



THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

Editor

R. N. AINGAR (*Bar.-at-Law*)

Reporters

Privy Council ... C. SIDNEY SMITH (*Bar.-at-Law*)

High Court ... { G. RAJAGOPALAN (*Advocate*)
A. S. VISWANATHA AYYAR (*Advocate*)
K. W. RAMA RAO (*Advocate*) (till 12th August).
V. V. CHOWDARY (*Bar.-at-Law*) (from 13th August).

Vol. LIX—1936

January—December

Published under the Authority of the Governor in Council
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS

[*All Rights Reserved*]

JUDGES OF THE HIGH COURT

1936

1ST JANUARY TO 31ST DECEMBER.

CHIEF JUSTICE.

The Hon'ble Sir OWEN BEASLEY, *Kt.*, Barrister-at-Law
(on leave from 20th July to 13th October).

The Hon'ble Sir M. VENKATASUBBA RAO, *Kt.*, B.A., B.L.
(officiating from 20th July to 13th October).

PUISNE JUDGES.

The Hon'ble Sir M. VENKATASUBBA RAO, *Kt.*, B.A., B.L.
(on leave from 16th November to 4th December).
(Member, Delimitation Committee, from 1st January to 7th February.)

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

The Hon'ble Mr. A. J. CURGENVEN, I.C.S. (on leave till 23rd July). (Retired on 24th July.)

The Hon'ble Mr. H. D. CORNISH, Barrister-at-Law.

The Hon'ble Sir GILBERT STONE, *Kt.*, Barrister-at-Law (till 5th January).

The Hon'ble Mr. S. VARADACHARIAR, B.A., B.L. (Rao Bahadur).

The Hon'ble Mr. S. BURN, I.O.S.

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

The Hon'ble Mr. V. PANDRANG ROW, I.C.S.

The Hon'ble Mr. A. J. KING, I.O.S. (on leave from 20th July to 14th November).

The Hon'ble Mr. S. WADSWORTH, I.O.S.

The Hon'ble Mr. F. VENKATARAMANA RAO NAYUDU,
B.A., B.L. (Rao Bahadur).

The Hon'ble Mr. K. P. LAKSHMANA ROW, B.A., B.L.
(Diwan Bahadur).

The Hon'ble Mr. F. W. GENTLE, Barrister-at-Law
(from 10th March).

The Hon'ble Mr. J. C. STODART, I.C.S. (from 24th July).

OFFICIATING JUDGES.

The Hon'ble Mr. J. C. STODART, I.C.S. (till 23rd
July).

The Hon'ble Mr. K. S. MENON, Barrister-at-Law
(Diwan Bahadur) (from 1st January to 9th
March and from 20th July to 13th October).

The Hon'ble Mr. L. O. HORWILL, I.C.S. (from 20th July
to 14th November and from 16th November to 4th
December).

ADVOCATE-GENERAL.

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

COUNCIL OF LAW REPORTING

1936

PRESIDENT.

The Hon'ble Sir OWEN BEASLEY, Kt., Barrister-at-Law,
Chief Justice.

The Hon'ble Mr. V. MOCKETT, Barrister-at-Law (from
8th May to 13th October).

MEMBERS.

Sir A. KRISHNASWAMI AYYAR, Kt., B.A., B.L. (Diwan
Bahadur), Advocate-General.

Mr. NUGENT GRANT, Barrister-at-Law.

Mr. H. M. SMALL, M.A., LL.B., Government Solicitor.

Mr. K. S. KRISHNASWAMI AYYANGAR, B.A., B.L.,
Government Pleader.

HONORARY SECRETARY.

Mr. G. S. WHITE, Solicitor, Registrar.

Mr. D. APPA RAO, Barrister-at-Law, Acting Registrar
(from 8th May to 13th October).

TABLE OF CASES REPORTED IN THIS VOLUME.

PRIVY COUNCIL.

	Page
Arunachalam Chettiar <i>v.</i> Commissioner of Income-tax	716
Chota Raja Sahab <i>v.</i> Sundaram Ayyar	633
Commissioner of Income-tax, Madras <i>v.</i> The Buckingham and Carnatic Co., Ltd.	175
Ponnambala Desikar <i>v.</i> Periyanan Chetti	809
Tyagaraja Mudaliyar <i>v.</i> Vedathanni	446
Venkatarama Rao <i>v.</i> Appa Rao	539
Zamindar of Polavaram <i>v.</i> Maharajah of Pittapur	910

INCOME-TAX REFERENCE.

Chidambaram Chettiar <i>v.</i> Commissioner of Income-tax, Madras ...	263
Commissioner of Income-tax, Madras <i>v.</i> Fletcher	216
Kesava Rao <i>v.</i> Commissioner of Income-tax, Madras	377
Ramanathan Chettiar <i>v.</i> Commissioner of Income-tax, Madras ...	385
Subrahmanyam Chettiar <i>v.</i> Commissioner of Income-tax, Madras ...	171

ORIGINAL MATRIMONIAL.

Sumathi Ammal <i>v.</i> Paul	509
-------------------------------------	-----

APPELLATE CIVIL—FULL BENCH.

A Second Grade Pleader, <i>In re</i>	732
Kanchamalai Pathar <i>v.</i> Shahaji Rajah Sahib	461
Lakshmi Amma <i>v.</i> Sankara Narayana Menon	359
Macha Koundan <i>v.</i> Kottora Koundan	202
Muthuswami <i>v.</i> Official Assignee, Madras	1020
Palaniappa Chettiar <i>v.</i> Narayanan Chettiar	188
Rama Krishnan Chettiar <i>v.</i> Viswanathan Chettiar	93
Ramasami Pillai <i>v.</i> Murugiah Padayachi	268
Sesha Ayyar <i>v.</i> Krishna Ayyar	562
Swami <i>v.</i> Sathayya	354
Venkataramayya <i>v.</i> Pullayya	998

Venkunaidu v. Mahadevu Sanyasi	Page
Zamindar of Khallikote v. Beero Pollai	356
	825

ORIGINAL MATRIMONIAL—FULL BENCH.

Sumathi Ammal v. Paul	518
------------------------------	-----

APPELLATE CIVIL.

Abdul Razack v. Kilpatti Co-operative Society	257
Alagappa Chettiar v. Official Assignee, Madras	862
Ammu v. Nagappan Nair	972
Ananthanarayana v. Rarichan	656
Ankamma v. Kameswaramma	549
Arumuga Bathan v. Semba Goundan	1042
Aruzachalam v. Rengaswami	289
Athimoola Mudaliar v. Kubra Begam	882
Ayoob Sait v. Thirunavukkarasu	918
Balireddi v. Abdul Satar	240
Basappa v. Hansaji Gulabchand Firm	1049
Basudeva Doss v. Raja Harischand Jagaddeva Garu	408
Butchayya v. Krishnamachari	966
Chinnapa Reddi v. Official Receiver, Guntur	62
Dalayya v. Sundara Narayana	303
Deputy Commissioner of Police v. Vedantam	428
Desu Reddiar v. Srinivasa Reddi	1152
Gopalachari, <i>In re</i>	719
Gosukani v. Sekka Maracayar	777
Govinda Rao, <i>In re</i>	293
Gurunatha v. Secretary of State for India	962
Iswaradas v. Corporation of Madras	1028
Jagadisan Pillai v. Narayanan Chettiar	759
Karunappa Mudaliar v. Secretary of State for India	107
Kanthimathi Ammal v. Ganesa Iyer	805
Karuppanna Pillai v. Haughton	887
Krishnamurthi v. H.R.E. Board, Madras	245
— v. Imperial Bank of India	642
Krishnamurthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam	554
Krishtiah v. Venkata Reddy	399
Kunchi Amma v. Minakshi Amma	693
Mon Singh v. Mothi Bai	855
Murugappa Chettiar v. Ramaswami Chettiar	342
Muthan Chettiar v. Venkitaswami Naicken	928
Muthiah Bhagavathar v. Venkatarama Ayyar	121
Muthuraman Chettiar v. Adaikappa Chetty	660

Nagappa v. Bhagavanji Rasaji Firm	Page
Nagarethna Mudaliyar v. Sami Pillai	1036
Narasimhamurthy v. Official Receiver, West Godavari	979
Official Receiver, East Godavari v. Imperial Bank of India	438
Polayya Dora v. Anantha Patro	296
Ponnu Nadar v. Kumaru Reddiar	44
President, Union Board, Pentapadu v. Venkata Srinivasa-charyulu	75
Rajammal v. Thyagaraja Ayyar	424
Ramahari Patro v. Govinda Rona	159
Ramalingam v. Veerabhadradu	415
Ramasami Pillai v. Trichinopoly Co-operative Credit Bank, Ltd.	51
Rama Vilas Nidhi, Ltd. v. Pera Naicken	101
Rangachariar v. Rangaswami Ayyangar	770
Revenue Divisional Officer, Trichinopoly v. Venkatarama Ayyar.	777
Roshan Umar Karim and Co. v. Madras and Southern Mahratta Railway Co., Ltd.	433
Sambasiva Ayyar v. Subramania Pillai	789
Sankara Ayyar v. Muhammad Ganni Rowther	312
Secretary of State for India v. Sivasankaram Pillai	744
Sequeria v. Abdul Khader	876
Seshasayee Ayyangar v. Govinda Pillai	419
Stanes Motors, Ltd. v. Peter	36
Subrahmanya Ayyar v. Ramasubba Ayyar	402
Subramanian v. Somasundaram	141
Subramania Pillai v. Piraviperumal Pillai	1064
Sundaram Pillai v. Karuppayee Ammal	149
Tavudu v. Venkataratnam	5
Thyagaraja Chettiar v. Collector of Madura	72
Vaikunta Bhat v. Sarvothama Rao	702
Vaithilinga Mudaliar v. Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur	895
Varadachari v. Secretary of State for India	751
Vardhanamma v. Muniswami	872
Veerappa Thevar v. Venkatarama Ayyar	975
Veeraraghava Rao v. Venkatanarasimha Raju Garu	1
Venkayya v. Basivireddi	901
Venugopal Naidu v. Lakshmi Ammal	250
Visweswara Rao v. Surya Rao	392
Yasobadra Nainar v. Samanthabadrar	667
Zeebunnissa Begum v. Mrs. Danagher	154
	942

APPELLATE CRIMINAL.

Abdul Gani, <i>In re</i>	Page
Appadurai Nainar, <i>In re</i>	995
	165

	Page
Muthuvelu Kudumburan, <i>In re</i> ...	1083
Rajaratnam Pillai, <i>In re</i> ...	442
Rama, Rao, <i>In re</i> ...	90
Rangappa Goundan, <i>In re</i> ...	349
Ratnasabapathy Goundan v. Public Prosecutor, Madras...	904
Sangama Naicker, <i>In re</i> ...	622
Siva Bhushana Mudaliyar v. The President, Panchayat Board, Tiruvallur...	261

TABLE OF CASES CITED

IN THIS VOLUME.

	A	Page
A (Wife) v. B (Husband). (1898) I.L.R. 23 Bom. 460	...	520, 530, 532, 534, 538
A Debtor, <i>In re</i> . The Debtor, <i>Ex parte</i> . [1908] 1 K.B. 344, 350.		272
A.K.R.P.L.A. Chettyar Firm v. S. Maher Singh. (1930) I.L.R. 8 Rang. 316	...	190
A'ba v. Dhondu Bai. (1894) I.L.R. 19 Bom. 276	...	466
Abdul Hakim Baig v. Burramiddin. (1925) I.L.R. 49 Mad. 580	...	756
Abdul Hakim Chowdhury v. Hem Chandra Das. (1914) I.L.R. 42 Cal. 433	...	976
Abdul Hussein Khan v. Sons Dero. (1917) I.L.R. 45 Cal. 450 (P.C.)	...	1073
Abdul Jabbar Talukdar v. Sana Bibi. (1934) 38 C.W.N. 1069	...	902
Abdul Jalil v. Md. Abdul Salam. A.I.R. 1932 All. 505	...	156
Abdullah Khan v. Banke Lal. (1910) I.L.R. 33 All. 79 (F.B.)	...	749, 750
Abdul Majid v. Jew Narain Mahto. (1888) I.L.R. 16 Cal. 233	...	778
Abdul Muhamad Rowther v. Seethalakshmi Ammal. (1930) 33 L.W. 109	...	105
Abdul Razak Rowther v. Abdul Rahiman Sahib. (1933) 65 M.L.J. 390	...	362, 364, 368, 374
Abdul Salam v. Veerabhadra Raju. (1929) I.L.R. 52 Mad. 760	...	307
Abdur Rahman v. Shankar Dat Dube. (1895) I.L.R. 17 All. 162	...	486
Abhiram Goswami v. Shyama Charan Nandi. (1909) L.R. 36 I.A. 148; I.L.R. 36 Cal. 1003	...	811
Aiyasami Aiyar v. District Board, Tanjore. (1929) I.L.R. 52 Mad. 972	...	886
Alagar Aiyangar v. Srinivasa Aiyangar. (1925) 22 L.W. 515	...	674
Alampath Krishnan v. Municipal Prosecutor. (1925) 92 I.C. 373	...	261
Alcock, Ashdown and Company, Limited v. Chief Revenue Authority of Bombay. (1923) I.L.R. 47 Bom. 742 (P.C.)	...	705, 711
Alimane Sahiba v. Subbarayudu. (1932) 63 M.L.J. 303	...	284
Alwar Ayyangar v. Subramania Dikshathar. (1931) 61 M.L.J. 863.	...	968
Amalabala Dasi v. Sarat Kumari Dasi. (1931) 54 C.L.J. 593	...	649
Amarendra Mansingh v. Sanatan Singh. (1933) I.L.R. 12 Pat. 642 (P.C.)	...	1076, 1077, 1078
Amba Lal v. Ramgopal Madhoprasad. (1932) I.L.R. 55 All. 221	...	213
Amernunnissa Khatoon v. Meer Mozuffer Hossein Chowdhry. (1873) 12 Beng. L.R. 65, 69	...	500
Amirthalinga Thevan v. Arumuga Ambalagaran. (1928) 28 L.W. 634	...	672, 674, 675, 683

