dismissed by the District Munsif. The appeal is allowed with costs here and in the lower Court. The order of the Subordinate Judge that plaintiff should get a refund of court-fee on 'his memorandum of appeal is set aside.

BEASLEY C.J.—I agree.

PANDRANG ROW J.—I agree.

G.R.

(1) (1932) 63 M.L.J. 703.

JANAKI BAI
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THIRU-
CHITRAMBALA
VINAYAKAR.
—
CORNISH J.

APPELLATE CIVIL—FULL BENCH.

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

1935,
March 29.

ADAPA PAPAMMA AND ANOTHER (PLAINTIFFS ONE,
AND THREE—DECREE-HOLDERS), APPELLANTS,

v.

DARBHA VENKAYYA AND TEN OTHERS (DEFENDANTS ONE,
THREE AND FIVE TO THIRTEEN—JUDGMENT-DEBTORS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92—Decree—If comes within the purview of—Pre-decree oral agreement between plaintiff and defendant—Defendant agreeing not to contest suit—Plaintiff agreeing not to execute decree that might be passed against him—Executing Court—If such agreement could be pleaded in bar of execution of the decree in.

In the executing Court a judgment-debtor resisted execution of a decree against him on the allegation that there was an oral agreement between him and the decree-holders (plaintiffs) therein, subsequent to the filing of the suit and before the passing of the decree, to the effect that they would not execute any decree that might be passed against him in the suit provided he did not contest the suit. On behalf of the decree-holders it was contended, *inter alia*, that evidence of the oral agreement was excluded by section 92 of the Indian Evidence Act and that the oral agreement could not be pleaded in bar of execution in the Court executing the decree.

Held that (i) a decree does not come within the purview of section 92 of the Indian Evidence Act,

(ii) an agreement not to execute a decree is not one which attempts to vary the terms of the decree, and

(iii) the agreement pleaded was one which related to execution alone and did not attack the decree itself and that the matter could be enquired into by the Court executing the decree.

* Appeal Against Order No. 185 of 1931.

Chidambaram Chettiar v. Krishna Vathiyar, (1916) I.L.R. 40 Mad. 233 (F.B.), and *Butchiah Chetti v. Tayar Rao Naidu*, (1930) I.L.R. 54 Mad. 184, considered.

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APPEAL against the order of the Court of the Additional Subordinate Judge of Cocanada, dated 8th October 1930, and passed in Execution Petition No. 91 of 1928 in Original Suit No. 61 of 1920.

The facts and the law arising in the appeal are fully dealt with in the judgment of PANDRANG ROW J.

In addition to the cases mentioned in the judgment, *G. Lakshmanan* with *G. Chandrasekhara Sastri* for appellants cited the following cases:—

Arumugam Pillai v. Krishnasami Naidu, (1920) I.L.R. 43 Mad. 725, *Mulla Ramzan v. Maung Po Kaing*, (1926) I.L.R. 4 Rang. 118 and *M. E. Moolla and Moolla & Sons, Ltd. v. Chartered Bank of India, Australia and China*, (1927) I.L.R. 5 Rang. 685, and

C. Rama Rao for *P. Somasundaram* for first respondent cited the following cases:—

Rama Ayyan v. Sreenivasa Pattar, (1895) I.L.R. 19 Mad. 230, *Krishnamachariar v. Rukmani Ammal*, (1904) 15 M.L.J. 370 and *Subramania Pillai v. Kumaravelu Ambalam*, (1915) I.L.R. 39 Mad. 541.

Other respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—This is an appeal from the order of the Additional Subordinate Judge of Cocanada, dated 8th October 1930, dismissing a petition for executing the decree in Original Suit No. 61 of 1920 on the file of the Sub-Court, Cocanada, as against the first judgment-debtor. The petitioner is the son and legal representative

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of the deceased second decree-holder and he applied to execute the decree for the benefit of the first decree-holder who did not join in the application. The decree sought to be executed was dated 28th September 1922 and the application was made on 12th October 1928 for realizing the mesne profits and costs awarded by the decree by arresting the first judgment-debtor and by attaching his properties as well as those of some other judgment-debtors. The application was resisted by the first judgment-debtor alone, and on two main grounds, namely, that there was an oral agreement between him and the petitioner in his capacity as agent of the two plaintiffs in the suit, sometime after he had filed his written statement in the suit and before the passing of the decree, to the effect that the plaintiffs would not execute any decree that might be passed against him in the suit, provided he did not contest the suit, and that the claim to execute the decree against him is barred by limitation. The Additional Subordinate Judge found that, while the claim was not barred by limitation, the oral agreement relied upon by the first judgment-debtor was true and could be successfully pleaded in bar of execution. The appeal of the petitioner in execution is directed against the latter finding about the oral agreement.

Three contentions are raised by the appellant in this appeal, namely :

- (1) Evidence of the oral agreement is excluded by section 92 of the Indian Evidence Act ;
- (2) the oral agreement cannot be pleaded in bar of execution in the Court executing the decree ; and
- (3) the alleged oral agreement is not true.

In order to succeed in his first contention the appellant has to establish two propositions, namely, that decrees come within the purview of section 92 of the Indian Evidence Act, and that evidence of the oral agreement pleaded in this case is tendered for the purpose of contradicting, varying, adding to, or subtracting from the terms of the decree sought to be executed. The first of these propositions raises a question of law regarding which there is a conflict of opinion which is well-nigh irreconcilable. According to one view a decree is a "matter required by law to be reduced to the form of a document", the parties shown in the cause-title of the decree being parties to the instrument, and therefore comes within the purview of section 92 of the Indian Evidence Act. This view was taken in *Rajah of Kalahasti v. Venkatadri Rao*(1), following an earlier unreported decision by NAPIER and KRISHNAN JJ. in Second Appeal No. 62 of 1920, and dissenting from the contrary view taken by the Calcutta High Court in *Debendra Narain Sinha v. Sourindra Mohan Sinha*(2) and in *Ananda Priya v. Bijoy Krishna*(3). The Bench decision in *Rajah of Kalahasti v. Venkatadri Rao*(1) was followed by a single Judge in *Gopala Krishna Iyer v. Sankara Iyer*(4). The same view had been expressed *obiter* by one of the two Judges of the Allahabad High Court who decided *Lachman Das v. Baba Ramnath Kalikamlivala*(5), but it was dissented from by the learned CHIEF JUSTICE of the same Court in a subsequent case, *Ganga Dihal Rai v. Ram Oudh*(6), and also by a single

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(1) (1927) I.L.R. 50 Mad. 897.
(3) A.I.R. 1926 Cal. 643.
(5) (1921) I.L.R. 44 All. 258.

(2) (1914) 24 I.C. 391.
(4) A.I.R. 1930 Mad. 673.
(6) A.I.R. 1929 All. 79.

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Judge of the Rangoon High Court in *Ma Shwe Pee v. Maung San Myo*(1). The latest case is *Abdul Karim v. Hakam Mal-Tani Mal*(2) in which a single Judge agreed with the ruling in *Hotchand Tolaram v. Premchand*(3) to the effect that an oral agreement between parties to a decree varying the terms of the decree can be proved, and that the proof thereof is not barred by section 92 of the Evidence Act.

Debendra Narain Sinha v. Sourindra Mohan Sinha(4) and the unreported case decided by NAPIER and KRISHNAN JJ. (Second Appeal No. 62 of 1920) may be taken as representing the two contrary views, as the remaining cases more or less follow the one or the other of these two. In the former case it was held that the words "any matter required by law to be reduced to the form of a document" found in the earlier part of section 92 of the Indian Evidence Act are controlled by the words "as between the parties to any such instrument or their representatives in interest" in its later part, which are applicable only in the case of documents of a dispositive character, and that the former words have therefore a narrower scope in section 92 than in the preceding section, and cannot cover the case of a decree; reliance was also placed on the omission of these words from the fourth proviso to section 92. NAPIER J. was of opinion that

"the result of this decision is certainly startling, for it comes to this; that, where a decree has been given, it would be open to one of the parties to come into Court with a fresh suit the next day saying that directly after the decree was passed the parties made an agreement to vary its terms."

(1) (1928) I.L.R. 6 Rang. 573.

(3) A.I.R. 1931 Sind 42.

(2) (1933) I.L.R. 14 Lah. 668.
(4) (1914) 24 I.C. 391.

It does not appear, however, that this result would follow from the decision; the criticism fails to take note of the provisions of section 47 and of Order XXI, rule 2, of the Civil Procedure Code. NAPIER J. was further of opinion that a decree was an instrument between the parties to the suit in which the decree was passed, and KRISHNAN J. concurred in this opinion, and did not think that the words "between the parties" necessarily imply that the document should be executed by one of the parties. This second line of criticism appears to ignore the real nature of a decree and the part which the Court plays in bringing a decree into existence.

The correct method of approaching this question is to consider first the real nature of a decree. Apart from the definition of "decree" in section 2 (2) of the Code of Civil Procedure, in all systems of jurisprudence this word or its equivalent means an adjudication by a Court of the rights of the parties litigating before it; it is not an act of the parties but an act of the Court, and derives its binding force or validity from the authority of the Court and not from any agreement or contract between the parties. A decree is not a creature of consensus but of the Court. Only a Court can bring it into existence, and only a Court can vary or nullify it. Even when the parties to a suit compromise the suit, the agreement or compromise does not become a decree until the Court directs the passing of a decree in the terms of the compromise. Even where parties adjust a decree an order of the Court is necessary to give effect to the adjustment; without such an order the adjustment by the parties leaves the decree as

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it is. A decree or its terms cannot be varied or modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of the decree, whether the agreement be oral or written.

The rule enacted by section 92 of the Indian Evidence Act is a rule excluding evidence of oral agreement varying the terms of certain documents, and it implies that but for such exclusion the agreement could in law vary the terms. Where no such variation is possible in law by agreement, whether written or oral, the rule of exclusion of evidence of oral agreement cannot apply, and this is the case with a decree. The law does not contemplate the possibility of varying decrees of Court by mere agreement between the parties thereto; the mischief against which section 92 of the Indian Evidence Act is directed could never affect decrees. Attempts to vary the terms of decrees are guarded against not by any rule of evidence but by rules of procedure, such as those relating to amendment of decrees, appeal, review, and execution of decrees. To construe section 92 of the Indian Evidence Act so as to include decrees within its purview is to construe things clean from the purpose of the things themselves.

The second proposition covered by the first contention of the appellant has also not been established in the present case. The first judgment-debtor does not seek to vary the terms of the decree; it is not his case that the terms of the decree were varied by the oral agreement, but that it was agreed that the decree against him

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should not be executed. An agreement not to execute a decree does not vary its terms, and in the present case the agreement pleaded is not one to which all the parties to the decree are parties but only some of them, as the other defendants are not parties to it. Section 92 of the Indian Evidence Act does not apply to an agreement of this kind; see *Goseti Subba Row v. Varigonda Narasimham*(1) and *Sri Sailam v. Bhushayya*(2). The first contention of the appellant therefore fails.