	Page
Ammayee v. Yalumalai. (1892) I.L.R. 15 Mad. 261 ...	78
Anantapadmanabhaswami v. Official Receiver, Secunderabad. (1933) L.R. 60 I.A. 167; I.L.R. 56 Mad. 405 ...	435
Anantharama Iyer v. Kuttimalu Kovilamma. (1916) 30 M.L.J. 611.	936
Anantharazu v. Narayanarazu. (1911) I.L.R. 36 Mad. 383 ...	83
Appa Dhond v. Babaji Krishnaji. (1921) I.L.R. 46 Bom. 85 ...	449
Appalanarasiah v. Chittavadu. A.I.R. 1934 Mad. 454 ...	32
Apparau v. Narasanna. (1891) I.L.R. 15 Mad. 47 ...	32, 34, 35
Aravamudhu Ayyangar v. Zamindarini Srimath Abiramavalli Ayah. (1933) 66 M.L.J. 566 ...	105
Ariyaputhira v. Muthukomaraswami. (1912) I.L.R. 37 Mad. 423.	911
Ariyaputra Naicker v. Muthu Chettiar. 1931 M.W.N. 470 ...	1005, 1008
Arumugam Pillai v. Panayadian Ambalam. (1920) 40 M.L.J. 475.	551
Arumugasundara Maharajah Pillay v. Narasimha Iyer. (1915) 29 M.L.J. 583 ...	50, 1045
Arunachalam Chettiar v. Commissioner of Income-Tax, Madras. (1929) 3 I.T.C. 441; 57 M.L.J. 300 ...	381
Arunachalam Chettiar v. Mangalam. (1915) I.L.R. 40 Mad. 640.	411, 412
Arunachalam Chetty v. Abdul Subhan Sahib. (1925) 50 M.L.J. 232.	652
Ashootosh Dutt v. Doorga Churn Chatterjee. (1880) I.L.R. 6 Cal. 504 ...	479
Attorney-General v. De Keyser's Royal Hotel. [1920] A.C. 508.	874
_____ v. Leonard. (1888) 38 Ch. D. 622 ...	431
Ayisa Bivi Ammal v. Jokara Bivi. (1925) 49 M.L.J. 375 ...	401, 402
Ayyamperumal v. Muthuswami. A.I.R. 1927 Mad. 687 ...	749
Ayyanna v. Nagabhoooshanam. (1892) I.L.R. 16 Mad. 285 ...	806
Ayyareddi v. Gopalakrishnayya. (1923) I.L.R. 47 Mad. 190 (P.C.).	369, 371, 374

B

B.B. & C.I.Ry. v. Rajnagar Spinning Co. A.I.R. 1930 Bom. 129...	798
B.N.Ry. Co. v. Hukum Chand. A.I.R. 1930 Pat. 559 ...	796
_____ v. Moolji Sikka & Co. A.I.R. 1929 Cal. 654 ...	797
Babu Lal v. Jalakia. (1916) 14 A.L.J. 1146 ...	327, 328, 329
_____ v. Raghunandan. (1930) I.L.R. 52 All. 839 ...	339
Bahadur Singh v. Ramphal. (1929) I.L.R. 5 Luck. 552 (F.B.) ...	190, 192, 198
Bai Chandaba v. Kuver Saheb Bapu Saheb. (1893) I.L.R. 18 Bom. 464 ...	206
Bai Devmani v. Ravishankar Oghadbhai. (1928) I.L.R., 53 Bom. 321...	902
Baijnath Singh v. Hajee Vally Mahomed Hajee Abba. (1924) I.L.R. 3 Rang. 106 (P.C.) ...	1007
Balbhadra v. Sheomangal. A.I.R. 1931 All. 347 ...	448
Balkishen Das v. W. F. Legge. (1899) L.R. 27 I.A. 58; I.L.R. 22 All. 149 ...	371, 372, 375
Balmakund Lal v. Musammat Sohano Kueri. (1928) I.L.R. 8 Pat. 153 ...	448
Baluse ni Ayyar, In re. (1928) I.L.R. 51 Mad. 417 (F.B.) ...	1080, 1061

	Page
Balvant Raghunath v. Bala. (1922) I.L.R. 46 Bom. 833 ...	205, 213
Bank of Australasia v. Breillat. (1847) 6 Moo. P.C. 152 ...	1039
Balku Behari Chatterji v. Naraindas Dutt. (1927) I.L.R. 54 Cal. 500 (P.C.) ...	200
Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons. (1933) 64 M.L.J. 606 ...	363, 368, 369
Barclay v. Pearson. [1893] 2 Ch. 154 ...	572, 587, 588, 597, 619
Barnet v. Cohen. [1921] 2 K.B. 461... ..	407
Bartlett v. Parker. [1912] 2 K.B. 497	566, 612
Battina Appanna v. Raja Yarlagadda. (1917) 33 M.L.J. 355 ...	31
Bazayet Hossein v. Dooli Chund. (1878) L.R. 5 I.A. 211; I.L.R. 4 Cal. 402	481, 482
Begam Jan v. Jannat Bibi. (1926) 98 I.C. 612	666
Bengal-Nagpur Railway Co. v. Moolji Sikka & Co. (1930) I.L.R. 58 Cal. 585	796, 797
Bengal-Nagpur Railway Co., Ltd. v. Moolji Sikka & Co. (1931) 54 C.L.J. 314	797
Bennett v. Slater. [1899] 1 Q.B. 45	860, 861
Bepin Behary Bera v. Sasi Bhushan Datta. (1913) 18 C.W.N. 766	466, 488, 489
Best & Co., Ltd. Messrs. v. The Collector of Madras. (1918) 35 M.L.J. 23	712
Beyts & Craig, In re. Ex parte Cooper, &c. (1894) 1 Mans. 56 ...	834, 865
Bhagbutti Deyi v. Bholanath Thakoor. (1875) L.R. 2 I.A. 256; I.L.R. 1 Cal. 104	634
Bhagwan Das v. Jugul Kishore. (1920) I.L.R. 42 All. 570... ..	486
Bhagwan Das Marwari v. Suraj Prasad Singh. (1924) I.L.R. 47 A.H. 217	260
Bhawani Kuwar v. Mathura Prasad Singh. (1912) L.R. 39 I.A. 228; I.L.R. 40 Cal. 89	911, 1045, 1046
Bhoje Mahadev Parab v. Gangabai. (1913) I.L.R. 37 Bom. 621 ...	103, 104
Bholanath Khettry v. Kartick Kissen Das Khettry. (1907) I.L.R. 34 Cal. 372	676, 686
Bhubaneswari Debi v. Nilcomul Lahiri. (1885) I.L.R. 12 Cal. 18 (P.C.)	1078
Bhup Kunwar v. Balbir Sahai. (1921) I.L.R. 44 All. 190	672, 675, 682
Bhyraraju Ramaraju v. Lakshmiah. A.I.R. 1931 Mad. 103 ...	347
Bindaji v. Mathurabai. (1905) I.L.R. 30 Bom. 152	551
Bindeshri Prasad Tiwari v. Badal Singh. (1924) I.L.R. 45 All. 369 (F.B.)	203, 205, 213
Bisseswar Prosad v. Lala Sarnam Singh. (1907) 6 C.L.J. 134 ...	372
Biswanath Prasad v. Chandra Narayan Chowdhury. (1921) L.R. 48 I.A. 127; I.L.R. 48 Cal. 509	541, 545
Bithal Das v. Nand Kishore. (1900) I.L.R. 23 All. 106	93, 96
Blanchenay v. Burt. (1843) 4 Q.B. 707; 114 E.R. 1064	479
Bobba Padmanabhudu v. Bobba Buchamma. (1918) 39 M.L.J. 144	1057
Bose, T.C. v. Obedur Rahman Chowdhury. (1928) I.L.R. 6 Rang. 297	326, 340

	Page
Bows v. Fenwick. (1874) L.R. 9 C.P. 339 ...	583
Brahmayya v. Venkatasuryanarayanamurthy (1925) 50 M.L.J. 409...	755
Brajagopal Ray Burman v. Amar Chandra Bhattacharjee. (1928) I.L.R. 56 Cal. 135 ...	658
Bright v. Walker. (1834) 1 C.M. & R. 211; 149 E.R. 1057 ...	992
Brojendra Kishore Roy Choudhury v. Sarojini Ray. (1915) 20 C.W.N. 431 ...	79, 80, 85
Browning v. Morris. (1778) 2 Cowp. 790; 98 E.R. 1364 ...	572, 587, 619
Bulkee Bee v. Kaka Hajee Muhammad Ummar Sahib. (1925) 50 M.L.J. 39...	199
Bunwari Lal v. Daya Sunker Misser. (1909) 13 C.W.N. 815. ...	672, 678, 679, 680

C

Calder v. Halket. (1839) 2 M.I.A. 293 ...	714
Chandi Prasad v. Jamna. (1927) I.L.R. 49 All. 830 ...	488
Chandramani Prushti v. Jambeswara Rayagaru. (1930) 34 L.W. 598 ...	672, 675, 681, 682
Chandramma v. Seethan Naidu. (1930) 61 M.L.J. 316 ...	328, 340
Chandrasekaram Pillai v. Srinivasa Pillai. (1932) 37 L.W. 723 ...	283
Chandrika Bakhsh Singh v. Indur Bikram Singh. (1916) I.L.R. 38 All. 440 (P.C.) ...	1082
Charlwood, <i>In re. Ex parte</i> The Trustee. (1894) 1 Mans. 42 ...	863, 864, 866
Chathakelan v. Govinda Karumiar. (1893) I.L.R. 17 Mad. 186 ...	482
Chathukutty, E. v. Raman, E. A.I.R. 1933 Mad. 674 ...	426
Chathu v. Neelakandhan. (1922) 42 M.L.J. 457 ...	83
Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali. (1930) I.L.R. 54 Mad. 212 ...	484, 664
Chenna Kesavulu v. Veeraswami. (1932) 65 M.L.J. 755 ...	151
Chhaterbijai Singh v. Damodar Das. (1932) I.L.R. 12 Pat. 181.	440
Chhattar Singh v. Kamal Singh. (1926) I.L.R. 49 All. 276 (F.B.)	766
Chhote Lal v. Bansidhar (1926) 24 A.L.J. 570 ...	371
Chidambaram Chettiar v. Ayyaswami Thevan. (1916) I.L.R. 40 Mad. 585 ...	271, 273
Chidambaram Nandan v. Muni Nagendrayyan. (1920) 39 M.L.J. 445 ...	368, 369
Chidambaram Patter v. Ramasamy Patter. (1903) I.L.R. 27 Mad. 67 (F.B.) ...	969
Chifman Lal v. Hari Chand. (1913) I.L.R. 40 Cal. 879 (P.C.) ...	1072
Chinnappan Chetty v. The Secretary of State for India. (1918) I.L.R. 42 Mad. 239 (F.B.) ...	16
Chinnasami Goundan v. Balasundara Mudaliar. (1934) 67 M.L.J. 262 ...	991, 995
Chinnayya Naidu v. Srinivasa Naidu. (1934) 67 M.L.J. 912 ...	270, 278
Chintamanrao Appasaheb v. Ramachandra Govind. (1931) I.L.R. 56 Bom. 32 ...	988, 990
Chokkalingam Chettiar v. Palaniappa Chettiar. (1934) I.L.R. 58 Mad. 261 ...	270, 283

	Page
Chogalal v. Trueman. (1883) I.L.R. 7 Bom. 481 ...	646
Chokkalingam Chetty v. Annamalai Chetty. (1915) 34 I.C. 417.	270, 273
Chukkun Lal Roy v. Lalit Mohan Roy. (1893) I.L.R. 20 Cal. 906 ...	86
Chunilal v. Bai Muli. (1899) d.L.R. 24 Bom. 420 ...	634
Chuttan Lal v. Kallu. (1910) I.L.R. 33 All. 283 ...	672, 676, 678, 679, 681
City Equitable Fire Insurance Co., <i>In re.</i> [1925] 1 Ch. 407 ...	799
Clarke, <i>In re.</i> [1898] 1 Ch. 336 ...	431
Clarke v. Bradlaugh. (1881) 8 Q.B.D. 63 ...	481
Clayton v. Ashdown. (1714) 9 Vin. Abr. 393 ...	953
Cohen v. Hale. (1878) 3 Q.B.D. 371 ...	277, 288
Collector of Gorakhpur v. Ram Sundar Mal. (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468...	541, 542, 546
Commissioner of Income-tax v. Arunachalam Chettiar. (1923) I.L.R. 47 Mad. 660 ...	719, 722
Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company. (1932) I.L.R. 59 Cal. 1343 (P.C.) ...	221, 227, 229, 238
Commissioner of Income-tax, Bombay Presidency v. The Saras-pur Mills Co., Ahmedabad. (1931) I.L.R. 56 Bom. 129 ...	176, 186
Commissioner of Income-tax, Burma, <i>In re. v.</i> The Rangoon Electric Tramway and Supply Co., Ltd. (1933) I.L.R. 11 Rang. 70 ...	234
Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras. (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302 ...	176, 180, 181, 185, 186, 187
Commissioners of Inland Revenue v. John Blott. [1919] 8 T.C. 191 ...	174
Co-operative Hindusthan Bank, Ltd. v. Surendranath De. (1931) I.L.R. 59 Cal. 667 ...	143
Copin v. Adamson. Copin v. Strachan. (1874) L.R. 9 Ex. 345 ...	922
Courtauld v. Legh. (1869) L.R. 4 Ex. 126, 130 ...	119

D

Dadaji Bhikaji v. Rukmabai. (1886) I.L.R. 10 Bom. 301 ...	396
Dallas, <i>In re.</i> [1904] 2 Ch. 385 ...	142
Damodar Das v. Lakhan Das. (1910) L.R. 37 I.A. 147; I.L.R. 37 Cal. 885 ...	820
Daso Polai v. Narayana Patro. (1933) I.L.R. 57 Mad. 195 ...	317, 319
— v. Narayana Patro. (1933) 65 M.L.J. 819 ...	48, 49, 1046
Dawal Piranshah v. Dharma Rajaram. (1917) I.L.R. 41 Bom. 550.	786
Day v. McLea. (1889) 22 Q.B.D. 610 ...	276
Dearle v. Hall. (1823) 3 Russ. 1; 38 E.R. 475 ...	142, 143, 145, 147, 148
Dearsly v. Middleweek. (1881) 18 Ch.D. 236 ...	254
Deboki Nundun Sen v. Hart. (1885) I.L.R. 12 Calc. 294 ...	96, 97
Dehra Dun—Mussoorie Electric Tramway Company, Limited, in the matter of. (1927) I.L.R. 50 All. 476...	1023

	Page
<i>De Montaigne v. De Montaigne</i> . [1913] P. 154	516
<i>Deo Bunsee Kooer v. Dwarkanath</i> . (1868) 10 W.R. 273 ...	700
<i>Deputy Commissioner of Police v. Vedantam</i> . (1935) I.L.R. 59 Mad. 428	873
<i>Deputy Shankar v. Mangal Sen</i> . (1932) I.L.R. 54 All. 948 ...	205, 213
<i>Derry v. Sanders</i> . [1919] 1 K.B. 223	987, 993
<i>Devanai v. Raghunatha Row</i> . (1912) 18 I.C. 298	412
<i>Dhanraj Joharmal v. Soni Bai</i> . (1925) I.L.R. 52 Cal. 482 (P.C.).	1081
<i>Dhanushkotirayudu v. Venkayala Venkatarathnam</i> . (1919) 38 M.L.J. 320	57, 58
<i>Dhirendrarao Krishnarao v. Virbhadrapa</i> . (1934) I.L.R. 59 Bom. 310	1033
<i>Din Dayal v. Gur Saran Lal</i> . (1920) I.L.R. 42 All. 336	941
<i>Dinobundhu Shaw Chowdhry v. Jogmaya Dasi</i> . (1901) I.L.R. 29 Cal. 154 (P.C.)	367, 370
<i>Dip Narain Singh v. Nageshar Prasad</i> . (1929) I.L.R. 52 All. 338 (F.B.)	957, 960
<i>District Munsif of Tiruvallur, Re</i> : (1911) I.L.R. 37 Mad. 17 (F.B.)	347
<i>Doe, dem. Roberts v. Roberts</i> . (1819) 2 B. & Ald. 367; 20 R.R. 477	1002, 1003, 1006, 1012, 1013
<i>Doggett v. Catterns</i> . (1864) 17 C.B. (N.S.) 669; 144 E.R. 268.	583
<i>Doorvas Seshadri Aiyar v. Govindaswami Pillai</i> . (1921) 40 M.L.J. 556	66
<i>Dorab Ally Khan v. The Executors of Khajah Moheesooddeen</i> . (1878) I.L.R. 3 Cal. 806 (P.C.)	208, 209
<i>Doraisami Mudaly and another, In re</i> . (1890) 1 Weir. 251 ...	613
<i>Doraisami Serumadan v. Nondisami Saluvan</i> . (1912) I.L.R. 38 Mad. 118	553
<i>Dora'swami v. Thangavelu</i> . A.I.R. 1929 Mad. 663	242
<i>Doraiswami Gurukkal v. Subramania Gurukkal</i> . (1927) I.L.R. 51 Mad. 266 (F.B.)	17, 30
<i>Doraiswami Mudaliar v. Doraiswami Aiyangar</i> . (1924) 48 M.L.J. 432	143
<i>Doraiswami Muthiriyar v. Nambiappa Muthiriyar</i> . 1918 M.W.N. 167	986
<i>Doraswami v. Chidambaram Pillai</i> . (1923) I.L.R. 47 Mad. 63 ...	466, 475, 489, 496, 502, 505, 508
<i>Dula Meah v. Moulavi Abdul Rahaman</i> . (1923) 28 C.W.N. 70 ...	284
<i>Dunput Sing Bahadoor v. Ramee Rajessuree</i> . (1871) 15 W.R. 476	482
<i>Durga Dai v. Bhagwat Prasad</i> . (1891) I.L.R. 13 All. 356 ...	197, 198
<i>Dwarkanad Marwari v. Jadaq Chandra Ganguly</i> . (1924) I.L.R. 51 Cal. 761	96
<i>Dwarkanath Sen v. Tara Prassanno Sen</i> . A.I.R. 1923 Cal. 356 ...	88
<i>Dwarkanath Varma v. The King-Emperor</i> . (1933) 64 M.L.J. 466 (P.C.)	626, 627, 628, 631

	Page
<i>Eardley v. Granville</i> . (1876) 3 Ch.D. 826	993
<i>East Stonehouse Urban Council v. Willoughby Brothers, Limited</i> . [1902] 2 K.B. 318	988, 992
<i>Edgeworth v. Edgeworth</i> . (1869) L.R. 4 H.L. 35	634
<i>Edulji Cowasji v. Dadabhoy</i> . (1913) 21 I.C. 536	902
<i>Edward Caston v. L. H. Caston</i> . (1899) I.L.R. 22 All. 270 (F.B.)	520, 532, 538
<i>Emmett, Re; Jenkins v. Emmett</i> . (1906) 95 L.T. 755	317
<i>Erava v. Sidramappa</i> . (1895) I.L.R. 21 Bom. 424	466, 477, 489, 497, 500

F

<i>Fakire v. Tasadduq Husain</i> . (1897) I.L.R. 19 All. 462 ...	254
<i>Falakrishna Pal v. Jagannath Marwari</i> . (1932) I.L.R. 59 Cal. 1314	201
<i>Fani v. Surendra</i> . (1921) 35 C.L.J. 9	492
<i>Farr v. Price</i> . (1800) 1 East. 55; 102 E.R. 22	277
<i>Farran v. Beresford</i> . (1843) 10 Cl. and F. 319; 8 E.R. 764 ...	479
<i>Farrell v. Gleeson</i> . (1844) 11 Cl. and F. 702; 8 E.R. 1269 ...	479
<i>Fielding v. Turner</i> . [1903] 1 K.B. 867	571
<i>Finch v. Lane</i> . (1870) L.R. 10 Eq. Cas. 501	634
<i>Flight v. Bolland</i> . (1828) 4 Russ. 298; 38 E.R. 817	951, 953
<i>Forder v. Great Western Railway</i> . [1905] 2 K.B. 532	799
<i>Forster v. Baker</i> . [1910] 2 K.B. 636	143
<i>Foster v. Cockerell</i> . (1835) III Cl. & Fin. 456; 6 E.R. 1508 ...	142
<i>Fuller v. Perryman</i> . (1895) 11 T.L.R. 350	581, 582

G

<i>Ganeshi Lal v. Charan Singh</i> . (1930) I.L.R. 52 All. 358 (P.C.) ...	127, 130, 138
<i>Gangayya v. Mahalakshmi</i> . (1886) I.L.R. 10 Mad. 90	1060
<i>Gardner v. Lucas</i> . (1878) 3 App. Cas. 582	335
<i>Gayanoda Bala Dassee v. Butto Kristo Bairaga</i> . (1906) I.L.R. 33 Cal. 1040	431, 873
<i>General Electric Trading Co. v. Siemens (India), Ltd.</i> (1928) 33 C.W.N. 418	466
<i>Giles Seddon v. Deputy Collector of Madras</i> . (1912) 17 I.C. 117.	558
<i>Girish Chander Lahiri v. Sasi Sekhaheswar Roy</i> . (1905) I.L.R. 33 Cal. 329	317
<i>Girja Bai v. Sadashiv Dhundiraj</i> . (1916) I.L.R. 43 Cal. 1031 (P.C.).	699
<i>Girwar Narayan Mahton v. Kamla Prasad</i> . (1932) I.L.R. 12 Pat. 117	69
<i>Gnanasambanda Pandara Sannadhi v. Velu Pandaram</i> . (1899) L.R. 27 I.A. 69; I.L.R. 23 Mad. 271	55, 57, 553, 820
<i>Gobindachandra Ghosh v. Jamaluddin Mandal</i> . (1933) I.L.R. 60 Cal. 777	341

	Page
Goda Coopooramier v. Soondarammall. (1909) I.L.R. 33 Mad. 167.	483
Goddard v. O'Brien. (1882) 9 Q.B.D. 37	276
Gorash Das Bagria v. Shiva Lakshman Bhakat. (1903) I.L.R. 30 Cal. 583 (F.B.)	96
Goodtitle v. Badtitle. 9 Dow. Pr. Cases. 1000	479
Gopalakrishna Iyer v. Gopalakrishna Iyer. (1909) I.L.R. 33 Mad. 123'	142
Gopalakrishnayya v. Gopalan. (1926) I.L.R. 51 Mad. 342 ...	300
Gopala Padayachi v. Rajagopala Naidu. A.I.R. 1926 Mad. 1148...	270, 278
Gopal Chunder Chatterjee v. Gunamoni Dasi. (1892) I.L.R. 20 Cal. 370	466, 473, 493, 501, 505, 508
Gopi Narain Khauna v. Bansidhar. (1905) I.L.R. 27 All. 325 (P.C.)	331
Gora Chand Halidar v. Prafulla Kumar Roy. (1925) I.L.R. 53 Cal. 166 (F.B.)	647, 648, 650
Gossami Sri Gridhariji v. Romanlalji Gossami. (1889) L.R. 16 I.A. 137; I.L.R. 17 Cal. 3	247, 248
Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi. (1901) I.L.R. 25 Bom. 494	93, 94, 97
Govinda Kurup v. Chowakkaran Keloth Beekku. (1930) 59 M.L.J. 941	959
Govinda Menon v. Krishna Mannadiar. (1923) 45 M.L.J. 71 ...	65
Govindan Nadar v. Natesa Pillai. (1931) 61 M.L.J. 520 ...	648, 652
Govindarajulu Naidu v. Imperial Bank of India, Vellore. (1931) 35 L.W. 168	749
Mad. 449 v. Secretary of State. (1926) I.L.R. 50	710
Govindasamy Chettiar v. Palaniappa Chettiar. (1924) 48 M.L.J. 397	947
Gevindaswami Koundan v. Kandaswami Koundan. (1927) 53 M.L.J. 489	200
Govindasami Tevan v. Doraswami Pillai. (1910) I.L.R. 34 Mad. 119	370, 372, 374
Grant v. Subramaniam. (1898) I.L.R. 22 Mad. 241	97
Great Berlin Steamboat Company, In re. (1884) 26 Ch.D. 616.	1018
Greedharee Doss v. Nundokissore Doss, Mohunt. (1867) 11 M.I.A. 405	811
Greeman Singh v. Wahari Lal Singh. (1881) I.L.R. 8 Cal. 12 ...	1060
Greenberg v. Cooperstein. [1926] 1 Ch. 657	587
Grimsdick v. Sweetman. [1909] 2 K.B. 740	947
Groves v. Administrator-General. (1898) I.L.R. 22 Mad. 119 ...	467, 487, 488, 499, 502, 504
Gura Sahu v. Krishnamma. (1932) 36 L.W. 432	283
Guardeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh. (1907) I.L.R. 36 Cal. 193	367
Gurudas Kundu Chaudhuri v. Hemendra Kumar Ray. (1929) I.L.R. 57 Cal. 1 (P.C.)	256
Guruvammal v. Arumuga Padayachi. (1931) 61 M.L.J. 894 ...	39, 42

H	Page
Hafiz Abdul Rashid v. Lala Mul Chand. (1928) I.L.R. 4 Luck. 237	200
Hall v. McWilliam. (1901) 85 L.T. 239	568, 590, 611
Hall (H.M. Inspector of Taxes) v. Marians. (1933) 18 T.C. 148.	173, 390
Hall and Hinds, In re. (1841) 2 M. & G. 847; 133 E.R. 987 ...	801
Hansraj Gupta v. Official Liquidators of Dehra Dun, etc. Com-pany. (1932) I.L.R. 54 All. 1067 (P.C.)	1022, 1023
Har Chandi v. Sheoraj Singh. (1916) I.L.R. 39 All. 178 (P.C.).	47, 49
Hardial v. Janki Das. (1928) 108 I.C. 894	857
Harendra Lal Roy Chowdhuri v. Haridasi Debi. (1914) L.R. 41 I.A. 110; I.L.R. 41 Calc. 972	541, 542, 544, 545, 546
Hargu Lal Singh v. Gobind Rai. (1897) I.L.R. 19 All. 541 (F.B.).	327
Hari Ram v. Sheodayal Mal. (1888) L.R. 16 I.A. 12; I.L.R. 11 All. 136	540
Har Narayan v. Sheo Prasad. (1912) 18 I.C. 95	317, 319
Henley & Co., In re. (1878) 9 Ch.D. 469	430, 432
Herman v. Jeuchner. (1885) 15 Q.B.D. 561	1009
Hill, Re. (1868) L.R. 3 Q.B. 543	801
Hiralal Ichhalal v. Narsilal Chaturbhujdas. (1913) I.L.R. 37 Bom. 326 (P.C.)	317, 319
Hirst v. Williams and Perryman. (1895) 12 T.L.R. 128	582, 616
Hitendra Narayan Singh v. Sukhdeb Prasad Jha. (1929) I.L.R. 8 Pat. 558	671, 677
Hukum Chand v. Maharaj Bahadur Singh. (1933) I.L.R. 12 Pat. 681 (P.C.)	88
Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koon-woote. (1856) 6 M.I.A. 393	911
Hurodoot Narain Singh v. Beer Narain Singh. (1869) 11 W.R. 480	672, 676, 678, 679, 680

I

Icharan Singh v. Nilmoney Balidar. (1908) I.L.R. 35 Cal. 470...	312
Indur Chunder Singh v. Radhakishore Ghose. (1892) L.R. 19 I.A. 90; I.L.R. 19 Cal. 507	911
Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission. [1928] A.C. 492	436
Inglis A.W. v. Sarju Prasad Misser. (1923) I.L.R. 3 Pat. 311 ...	156
Inverclyde v. Inverclyde. [1931] P. 29	514, 515
Isharani Nirupoma Devi v. Victor Nitendra Narain. (1925) I.L.R. 53 Cal. 282	537
Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board. (1931) I.L.R. 54 Mad. 928	775
Iswarayya v. Iswarayya. (1929) 58 M.L.J. 29	521, 523, 537
v. Swarnam Iswarayya. (1931) I.L.R. 54 Mad. 774 (P.C.)	523, 531, 534, 537

Iyyanar Kone v. Vidoomada Kone. (1858) S.D.A. 53 ...	Page 603, 604
Izzat-un-nisa Begam v. Partab Singh. (1909) I.L.R. 31 All. 583 (P.C.) ...	818