The next question is whether the oral agreement can be pleaded in bar of execution. The oral agreement is one subsequent to the filing of the suit and prior to the passing of the decree, and according to the Full Bench decision in *Chidambaram Chettiar v. Krishna Vathiyar*(3) such an agreement can be pleaded in execution. That decision was itself based on previous decisions to the same effect. ABDUR RAHIM Offg. C.J. refers at page 237 to the fact that

“by a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree, by which the decree was not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court”,

and at page 238 to

“the practice which has so long obtained in this Presidency.”

SESHAGIRI AYYAR J. bases his opinion expressly on the practice in this Presidency; he observes at page 240 that he would have hesitated a great deal before allowing agreements of this kind to be raised in execution if the matter were

(1) (1903) I.L.R. 27 Mad. 368.

(2) (1924) 48 M.L.J. 280.

(3) (1916) I.L.R. 40 Mad. 233 (F.B.).

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res integra. PHILLIPS J. who dissented from the majority view was of opinion that the case was one to which "the principle of *stare decisis* need not be strictly applied". The decisions of the other High Courts on this point were considered by the Full Bench, namely, *Laldas v. Kishordas*(1) and *Gauri Singh v. Gajadhar Das*(2) which adopted the same view as that of the majority of the Full Bench, and the Calcutta cases, *Benode Lal Pakrashi v. Brajendra Kumar Saha*(3), *Hassan Ali v. Gauzi Ali Mir*(4) and *Chhoti Narain Singh v. Musst. Rameshwar Koer*(5) which took a different view, and it is therefore unnecessary to consider them in detail. The Madras decisions subsequent to the Full Bench Case of *Chidambaram Chettiar v. Krishna Vathiyar*(6) do not disclose any real departure from the rule laid down by the Full Bench. The case law has been so exhaustively reviewed by a Bench of this Court in a recent case, *Butchiah Chetti v. Tayar Rao Naidu*(7), that it is unnecessary to go through it again. The conclusion arrived at was tersely stated by PAKENHAM WALSH J., who pronounced the judgment of the Bench, as follows, at page 196 :

"On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar v. Krishna Vathiyar*(6), only covers agreements which relate to execution, and not to agreements which attack the decree itself."

This view which reconciles almost all, if not all, the Madras decisions on the subject is one in which I venture to express my entire concurrence. The agreement pleaded in the present case is one

- (1) (1896) I.L.R. 22 Bom. 463 (F.B.).
(2) (1909) 6 A.L.J. 403.
(3) (1902) I.L.R. 29 Calc. 810.
(4) (1903) I.L.R. 31 Calc. 179.
(5) (1902) 6 C.W.N. 796.
(6) (1916) I.L.R. 40 Mad. 233 (F.B.).
(7) (1930) I.L.R. 54 Mad. 184.

which relates to execution alone, and does not attack the decree itself, for it is merely an agreement not to execute the decree as against the first judgment-debtor, and nothing more. It follows therefore that the agreement can be pleaded in execution, and that the executing Court can determine whether the agreement is true.

The only question which remains is whether the agreement is true.

[His Lordship discussed the evidence and agreed with the finding of the Subordinate Judge that it was true and proceeded:]

It follows from what has been said above that this appeal must fail. It is accordingly dismissed with costs of the first respondent. Vakils' fee is fixed at Rs. 100 under rule 46 of Appendix III of the Appellate Side Rules.

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APPELLATE CIVIL

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

1935,
March 11.

THUKRU BAI (PETITIONER), APPELLANT,

v.

C. ATTAVAR AND SEVEN OTHERS (RESPONDENTS), RESPONDENTS.*

Special Marriage Act (III of 1872), sec. 24 (added by amending Act XXX of 1923)—Retrospective effect, if has—Marriage solemnised before coming into force of sec. 24—Rights of parties to—Law governing.

Section 24 which has been added to the Special Marriage Act III of 1872 by the amending Act XXX of 1923 has no retrospective effect and is inapplicable to persons who solemnised their marriage under the Special Marriage Act III of 1872 before its amendment. The words "who marries" in section 24 show that the marriage contemplated is one after the date of the coming into force of the section and not a marriage under the Act before it was amended. The rights of the parties to a marriage which took place under the Special Marriage Act III of 1872 before its amendment are governed not by the amending Act of 1923 but by the original Act.

Vidyagarri v. Narandas, A.I.R. 1928 Bom. 74, and *Punjabra Das v. Monmohan Ray*, A.I.R. 1934 Pat. 427, approved.

APPEAL against the order of the District Court of South Kanara, dated 9th November 1932 and passed in Original Petition No. 94 of 1929.

P. Govinda Menon for appellant.

K. Y. Adiga for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This appeal arises out of an application under section 372 of the Indian

*Appeal Against Order No. 37 of 1933.

Succession Act XXXIX of 1925, made by the widow of one Venkappa for the grant of a succession certificate to enable her to collect the amount of two deposits as regards which her husband died intestate.

The widow is the appellant. She and her husband are members of the Billava community in South Kanara which follows the Aliyasanthana law of inheritance according to which a widow has no right to the property of her deceased husband. They were originally married in 1890 according to the rules of their community and had children, respondents 1 to 7. Later on, Venkappa and his family became Brahmos. On 19th June 1903, a marriage under the Special Marriage Act III of 1872 was solemnised between the appellant and her deceased husband in the presence of the Registrar. Act III of 1872 was amended by Act XXX of 1923 and sections 22, 23, 24, 25 and 26 were newly added to the Act. Section 24 says :

"Succession to the property of any person professing the Hindu, Buddhist, Sikh or Jaina religion, who marries under this Act, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1865."

The appellant before us claims under this provision that, as she and her husband were married under "this Act", i.e., the Special Marriage Act, she is entitled to the grant of a succession certificate under the Indian Succession Act. Her claim is resisted by the eighth respondent, who is a brother of the deceased Venkappa. He contends that section 24 of the Act on which the appellant relies has no retrospective operation and as such, though she was married under the Special Marriage

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Act, she is not entitled to get a succession certificate. The appellant's contention was overruled by the learned District Judge and her petition was dismissed.

The short question for determination in this civil miscellaneous appeal is whether, under the new section 24 added to the Special Marriage Act III of 1872 by the amending Act XXX of 1923, the appellant is entitled to a succession certificate under the Indian Succession Act XXXIX of 1925.

Under section 10 of the Special Marriage Act III of 1872 before it was amended, the parties to the marriage should sign a declaration that they did not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion. The law is well settled that, in spite of this declaration, a Hindu by becoming a Brahmo did not cease to be a Hindu and that, in the case of such a person, a succession certificate under the Succession Act cannot be granted; see *Bhagwan Koer v. Bose*(1) and *Jnanendra Nath Ray, In re*(2). This position is not disputed by the learned Counsel for the appellant; but what he contends is that after the introduction of section 24 into the Act the petitioner is entitled to ask for a succession certificate as she has been validly married under the Act. The answer to the question we have to determine does not depend upon the consideration whether the marriage of the petitioner with her deceased husband under the Special Marriage Act is valid or not, for its validity is not disputed by anyone. What we have to determine is whether the case of the appellant falls within the words of

(1) (1903) I.L.R. 31 Calo. 11 (P.C.). (2) (1922) I.L.R. 49 Calo. 1069.

the new section 24 of the Act. That section can apply only to a person

"professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act."

It is obviously inapplicable to the appellant for two reasons. In the first place, when she and her husband solemnised their marriage under the Special Marriage Act in 1903 the declaration that they must have made under section 10 of the Act was that they did not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion, whereas persons claiming the benefit of section 24 should have declared at the time of the marriage that they professed the Hindu, Buddhist, Sikh or Jaina religion. The form of declaration under section 10 to be used by the parties has been changed subsequent to the introduction of section 24 as will be seen from the second schedule to the Act. The declaration now in use after the amendment of the Act is totally the reverse of the declaration which must have been made by the appellant and her husband when their marriage was solemnised under the Act in 1903. Secondly, the words "who marries" used in the section clearly show that the marriage contemplated is one after the date of the coming into force of the section and not a marriage under the Act before it was amended. These two grounds would show that section 24 can apply only to persons who marry under the Act subsequent to the enactment which has added it to the old Act by amendments, i.e., in other words, section 24 cannot have any retrospective effect and will not apply to persons who solemnised their marriage

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under the Special Marriage Act before its amendment. If it was the intention of the Legislature to give section 24 retrospective operation it could clearly have shown that intention by using appropriate language. The conclusion we have arrived at, based on the language of the section, is supported by authorities also. In *Vidyagavri v. Narandas*(1) it was pointed out that

"Act XXX of 1923 is an amending Act and there is no provision therein for retrospective effect."

In that case, the plaintiff's marriage took place in 1918 under the Special Marriage Act of 1872 and it was held that the rights of parties could not be governed by the amending Act of 1923 but by the original Act as the amending Act has no retrospective effect. In *Punyabrata Das v. Monmohan Ray*(2) the learned Judges construed the words "who marries" in section 24 as synonymous with "who shall marry hereafter", which means from the date of the enactment which brought that section into being and cannot mean who is married under the Act hereby amended.

For the above reasons we hold that the appellant is not entitled to claim a succession certificate by virtue of the new section 24 of the Act and that her rights to claim the succession certificate should be regulated by the provisions of the Act before its amendment, in which case it is not disputed, having regard to the decisions, that she will not be entitled to ask for a succession certificate. The civil miscellaneous appeal therefore fails and is dismissed with costs.

A.S.V.

(1) A.I.R. 1928 Bom. 74.

(2) A.I.R. 1934 Pat. 427.

APPELLATE CIVIL.

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

RAMANATHAN CHETTIAR AND TWO OTHERS
(PETITIONERS-PLAINTIFFS), APPELLANTS,

1935,
March 7.

v.

A. M. R. MUTHAYYAN CHETTIAR (FIRST RESPONDENT-
DEFENDANT), RESPONDENT.*

*Execution of decree—Jurisdiction—Temporary Court established
for one year and continued thereafter—Decree passed by,
in one year—Execution in subsequent year of—Jurisdiction
of that Court as to.*

A temporary Court has jurisdiction not only to pass decrees but also to execute the decrees passed by it. The mere fact that a temporary Court is established for one year and is thereafter continued cannot deprive that Court of its character of the Court which passed the decree and of its power to execute the decree passed by it. A Court which is originally established for one year and whose existence is continued year after year does not cease at the end of each year to have jurisdiction in following years to execute decrees passed by it in the previous year of its life.

Mussammatt Bibi Khodaijatul Kobra v. Harihar Missir,
(1925) I.L.R. 4 Pat. 688, relied upon.