J

Jagadish v. Bamasundari. (1919) 29 C.L.J. 411 ...	466
Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited. (1916) I.L.R. 38 All. 347 ...	1023, 1027
Jagatdhar Narain Prasad v. A. M. Brown. (1906) I.L.R. 33 Cal. 1133 ...	371
Jagmohan Das v. Jukal Kishore. (1931) 36 C.W.N. 4 (P.C.) ...	376
Jai Narain v. Rashik Behari. A.I.R. 1931 All. 546 ...	131, 140
James Jones & Sons, Limited v. Tankerville (Earl). [1909] 2 Ch. 440 ...	951
Jamiyatram Ramchandra v. Parbhudas Hathi. (1872) 9 B.H. C.R. 116 ...	481
Jamunadas v. E.I.Ry. Co. A.I.R. 1933 Pat. 630 ...	797
Janaki Ammal v. Narayanasami Aiyer. (1916) I.L.R. 39 Mad. 634 (P.C.) ...	1058
Janaki Nath Hore v. Prabhasini Dasee. (1915) I.L.R. 43 Cal. 178 ...	976
Jardine, Skinner & Co. v. Rani Surut Soondari Debi. (1878) L.R. 5 I.A. 164 ...	958
Jenks v. Turpin. (1884) 13 Q.B.D. 505 ...	571, 573, 583
Jeuna Bahu v. Parmeshwar Narayan Mahtha. (1918) I.L.R. 47 Cal. 370 (P.C.) ...	201
Jhabbu v. Musammat Batul. (1922) I.L.R. 45 All. 208 (F.B.) ...	88
Jibun Nissa v. Asgar Ali. (1890) I.L.R. 17 Cal. 937 (P.C.) ...	449
Jijoyamba Bayi Saiba v. Kamakshi Bayi Saiba. (1868) 3 M.H.C.R. 424 ...	634
Jiwan Mal v. Jamna Das. (1910) 10 I.C. 822 ...	1071
Jhannendra Moham Bhaduri v. Rabindra Nath Chakravarti. (1932) L.R. 60 I.A. 71 ...	653
Joel v. Morison. (1834) 6 Car. & P. 501; 172 E.R. 1338 ...	405
Jogendra Chandra Roy v. Shyam Das. (1909) I.L.R. 36 Cal. 543. ...	479
Jogeshwar v. Moci. (1921) 66 I.C. 631 (F.B.) ...	331
Johnson v. Pickering. [1908] 1 K.B. 1 ...	480
John Young & Co. v. Bankier Distillery Company. [1893] A.C. 691 ...	985, 986
Jungli Lal v. Laddu Ram Marwari. (1919) 4 P.L.J. 240 (F.B.) ...	651
Juramu Mahamad v. Jathi Mahamad. (1917) 22 C.W.N. 760 ...	212
Jurawan Singh v. Ramsurekh Singh. (1933) I.L.R. 12 Pat. 261 ...	88

K

Kailasam Pillai v. Nataraja Thambiran. (1909) I.L.R. 33 Mad. 265 (F.B.) ...	814
Kalicharan Singha v. Bibhutibhushan Singha. (1932) I.L.R. 60 Cal. 191 ...	648, 652

Kalidas Chaudhuri v. Prasanna Kumar Das. (1919) I.L.R. 47 Cal. 446 ...	Page 317, 319
Kalipada Sarkar v. Hari Mohan Dalal. (1916) I.L.R. 44 Cal. 627. ...	643, 644, 645, 647, 649, 651
Kamakshi Achari v. Appavu Pillai. (1863) 1 M.H.C.R. 448 ...	603, 604, 605, 609
Kamala Naicken v. Pitchacootty Chetty. (1865) 10 M.I.A. 386. ...	960
Kamaraju v. The Secretary of State for India. (1888) I.L.R. 11 Mad. 309 (F.B.) ...	557, 559
Kamayya v. Mamayya. (1916) 32 M.L.J. 484 ...	291, 1003, 1004, 1005, 1006, 1007, 1010, 1012, 1013, 1016, 1017
Kanta Singh v. Chaturbhuj Singh. (1929) I.L.R. 8 Pat. 585 ...	139
Kanakamma v. The Secretary of State for India. (1927) 54 M.L.J. 230 ...	111
Kanakasabapathy Chetti v. Venkatarama Iyer. (1909) 5 I.C. 339 ...	487
Kancherla Krishna Rao, In re. (1927) I.L.R. 51 Mad. 540 (F.B.) ...	1022
Kandappa Achary v. Vengama Naidu. (1913) I.L.R. 37 Mad. 548 (F.B.) ...	61
Kandaswami Asari v. Somaskanda Ela Nidhi, Ltd. (1910) I.L.R. 35 Mad. 177 ...	673, 674
Kanhaiya Lal Sahu v. Mussammat Suga Kuer. (1925) I.L.R. 4 Pat. 824 ...	1071
Kanjee and Mooljee Bros. v. Shanmugam Pillai. (1932) I.L.R. 56 Mad. 169 ...	365
Kannam Naidu v. Latchanna Dhora. (1899) I.L.R. 23 Mad. 492. ...	355
Karri Peddi Reddy v. Receiver, Nidadavole and Medur Estates. (1916) 18 M.L.T. 171 ...	411
Karuppaiya v. Ponnusami. (1932) I.L.R. 56 Mad. 563 ...	749
Kasia Pillai v. Kumaraswami Pillai. (1928) I.L.R. 52 Mad. 426. ...	986
Kasturshet Javershet v. Rama Kanhoji. (1885) I.L.R. 10 Bom. 65 ...	646
Kathama Natchiar v. Dorasinga Tever. (1875) 2 I.A. 169 ...	1056
Kattiya Pillai v. Ramaswamia Pillai. (1929) 56 M.L.J. 394 ...	162
Kearley v. Thomson. (1890) 24 Q.B.D. 742 ...	571, 587, 1009, 1018, 1019
Kerslake v. Knight. (1925) 133 L.T.R. 606 ...	612
Keshwar Mahton v. Sheonandan Mahton. (1929) 122 I.C. 533 ...	788
Keyes v. Keyes and Gray. [1921] P. 204 ...	513
Khagendra Nath Mahata v. Pran Nath Roy. (1902) I.L.R. 29 Cal. 395 (P.C.) ...	774
Khizarajmal v. Daim. (1904) L.R. 32 I.A. 23 ...	644, 653
Khodabux Haji v. Emperor. (1933) I.L.R. 61 Cal. 6 ...	908
Kilgour v. Gaddes. [1904] 1 K.B. 457 ...	991, 992
Konga Ramaswami v. Thambusami Maniagar. (1922) 16 L.W. 98 (F.B.) ...	672, 683, 684
Kottayya v. Mahalakshamma. (1933) I.L.R. 56 Mad. 646. ...	1005, 1008, 1015
Koti Reddi v. Subbiah. (1918) I.L.R. 41 Mad. 792 (F.B.) ...	889, 892, 893
Koyyamm v. Kuttiammo. (1919) I.L.R. 42 Mad. 567 ...	994

	Page
Krishnan v. Maruvalamma. (1934) 41 L.W. 353	696
Krishnaji v. Rajmal. (1899) I.L.R. 24 Bom. 360	280, 281, 283
Krishnaji Anajee v. Anajee Dhondajee. (1929) I.L.R. 54 Bom. 4.	83
Krishna Pershad Singh v. Moti Chand. (1913) I.L.R. 40 Cal. 635 (P.C.)	466, 468, 492, 503
Krishna Row v. The Collector of Kistna. (1914) 26 M.L.J. 210 ...	111, 120
Krishnaswami Panikondar v. Ramaswami Chettiar. (1917) I.L.R. 41 Mad. 412 (P.C.)	976
Krishnaaya v. Secretary of State for India. (1895) I.L.R. 19 Mad. 24	109, 110, 115
— v. Unnissa Begam. (1891) I.L.R. 15 Mad. 399	467, 487
Kunchithapatham Pillai v. Palamalai Pillai. (1916) 32 M.L.J. 347	127
Kunjammal v. Rathinam Pillai. (1921) I.L.R. 45 Mad. 633 ...	988, 995
Kuppuswami v. Chinnaswami. A.I.R. 1928 Mad. 546	787
Kuppuswamy Ayyangar v. Bavaswami Rao. (1926) I.L.R. 50 Mad. 357	466, 468, 492
Kuppuswami Ayyangar v. Kamalammal. (1920) I.L.R. 43 Mad. 842	653

L

Lachhman Prasad v. Lachmeshwar Prasad. A.I.R. 1922 All. 76 (P.C.)	49
— v. Sarnam Singh. (1917) I.L.R. 39 All. 500	674
Lachman Das v. Ram Prasad. (1927) I.L.R. 49 All. 680 ...	449
Lachmi Narain Das v. Hirdey Narain. (1926) 24 A.L.J. 661 ...	327, 340
Lachmi Narain Prasad v. Kishan Kishore Chand. (1915) I.L.R. 38 All. 126	677, 683, 684, 690
Lahore Bank v. Ghulam Jilani. (1923) I.L.R. 5 Lah. 54	652
Lake, <i>In re</i> . Cavendish, <i>Ex parte</i> . [1903] 1 K.B. 151	142
Lakshmanacharyulu v. Venkataramanujacharyulu. (1926) 51 M.L.J. 414	74
Lakshmanan Chettiar v. Chidambaram Chettiar. (1934) I.L.R. 58 Mad. 752	651, 653
Lakshmanan v. Appa Rau. (1893) I.L.R. 17 Mad. 73	411
Lakshmi Achi v. Narayanasami Naiker. (1929) I.L.R. 53 Mad. 138	363, 364, 369, 372, 374
Lal Bahadur v. Ambika Prasad. (1925) I.L.R. 47 All. 795 (P.C.).	672, 686
Lalchand Marwari v. Mahanth Ramrup Gir. (1925) L.R. 53 I.A. 24; I.L.R. 5 Pat. 312	812
Lalitagar Keshargar v. Bai Suraj. (1893) I.L.R. 18 Bom. 316 ...	394, 396
Lallu v. Jagmohan. (1896) I.L.R. 22 Bom. 409	634
Latchamma v. Appanna. (1921) 41 M.L.J. 386	1062
Lee v. Lee. (1924) I.L.R. 5 Lah. 147 (F.B.)	513
Lekraj Boy v. Becharam Misser. (1867) 7 W.R. 52	500

	Page
Lewis v. Great Western Railway Co. (1877) 3 Q.B.D. 195 ...	799
Lilo Sonar v. Jhagru Sahu. (1924) I.L.R. 3 Pat. 853	665
Lummore v. Robson. (1818) 1 B. and Ald. 584; 106 E.R. 215 ...	86
M	
M. & S.M. Ry. v. Jumakhram. A.I.R. 1928 Bom. 504	798
M. & S.M. Ry. Co. v. Nallathambi Chetti & Co. A.I.R. 1927 Mad. 908	798
Madam Pillai v. Badrakali Ammal. (1922) I.L.R. 45 Mad. 612 (F.B.)	911
Madan Lal v. Bhagwan Das. (1899) I.L.R. 21 All. 235 (F.B.) ...	317, 327
Madan Mohan Dey v. Rebati Mohan Poddar. (1915) 21 C.W.N. 158	3
Madden v. Chappani. (1887) I.L.R. 11 Mad. 356	1035
Madhavrao Waman v. Raghunath Venkatesh. (1923) L.R. 50 I.A. 255; I.L.R. 47 Bom. 798	55, 811
Madho Parshad v. Mehrban Singh. (1890) I.L.R. 18 Cal. 157 (P.C.)	699
Madho Prasad v. Kesho Prasad. (1897) I.L.R. 19 All. 337 ...	483, 498
Madras and Southern Mahratta Railway Co., Ltd. v. Sundarjee Kalidas. (1933) I.L.R. 60 Cal. 996	796, 800
Mahabir Singh v. Dip Narain Tewari. (1931) I.L.R. 54 All. 25 (F.B.)	645
Mahalinga Kudumban v. Theetharappa Mudaliar. (1928) 56 M.L.J. 387	558
Mahant Bagavathi Doss v. Sarangaraja Iyengar. (1931) 33 L.W. 528	560, 561
Mahanth Ram Charan Das v. Naurangi Lal. (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251	811, 818, 820, 821
Maharaja of Benares v. Patraj Kunwar. (1905) I.L.R. 28 All. 262.	968
Maharaja of Jeypore v. Gunupuram Deenabandhu Patnaick. (1904) I.L.R. 28 Mad. 42 (P.C.)	66
Maharaja of Jeypore v. Ramamurty. (1933) I.L.R. 57 Mad. 73 ...	66
Maharaja of Kolhapur v. Sundaram Ayyar. (1924) I.L.R. 48 Mad. 1	634
Mahendra Nath Srimari v. Kailash Nath Das. (1927) I.L.R. 55 Cal. 841	956
Mahomed v. Ganapati. (1889) I.L.R. 13 Mad. 277	811, 820
Mahomed Favez Chowdhry v. Jamoo Gaze. (1882) I.L.R. 8 Cal. 730	409
Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh. (1912) L.R. 39 I.A. 68; I.L.R. 39 Cal. 527	367, 370
Majavath Alli v. Mujafar Alli. (1923) 45 M.L.J. 791	58
Makar Ali v. Sarfuddin. (1922) I.L.R. 50 Cal. 115	211
Ma Kyway v. Ma Mi Lay and another. (1928) I.L.R. 6 Rang. 682	858
Malkarjun v. Narhari. (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337	466, 468, 472, 477, 484, 489, 493, 496, 503, 505, 508, 941

	Page
Mallikarjunadu Setti v. Lingamurti Pantulu. (1902) I.L.R. 25 Mad. 244 (F.B.) ...	105, 197, 198
Manchester and Oldham Bank, Limited v. W. A. Cook and Co. (1883) 49 L.T.N.S. 674 ...	373
Mangamma Nayakuralu v. Ramadasappa Nayanimvary. (1924) 48 M.L.J. 563 ...	766, 767, 768
Mangtupal Bagaria v. Upendra Mohan Pal Chaudhuri. (1929) I.L.R. 57 Cal. 82 ...	1047
Manikyam v. Chandrasekharudu. (1930) 58 M.L.J. 542 ...	60
Maniram Seth v. Seth Rupchand. (1906) I.L.R. 33 Cal. 1047 (P.C.) ...	317
Manmatha Nath Biswas v. Rohilli Moni Dasi. (1904) I.L.R. 27 All. 406 ...	1060
Manmatha Nath Ghose v. Lachmi Debi. (1927) I.L.R. 55 Cal. 96 ...	468, 474, 490
Manohar Ramchandra v. Lakshman Mahadev. (1885) I.L.R. 9 Bom. 371 ...	903
Mansell, Re. <i>Ex parte</i> Norton. (1892) 66 L.T. 245 ...	1021, 1024, 1026, 1027
Ma Nu v. Ma Gun. (1924) I.L.R. 2 Rang. 388 ...	858
Mardan Singh v. Thakur Sheo Dayal. (1905) I.L.R. 27 All. 549 ...	122
Mariamnissa Bibi v. Joynab Bibi. (1906) I.L.R. 33 Cal. 1101 ...	778
Marina Ammayi v. Sundayya. A.I.R. 1929 Mad. 432 ...	541
Marks v. Benjamin. (1839) 5 M. & W. 565; 151 E.R. 239 ...	583, 617
Martin v. Benjamin. [1907] 1 K.B. 64 ...	571, 583, 595, 618
Ma Saw Yin v. Hockto. (1926) I.L.R. 4 Rang. 100 ...	968
Maung Ba Thaw v. Ma Pin. (1934) I.L.R. 12 Rang. 194 (P.C.) ...	555, 556, 557, 559
Maung Chit v. Roshan N. M. A. Kareem Omer & Co. (1934) I.L.R. 12 Rang. 500 (F.B.) ...	274, 282, 285
Maung Naung v. Maung Ba Gy. (1928) I.L.R. 6 Rang. 468 ...	214
Md. Barkat Ali v. Anjuman Imdad Qarza. A.I.R. 1935 Lah. 330 ...	897, 899
Md. Rafi v. Kripa Ramji. A.I.R. 1933 All. 99 ...	317
Md. Saafiqullah v. Md. Samiullah. A.I.R. 1929 All. 943 ...	370
Mehr Chand v. Milkhi Ram. (1932) I.L.R. 13 Lah. 618 (F.B.) ...	203, 206, 214
Meyyappa Chettiar v. Chidambaram Chettiar. (1923) I.L.R. 47 Mad. 483 (F.B.) ...	309
Miller v. Miller. (1924) I.L.R. 52 Cal. 566 ...	513
Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri. (1911) I.L.R. 39 Cal. 232 (P.C.) ...	946, 951, 952, 953, 956
Mitchell v. Crassweller. (1853) 13 C.B. 237 ...	406
M'Kinnell v. Robinson. (1838) 3 M. & W. 434; 150 E.R. 1215 ...	571
Mohesh Lal v. Mohunt Bawan Das. (1883) L.R. 10 I.A. 62; I.L.R. 9 Cal. 961 ...	363, 370
Mohideen Imbrahim v. Mahorad Mura Levai. (1912) 23 M.L.J. 487 ...	204, 205, 211, 212

	Page
Mohori Bibee v. Dharmodas Ghose. (1903) I.L.R. 30 Cal. 539 (P.C.) ...	950
Moolaswami v. Tatayya. (1925) 51 M.L.J. 389 ...	773
Moolji Sica and others, <i>In re</i> . (1934) 3 I.T.R. 123 ...	384
Moore v. High Bailiff of Brompton County Court. (1893) 69 L.T. 140 ...	801
Morris v. Blackman. (1864) 2 H. & C. 912; 159 E.R. 378 ...	590
Moti Lal v. Bhagwan Das. (1909) I.L.R. 31 All. 443 ...	4
Motiram Rosan Lal Coal Company, Limited v. Commissioner of Income-tax. (1932) I.L.R. 12 Pat. 12 ...	176, 186
Mottayappan v. Palani Goundan. (1913) I.L.R. 38 Mad. 226 ...	449, 459
Muhammad Abbas v. Muhammad Hamid. (1912) 9 A.L.J. 499 ...	139
Muhammad Hanif v. Ratan Chand. (1921) I.L.R. 3 Lah. 43 ...	83
Muhammad Iltifat Husain v. Alim-un-nissa Bibi. (1918) I.L.R. 40 All. 551 ...	198
Muhammad Mumtaz Ali Khan v. Mohan Singh. (1923) L.R. 50 I.A. 202; I.L.R. 45 All. 419 ...	810
Muhammad Sadiq v. Ghaus Muhammad. (1910) I.L.R. 33 All. 101 (F.B.) ...	372
Mukand Lal v. Liquidator, Malhotra Bank, Hafizabad. (1933) I.L.R. 14 Lah. 703 ...	899
Mukand Singh v. Waziruddin. A.I.R. 1933 Lah. 359 ...	670, 673, 690
Mulla Singh v. Jagannath Singh. (1910) I.L.R. 32 All. 585 ...	254
Mulla Vittil Seethi v. Achuthan Nair. (1911) 21 M.L.J. 213 (F.B.) ...	329, 1047
Mulraj Khatau v. Viswanath Prabhuram Vaidya. (1912) I.L.R. 37 Bom. 198 (P.C.) ...	142
Mulraj Khatav v. The Collector of Poona. (1913) 15 Bom. L.R. 802 ...	558
Municipal Council, Cannanore v. Anandan. (1927) I.L.R. 51 Mad. 601 ...	261
Municipal Council, Salem v. Gururajah Rao. (1934) 68 M.L.J. 118 ...	235
Munugarra Satyalakshmi Narayana v. Munugarra Jagannadham. (1917) 34 M.L.J. 229 ...	552
Murugappa v. Ramasami. A.I.R. 1935 Mad. 893 ...	1032
Murugappa Chetty v. Nachiappa Chetty. (1934) 67 M.L.J. 30 ...	270, 272
Mussumat Bhobun Moyee Debia v. Ram Kishore Acharj Chowdhry. (1865) 10 M.I.A. 279 ...	1072, 1076, 1077, 1080
Mussumat Raneesurno Moyee v. Shooshee Mokhee Burmonia. (1868) 12 M.I.A. 244 ...	333
Mussamat Wahidunnissa v. Mussamat Shubratun. (1870) 6 Beng. L.R. 54 ...	482
Muthalakammal v. Narappa Reddiar. (1933) I.L.R. 56 Mad. 430 (F.B.) ...	152, 153
Muthu Goundan v. Anantha Goundan. (1915) 31 I.C. 528 ...	988
Muthukrishnien v. Veeraraghava Iyer. (1913) I.L.R. 38 Mad. 297 ...	142
Muthukumarasami Mudaliar v. Harinarayana Mudaliar. (1927) 53 M.L.J. 601 ...	1057

	Page
Muthukumarswami Pillai v. Muthuswami Thevan. (1926) I.L.R. 50 Mad. 639 ...	212
Muthurakku Maniagan v. Rakkappa. (1913) 26 M.L.J. 66 ...	127, 130
Muthuraman Chettiar v. Adaikappa Chetty. (1934) I.L.R. 58 Mad. 407 ...	483, 484, 660
Muthuraman Chetty v. Krishna Pillai. (1905) I.L.R. 29 Mad. 72 ...	1008, 1014
Muthusamier v. Sree Sreemethanithi Swamiyar. (1913) I.L.R. 38 Mad. 356 ...	811
Muthu Sastrigal v. Viswanatha Pandarasannadhi. (1913) I.L.R. 38 Mad. 660 ...	270, 283
Muthuswami Aiyar v. Subramania Ayyar. (1931) 61 M.L.J. 638 ...	255
Mutual Life Assurance Society v. Langley. (1886) 32 Ch. D. 460 ...	143

N

Nachiappa Chettiar, A. C. T. v. The Commissioner of Income-tax, Madras. (1933) 6 I.T.C. 369 ...	233
Nagappa Pillai v. Arunachalam Chetty. (1924) 47 M.L.J. 876 ...	586, 620
Nagendran Chettiar v. Lakshmi Ammal. (1933) I.L.R. 56 Mad. 846 (F.B.) ...	334, 338
Nagendra Nath Ghosh v. Sambhu Nath Pandey. (1924) I.L.R. 3 Pat. 947 ...	214
Nagoor Meera v. Mahadu Meera. (1925) 22 L.W. 820 ...	922
Nainapillai Marakayar v. Ramanathan Chettiar. (1923) L.R. 51 I.A. 83; I.L.R. 47 Mad. 337 ...	811, 819, 820
Nannu Lal v. Bhagwan Das. (1916) I.L.R. 39 All. 114 ...	212
Narain Dass Dutt v. Banku Behary Chattopadhyay. (1924) 78 I.C. 1001 ...	206
Narasiah v. Venkataramiah. (1918) I.L.R. 42 Mad. 59 ...	143
Narasimha v. Ramaswami. (1890) I.L.R. 14 Mad. 44 ...	31, 34
Narasimhachariar v. Krishnamachariar. (1914) 26 M.L.J. 406 ...	1030
Narayana Ayyangar v. Vellachami Ambalam. (1927) I.L.R. 50 Mad. 696 (F.B.) ...	569, 574, 577, 578, 580, 581, 585, 590, 599, 615, 617
Narayana Iyengar v. Desikachariar. (1933) I.L.R. 57 Mad. 35 ...	42
Narayana Chettiar v. Muthu Chettiar. (1926) I.L.R. 50 Mad. 67 ...	976
Narayana Kothan v. Kalyanasundaram Pillai. (1895) I.L.R. 19 Mad. 219 ...	487, 503
Narayanan Moosad v. Raman Moosad. (1935) I.L.R. 58 Mad. 811 ...	696, 697
Narayana Nair v. Kunhi Raman Nair. (1924) 20 L.W. 190 ...	426
Narsaya Upada v. Venkataramana Bhatta. (1912) 23 M.L.J. 260 ...	812
Nathan, S. A. v. S. R. Samson. (1931) I.L.R. 9 Rang. 480 (F.B.) ...	649, 654
National Telephone Company, Limited v. Postmaster-General. [1913] A.C. 546 ...	41
Nava Kishore Das v. Madan Mohan Das. A.I.R. 1924 Cal. 346 ...	957
Navalbai v. Sivubai. (1906) 8 Bom. L.R. 761 ...	449
Nazim v. Wazidulla. (1915) 21 C.L.J. 640 ...	88
Nazir Khan v. Ram Mohan. (1930) I.L.R. 53 All. 114 (F.B.) ...	284
Nesalachalam v. Kamarazu. (1904) 14 M.L.J. 438 ...	57, 58

	Page
Neemchand Daga, In re. (1931) I.L.R. 58 Cal. 1204 ...	726
Net Lal Sahoo v. Sheikh Kareem Bux. (1896) I.L.R. 23 Cal. 686 ...	466
New South Wales Taxation Commissioners v. Palmer. [1907] A.C. 179 ...	430
Nilmani v. Hiralal. (1917) 27 C.L.J. 100 ...	94, 98, 100
Norris v. Great Central Railway Company. (1915) 114 L.T. 183 ...	799
Nugent v. Gifford. (1738) 1 Atk. 463; 26 E.R. 294 ...	481

O

Official Assignee, Madras v. Narasimha Mudaliar. (1929) I.L.R. 52 Mad. 717 (F.B.) ...	1022, 1025
M.L.J. 1 ... v. Subramania Aiyar. (1923) 46 ...	317
Oudh Behari Lal v. Nageshar Lal. (1890) I.L.R. 13 All. 273 (F.B.) ...	197, 198

P

Pachayappan v. Narayana. (1887) I.L.R. 11 Mad. 269 ...	203
Padmakumari Debi Chowdhurani v. Court of Wards. (1879) I.L.R. 5 Cal. 615; (1881) I.L.R. 8 Cal. 302 (P.C.) ...	1075, 1076
Palaniappa Chettiar v. Alagan Chetti. (1921) I.L.R. 44 Mad. 740 (P.C.) ...	1073
Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi. (1917) I.L.R. 40 Mad. 709 (P.C.) ...	817
Panchanada Velan v. Vaithinatha Sastrial. (1905) I.L.R. 29 Mad. 333 (F.B.) ...	778
Panchu Choudhry v. Emperor. (1921) 23 Cr.L.J. 233 ...	626
Paramaswami v. Pusala Thevan. (1909) 20 M.L.J. 142 ...	17
Paramasivam Pillai, In re. (1915) 28 I.C. 957 ...	807
Paramasivam Pillai v. Venkatachellam Chettiar. 1935 M.W.N. 1109 ...	652
Paramaswami Ayyangar v. Alamelu Nachiyar. (1926) I.L.R. 49 Mad. 954 ...	558
Parameswaram Mumbannoo v. Krishnan Tengal. (1902) I.L.R. 26 Mad. 535 ...	812
Parameswaran Nambudri, Re. (1915) I.L.R. 39 Mad. 677 ...	170
Parameswara Pattar, In re. (1930) I.L.R. 54 Mad. 1 (F.B.) ...	742
Parshotam Ganpat v. Venichand Ganpat. (1920) I.L.R. 45 Bom. 754 ...	1072
Parsotam Narain v. Taley Singh. (1903) I.L.R. 26 All. 178 ...	281
Parthasarathy Reddiar v. Kandaswami Mudaliar. (1923) 45 M.L.J. 161 ...	291
Parvathi Ammal v. Govindasami Pillai. (1915) I.L.R. 39 Mad. 603 ...	205, 211, 212
Payana Reena Saminathan v. Pana Lana Palaniappa. [1914] A.C. 618 ...	272, 278
Payapa v. Appanna. (1898) I.L.R. 23 Bom. 327 ...	1077