APPEAL against the order of the Court of the Subordinate Judge of Salem, dated 5th December 1932 and made in Execution Petition No. 79 of 1932 in Original Suit No. 54 of 1919.

K. Sankara Sastri for appellants.

V. Ratnam for respondent.

JUDGMENT.

BEASLEY C.J.—This is an appeal from an BEASLEY C.J.
order of the Subordinate Judge of Salem holding

* Appeal Against Order No. 172 of 1933.

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that the execution petition presented by the appellants here was barred by limitation having been presented more than twelve years after the passing of the decree. The short facts of the case are that a decree was passed in 1919 by the Temporary Sub-Court, Salem. That Court was established in 1919 for a period of one year by a notification published in the *Fort St. George Gazette*, dated 29th January 1919. At the end of that period there was another notification sanctioning the same Sub-Court but no period of life of that Court was specified in it. It would appear that from 1919 onwards until 1929 this temporary Court was, by notification in various years, continued. The decree-holder, having obtained the decree in the Temporary Sub-Court in 1919, subsequently applied for the transfer of the decree to the Mayavaram Sub-Court. The decree was accordingly transferred and some amount was realized there. It was then re-transferred to the Temporary Sub-Court, Salem, in 1926 on an application of the decree-holder, dated 10th March 1926. Subsequently on 7th March 1929 an application for execution was made to the District Court. That application was returned for information about previous execution petitions several times and eventually the decree-holder, who took time to furnish the information, did not re-present it. Then an application was made to the District Court on 2nd November 1931 and, after several returns and re-presentations there, the learned District Judge returned the application on 2nd February 1932 on the ground that the decree-holder should have applied to the Court which passed the decree, and accordingly the

execution petition was presented to the Sub-Court, Salem, on 5th February 1932. The question which the learned Subordinate Judge had before him was whether the application presented to the District Court on 7th March 1929 was a valid one. It could only be valid if that was the proper Court for the application to be presented to. If that was the right Court, then clearly the application was not barred by limitation. On the other hand, if it was the wrong Court and the Subordinate Court of Salem was the proper one, then the application was barred by limitation. It was argued before the learned Subordinate Judge, as it was here, that the fact that the decree was passed by the Subordinate Court of Salem when it was a temporary Court for one year made it obligatory, unless execution was sought of the decree in the same year in which it was passed, to apply to the District Court, because at the end of each period of one year the temporary Court ceased to exist, and that the Court which passed the decree being dead the application for execution had then to be presented to the District Court. It is of course conceded, it being well-established, that temporary Courts have jurisdiction not only to pass decrees but also to execute the decrees passed by them. It is difficult to see any logical reason for the contention which is put before us. The mere fact that a temporary Court is established for one year and is thereafter continued, it seems to me, cannot deprive that Court of its character of the Court which passed the decree. If it is the Court which passed the decree, then clearly execution must be had in that Court. It

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is conceded that the property which is the subject-matter of the execution petition lies within the jurisdiction of the Salem Sub-Court. That Court is now become permanent as a matter of fact, but I do not think that that is a matter which is at all material. It is difficult to see how it can seriously be contended that, because a Court is originally established for one year and its existence is continued year after year, it ceases at the end of each year to have any jurisdiction in the following years to execute decrees passed by it in the previous year of its life. On the contrary, there is the decision of the Patna High Court in *Mussammat Bibi Khodaiyatul Kobra v. Harihar Missir*(1) which is very much against the contention advanced here. The facts of that case as they appear in the head-note are as follows :— Two decrees were made on 21st August 1920 by the Additional Subordinate Judge. Some time afterwards the Court of the Additional Subordinate Judge was abolished, and the business of that Court was transferred to the third Subordinate Judge's Court. Subsequently the Court of the Additional Subordinate Judge was re-established, and, on the 27th August 1923, two applications were made to it for the execution of the decree of 1920. The Additional Subordinate Judge held that he had jurisdiction to entertain the application. On appeal the District Judge reversed the order and held that the new Additional Subordinate Judge had no jurisdiction on the ground that the Court of the First Additional Subordinate Judge having ceased to exist the present Court could not be the Court

(1) (1925) I.L.R. 4 Pat. 688.

which passed the decree. It was held that in point of fact the Court of the Additional Subordinate Judge had not ceased to exist as the present Court being a Court of the same designation was identifiable with it. I entirely agree with the reasons given in the judgment. The Temporary Subordinate Court at Salem clearly had jurisdiction to execute decrees passed by the same Court in previous years. The mere fact that it was a temporary Court and required a renewal at the end of every year—even that fact does not appear to be established—cannot possibly make any difference. The learned Subordinate Judge was, therefore, quite correct in holding that the execution petition was barred by limitation. This appeal must, therefore, be dismissed with costs.

CORNISH J.—I agree.

A.S.V.

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CHETTIAR.
—
BEASLEY C.J.

APPELLATE CIVIL.

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

1935,
March 7.

RAO BAHADUR PATRI VENKATA SRINIVASA RAO.
OFFICIAL RECEIVER, GUNTUR (RESPONDENT),
APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL REPRESENTED BY THE COLLECTOR OF
GUNTUR (PETITIONER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), ss. 43, 37 and 34—
Annulment of adjudication under sec. 43 and vesting of
property under sec. 37 in Official Receiver—Effect of—
Pauper appeal by debtor (insolvent) after annulment of
adjudication—Court-fee ordered to be paid to Government
on dismissal of—Recovery of, from property of debtor in
hands of Official Receiver—Government's right of—Sec. 34
of Act—Rule in—Applicability of, after annulment of
adjudication.*

An adjudication was annulled under section 43 of the Provincial Insolvency Act for failure of the debtor to apply for his discharge within the time prescribed by the Court and under section 37 of that Act the property of the debtor was by order vested in the Official Receiver. Subsequent to the date of the annulment of the adjudication, the debtor preferred an appeal in *forma pauperis* which was dismissed, the court-fee payable on the appeal being ordered to be paid to Government. Government then applied to the Official Receiver for payment of the amount of that court-fee out of the assets of the debtor's estate in his hands. The Official Receiver declined to recognize the Government's claim on the ground that the debt due to the Government was not one which was provable in the insolvency.

Held that the Government was entitled to recover the amount of the court-fee from out of the assets of the debtor's

* Appeal Against Order No. 400 of 1933.

estate in the hands of the Official Receiver and that being a Crown debt it had priority over the debts of all other creditors.

The rule in section 34 of the Act that only debts which are subsisting at the time of the adjudication are provable in the insolvency can have no further application when the adjudication has been annulled.

The scheme of section 37 of the Act is to enable an orderly distribution of the assets of the insolvent which under the provisions of the section the Court has vested in its appointee and to place those assets at the disposal of all those creditors who would be able to proceed against the debtor if the property had reverted to him by reason of the annulment.

APPEAL against the order of the District Court of Guntur, dated 11th March 1933, in Civil Miscellaneous Petition No. 233 of 1933 in Insolvency Petition No. 42 of 1923.

B. V. Ramanarasu for *N. Rama Rao* for appellant.

P. V. Rajamannar for *Government Pleader* (*P. Venkataramana Rao*) for respondent.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J.—This appeal raises a point which appears to be entirely free from authority. The appeal is by the Official Receiver of Guntur and the respondent is the Secretary of State for India in Council. One K. Thomasu Reddy was adjudged an insolvent in 1924. Subsequently his adjudication was annulled because he failed to apply for his discharge within the time specified by the Court. Upon the annulment of the adjudication, under section 37 of the Provincial Insolvency Act the property of the debtor was by order vested in the Official Receiver who sold some of the properties of the insolvent and is in possession of the sale proceeds and other properties of the debtor.

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Subsequent to the date of the annulment of the adjudication, the debtor preferred four appeals in the District Court, Guntur, in *forma pauperis*. These appeals were dismissed and the court-fee payable on the respective appeals was ordered to be paid to Government. Government then put in an application to the Official Receiver for payment of the court-fees payable by reason of the appellate decrees out of the assets of the debtor's estate in his hands, claiming to be entitled to be paid in priority to the debts of all other creditors because the debt due is a Crown debt. The Official Receiver declined to recognise the Government's claim contending that, on account of the order under section 37 of the Provincial Insolvency Act vesting the property in him, he held the property of the debtor for the benefit of creditors whose debts were provable and proved in the insolvency and that in distributing the assets in his hands as a result of the vesting order he has to be governed by the same rules that govern the case of an insolvency. It is quite clear that by reason of section 34 (2) the debts provable in insolvency are those which the debtor is subject to when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of his adjudication. Therefore, no debt incurred after his adjudication is provable in insolvency. Hence it is contended by the appellant that, as this was a debt incurred after the insolvent's adjudication, indeed after the annulment of the adjudication, the Crown has no debt which the Official Receiver can recognise. The learned District Judge allowed the claim of the Crown.

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What we have to consider is, what is the effect of the annulment of an adjudication and the subsequent vesting order under section 37 (1) of the Provincial Insolvency Act? A Full Bench of this High Court has, on a reference to it in *Veerayya v. Sreenivasa Rao*(1), considered the following question, viz. :—

“Where the Insolvency Court annuls an adjudication under section 43 of the Provincial Insolvency Act V of 1920 and chooses to pass an order under section 37 vesting the properties of the *quondam* insolvent in an appointee (Official Receiver or any other person), is the administration in insolvency to continue for the realisation and distribution of the assets of such a person despite the annulment of the adjudication itself?”

and has given the following answer, viz. :—

“The appointee continues to be subject to the directions of the Insolvency Court which appointed him, these directions relate to the property of the insolvent and they should be given in accordance with the policy and provisions of the Insolvency Act”

and that

“this is not in all respects equivalent to the actual continuation of the insolvency proceedings.”

In the view of the Full Bench the principle underlying section 43 of the Act, which provides that the Court shall annul an adjudication on the failure of the insolvent to apply for an order of discharge within the period specified by the Court, is primarily to punish the insolvent by depriving him of any protection which he may hitherto have been enjoying under the insolvency law. It is stated in the judgment :

“Why should the negligence of the insolvent have the necessary effect of upsetting the rights of his creditors *inter se* for if this first view is to be upheld those creditors can no longer expect the fair and equal treatment which had been

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assured to them by the insolvency? Those who have got no decrees will be hopelessly handicapped as against those who may proceed immediately to execution, and those who are aware of the annulment will have an advantage over those who are not."