	Page
<i>Payidanna v. Lakshminarasamma.</i> (1914) I.L.R. 38 Mad. 1076.	653
<i>Pell v. Gregory.</i> (1925) I.L.R. 52 Cal. 828 (F.B.)	190, 192, 200
<i>Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.</i> (1918) I.L.R. 42 Mad. 475 (F.B.)	27
<i>Perianna Muthirian v. Vengu Aiyar.</i> (1928) 56 M.L.J. 208	170
<i>Peria Thiruvadi Ayyangar v. Pokutti Janaki.</i> (1923) 45 M.L.J. 698	372
<i>Pertap Chunder Ghose v. Mohendranath Purkait.</i> (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291	448, 454, 460
<i>Petherpermal Chetty v. Muniandy Servai.</i> (1908) I.L.R. 35 Cal. 551 (P.C.)	587, 618, 619, 1002, 1005, 1006, 1007, 1008, 1010, 1016, 1017, 1019, 1020
<i>Piara Ram v. Ganga Ram.</i> A.I.R. 1914 Lah. 367	969, 970
<i>Pichuvayyan v. Vilakkudayan Asari.</i> (1897) I.L.R. 21 Mad. 134.	59
<i>Polayya Pora v. Anantha Patro.</i> (1935) I.L.R. 59 Mad. 44	1046
<i>Pothi Reddi v. Velayudasivan.</i> (1886) I.L.R. 10 Mad. 94	270, 275, 282, 283
<i>Powell v. Kempton Park Racecourse Company.</i> [1899] A.C. 143.	583, 595
<i>Pramatha Nath Sandal v. Dwarka Nath Dey.</i> (1896) I.L.R. 23 Cal. 851	279, 280, 281
<i>Pran Nath Roy v. Mohesh Chandra Moitra.</i> (1897) I.L.R. 24 Cal. 546	774
<i>Prasanna v. Ibrahim.</i> (1917) 36 C.L.J. 205	214
<i>Prehn v. Royal Bank of Liverpool.</i> (1870) L.R. 5 Ex. 92	373
<i>President and Governors of Magdalen Hospital v. Knotts.</i> (1879) 4 App. Cas. 324, 335	811
<i>Prole v. Wiggins.</i> (1836) 3 Bing. (N.C.) 230; 132 E.R. 398	1003, 1012, 1013
<i>Prosunno Kumari Debya v. Golab Chand Baboo.</i> (1875) L.R. 2 I.A. 145; 23 W.R. 253	811
<i>Pugh v. Heath.</i> (1882) 7 A.C. 235	329
<i>Pukhraj Jeshraj v. Jamsetji Rustum.</i> (1926) I.L.R. 50 Bom. 802.	664
<i>Punnayyah v. Viranna.</i> (1921) I.L.R. 45 Mad. 425	772
<i>Purnan Chand v. Sheodat Rai.</i> (1906) I.L.R. 29 All. 212	774
<i>Purna Chand Mandal v. Radha Nath Dass.</i> (1906) I.L.R. 33 Cal. 867	196, 198
<i>Purushottam v. Rajbai.</i> (1909) I.L.R. 34 Bom. 142	486
<i>Purushotama v. Brundavana.</i> A.I.R. 1931 Mad. 597	552
<i>Puttanna alias Keshava Bhatta v. Ramakrishna Sastri.</i> (1906) I.L.R. 30 Mad. 195	1060, 1061
<i>Pym v. Campbell.</i> (1856) 6 EL. & BL. 370; 119 E.R. 903	457, 458, 459
<i>Queen v. Poor Law Commissioners, In re. Holborn Union.</i> (1838) 6 A. & E. 56, 68; 112 E.R. 21	119
<i>Queen-Empress v. Jadub Das.</i> (1899) I.L.R. 27 Cal. 295	351

R

	Page
<i>Rachappa Subrao v. Shidappa Venkatrao.</i> (1918) I.L.R. 43 Bom. 507 (P.C.)	162
<i>Radha Charan Ray Chowdhry v. Golak Chandra Ghose.</i> (1904) I.L.R. 31 Cal. 834	409
<i>Raghava Chariar v. Srinivasa Raghava Chariar.</i> (1916) I.L.R. 40 Mad. 308 (F.B.)	955
<i>Raghunathaswamy Iyengar v. Gopal Rao.</i> (1921) 41 M.L.J. 547; A.I.R. 1922 Mad. 206	466, 468, 470, 487, 506
<i>Raghunath Das v. Sundar Das Khetri.</i> (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72	466, 467, 468, 472, 490, 492, 493, 501, 503, 508, 937
<i>Raghunathdas Harjivandas v. The District Superintendent of Police, Nasik.</i> (1932) I.L.R. 57 Bom. 314	558
<i>Rai Jatindra Nath Chaudhuri v. Amrita Lal Bagchi.</i> (1900) 5 C.W.N. 20	1077
<i>Rai Saheb Sundermull v. John Carapiet Galstaun.</i> (1931) 62 M.L.J. 170 (P.C.)	190, 200
<i>Rajagopala Ayyar v. Ramanujachariar.</i> (1923) I.L.R. 47 Mad. 288 (F.B.)	466, 474, 475, 479, 490, 504, 508
<i>Rajagopala Chettiar v. H.R.E. Board, Madras.</i> (1933) I.L.R. 57 Mad. 271 (F.B.)	555, 559
<i>Rajanikanta Saha v. Emperor.</i> (1930) I.L.R. 58 Cal. 940	491
<i>Raja Shri Prakash Singh v. Allahabad Bank, Limited.</i> (1928) I.L.R. 3 Luck. 684 (P.C.)	426
<i>Raja of Kalahasti v. Maharaja of Venkatagiri.</i> (1913) I.L.R. 38 Mad. 387	493
<i>Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varnu.</i> (1916) 30 M.L.J. 391	50
<i>Rajah of Mandasa v. Jagannayakulu.</i> (1931) 63 M.L.J. 450 (F.B.)	839, 850, 851
<i>Rajah of Venkatagiri v. Isakapalli Subbiah.</i> (1902) I.L.R. 26 Mad. 410	78, 79, 80, 81, 85, 90
<i>Rajaram v. Central Bank.</i> A.I.R. 1926 Bom. 481	70
<i>Rajayya v. Annapurnamma.</i> (1925) 50 M.L.J. 662	466, 469, 475, 487, 489, 506
<i>Raj Nath v. Narain Das.</i> (1914) I.L.R. 36 All. 567 (F.B.)	331, 340
<i>Rajrup Koer v. Abul Hossein.</i> (1880) I.L.R. 6 Cal. 394 (P.C.)	88, 988, 994
<i>Ramabhadrachar v. Srinivasa Ayyangar.</i> (1900) I.L.R. 24 Mad. 85	136
<i>Ramabhadra Naidu v. Kadiriyasami Naicker.</i> (1921) I.L.R. 44 Mad. 483 (P.C.)	317
<i>Ramachandra Rao v. Ramachandra Rao.</i> (1922) I.L.R. 45 Mad. 320 (P.C.)	554, 555, 557, 558, 559, 560
<i>Ramacharyulu v. Narasimha Suryanarayana.</i> 1933 M.W.N. 183	754
<i>Ramajogayya v. Jagannadham.</i> (1918) I.L.R. 42 Mad. 185 (F.B.)	911, 950, 954, 960

	Page
Ramakrishna Reddiar v. Kasivasi Chidambara Swamigal. (1927) 54 M.L.J. 412	951
Ramakrishnayya v. Seshamma. (1934) 68 M.L.J. 369	244
Ramalinga Pillai v. Sadasiva Pillai. (1864) 9 M.I.A. 506	1079, 1080
Ramanatha v. Vijayaraghavalu. A.I.R. 1927 Mad. 983	936
Ramanathan Chetty v. Alagappa Chetty. (1929) I.L.R. 53 Mad. 378	199
Ramanathan Chettiar v. Kalimuthu Pillai. (1912) I.L.R. 37 Mad. 163	923
_____ v. Ramanathan Chettiar. (1928) 30 L.W. 995	466, 467, 468, 491, 492, 503, 504
_____ v. Subramania Sastrial. (1902) I.L.R. 26 Mad. 179	93, 97
Ramanayya v. Kotayya. (1929) 57 M.L.J. 398	294, 295
Ram Dhun Dhur v. Mohesh Chunder Chowdhry. (1882) I.L.R. 9 Cal. 406	481
Rama Rao v. Mandachalugai. (1918) 35 M.L.J. 467	1047
_____ v. The Raja of Pittapur. (1918) I.L.R. 42 Mad. 219	1061
Rama Sahu v. Gowro Ratho. (1920) I.L.R. 44 Mad. 55 (F.B.)	786
Ramasami v. Bagirathi. (1883) I.L.R. 6 Mad. 180	467, 486, 489
Ramasami Aiyangar v. Govinda Iyer. (1916) 31 M.L.J. 839	104
Ramasawmy v. Rasi. (1913) I.L.R. 38 Mad. 149	985
Ramaswami Chettiar v. Oppilamani Chetti. (1909) I.L.R. 33 Mad. 6; 19 M.L.J. 671	484
Ramaswami Naicker v. Alamelu Ammal. (1923) 46 M.L.J. 298.	1004, 1008, 1010, 1013,
Rama Venkatasubba Iyer v. Shanmukam Pillai. (1913) 21 I.C. 530	199
Rambhai Dabhai v. Vallabhbhai Jhaverbhai. (1920) I.L.R. 45 Bom. 1027	988
Rameshvar Singh v. Homeshvar Singh. (1920) 40 M.L.J. 1 (P.C.)	766, 767, 768
Ram Golam Dobey v. Ayma Begum. (1869) 12 W.R. 177	482
Ramaneedi Venkata Appa Rao v. Lakkoju China Ayyanna. (1906) I.L.R. 30 Mad. 209	766, 767
Ramireddi v. Sreeramulu. A.I.R. 1933 Mad. 120	39
Ramkishore v. Jainarayan. (1921) I.L.R. 49 Cal. 120 (P.C.)	1070
Ram Pershad Chowdry v. Jokhoo Roy. (1884) I.L.R. 10 Cal. 1003	1061
Ram Sahai v. Binode Biharj Ghosh. (1923) I.L.R. 45 All. 306	84
Ram Sarup v. Ghaurani. (1899) I.L.R. 21 All. 453	197
Ram Surun Singh v. Mussamut, Pran Peary. (1870) 13 M. I.A. 551	291
Ram Tuhul Singh v. Biseswar Lall Sahoo. (1875) L.R. 2 I.A. 131	213
Ramu Aiyar v. Sankara Aiyar. (1907) I.L.R. 31 Mad. 89 (F.B.)	886
Ranga Ayyar v. Srinivasa Ayyangar. (1897) I.L.R. 21 Mad. 56.	449

	Page
Ranganatha Thathachariar v. Krishnaswami Thathachariar. (1923) I.L.R. 47 Mad. 139	752
Ranken v. Harwood. (1846) 5 Hare. 215; 67 E.R. 892	480
Ranodip Singh v. Parmeshwar Prasad. (1924) I.L.R. 47 All. 165 (P.C.)	672, 683, 684, 686
Rarichan v. Manakkal Raman Somayajipad. (1922) 44 M.L.J. 515.	955
Rattamma v. Seshachalam Sarma. (1926) 52 M.L.J. 520	103
Rattayya v. Brahmayya. (1925) 49 M.L.J. 309	162
Ravanappa Reddi, In re. (1931) I.L.R. 55 Mad. 343	169, 170, 1085, 1087
Rayarappan Nambiar v. Malikandi Aket Mayan. (1914) 26 M.L.J. 267	468, 487
Rayner v. Mitchell. (1877) 2 C.P.D. 357	406
Real and Personal Advance Company v. McCarthy. (1881) 18 Ch.D. 362	254
Redman, In re : Warton v. Redman. [1901] 2 Ch. 471	860
Reg v. Harris. (1866) 10 Cox. C.C. 352	563
Rewa Mahton v. Ram Kishen Singh. (1886) L.R. 13 I.A. 106; I.L.R. 14 Cal. 18	466, 505
Reynell v. Sprye. (1852) 1 D.E.G. M. & G. 660; 42 E.R. 710	587
Richards v. Starck. [1911] 1 K.B. 296	581, 582, 615 616
Richardson v. The Bank of England. (1838) 4 M.Y. & CR. 165; 41 E.R. 65	725
Richerson, In re. Scales v. Heyhoe. [1893] 3 Ch. 146	491
Rishikesh Laha v. Manik Molla. (1926) I.L.R. 53 Cal. 758	205, 212, 213
Roberts v. Brennan. [1902] P. 143	514, 516
Rodha Charan Ray Chowdhry v. Golak Chandra Ghose. (1904) I.L.R. 31 Cal. 834	409
Romer & Haslam, In re. [1893] 2 Q.B. 286	275, 287
Rousillon v. Rousillon. (1880) 14 Ch.D. 351	922
Rungama v. Atchama. (1846) 4 M.I.A. 1	1072
Rungiah Gounden & Co. v. Nanjappa Row. (1903) I.L.R. 26 Mad. 780	766
Rup Chand v. Jambu Prasad. (1910) I.L.R. 32 All. 247 (P.C.)	1072
Rutherford v. Commissioner of Income-tax, Bihar and Orissa. (1930) I.L.R. 10 Pat. 315	221, 223, 235, 237
Ruthna, G. v. K. Arumuga. (1872) 7 M.H.C.R. 189	448
Ryall v. Bowles. (1750) 1 VES. SEN. 348; 27 E.R. 1074	142

S

S.I.Ry. Co., Ltd. v. Dandayutham Chettiar. A.I.R. 1934 Mad. 715; (1934) 67 M.L.J. 704	796
Sabu Ram Chandra v. Bhup Singh. (1917) I.L.R. 39 All. 437 (P.C.)	674
Sait Punnamchand Chatrabhan v. Satyanandan. (1933) 65 M.L.J. 569	348

	Page
Salar Beg Saheb v. Karumanchi Kotayya. (1925) 23 L.W. 538 ...	1051
Salvesen or von Lorang v. Administrator of Austrian Property. [1927] A.C. 641 ...	514
Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar. (1918) 37 M.L.J. 356 ...	191, 192, 193, 196
Sami Mudaliar v. Muthiah Chetti. (1922) 43 M.L.J. 293 ...	644
Saminatha Ayyar v. Venkatasubba Ayyar. (1903) I.L.R. 27 Mad. 21 ...	806
Samuel v. Samuel. (1934) I.L.R. 15 Lah. 846 (S.B.) ...	520, 532
Sankaralinga Mudaliar v. Official Receiver of Tinnevely. (1925) 49 M.L.J. 616 ...	468
Sankaran v. Periasami. (1890) I.L.R. 13 Mad. 467 ...	812
Sankunni v. Ikkora Kirtti. 1919 M.W.N. 570 ...	603, 613
Sanwal Das v. Ali Mahdi. (1924) 85 I.C. 330 ...	317, 318
Sarat Chandra Ghose v. The Secretary of State for India. (1919) I.L.R. 46 Cal. 861 ...	558
Sarat Kamini Dasi v. Nagendra Nath Pal. (1925) 89 I.C. 1000 ...	333
Sarkies v. Prosonomoyee Dossee. (1881) I.L.R. 6 Cal. 794 ...	961
Sattappa Pillai v. Raman Chetti. (1892) I.L.R. 17 Mad. 1 ...	34
Saudagar Singh v. Pardip Narayan Singh. (1917) I.L.R. 45 Cal. 510 (P.C.) ...	1058
Scammell, G. & Nephew, Ltd. v. Hurley. [1929] 1 K.B. 419 ...	889, 891
Schibsby v. Westenholz. (1870) L.R. 6 Q.B. 155 ...	922
Scottish Shire Line, Ltd. v. Lethem. (1912) 6 T.C. 31 ...	176, 177
Secretary of State v. Dhokalmal. A.I.R. 1931 Cal. 734 ...	797
Secretary of State for India v. Janakiramayya. (1913) I.L.R. 37 Mad. 322 ...	111, 116
— v. Bombay Landing Shipping Co. (1868) 5 Bom. H.C.R. 23 ...	875
— v. Chellikani Rama Rao. (1916) I.L.R. 39 Mad. 617 (P.C.) ...	556, 559
— v. Janakiramayya. (1915) 29 M.L.J. 389 ...	120
— v. Narayanaswamy Chettiar. (1931) I.L.R. 55 Mad. 391 ...	554, 555, 558, 559
— v. Swami Naratheeswarar. (1910) I.L.R. 34 Mad. 21 ...	110, 116, 118
— v. Volkart Brothers. (1928) I.L.R. 51 Mad. 885 (P.C.) ...	958
Secretary of State for India in Council v. Fahamidannissa Begum. (1889) I.L.R. 17 Cal. 590 (P.C.) ...	898
Sahaba. (1859) 7 M.I.A. 476 ...	635
Sellappa Goundan v. Masa Naiken. (1923) I.L.R. 47 Mad. 79 ...	652
Selmes v. Judge. (1871) L.R. 6 Q.B. 724 ...	891
Seymour v. Reed. [1927] A.C. 554 ...	238

	Page
Sham Sundar v. Muhammad Ihtisham Ali. (1905) I.L.R. 27 All. 501 (F.B.) ...	197
Shankar Daji v. Dattatraya Vinayak. (1921) I.L.R. 45 Bom. 1186.	468
Shankerbhai Manorbhai v. Motilal Ramdas. (1924) I.L.R. 49 Bom. 118 ...	666
Shanmuga Mudali v. Kumaraswami Mudali. (1925) I.L.R. 48 Mad. 661 ...	569, 574, 577, 578, 580, 592, 599, 607, 614, 615
Shaw v. Morley. (1868) L.R. 3 Ex. 137 ...	583
Sheikh Akbar v. Sheikh Khan. (1881) I.L.R. 7 Cal. 256 ...	270, 275, 279, 280, 281, 282
Sheik Hussain Sahib v. Subbayya. (1925) I.L.R. 49 Mad. 441 (F.B.) ...	986
Sheoparsan Singh v. Ramnandan Prasad Singh. (1916) I.L.R. 43 Cal. 694 (P.C.) ...	1056, 1058
Sheo Prasad v. Hira Lal. (1889) I.L.R. 12 All. 440 (F.B.) ...	466, 483, 485, 486, 487, 488, 493, 496
Sheo Tahal Ram v. Binaik Shukul. (1931) I.L.R. 53 All. 747 ...	925
Shephard, In re. Atkins v. Shephard. (1889) 43 Ch. D. 131 ...	471, 477, 498
Shiam Lal v. Bashir-ud-din. (1906) I.L.R. 28 All. 778 ...	371
Shib Dutta Singh v. Sheikh Karim Bakhsh. (1924) I.L.R. 4 Pat. 320 ...	665
Shurfun Bebee v. The Collector of Sarun. (1868) 10 W.R. 199 ...	482
Sidhari Ram v. Gargi Din. (1923) 89 I.C. 118 ...	317, 319
Sinclair, In re. Ex parte Payne. (1885) 15 Q.B.D. 616 ...	864
Singa Raja v. Pethu Raja. (1918) I.L.R. 42 Mad. 61 ...	191, 192, 193, 196
Sirdar Gurdyal Singh v. Rajah of Faridkote. [1894] A.C. 670 ...	924
Sir Jamshed Kanga v. Kaikhushru. (1934) 36 Bom. L.R. 1136 (F.B.) ...	737
Sivan Pillai v. Venkateswara Aiyar. (1925) 22 L.W. 796 ...	755
Sivaram Dubai v. Rajagopala Misra. (1930) I.L.R. 54 Mad. 315 ...	756
Sivasami Odayar v. Subramania Aiyar. (1931) I.L.R. 55 Mad. 316 ...	934, 935, 940
Smith v. Anderson. (1880) 15 Ch. D. 247 ...	608
— v. Kailash Chandra Chakraverty. (1931) I.L.R. 11 Pat. 241 ...	468, 474, 492
Somaraju v. Venkatasubbarayudu. (1924) 20 L.W. 943 ...	283
Sooratha Singa v. Kanaka Singa (1920) I.L.R. 43 Mad. 867 ...	1079, 1080
South African Territories v. Wallington. [1897] 1 Q.B. 692 ...	373
Sowdaminee Chowdhrair v. Kishen Kishore Poddar. (1869) 12 W.R. 8 (F.B.) ...	208, 209
Spooner v. Juddow. (1850) 4 M.I.A. 353 ...	713, 714
Sreemati Rajkumari Debi v. Mukundalal Bandopadhyaya. (1920) 25 C.W.N. 283 ...	331
Sreemati Soojan Bibi v. Shamed Ali. (1892) 1 C.W.N. 96 ...	88
Sreenivasa Varadachary v. Narasinga Pillai. (1911) 9 M.L.T. 430 ...	59
Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam. (1916) 32 M.L.J. 63 ...	66

	Page
Sree Sankarachari Swamiar v. Varada Pillai. (1903) I.L.R. 27 Mad. 332 ...	34, 411
Sri Mahant Prayaga Doss Jee v. Venkama Naidu. (1917) 7 L.W. 477 ...	412
Srimati Giribala Dasi v. Kali Das Bhanja. (1920) 39 M.L.J. 329 (P.C.) ...	958
Srinivasa Aiyangar v. Kanthimathi Ammal. (1910) I.L.R. 33 Mad. 465 ...	93, 97
Srinivasa Chariar v. Evalappa Mudaliar. (1922) L.R. 49 I.A. 237; I.L.R. 45 Mad. 565 ...	812
Srinivasa Moorthy v. Venkata Varada Aiyangar. (1911) L.R. 38 I.A. 129; I.L.R. 34 Mad. 257 ...	812
Sri Rani Chattri Kumari Devi v. Broucke. (1927) 54 M.L.J. 293 (P.C.) ...	409
Shishchandra Nandi v. Rahatannessa Bibi. (1930) I.L.R. 58 Cal. 825 ...	490
Sri Sri Radha Gobinda Deb Thakur v. Girija Prasanna Mookherjee. (1931) 35 C.W.N. 912 ...	750
Stathatos v. Stathatos. [1913] P. 46 ...	516
Steel Wing Company, <i>In re</i> . [1921] 1 Ch. 349 ...	143
Stewart v. Rhodes. [1900] 1 Ch. 386 ...	478
Storey v. Ashton (1869). L.R. 4 Q.B. 476 ...	405
Subba Chariyar v. Muthuveeran Pillai. (1912) I.L.R. 36 Mad. 553 ...	65
Subba Goundan v. Krishnamachari. (1921) I.L.R. 45 Mad. 449.	673, 674
Subbai Goundan v. Palani Goundan. (1916) 30 M.L.J. 607 ...	468
Subbaiya Pandaram v. Mahammad Mustapha Marcayar. (1923) L.R. 50 I.A. 295; I.L.R. 46 Mad. 751 ...	812, 820
Subbaraya Chetty v. Subbaraya Chetty. (1926) 24 L.W. 500 ...	291, 1004, 1006
Subbaraya Naicker v. Venkatesa Naicker. (1933) 39 L.W. 357	1006, 1007, 1016
Subba Rao v. Official Receiver, Guntur. (1935) 42 L.W. 295 ...	301
Subba Row v. Perumal Reddi. 1917 M.W.N. 318 ...	67, 68
Subbier v. Moideen Pitchai. (1923) 44 M.L.J. 588 ...	969, 970
Subbu Reddi v. Ponuambala Reddi. 1918 M.W.N. 655 ...	212
Subramania Ayyar v. Sitha Lakshmi. (1896) I.L.R. 20 Mad. 147.	960
Subramania Aiyar v. The Official Receiver, Tanjore. (1925) 50 M.L.J. 365 ...	934, 935
— v. Vaithinatha Aiyar. (1913) I.L.R. 38 Mad. 632 ...	651
Subrahmanyam v. Subbayi. 1933 M.W.N. 934 ...	40
Subraya v. Nagappa. (1908) I.L.R. 33 Bom. 264 ...	300
Sujan Singh v. Hira Singh. (1889) I.L.R. 12 All. 399 (F.B.) ...	426, 427
Sukdevdoss Ramprasad v. Musamat Choti Bai. (1927) 27 L.W. 145 ...	1076
Sukhamoni Chowdhurani v. Ishan Chunder Roy. (1898) I.L.R. 25 Cal. 844 (P.C.) ...	317
Sukhi v. Ghulam Safdar Khan. (1921) I.L.R. 43 All. 469 (P.C.).	330

	Page
Sukh Lal Sheikh v. Tara Chand Ta. (1905) I.L.R. 33 Cal. 68 (F.B.) ...	496
Sundaram v. Mause Mavuthar. (1921) I.L.R. 44 Mad. 554 (F.B.).	311
Sundaram Iyer v. Theetharappa Mudaliar. (1916) 40 I.C. 159 ...	412
Sundara Ramanujam v. Sivalingam. (1923) I.L.R. 47 Mad. 150.	244
Suraj Bansi Koer v. Sheo Persad Singh. (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148, 150, 166 ...	466, 468, 484
Surajpal Pandey v. Utim Pandey. (1921) 6 P.L.J. 625 ...	976
Surayya v. Annapurnamma. (1919) I.L.R. 42 Mad. 699 ...	1057
— v. Subbamma. (1919) I.L.R. 43 Mad. 4 ...	1062
Surendralal Kundu v. Ahammad Ali. (1933) I.L.R. 60 Cal. 1193.	325
Surendra Prasad v. Attabuddin. A.I.R. 1922 Cal. 234 ...	976
Surjiram Marwari v. Barhamdeo Persad. (1905) 2 C.L.J. 288 ...	372
Suryanarayana Nayakaram v. Butchiah Naidu. (1915) 3 I.W. 111 ...	1004, 1005, 1007, 1008, 1009, 1010, 1014
Suthi Kutti v. Achutan Nair. (1911) 21 M.L.J. 475 ...	1047
Swami Kotayya v. Venkata Rangarao. (1934) 68 M.L.J. 148 ...	765
Swaminatha Odayar v. Subbarama Aiyar. (1926) 51 M.L.J. 856.	317
— v. Thiagarajaswami Odayar. (1925) I.L.R. 50 Mad. 5 ...	200
Syed Mamshah Tharka v. The Secretary of State for India. (1918) 37 M.L.J. 213 ...	83
Sykes v. Beadon. (1879) 11 Ch. D. 170 ...	607, 608, 609
Symes v. Hughes. Symes v. Hughes. (1870) L.R. 9 Eq. 475 ...	1007, 1009, 1018

T

Tanguturi Jaganadham v. Seshagiri Rao. (1916) 20 M.L.J. 479.	493
Tarakanath Mukherji v. Sanatkumar Mukherji. (1929) I.L.R. 57 Cal. 274 ...	4
Tarangini Debi v. Raj Krishna Mondal. (1927) 32 C.W.N. 418 ...	466, 487
Tarani Dass Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya. (1886) I.L.R. 12 Cal. 608 ...	426, 427
Tayaballi Gulam Husein v. Atmaram Sakharan. (1914) I.L.R. 38 Bom. 631 ...	969, 970
Taylor v. Bowers. (1876) 1 Q.B.D. 291 ...	1007, 1009, 1016, 1017, 1018, 1019
— v. Smetten. (1883) 11 Q.B.D. 207 ...	569, 590, 611
Thakore Fatesingji v. Bamanji A. Dalal. (1903) I.L.R. 27 Bom. 515 ...	812
Thayammal v. Muttia. (1887) I.L.R. 10 Mad. 282 ...	16, 17, 34
Thirumala Rao v. Kadekar Durgi Shettethi. (1914) 22 I.C. 883...	83
Thulasi v. Official Receiver, Coimbatore. A.I.R. 1934 Mad. 671 ...	1001
Tirath Ram v. Mst. Kahan Devi. (1920) I.L.R. 1 Lah. 588 ...	1071
Tirumalai Kadirvelusami Naicker v. The Eastern Development Corporation, Ltd. (1917) 33 M.L.J. 392 ...	199

	Page
Tirumalaisami Naidu v. Subramanian Chettiar. (1916) I.L.R. 40 Mad. 1009	204, 205, 211
Tota Ram v. Ram Lal. (1932) I.L.R. 54 All. 897 (F.B.)	361, 365, 366, 370, 371, 375
Tsang Chuen v. Li Po Kwai. [1932] A.C. 715	449
Tuljaram Row v. Alagappa Chettiar. (1910) I.L.R. 35 Mad. 1 (F.B.)	657
Tulshi Ram v. Babu. (1911) I.L.R. 33 All. 654	672, 675, 676, 681
Turner v. Edgell: (1837) 6 L.J. (N.S.) Ch. 201	911
Tyte v. Jones. (1800) 1 East 58; 102 E.R. 23 (F.N.)	277

U

Udayamuthier v. Shunmugam Chettiar. (1934) 41 L.W. 610	672, 680, 683, 686
Udumalpet Nidhi, Ltd., <i>In re</i> . (1934) I.L.R. 57 Mad. 844	574, 590, 599, 607
Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu. (1932) I.L.R. 56 Mad. 26	586, 607
Uppi Haji v. Mammavan. (1893) I.L.R. 16 Mad. 366	317