These observations relate to a contention which had been put forward that with the annulment of the adjudication the insolvency proceedings come to an abrupt and final conclusion, that the Insolvency Court has no longer any power to pass any orders in regard to the insolvent's property, its order vesting that property in the appointee being its last expiring act, that the appointee is a mere custodian of the insolvent's property and must merely hold it subject to any orders as to attachment and sale which he may receive from any Court entertaining an application in execution against the insolvent and that the insolvent's creditors are restored to the position in which they found themselves before the insolvency proceedings began and all must pursue afresh their remedies by execution or by suit in the ordinary way. That contention the Full Bench did not agree with nor did it accept the contention which went to the other extreme, namely, that the insolvency proceedings are continued for all purposes. The view which is one intermediate between these two before-mentioned extreme contentions was accepted by the Full Bench as being correct. It is quite clear in my view—and this is also the view of the Full Bench—that the appointee under section 37 does not hold the property for the benefit of the insolvent. Under section 37, it is true that the property may, in default of any order by the Court vesting the property in an appointee, revert to the debtor to the extent of his right or

interest therein on such conditions, if any, as the Court may, by order in writing, declare. But in the opinion of the Full Bench the legal effect of the vesting order will be different from the legal effect of the reversion of the property to the debtor. The whole significance of the Court's action in vesting the debtor's property in someone else is that the Court is entitled to preserve its control over that property just as a similar control is always retained when a receiver is appointed to administer the property which is the subject-matter of a suit. In the opinion of the Full Bench the Insolvency Court retains full power to give directions under section 37 as to the realisation and disposal of the debtor's assets and that power should not, of course, be used arbitrarily but should be used in the interests not of this or that individual creditor but of the whole body of creditors which means, in other words, that the only proper order of the Court to pass is that the appointee should continue to realise and distribute the debtor's property in accordance with the provisions of the Insolvency Act. It is contended on behalf of the appellant that this means that the debtor's property can only be distributed amongst those who would be entitled to it under the provisions of the Insolvency Act. If that contention is correct, then of course the Crown debt cannot be recognised because this was not a debt provable in insolvency. The Full Bench decision, however, does not say who comprise "the whole body of creditors". It is not clear that in that judgment it is intended to decide that only debts provable in the insolvency can be

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recognised by the appointee under section 37 unless the words "distribute the debtor's property in accordance with the provisions of the Insolvency Act" express such an intention. It seems to me that this is by no means clear. It is plain from section 10 (2) of the Provincial Insolvency Act that after the annulment of an adjudication the insolvency does not continue. The insolvent is not an insolvent any longer and has to be re-adjudicated an insolvent by the Court if he again desires to be an insolvent. If the property, on the Court's failure to vest it in an appointee, reverts unconditionally to the debtor, then it is obvious that not only those creditors who had debts provable in insolvency but all other creditors are entitled to proceed against him; and this would no doubt lead to a wild scramble or, as suggested in the Full Bench decision, to some creditors being enabled to gain an advantage over others; and it seems to me that the scheme of the section is to enable an orderly distribution of the assets of the insolvent which under the provisions of the section the Court has vested in its appointee and to place those assets at the disposal of all those creditors who would be able to proceed against the debtor if the property had reverted to him by reason of the annulment. Unfortunately, as I have stated before, we are unable to get any assistance upon the point from reported decisions and the intention of the Legislature is by no means easy to discover; but on the whole I think that the view I have just expressed, after giving the matter the best consideration I can, is the correct one. If this is the position, then it is very fairly conceded by Mr. Ramanarasu, the learned Counsel for the

appellant, that the Crown is entitled to claim priority in common law, quite irrespective of the Insolvency Act, for this debt which is clearly a Crown debt. For these reasons, the decision of the learned District Judge was correct and this appeal must be dismissed with costs out of the proceeds now in the hands of the Official Receiver of Guntur.

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CORNISH J.—I agree. When an order of adjudication is annulled under section 43 the provisions of section 37 (1) are made applicable. In other words, the position upon an annulment under section 43 is the same as when an adjudication is annulled following the approval by the Court of a composition or scheme under section 39. The result of this is that, although the debtor is no longer an adjudicated insolvent, the debtor's property, whether vested in a trustee appointed by the Court or whether it has reverted to the debtor subject to any conditions imposed by the Court, continues to be under the control of the Insolvency Court: see Williams on Bankruptcy, 14th edition, page 139. The recent Full Bench ruling of this High Court, *Veerayya v. Sreenivasa Rao*(1), is to the same effect. If upon an annulment the property reverts to the debtor without any conditions, the consequence is that he is remitted to his original situation prior to the insolvency. It has accordingly been held that a debtor so placed is free to sue for debts due to him, *Flower v. Lyme Regis Corporation*(2), and that he can be sued by a creditor in respect of a debt which, though provable, had not been

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(1) (1934) I.L.R. 58 Mad. 908 (F.B.).

(2) [1921] 1 K.B. 488.

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included in the scheme of composition; *Gopalu Pillai v. Kothandarama Ayyar*(1). On the other hand, if upon an annulment the property of the debtor is vested in a trustee, the object can only be that the property shall be safeguarded for the benefit of the creditors.

The question is whether a creditor, in this case the Crown, can enforce against the trustee a debt which was not provable at the time of the adjudication because the debt had not then come into existence. This would seem to depend on whether the creditor's right to enforce a claim continues, notwithstanding the annulment, to be subject to the restrictions of the Insolvency Act both as regards the means of recovery and in respect of the debt which is recoverable. The prohibition placed by section 28 (2) upon the commencement of a creditor's suit after an adjudication arises as a consequence of the order of adjudication and must, I think, cease to be operative after annulment of the adjudication. Similarly, the rule in section 34 that only debts which are subsisting at the time of the adjudication are provable in the insolvency can have, in my view, no further application when the adjudication has been annulled. This view is fortified by the saving words in section 37 (1) in favour of all dispositions and payments duly made before the annulment. It follows from these conclusions that the Act does not prevent the claim from being enforced in the present case. Moreover, the debt being one due to the Crown is a debt from which the debtor, even if he had got his discharge, would not have been released. The debtor cannot be in a better

(1) (1934) 40 L.W. 110.

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or the Crown in a worse position in respect of this debt by reason of the fact that the insolvency has been annulled for failure of the debtor to apply for his discharge. For these reasons I am of opinion that the Collector is entitled to recover payment of the debt from the trustee. The right of the Crown to payment of a debt in priority to the debts of other creditors does not depend on the Insolvency Act. For section 61 (1) (a) of the Act only declares a long-established rule of law that when claims of the Crown and claims of subjects as creditors are in competition, the Crown has priority.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice King.

S. RAJAGOPALAN PILLAI (PETITIONER AND FIRST
DEPENDANT), APPELLANT,

1935,
March 26.

v.

K. NAMASIVAYAM PILLAI AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

*Malabar Tenancy Act (XIV of 1930), sec. 33—Applicability—
Succession of tenants—Possession of, for over ten years—
Applicability of sec. 33 to case of—Sec. 38 of Act—Effect of.*

Property, which belonged in kanam to the deceased father of the respondent, was held under a lease dated 15th March 1906. The rights of the lessee were eventually purchased by the appellant on 15th October 1929. In a suit filed by the respondent on 4th December 1929 for the eviction of the appellant,

* Second Appeals Nos. 210 and 211 of 1933.

RAJAGOPALAN *held* that the appellant could not enforce against the
 v. respondent the right of purchase granted by section 33 of the
 NAMASIVAYAM. Malabar Tenancy Act.

The words "a tenant" in section 33 refer to the tenant whose eviction is actually sought. The expression "the continuous occupation of a tenant" in the section means that a single tenant must have been in occupation for the whole ten years; and the expression "the continuous occupation of a tenant or the members of his family for ten years" means that throughout the ten years no other than the tenant or members of his family must have been in occupation. Section 33 is inapplicable to the case of the possession of a succession of tenants for ten years. In the present case the appellant's personal occupation at the time of the institution of the suit had lasted only for a few weeks and his predecessor in title was not a member of his family.

APPEALS against the judgments and decrees of the Court of the Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 97 of 1931 (Appeal Suit No. 382 of 1931, District Court, Calicut) and of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 17 of 1932 (Appeal Suit No. 516 of 1931, District Court, Calicut), preferred respectively against the order and decree of the Court of the District Munsif of Ottapalam in Original Petition No. 22 of 1931 and Original Suit No. 290 of 1929 respectively.

The above second appeals came on for hearing before MADHAVAN NAIR J. when his Lordship made the following

ORDER OF REFERENCE TO A BENCH:—

This second appeal arises under the Malabar Tenancy Act. The petitioner in Original Petition No. 22 of 1931 is the appellant.

The suit property belonged in kanam to one Kumaraswami Pillai, the deceased father of the respondent. It was being held under a lease, Exhibit B, dated 15th March 1904. The rights of the lessee were eventually purchased by the first

defendant in the suit (that is, the appellant) under Exhibit A, RAJAGOPALAN
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 on the 15th October 1929. The respondent instituted Original Suit No. 290 of 1929 on the file of the District Munsif of Ottapalam for the eviction of the appellant, his tenant. This suit was filed on the 4th December 1929. Section 33 of the Malabar Tenancy Act says: "In any suit for eviction relating wholly or in part to a kudiyruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyruppu, of the landlord who seeks to evict him, at the market price on the said date." With a view to purchase the property, availing himself of this section, the appellant filed Original Petition No. 22 of 1931 under sections 34, 35, 36 and 47 of the Malabar Tenancy Act praying that the Court may be pleased to direct the sale of his landlord's rights in his favour. It will be observed that the appellant had been himself in possession of the land only for a very short time, from 15th October 1929 to the 4th December 1929. But if the period of his predecessor's possession is tacked on to his own possession he would be in possession for over ten years.

The landlord (respondent) resisted the claim on the ground that the suit land is not a "kudiyruppu" and that, even if it is to be held that it is a kudiyruppu, the appellant, not having been himself in continuous possession of it for ten years as required under section 33, is not entitled to claim the benefit of that section.

On both the above points the District Munsif accepted the contentions of the respondent and so dismissed the plaintiff's petition. On appeal, the learned Subordinate Judge agreed with the District Munsif that section 33 gives protection only to such tenants as have been in continuous possession of the property for ten years and held that as the appellant has not had such possession he was not entitled to purchase the landlord's rights. Whether the land would be a kudiyruppu within the meaning of the Malabar Tenancy Act was not considered by the Subordinate Judge. It has not been seriously argued before me that the suit land will not fall within the meaning of the term "kudiyruppu".

The only point therefore that arises for determination is whether the appellant, though he or the members of his family have not been in continuous possession of the suit land for ten

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years, can claim the benefit of section 33 by adding to his period of occupation the period of his assignor also. The appellant came into possession of the property only in 1929. As already stated the previous tenant came into possession in 1906. He was in possession for more than ten years. It is contended in second appeal that the appellant could claim the benefit of the ten years' continuous enjoyment by his predecessor. It is argued in support of the lower Court's conclusion that the object which the Legislature had in framing section 33 was only to benefit a tenant who by himself or through the members of his own family had been in continuous occupation of the kudiyiruppu for ten years on the date of the institution of the suit and that the right conferred by the section is a personal one. It may be conceded that there is force in this argument; but what we are really concerned with is, does the section, as it stands, compel us to accept the view that the tenant or the members of his family before he claims the right under it should have been in continuous possession of the kudiyiruppu for ten years? The expression "continuous possession" is emphasised by the respondent to show that the tenant claiming the benefit should himself have been continuously in possession for ten years. For the purpose of the present case we may omit from our consideration possession by the members of the family of the appellant altogether, for possession by them is not alleged on behalf of the appellant. The respondent's argument if accepted would lead to the conclusion that the heir or the legal representative of a tenant cannot claim the benefit of his possession. Would such a position have been contemplated by the Legislature? Similarly, the members of the family of a tenant would not also be entitled to claim the benefit of his possession. The definition of the term "tenant" in the Act is not made to include a transferee or an assignee. According to the ordinary rule of construing statutes, "tenant" will include his legal representative and his assignee also, unless it is clear that on some principle the meaning of the term should not be so understood. In *Ramakrishnama Chetty v. Vuvvati Chengu Aiyar*(1) it was pointed out that "a provision in a statute which gives a right or imposes a liability on a person must be deemed to confer that right and impose that liability on that person's legal representative and if it confers

(1) (1914) 27 M.L.J. 494.

that right or imposes that liability on that person as the owner of a certain property, such right or liability is conferred or imposed on the assignee of the property unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor." Is there any reason why the benefit of section 33 should be limited only to the tenant who has been in actual possession of the kudiyiruppu for ten years? I am not able to see any. Obviously, the intention was not to benefit the members of the family as such, because they cannot claim the benefit of the section. In this connection reference is made to section 38 of the Act which says: "The order or decree under section 36 shall operate as a sale to the tenant of the landlord's rights in the kudiyiruppu subject to the condition that, in the event of any sale of the kudiyiruppu, subsequent to the said order or decree by the tenant, his heirs, executors, representatives in interest or assigns, or in execution of a decree against them, or by a Receiver in insolvency, the person who, but for the provisions of this section, would be entitled to the landlord's rights in the said property at the time of such subsequent sale, shall be entitled to claim pre-emption." According to this section, even after the purchase by the tenant of the rights of the landlord, the landlord will have a right of pre-emption in case the tenant parts with his rights in the property after the said purchase. It is argued that the implication of this section is that the intention of the Legislature is to benefit the actual tenant and nobody else, and similarly that the principle governing section 33 also is to benefit only the tenant who has by himself or through his family been in possession for ten years. This argument overlooks the fact that it is not disputed that a tenant can will away the rights which he has purchased, his heir can claim them, and that he can make a gift of them also. To such cases section 38 will not apply. If it is argued that the principle of section 38 is that it was the intention of the Legislature that only the actual tenant should be benefited and that such a principle underlies section 33 also, then certainly the tenant's heir should be able to claim the benefit of his possession; but this is not conceded. Section 38 in my opinion does not therefore afford us much help in construing section 33 of the Act. The appellant relies on section 39 of the Act which says: "Subject to the provisions of this Act all rights which a tenant has in his holding shall be heritable and alienable." This does not

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solve the problem as alienability and heritability of the tenant's rights are made by this section subject to the provisions of this Act, and so, we are thrown back to a consideration of the terms of section 33 for a solution of our difficulty. No doubt, as I have already stated, at the first blush the section seems to support the contention of the Counsel for the respondent, but I see no reason why the privilege conferred by that section should be confined to the tenant who has been in actual occupation for ten years by himself and why his transferee or his legal representative should not be allowed to tack on their period of possession to his period of possession. I cannot see any justification for departing from the usual rule of construction that a "tenant" would include his legal representative as well as his assignee.

Mr. Sitarama Rao for the appellant has brought to my notice a decision of this Court under the Malabar Tenancy Act reported as *Achayi v. Parameswaran*(1), in which the CHIEF JUSTICE and KING J. pointed out that a "Kanamdar" would include the transferee mentioned in the document or his legal representative or his assignee. I am not quite sure whether this decision is very helpful as we are concerned with the interpretation of section 33 in the light of the language used in it.

The question raised in the case is a very important one and arises for the first time for decision in this Court. Many cases of this description are likely to arise in future. In these circumstances, in order to avoid a possible conflict of decisions by single Judges, I would refer this and the connected case to a Bench for its decision.

The second appeals then came on for hearing before the Bench constituted as above.

B. Sitarama Rao for *N. R. Sesha Ayyar* for appellant.

P. Govinda Menon for *P. Narayanan Nair* for respondents.

Cur. adv. vult.

KING J. The JUDGMENT of the Court was delivered by KING J.—The question at issue in these connected

(1) (1934) I.L.R. 58 Mad. 334.

appeals is whether the appellant who came into the occupation of a kudiyiruppu in October 1929 can enforce against his landlord the right of purchase granted by section 33 of the Malabar Tenancy Act. That section runs as follows :

"In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date."

Now the appellant has *prima facie* no rights under this section. His personal occupation at the time of the institution of the suit had lasted for just seven weeks, and his predecessor in title from whom he purchased his tenant's right was not a member of his family. But he contends that the kudiyiruppu has been in the continuous occupation of himself and his two predecessors in title since 1906, and that he is entitled to reckon this whole period of twenty-three years in his favour. The word "tenant" according to him is used in the section as contrasted with other possible occupiers, e.g., a landlord or a usufructuary mortgagee, and whenever a kudiyiruppu has been in the possession of a succession of tenants for ten years the section applies.

This contention amounted in the arguments before us to little more than a mere assertion. The only other section of the Act which Mr. Sitarama Rao called to his aid was section 39. This section no doubt permits a tenant to alienate whatever rights he has but that alienation is expressly made "subject to the provisions of this Act" and, if section 33 provides what is only a

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personal and conditional and not an absolute right, section 39 cannot make it alienable so as to relieve the alienee of the conditions. We must therefore go back to section 33 itself and to us it seems apparent that that section can confer no rights upon the appellant. Omitting for the moment the words "or the members of his family", what is the meaning of the expression "the continuous occupation of a tenant"? Only one meaning we think is possible without a violent straining of the English language, and that is that a single tenant must have been in occupation for the whole ten years. The section goes on to qualify this by the words "or the members of his family". What now is the meaning? Surely this, that throughout the ten years, no one other than the tenant or the members of his family must have been in occupation. If the appellant's contention is correct, it would surely have been easy to make a specific reference in the section to predecessors in title, or, if that were not done, to use the word "tenants" in the plural instead of "a tenant" in the singular. The words "a tenant" in the section must refer to the tenant whose eviction is actually sought, for it is "such tenant" who shall be entitled to offer to purchase.

This interpretation of section 33 is further confirmed, we think, by a consideration of section 38. That section provides that, when the tenant has become the owner of the landlord's rights in the kudiyruppu, any sale by him or his representatives of the kudiyruppu shall be subject to the landlord's right of pre-emption. Why should the tenant's powers of alienation be thus restricted? If the object of section 33 is to benefit tenants as

a class rather than individual tenants with personal qualifications, if a tenant like the appellant with seven weeks' occupation can take advantage of the section, on what principles of logic can the interference with such a tenant's rights which section 38 creates be justified? But, if, on the other hand, the object of section 38 is to bestow special rights on an individual tenant on the ground that he and his family have had a long residence in the family house, it is obviously just that a tenant should not be allowed to make use of the section for his own personal profit, and if he and his family no longer want to retain the family house, then the landlord's rights which have been curtailed by the special provisions of section 33 are enlarged again by section 38. We think that this latter object must clearly have been the object which the Legislature desired to attain. It is the only object which is consistent with the language of the two sections, or with the language of section 33 read by itself.

These appeals accordingly fail and are dismissed with costs.

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APPELLATE CIVIL.

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

MULUKUTLA ATCHUTA RAMAYYAGARU (FIRST
RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, EAST GODAVARI
AT RAJAHMUNDRY (PETITIONER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), sec 28 (7) and (2)—
Relation back—Doctrine of—Applicability—Suit for specific
performance of agreement to execute a mortgage for a
debt—Filing of, after filing of petition to adjudicate
defendant debtor an insolvent—Decree by consent in suit
passed before adjudication of debtor and before appointment
of Official Receiver as Receiver of insolvent's property
—Decree binding on Official Receiver, if—"Transaction"
within sec. 55 of Act—Filing of suit and obtaining of
decree, if.*

A to whom B owed some money and in whose favour B had executed an agreement undertaking to execute a mortgage as security for his debt sued B for specific performance of the agreement. B filed a written statement but subsequently withdrew his defence whereupon the suit was decreed. Before the institution of A's suit an insolvency petition had been presented against B and A's debt was included in the schedule of debts filed by the insolvent, but the decree in A's suit was passed before B was adjudicated an insolvent and before the Official Receiver was appointed Receiver of the insolvent's property.

Held that the decree in A's suit was not binding upon the Official Receiver.

The filing of the suit and the obtaining of the decree by A even though by consent of the judgment-debtor was not a "transaction" which was protected by section 55 of the Provincial Insolvency Act. Under section 28 (7) of

* Appeal Against Order No. 374 of 1933.

that Act, the order of adjudication related back to and took effect from the date of the presentation of the insolvency petition. It was from that date that the vesting of the estate in the Official Receiver commenced and that the rule in section 28 (2) restraining a creditor's right of suit in respect of a debt came into force. A's suit being one in respect of a debt was therefore incompetent under the provisions of section 28 (2), leave of the Court to commence the suit not having been first obtained.

Kaliaperumal Naicker v. Ramachandra Aiyar, (1927) 53 M.L.J. 142, considered.

In re O'Shea's Settlement. Courage v. O'Shea, [1895] 1 Ch. 325, and *Wild v. Southwood*, [1897] 1 Q.B. 317, referred to.

APPEAL against the order of the District Court of East Godavari at Rajahmundry, dated 5th April 1933 and made in Interlocutory Application No. 153 of 1932 in Insolvency Petition No. 9 of 1931.

Ch. Raghava Rao for appellant.

R. N. Aingar as *amicus curiae*.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is an appeal from an order of the learned District Judge of East Godavari declaring void as against the Official Receiver a decree obtained by the appellant here, the first respondent in the lower Court, against the second respondent in the lower Court, an insolvent. A petition to adjudicate the second respondent in the lower Court and his son was presented on 3rd February 1931. The second respondent owed moneys on promissory notes to one Mulukutla Atchutaramayya, afterwards the twenty second creditor in the list of creditors filed by the insolvent and the appellant here. He threatened the second respondent with a suit and the second respondent

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executed an agreement in favour of the appellant here on 19th March 1930 undertaking not to alienate his immovable property till his debt was discharged and undertaking to execute a mortgage bond in his favour for the amount due whenever demanded by him. On the strength of this agreement the appellant filed a suit against the second respondent on 4th February 1931, i.e., the day after the presentation of the insolvency petition, in the District Munsif's Court of Rajahmundry praying for a decree for specific performance of the before-mentioned agreement. The second respondent appeared by pleader on 31st July 1931 and filed his written statement on 7th August 1931 but withdrew his defence on 8th September 1931 upon which date the suit was decreed. On 8th October 1931 the second respondent was adjudicated an insolvent but not his son; and on the same date the Official Receiver of East Godavari was appointed Receiver of the insolvent's property; and on 13th February 1932 he filed the application which resulted in the order which is under appeal. The position is that the creditor, the appellant here, obtained his decree before the date of the adjudication of the insolvent but after the date of the presentation of the insolvency petition. The suit was also filed after that date. The question here is whether this decree is binding upon the Official Receiver who contended in the lower Court that section 28 (7) of the Provincial Insolvency Act, which makes the adjudication order take effect as from the date on which the insolvency petition was presented, renders legal proceedings taken after that date against a debtor of no effect against the

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Official Receiver, because, by reason of sub-section 2, on the making of an order of adjudication the whole of the property of the insolvent vests in the Court and thereafter no creditor to whom the insolvent is indebted can, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court. The appellant relies on *Kaliaperumal Naicker v. Ramachandra Aiyar*(1), a decision of RAMESAM J. There, the owner of the equity of redemption in certain properties presented a petition to be adjudicated an insolvent on 16th November 1920. A suit was filed on the mortgage on 26th October 1921 impleading this person as the defendant. On 20th December 1921 the order of adjudication was passed. On 25th April 1922 the plaintiff applied to implead the Official Receiver also as a defendant. It was held that there was no necessity to obtain the leave of the Court for the institution of the suit as the suit was filed before the date of the order of adjudication and that the filing of a suit prior to the adjudication must be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2) of the Act. On page 145, RAMESAM J. says:

"The appellant contends that the plaintiff had not obtained the leave of Court for the filing of that suit. Mr. Subramania Iyer refers me to a number of cases under section 28 (7). Most of these cases had to do with the effect of dealings by the insolvent in the interval between the application and adjudication. For instance, in *Sheonath Singh v. Munshi Ram*(2) it was held that alienations by the insolvent are not valid against

(1) (1927) 53 M.L.J. 142.

(2) (1920) I.L.R. 42 All. 438.

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the Official Receiver. The effect of section 28 (7) was correctly described there. The actual sections referred to there are the corresponding sections of the old Act. 'No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property and only upon such an order being made can any vesting take place at all. But once the order is made the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or, in other words, the commencement of the insolvency.' For all purposes of the Insolvency Act this fiction has to be used and it is a very useful fiction; but outside those purposes it has no place. The filing of a suit prior to the adjudication may be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2)."

The Allahabad case referred to, viz., *Sheonath Singh v. Munshi Ram*(1), is a decision of a Bench of that High Court consisting of PIGGOT and WALSH JJ. It was there held that when once an order of adjudication has been made the insolvency commences by the legal fiction of relation back on the date of the presentation of the petition and that therefore the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication. What the debtor did in that case was to execute a sale deed of his immovable property after the presentation of an insolvency petition against him. On page 435, in discussing *Sankaranarayana Aiyar v. Alagiri Aiyar*(2), a decision of this High Court, they say:

"We are not satisfied that there is really all the difference between the provisions of the English law and the Provincial Insolvency Act, which appears to have troubled the Madras High Court, but it does not matter, as the view which we take is the view which was always taken from the earliest days in the administration of Bankruptcy law for reasons inherent in

(1) (1920) I.L.R. 42 All. 433.

(2) (1918) 49 I.C. 283.

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the policy of the Bankruptcy law, some of which are contained in the judgment of the Madras High Court. The commercial community cannot be too often reminded of the risks which everybody runs in dealing with a man who is in low water and who may have committed an act of insolvency. Section 38 of the Provincial Insolvency Act, which is another section taken from the English Legislature, protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the Bankruptcy law, that is to say, a man cannot claim the protection of a *bona fide* transfer for value, where he is himself engaged in an act which is an act of insolvency."

Another case relied upon by the appellant is *Subramania Aiyar v. The Official Receiver, Tanjore*(1), a decision of SPENCER and MADHAVAN NAIR JJ. In that case, an execution sale was held on 30th September 1920. Seven days previously the first judgment-debtor, who was the father of the other judgment-debtors, presented an insolvency petition. An interim Receiver was appointed and he wrote and asked the Subordinate Judge to stop the sale. It was nevertheless held and confirmed by the Subordinate Judge on 27th November 1920. An adjudication order in insolvency was made on 15th December 1920 which was finally confirmed by the High Court. It was held that when the Official Receiver wrote to the Subordinate Judge asking him to stop the sale he was acting only in the capacity of an interim Receiver, and, as he was not, therefore, in possession of the debtor's properties, the Subordinate Judge was not therefore bound to stop the sale; that until the Receiver is actually in possession a creditor is not barred from proceeding to

(1) (1925) 50 M.L.J. 665.

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execution; and that under section 28 of the Provincial Insolvency Act vesting only takes place upon adjudication and under section 29 it is not till then that a Court in which proceedings are pending against a debtor is bound to stay them. The effect of sub-section 7 of section 28 was not there considered. Mr. R. N. Aingar as *amicus curiae*, to whom we are very much indebted for his very able argument, has stressed the fact that the transaction in question was to give a remedy to the creditor against the insolvent's property. This he contends is contrary to the provisions of section 28 (2) of the Act which vests the property of the insolvent in the Court on the making of an order of adjudication and no creditor to whom the insolvent is indebted in respect of any debt provable under the Act is permitted during the pendency of the insolvency proceedings to have any remedy against the property of the insolvent and that, as under sub-section 7 the order of adjudication relates back to and takes effect from the date of the presentation of the petition, the insolvency is deemed to commence on the latter date and that from that date the insolvency proceedings are pending. He contends, therefore, that the Official Receiver becomes the owner of the property not merely from the date when the order of adjudication is made but from the commencement of the insolvency. The result is that a debtor cannot himself after the date of the presentation of the insolvency petition which results in his subsequent adjudication enter into any transaction which will bind the Official Receiver, and a person dealing with him from that date may find himself in a precarious position unless the

transaction comes within section 55 of the Act which protects *bona fide* transactions. Under that section the only transactions which are protected are payments by the insolvent to any of his creditors, any payment or delivery to the insolvent, transfers by the insolvent for valuable consideration or contracts or dealings by or with the insolvent for valuable consideration, provided that such transactions take place before the date of the order of adjudication and that the persons with whom such transactions take place have not at the time notice of the presentation of any insolvency petition by or against the debtor. Upon the question of whether the appellant had notice of the presentation of the insolvency petition, the learned District Judge in his judgment says that he had no notice of that petition. I am bound to say that the facts of this case give rise to a very strong inference that the appellant did know of the presentation of the insolvency petition. The agreement upon which he sued is dated 19th March 1930 and it is significant that the appellant took no steps whatever to enforce that agreement by suit for nearly eleven months after the date of the agreement and only filed his suit the day after the presentation of the insolvency petition in the District Court of East Gōdāvari at Rajahmundry, in the District Munsif's Court of Rajahmundry. It is difficult to avoid the conclusion that the suit was filed in consequence of the filing of the insolvency petition on the previous day. However, in my view, the question of notice is immaterial as this is not one of those transactions which is protected by section 55. In an English case, namely, *In re O'Shea's Settlement*,

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Courage v. O'Shea(1), it was held that a charging order under section 14 of the Judgments Act, 1838, upon stock or shares or money in Court belonging to a judgment-debtor is not a "transaction" protected by section 49 of the Bankruptcy Act, 1883. Section 49 protected any contract, dealing or transaction by or with the bankrupt for valuable consideration provided that the person with whom the contract, dealing or transaction was made or entered into had not, at the time of the contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time. That section is very similar to section 55 of the Provincial Insolvency Act. LINDLEY L.J. on page 331 says :

"'Contract, dealing or transaction' with the bankrupt means something done by him. The words do not point to a proceeding in which the bankrupt is merely passive."

It is difficult to see how the filing of a suit and the obtaining of a decree even though by consent of the judgment-debtor can be held to be a contract, dealing or transaction done by the judgment-debtor.

This case was followed in *Wild v. Southwood*(2). There, a charging order under section 23 of the Partnership Act, 1890, upon a judgment-debtor's interest in a partnership, being a proceeding *in invitum*, was held not to be a "transaction" protected by section 49 of the Bankruptcy Act. The plaintiff in that suit, who had on 20th April 1896 obtained judgment against the defendant for £147-8-6 and costs, obtained an order on the 27th April in the action under section 23 of

(1) [1895] 1 Ch. 325.

(2) [1897] 1 Q.B. 317.

the Partnership Act, 1890, charging the judgment-debt and costs on the defendant's share and interest in a business he was carrying on in co-partnership with two other persons. On the 23rd May he took out a summons to enforce his charging order by a sale of the defendant's interest in the partnership property. At that time the defendant, although the plaintiff was unaware of it, had committed an act of bankruptcy on the previous 17th April. On the 1st June a bankruptcy petition was presented against the defendant grounded on the act of bankruptcy he had committed on the 17th April, and on the 15th June a receiving order was made on the petition which was followed by an adjudication. Following *In re O'Shea's Settlement. Courage v. O'Shea*(1), VAUGHAN WILLIAMS J. held that the obtaining of the charging order was not a transaction within the meaning of section 49 of the Bankruptcy Act. He then deals with the law of relation back and says :

"This law of relation back, which makes the title of the trustee vest as from a date antecedent to the transaction or event which took place without any petition in bankruptcy having occurred or a receiving order having been made, operates no doubt very hardly in many cases, and therefore various Acts of Parliament have contained protective sections to relieve those persons who would be injured by the stringency of that law. Apart from those protective sections, it is plain that this execution cannot hold good against the trustee in bankruptcy whose title relates back to a period anterior to it."

In my view, Mr. R. N. Aingar's contention must be upheld. This was not a transaction which is protected by section 55 of the Provincial Insolvency Act and, unless it comes within the

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protection of that section, by reason of the doctrine of relation back the property of the insolvent must be deemed to have vested in the Official Receiver on the date of the presentation of the insolvency petition which was antecedent to the date of the filing of the suit and the subsequent decree. For these reasons, I am unable to agree with the opinion expressed by RAMESAM J. in *Kaliaperumal Naicker v. Ramachandra Aiyar*(1) that the filing of a suit against a debtor prior to the adjudication although after the presentation of an insolvency petition is to be regarded as being outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2). The result is that this appeal must be dismissed.

CORNISH J.

CORNISH J.—I agree. In my opinion the decree which the creditor obtained in his suit against the debtor for specific performance was not a “transaction” covered by section 55 of the Provincial Insolvency Act. The construction put upon the word in the corresponding section 49 of the English Bankruptcy Act is that it means a transaction in which the insolvent does something, and not a proceeding in which the insolvent is merely passive. Thus, a charging order upon property belonging to the judgment-debtor in Court, and a garnishee order attaching a debt due to the insolvent have been held not to be a transaction within the protection of the section: see Williams on Bankruptcy, 14th edition, page 331. There is no reason why the word “transaction” as it occurs in section 55 of the Provincial Insolvency Act should bear a different meaning.

(1) (1927) 53 M.L.J. 142.

The act done by the debtor in this case is that he withdrew his defence to his creditor's suit and submitted to a decree. It was a purely passive act, and judged by the above-mentioned criterion would not be a transaction within the contemplation and protection of section 55.

Now, if the creditor had commenced his suit against the debtor prior to the filing of the insolvency petition, the suit could have been continued notwithstanding the insolvency, subject to the possibility of the suit being stayed or its continuance being made subject to terms by the Court under section 29 of the Act. But it has so happened that the suit was instituted on the day after that on which the insolvency petition was filed. The effect of the relation back of the adjudication made upon that petition is that the adjudication commenced from the time when the petition was filed. It is from that time that the vesting of the estate in the Official Receiver is made to commence, and that the rule in section 28 (2) restraining a creditor's right of suit in respect of a debt comes into force. The consequence is that the suit in the present case must be deemed to have been commenced after the adjudication; and the suit being one in respect of a debt, namely, to enforce performance of an agreement by the debtor to execute a mortgage to the creditor as security for his debt, the suit was incompetent under the provisions of section 28 (2), leave of Court to commence the suit not having been first obtained. The decree made in the suit would therefore not be binding upon the Official Receiver as representing the insolvent, nor could it be effectual against the insolvent, for after

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adjudication his power to transfer his property by mortgage or otherwise was gone.

With regard to what is said by RAMESAM J. in *Kaliaperumal Naicker v. Ramachandra Aiyar*(1), if he intended to lay down the proposition that the relation back of an adjudication order to the time when the insolvency petition is filed did not affect a suit instituted in the interval between petition and adjudication by a creditor in respect of a debt, I must respectfully dissent from it. But I question whether this was what the learned Judge intended to convey. I think his observations should be understood as referring to the particular suit before him. It was a suit upon a mortgage. The right of a secured creditor, such as a mortgagee, to realise his security independently of the Insolvency Court is expressly reserved to him by section 28 (6) of the Act, and this right includes the power of realising the security by suit: *Lang v. Heptullabhai Ismailji*(2). A suit instituted by a mortgagee to enforce his claim under the mortgage would, therefore, be outside the Insolvency Act, and section 28 (2) would have no application to it. But in the present case the creditor who filed the suit was not a secured creditor, though he doubtless hoped to become one as the result of his suit.

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(1) (1927) 53 M.L.J. 142.

(2) (1913) I.L.R. 38 Bom. 359.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice King.

NOOKALA PEDA SATYAM AND ANOTHER (PETITIONERS—
DEFENDANTS SIX AND SEVEN), APPELLANTS,

1935,
February 12.

v.

THUMMALAPALLI KRISHNAMURTY (RESPONDENT—
PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. IX, r. 13—Minor—Ex parte decree against—Setting aside of—"Sufficient cause" for—Non-appearance of guardian deliberate and due to his honest conviction that plaintiff's claim is just, if a.

When a guardian realises that the plaintiff's claim is just and that the minor defendant has no case to put forward and, exercising his judgment honestly and deliberately and in the interests of the minor defendant, decides that no good purpose can be served by putting in an appearance and for that reason fails to appear, the non-appearance of the guardian is not a "sufficient cause" within the meaning of Order IX, rule 13, of the Code of Civil Procedure.

Kathaswamy Chettiar v. Ramachandran, (1934) I.L.R. 57 Mad. 1069, followed.

Venkataratnam v. Nagappa, (1934) 67 M.L.J. 387, considered.

APPEALS against the orders of the Court of the Subordinate Judge of Ellore dated 16th April 1932 and made in Interlocutory Applications Nos. 74 of 1932 and 1004 of 1931 respectively in Original Suit No. 63 of 1930.

Ch. Raghava Rao for appellants.

K. Bhimasankaran for N. Rama Rao for respondent.

Cur. adv. vult.

* Appeals Against Orders Nos. 474 and 475 of 1932.

JUDGMENT.

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KING J.—Original Suit 63 of 1930 on the file of the Subordinate Judge of Ellore was a suit upon a mortgage. The mortgagors were defendants 1 to 5 of whom defendants 2 to 5 are brothers, and the first defendant their mother. Two other defendants were impleaded, defendants 6 and 7, the minor sons of the second defendant, and their mother was proposed as their guardian. Of these defendants, defendants 1 to 3 filed a written statement but did not further contest the plaintiff's claim; defendants 4 and 5 and the mother of defendants 6 and 7 remained *ex parte*. A decree was accordingly passed against all the defendants and in due course two applications were filed under Order IX, rule 13, to set this decree aside. One was filed by the fourth defendant and the other by defendants 6 and 7, appearing this time by their maternal grandmother. Both applications were heard together by the learned Subordinate Judge and dismissed, and against this order of dismissal the two appeals now under consideration have been filed.

[His Lordship considered Civil Miscellaneous Appeal No. 475 of 1932, the appeal preferred by the fourth defendant, upheld the finding of the Subordinate Judge that the fourth defendant must be deemed to have had at least constructive notice of the date of hearing of the suit, and dismissed his appeal with costs.]

The other appeal (Civil Miscellaneous Appeal 474 of 1932) raises a very interesting point of law. It is this—what is the effect with reference to Order IX, rule 13, or rule 9, of the failure of a guardian or next friend of a minor party in a suit

to appear? Three points of view are possible. The first is what may be called the complete identification of the minor with his guardian. If that guardian does not appear and cannot satisfy the Court that he or she was prevented from appearing by sufficient cause, then no application under Order IX, rule 13, can be successful and the remedy of the minor, if he has any grievance against his guardian, is by separate suit. This is the view adopted by the learned Subordinate Judge.

The second view is that the mere fact of the non-appearance of the guardian is sufficient proof that the minor party, who is precluded from appearing in person or from choosing his own guardian, has been prevented by sufficient cause from appearing. This is the view which has been taken by the learned CHIEF JUSTICE sitting alone in a recent case reported as *Venkataratnam v. Nagappa*(1).

The third view is intermediate between these two. It finds expression in a case decided by my learned brother, also sitting alone, and reported as *Kathaswamy Chettiar v. Ramachandran*(2). It is there held that

“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, Civil Procedure Code.”

The first of these views is not seriously pressed before us. Neither the learned Subordinate Judge nor the learned Advocate for the respondent has referred to any authority in support of it, and it is in direct conflict with the principle that the

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Court is under a duty to show a special solicitude for the interests of minor parties in suits which come before it.

In the case of *Venkataratnam v. Nagappa*(1), which has been quoted as authority for the second view, the minor parties were plaintiffs whose next friend (their mother) failed to prosecute their suit, and the suit was dismissed on a day on which the defendants also were not ready to go on with it. An application was then made for the restoration of the suit on the plea that the next friend was prevented from appearing by illness. This plea was rejected by the District Munsif, and the application in consequence dismissed. In dealing with this order in revision the learned CHIEF JUSTICE begins by saying that the District Munsif had not addressed himself to the question whether the interests of the minors could be allowed to be prejudiced by the absence of the mother. Then three possible explanations for the mother's failure to appear are considered. She may have been ill, she may have been negligent, she may have been deliberately acting adversely to the minors' interests. In all these cases it is pointed out that the minors' interests should not be allowed to be prejudiced. Then follows the general conclusion, expressed in these words :—

"It appears to me, therefore, that the position in justice is that, if there are minor plaintiffs and defendants who are represented as they must be by a next friend and the next friend is absent, through whatever cause it may be, at the trial, then that fact alone is a sufficient reason for setting aside an *ex parte* decree passed against minor defendants or for setting aside an order of dismissal of the suit in the case of minor plaintiffs. I am supported in this view by a decision of

(1) (1934) 67 M.L.J. 387.

the Calcutta High Court in *Kesho Pershad v. Hirday Narain*(1) and by a decision of CUEGENVEN J. in *Kathaswamy Chettiar v. Ramachandran*(2).

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If I may say so with very great respect, it seems to me that the general conclusion does not necessarily follow from the reasoning of the judgment, and that the two authorities quoted do not go so far as to support this conclusion expressed as it is in its widest form and without any reservation. There is a fourth possible explanation for non-appearance which has not been considered; an explanation which no doubt would very rarely apply in the case of the next friend of a plaintiff whose change of attitude is itself *prima facie* indication of the neglect of the plaintiff's interests, but may well apply to the guardian of a minor defendant. It is this, that the minor defendant has no case to put forward, and that his guardian realises this and, exercising his judgment honestly and deliberately and in the interests of the minor defendant, decides that no good purpose can be served by putting in an appearance. In such circumstances it seems to me that the non-appearance of a guardian is not a "sufficient cause" within the meaning of Order IX, rule 13. A party can be said to be "prevented" from appearing only when he wishes to appear, and he wishes to appear only when he has some point of view to press upon the Court's attention. If he recognises the justice of the plaintiff's claim and is content to have a decree passed against him and for that reason fails to appear, he is in no sense prevented from appearing.

(1) (1880) 6 C.L.R. 69.

(2) (1934) I.L.R. 57 Mad. 1069.

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—
KING J.

Kesho Pershad v. Hirday Narain(1) is a case decided in Calcutta in 1880. The crucial passage in that judgment is quoted by my learned brother in *Kathaswamy Chettiar v. Ramachandran*(2). It is there pointed out that the guardian's default was a "neglect of duty" and that he failed to take "what was obviously a necessary step to protect the minors' interests". And in *Kathaswamy Chettiar v. Ramachandran*(2) itself the same stress is laid upon the conduct of the guardian. The discussion which begins on page 1072 proceeds upon the finding of fact that the guardian had wrongfully allowed the claim to be decreed *ex parte*, and ends with that finding of fact, again expressed in another form, that the first defendant had betrayed his trust as guardian.

With great respect I find myself in entire agreement with this decision of my learned brother in *Kathaswamy Chettiar v. Ramachandran*(2) and unable to extend the principle so far as it has been extended in *Venkataratnam v. Nagappa*(3). It seems also to me that if the mere absence of a guardian without any enquiry into the reasons for that absence is to be accepted as sufficient cause for setting aside an *ex parte* decree, the door is opened wide for fraudulent conduct on the part of a group of defendants who desire unduly to protract the trial of a suit against them.

[Portion of the judgment is omitted as not being necessary for the purposes of the report.]

CURGENVEN J.—I agree.

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(1) (1880) 6 C.L.R. 69.

(2) (1934) I.L.R. 57 Mad. 1069.

(3) (1934) 67 M.L.J. 387.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

C. M. MAROOF SAHIB AND FOUR OTHERS (PLAINTIFFS
ONE AND FOUR TO EIGHT), PETITIONERS,

1934,
December 14.

v.

AYYAKANNU NAICKER (DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), sec. 7 (iv) (c) and (v)—Applicability—Inamdar—Declaration of his ownership of kudivaram and recovery of holding—Suit by inamdar for—Court-fee payable in—Court-fee valuation—Trial Court's power to revise—Remand order—Case coming back to it for fresh disposal after—Civil Procedure Code (Act V of 1908), O. VII, r. 11.

An inamdar, whose right to the melvaram in a holding comprised in the inam was admitted, but whose right to the kudivaram therein was disputed, by the tenant, sued the tenant for a declaration that he was the owner of the kudivaram and for the recovery of the holding.

Held that the suit was governed by section 7 (v) and not by section 7 (iv) (c) of the Court Fees Act and that under sub-clause (d) of section 7 (v) court-fee was leviable on the market-value of the kudivaram right, which alone was the subject-matter of the suit.

In *re Sobhanadri Rao*, (1932) I.L.R. 56 Mad. 314, dissented from.

Held further that the trial Court had the power to revise the valuation even after the case had come back to it for fresh disposal on an order of remand.

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 Court of the District Munsif of Chingleput, dated 27th April 1933 and made in Original Suits Nos. 44 to 57 of 1929.

* Civil Revision Petitions Nos. 888 to 901 of 1933.

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v.
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K. Bhashyam Ayyangar for petitioners.
P. V. Rajamannar for Government Pleader
(P. Venkataramana Rao) for respondent.

JUDGMENT.

The question raised is whether a proper court-fee has been paid on the plaints in each of these fourteen suits. They were filed by an inamdar for the recovery of holdings comprised in the inam, each suit being against a particular tenant in respect of his holding. It is alleged that, so far as the plaintiff's right to the melvaram is concerned, there is no dispute and that the only quarrel between the plaintiff and the defendants is as regards the former's right to the kudivaram. The plaintiff brings these suits for a declaration that he is the owner of the kudivaram and for the recovery in each suit of the specific holding to which it relates. These cases were originally filed in the District Munsif's Court in 1929 and a plea of *res judicata* having been raised and upheld, the suits were dismissed. Appeals were taken to the District Court and the finding of the learned Munsif on the question of *res judicata* having been reversed, the suits were remanded on 22nd April 1932 to the trial Court for fresh disposal. When the cases came back to the District Munsif's Court, the Court-fee Examiner found on scrutiny that the reliefs were inadequately valued and that the proper provision applicable is not section 7 (iv) (c) but section 7 (v) of the Court Fees Act. The District Munsif upheld this view and the first question that arises is, whether the suits are governed by section 7 (iv) (c) or by section 7 (v).

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On behalf of the plaintiff, it is contended that, as what is prayed for is a declaration with consequential relief, the provision applicable is section 7 (iv) (c). A similar contention was raised before me in *Ramakrishnayya v. Seshamma*(1) and I held that in suits to obtain recovery of possession, the relief ought to be valued under section 7 (v), although the possession is asked for as being consequential on the declaration. There, I quoted a passage from the judgment of BODDAM and BHASHYAM AYYANGAR JJ. in *Chinnammal v. Madarsa Rowther*(2) to the effect that, where the relief prayed for, though consequential upon the declaration, falls within any of the paragraphs, namely, i to iii and v to xi of section 7, the mode of valuing the relief is as provided in the relevant paragraph out of the said paragraphs and not in section 7 (iv) (c). A little reflection will show that if the opposite view should prevail, most anomalous consequences would follow. Supposing before action a person's right to a sum of money claimed by him is denied, in such a case the plaintiff, contending that the declaration is not an idle relief, may so frame his plaint as to contain prayers both for declaration and recovery of money. In effect, whenever there is a previous denial of the plaintiff's right to the money, he may contrive to file his suit in that form ; it seems unreasonable that because there is a prayer for declaration, the suit is not to be valued as for money but under section 7 (iv) (c). Similarly, in every suit for possession of land, on the ground that the plaintiff's title had been previously

(1) (1934) 68 M.L.J. 369.

(2) (1903) I.L.R. 27 Mad. 480.

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denied, he may frame his plaint as one for declaration and recovery of possession ; to hold likewise that such a suit is to be valued not as one for possession but under section 7 (iv) (c) seems opposed to the scheme of the Act. These examples will serve to show that it is both good practice and good sense that, as observed by BODDAM and BHASHYAM AYYANGAR JJ. in the passage quoted above, the relief claimed consequent on the declaration should be valued under the paragraph dealing with that particular relief and not under section 7 (iv) (c). This view has also been taken in the Full Bench judgment in *Arunachalam Chetty v. Rangasawmy Pillai*(1) and again in *Rajagopala v. Vijayaraghavalu*(2). In accordance with these decisions I held, in the case referred to above, that a suit for declaration and possession is governed by section 7 (v) and not section 7 (iv) (c). To that view I still adhere notwithstanding the decision in *In re Sobhanadri Rao*(3), cited for the petitioners. In that case, as in this, the inamdar's right to the melvaram was not in controversy and the only dispute was in respect of his kudivaram right. JACKSON J. held that section 7 (iv) (c) applied on the ground that

"it can hardly have been contemplated that a plaintiff should pay the same court-fee when he sues for possession of an inam against a rival claimant and when as undisputed inamdar he asserts his title to the kudivaram."

I should have regarded it as a binding decision, were it not opposed to the Full Bench ruling and the other cases to which I have referred ; in fact, the view of JACKSON J. seems to be based more

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upon some principle of natural justice than upon any provision of the Court Fees Act. Suits for possession of land are in terms governed by section 7 (v) and the fact that the melvaram right is not in dispute seems to make no difference. I therefore agree with the lower Court that the provision applicable is section 7 (v) and not section 7 (iv) (c).

In holding that section 7 (v) governs the case, the learned Munsif has applied sub-clause (d) and the correctness of that view has not been questioned. Under that sub-clause, it is upon the market-value of the land that the court-fee has to be levied ; but in assessing the market-value, the lower Court has made no deduction in respect of the melvaram right, regarding which there is no dispute. The kudivaram right alone (which in the present actions constitutes "the land" under this section) being the subject-matter of the suits, it is on the market-value of that right that the court-fee has to be levied. I therefore direct that the lower Court, while making a computation on this basis, shall make the necessary deduction.

There is no substance in the last contention of the petitioners that the District Munsif was wrong in revising the valuation when the cases came back to him for fresh disposal on an order of remand. The Court's power to correct the valuation is not limited under Order VII, rule 11, of the Civil Procedure Code to any particular stage of the suit. It has been held that the power under that provision to reject a plaint is not exhausted when it had been admitted and registered. That being so, the Court must be held to retain the power till the point is raised and it

(1) (1914) I.L.R. 38 Mad. 922 (F.B.).

(2) (1914) I.L.R. 38 Mad. 1184.

(3) (1932) I.L.R. 56 Mad. 314.

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decides it, whatever the stage may be in the course of the trial. Moreover, the analogy of section 12 of the Court Fees Act, which says that even a Court of appeal, if it finds that a question was wrongly decided to the detriment of the revenue, may exact the proper court-fee, also shows the trial Court's power may be exercised at any stage of the suit.

I direct that the parties shall bear their own costs and the Government Pleader's fee in all the fourteen petitions is fixed at a consolidated sum of Rs. 200.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row.

THE OFFICIAL RECEIVER, KISTNA AT MASULI-
PATAM (PETITIONER), APPELLANT,

v.

GOGINENI KODANDARAMAYYA AND ANOTHER,
(RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 52—Application under—Executing Court—Competent only to direct delivery to Receiver of property against which execution has issued—No longer competent to investigate or decide questions of disputed title.

In an application under section 52 of the Provincial Insolvency Act (V of 1920) where the conditions prescribed therein have been fulfilled, the executing Court has no other duty to perform than to direct the delivery to the Receiver of the property against which it has issued execution as the property of the insolvent. That section does not contemplate any enquiry

* Appeals Against Appellate Orders Nos. 176 and 177 of 1933.

at all as regards the rights of the insolvent in such property and the executing Court is no longer competent to investigate or decide questions of title in dispute between the insolvent-judgment-debtor and any other co-judgment-debtor or stranger.

APPEALS against, and petitions under sections 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 150 of 1932, dated 12th April 1933 (Execution Application No. 995 of 1932 in Original Suit No. 330 of 1931, Court of the District Munsif of Bezwada) and the order of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 48 of 1932, dated 12th April 1933 (Execution Application No. 996 of 1932 in Original Suit No. 169 of 1931, Court of the District Munsif of Bezwada).

Ch. Raghava Rao and A. Sundaram Aiyar for S. Rajaraman for appellant.

V. Subrahmanyam and V. Satyanarayana for respondents.

JUDGMENT.

These appeals arise out of the order in appeal of the Additional Subordinate Judge of Bezwada, dated 12th April 1933. There were two appeals to the Subordinate Judge from one and the same order passed by the District Munsif of Bezwada in two applications made to him under section 52 of the Provincial Insolvency Act. Two different decree-holders had attached certain properties in execution of decrees obtained by them against two persons, father and son. Before the properties were actually brought to sale, the father filed an insolvency petition, and in that petition the Official Receiver, Kistna, was appointed Receiver

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of his properties. Thereupon the Official Receiver presented two applications under section 52 of the Provincial Insolvency Act praying that the sale of the properties may be stopped. The District Munsif after enquiry held that the properties brought to sale were the self-acquisitions of the father, Bapayya, and accordingly stopped the sales and directed the delivery of the entire properties to the Official Receiver. From this order the decree-holders appealed to the Subordinate Judge, and the Subordinate Judge held that it was not competent to the executing Court, to whom an application is made under section 52 of the Provincial Insolvency Act, to investigate and decide the questions of title arising between the insolvent and others, and accordingly he modified the order of the District Munsif to the extent allowing the Official Receiver to take possession only of the interest of the insolvent, whatever it might be, in the properties, and allowing the decree-holders to proceed with the execution of their decrees so far as the second judgment-debtor's, i.e., the son's interest in the attached properties, whatever it might be, was concerned. Preliminary objection was raised before the Subordinate Judge to his competency to hear the appeals on the ground that the appeals must be deemed to have been presented under section 75 of the Provincial Insolvency Act, and that the Appellate Court under that section was the District Judge and not the Subordinate Judge. This objection was overruled by the Subordinate Judge, and it has not been pressed before me. It is therefore unnecessary for me to consider whether there is any substance in this objection.