V

Vaidiswara Ayyar v. Siva Subramania Mudaliar. (1907) I.L.R. 31 Mad. 66	1023
Vaiyapuri Chetty v. Ramachandra Thevar. (1925) 21 L.W. 699	964
Vallabhdas Naranji v. Development Officer, Bandra. (1929) I.L.R. 53 Bom. 589 (P.C.)	436
Vanchinatha Iyer v. Rajagopala Iyer and others. (1921) 41 M.L.J. 372	59
Vanmikalinga Mudali v. Chidambara Chetty. (1905) I.L.R. 29 Mad. 37	367, 371
Vannisami Thevar v. Chellasami Thevar. (1920) 13 L.W. 104	883, 885
Varadacharyulu v. Narasimhacharyulu. (1925) 23 L.W. 85	748
Varada Ramaswami v. Vumma Venkataratnam. (1921) 42 M.L.J. 423	401, 402
Vasireddi Veeramma v. Butchayya. (1926) I.L.R. 50 Mad. 646	162
Vasudeva Mudaliar v. Srinivasa Pillai. (1907) I.L.R. 30 Mad. 426 (P.C.)	333
Vasudevan Nambudri v. Mammod. (1898) I.L.R. 22 Mad. 212	605, 609
Vedathanni v. Commissioner of Income-tax, Madras. (1932) I.L.R. 56 Mad. 1 (S.B.)	383
Veerammal v. Kamu Annal. (1915) 2 L.W. 850	1063
Veeranan Ambalam v. Ayyachi Ambalam. (1925) 49 M.L.J. 791	581, 585, 591, 613, 614, 615, 620
Veeranna v. Sayamma. (1928) I.L.R. 52 Mad. 398	1078
Veeraraghavachariar v. Advocate-General, Madras. (1927) I.L.R. 51 Mad. 31 (F.B.)	753, 758
Veeraraghavayya v. Kamala Devi. (1934) 68 M.L.J. 67	3
Veerasokkaraju v. Papiiah. (1902) I.L.R. 26 Mad. 792	482

	Page
Veerayya v. Sreenivasa Rao. (1934) I.L.R. 58 Mad. 908 (F.B.)	65
Velivalli Brahmaiah, <i>In re</i> . (1930) I.L.R. 54 Mad. 252	74
Venkata v. Rama. (1884) I.L.R. 8 Mad. 249 (F.B.)	56
Venkatachalam Chetty v. Aiyamperumal Tevan. (1919) I.L.R. 42 Mad. 702	15, 16, 18, 31
Venkatachalam Chetti v. Ramaswamy Servai. (1931) I.L.R. 55 Mad. 352 (F.B.)	486
Venkatachalam Pillai v. Sethuram Rao. (1932) I.L.R. 56 Mad. 433 (F.B.)	951
Venkata Jagannadha v. Veerabhadrayya. (1921) I.L.R. 44 Mad. 643 (P.C.)	55
Venkatakrishna Pathar, <i>In re</i> . (1926) 52 M.L.J. 121	964
Venkata Krishnayya v. Venkataratnam. (1935) 42 L.W. 452	1007, 1016
Venkatanarasimha Raju v. Chandrayya. (1926) 53 M.L.J. 267	243
Venkata Narasimha Rao v. Suryanarayana. (1925) 23 L.W. 409.	1051
Venkata Perumal Raja v. Ramudu. (1914) I.L.R. 39 Mad. 84	410
Venkata Lakshamma Garu v. Achi Reddi. (1921) I.L.R. 44 Mad. 433 (F.B.)	788
Venkata Lakshmikantaraju Garu v. Peda Venkata Jagannatha Raju Garu. (1923) 46 M.L.J. 12	541
Venkatappayya v. The Collector of Kistna. (1889) I.L.R. 12 Mad. 407	109, 110, 114
Venkataramier v. Vaithilinga Thambiran. (1913) I.L.R. 38 Mad. 655	88
Venkata Rao v. Vaithilinga Udayan. (1901) 12 M.L.J. 22	34
Venkataratnam v. Secretary of State for India. (1929) I.L.R. 53 Mad. 979	709, 711
_____ v. Venkataswami. A.I.R. 1929 Mad. 807	1006, 1016
Venkatareddi v. Adinarayana Rao. (1928) I.L.R. 52 Mad. 142.	558
Venkata Reddi v. Yellappa Chetty. (1916) 5 L.W. 234	3
Venkatasami Chettiar v. Sankaranarayana Chettiar. (1934) 69 M.L.J. 566	1047
Venkatasiva Rao v. Satyanarayanamurty. (1932) I.L.R. 56 Mad. 212	243
Venkatasomeswara Rao v. Lakshmanaswami. (1928) I.L.R. 52 Mad. 275 (F.B.)	653, 654, 655
Venkatramana v. Sanyasayya. (1933) 66 M.L.J. 76	580
Venkat Reddy v. Kunjappa Goundan. (1923) I.L.R. 47 Mad. 551	328, 330, 338, 1047
Venkitaswami Naicker v. Muthuswamy Pillai. (1917) 34 M.L.J. 177	911, 950
Veyindramuthu Pillai v. Maya Nadan. (1919) I.L.R. 43 Mad. 107 (F.B.)	401
Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami. (1904) I.L.R. 27 Mad. 435	812
Vidya Varuthi v. Balusami Ayyar. (1921) I.L.R. 48 I.A. 302; I.L.R. 44 Mad. 831	811, 818, 820, 821, 822

	Page
Vijaysingji v. Shivsangji. (1935) I.L.R. 59 Bom. 360 (P.C.) ...	1076, 1077, 1078
Vishnu Sakham Nagarkar v. Krishnarao Malhar. (1886) I.L.R. 11 Bom. 153 ...	651
Vyapuri v. Sonamma Boi Ammani. (1915) I.L.R. 39 Mad. 811 (F.B.) ...	333
Vythelinga Mudaliar v. Mahadeva Iyer. A.I.R. 1926 Mad. 659.	756
Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur. (1931) 61 M.L.J. 904...	757, 759

W

Waghela Rajsanji v. Shekh Masludin. (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551 ...	911, 945, 954, 955
Wajid Ali Khan v. Puran Singh. (1928) I.L.R. 51 All. 267 (P.C.).	664
Wallingford v. Mutual Society. (1880) 5 App. Cas. 685 ...	576, 578, 591, 592, 593, 605, 607, 608, 609
Ward v. Duncombe. [1893] A.C. 369 ...	142
Watkins v. Frederick. (1865) 11 H.L.C. 358; 11 E.R. 1371 ...	634
Weldon v. Weldon. (1883) 9 P.D. 52 ...	396
Wheaton v. Maple & Co. [1893] 3 Ch. 48 ...	991, 992
Wilkinson v. Wilkinson. (1923) I.L.R. 47 Bom. 843 ...	513, 531
Wills v. Young and Stenbridge. [1907] 1 K.B. 448 ...	566, 568, 586, 589, 610, 612
Wilson v. Wilson. A.I.R. 1931 Lah. 245 ...	510
Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co. (1873) L.R. 16 Eq. Cas. 433 ...	960
Wrexham, Mold and Conah's Quay Railway, <i>In re</i> . [1889] 1 Ch. 440 ...	367
Wright v. Mills. (1859) 4 H. & N. 488; 157 E.R. 931 ...	481

Y

Yakub v. Mahadev. (1932) 34 Bom. L.R. 987 ...	491
Yandluri Yellamanda v. Kunchala Chitambaram (1925) 50 M.L.J. 267 ...	60
Yerukola v. Yerukola. (1922) I.L.R. 45 Mad. 648 (F.B.) ...	156, 157
Yogamba Bai Ammani v. Arumuga Mudaliar. (1916) 2 M.W.N. 63 ...	774

Z

Zamindarini of Mandasa v. Ryots of Mandasa Zamindari. (1932) I.L.R. 56 Mad. 579 ...	849, 852, 853
Zamindar of Ettiyapuram v. Chidambaram Chetty. (1920) I.L.R. 43 Mad. 675 (F.B.) ...	643, 644
Zamindar of Polavaram v. Maharaja of Pittapuram. (1930) I.L.R. 54 Mad. 163 ...	948
Zamindar of Tuni v. Bennayya. (1898) I.L.R. 22 Mad. 155 ...	806
Zouch v. Parsons. (1765) 3 Burr. 1794; 97 E.R. 1103 ...	951

GENERAL INDEX

FOR

1936

Page

ABKARI ACT, MADRAS (I OF 1886), ss. 55 (b), (g) AND 58—Unlawfully manufacturing arrack and being in possession thereof—Conviction for, sustainable only under sec. 55 (b).
Rama Rao, In re ... (1936) I.L.R. 59 Mad. 90

ACTS—

INDIAN—

1855—XIII:—See FATAL ACCIDENTS ACT.
 1860—XLV:—See PENAL CODE.
 1869—IV:—See DIVORCE ACT.
 1870—VII:—See COURT FEES ACT.
 1872—I:—See EVIDENCE ACT.
 —IX:—See CONTRACT ACT.
 1879—XVIII:—See LEGAL PRACTITIONERS' ACT.
 1882—II:—See TRUSTS ACT.
 —IV:—See TRANSFER OF PROPERTY ACT.
 —V:—See EASEMENTS ACT.
 1890—I:—See REVENUE RECOVERY ACT.
 —VIII:—See GUARDIANS AND WARDS ACT.
 —IX:—See RAILWAYS ACT.
 1894—I:—See LAND ACQUISITION ACT.
 1898—V:—See CRIMINAL PROCEDURE CODE.
 1908—V:—See CIVIL PROCEDURE CODE.
 —IX:—See LIMITATION ACT.
 —XVI:—See REGISTRATION ACT.
 1909—III:—See PRESIDENCY-TOWNS INSOLVENCY ACT.
 1912—II:—See CO-OPERATIVE SOCIETIES ACT.
 1915—See GOVERNMENT OF INDIA ACT.
 1920—V:—See PROVINCIAL INSOLVENCY ACT.
 1922—XI:—See INCOME-TAX ACT.
 1925—XIX:—See PROVIDENT FUNDS ACT.
 1929—XX:—See TRANSFER OF PROPERTY (AMENDMENT)

MADRAS—

1865—VII:—See IRRIGATION CESS ACT.
 1886—I:—See ABKARI ACT.
 1889—I:—See VILLAGE COURTS ACT.
 1895—III:—See HEREDITARY VILLAGE OFFICES ACT.

ACTS—cont.

MADRAS—cont.

- 1900—I:—See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.
 1908—I:—See ESTATES LAND ACT.
 1920—V:—See DISTRICT MUNICIPALITIES ACT.
 —XIV:—See LOCAL BOARDS ACT.
 1922—V:—See COURT FEES (AMENDMENT) ACT.
 1927—II:—See HINDU RELIGIOUS ENDOWMENTS ACT.
 1930—XIV:—See MALABAR TENANCY ACT.
 1931—III:—See MOTOR VEHICLES TAXATION ACT.
 1932—VI:—See CO-OPERATIVE SOCIETIES ACT.
 1933—XXII:—See MARUMAKKATTAYAM ACT.

ADVERSE POSSESSION—Service inam—Adverse possession of, by person not entitled to or in fact discharging duties of village office—Title by prescription to inam, if acquired by such person against office-holder against whom possession held adversely and his successors in office—Limitation Act, Indian (IX of 1908), sec. 28—Applicability of, or of principle of.

Ramalingam v. Veerabhadradu ... (1936) I.L.R. 59 Mad. 51

AGENCY RULES, R. 46:—See GOVERNMENT OF INDIA' ACT (1915), SEC. 107 ... 356

APPEAL:—See LETTERS PATENT (MADRAS), CL. 15 ... 656

CASES—

- Abdul Hakim Chowdhury v. Hem Chandra Das*, (1914) I.L.R. 42 Cal. 433, referred to ... 975
Abdullah Khan v. Banke Lal, (1910) I.L.R. 33 All. 79 (F.B.), distinguished ... 745
Abdul Razak Rowther v. Abdul Rahiman Sahib, (1933) 65 M.L.J. 390, approved ... 360
Abdul Salam v. Veerabhadra Raju, (1929) I.L.R. 52 Mad. 760, referred to ... 304
Alampoth Krishnan v. Municipal Prosecutor, (1925) 92 I.C. 873, referred to and followed ... 261
Alwar Aiyangar v. Subramania Dikshathar, (1931) 61 M.L.J. 863, followed ... 966
Ammayee v. Yalumalai, (1892) I.L.R. 15 Mad. 261, referred to ... 72
Anantharama Iyer v. Kuttimalu Kovilamma, (1916) 30 M.L.J. 611, dissented from ... 929
Appalanarasiah v. Chittavadu, A.I.R. 1934 Mad. 454, followed ... 6
Apparau v. Narasanna, (1891) I.L.R. 15 Mad. 47, referred to ... 6
Arumugam Pillai v. Panayadian Ambalam, (1920) 40 M.L.J. 475, referred to ... 549
Ayisa Bivi Ammal v. Jokara Bivi, (1925) 49 M.L.J. 375, followed ... 399
Ayyamperumal v. Mathuswami, A.I.R. 1927 Mad. 687, approved ... 745
Ayyanna v. Nagabhooshanam, (1892) I.L.R. 16 Mad. 285, referred to ... 806
Balbhadra v. Sheomangal, A.I.R. 1931 All. 347, referred to ... 360

CASES—cont.

- Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons*, (1933) 64 M.L.J. 606, considered ... 360
Begam Jan v. Jannat Bibi, (1926) 98 I.C. 612, approved ... 660
Bennett v. Slater, [1899] 1 Q.B. 45, relied upon ... 855
Bhagwan Das Marwari v. Suraj Prasad Singh, (1924) I.L.R. 47 All. 217, referred to ... 258
Bindaji v. Mathurabai, (1905) I.L.R. 30 Bom. 152, referred to ... 549
Biswanath Prasad v. Chandra Narayan Chowdhury, (1921) L.R. 48 I.A. 127; I.L.R. 48 Cal. 509, referred to ... 539
Brajagopal Ray Burman v. Amar Chandra Bhattacharjee, (1928) I.L.R. 56 Cal. 135, relied upon ... 656
Calder v. Halket, (1839) 2 M.I.A. 293, distinguished ... 703
Charlwood, In re. Ex parte The Trustee, (1894) 1 Mans. 42, referred to ... 862
Chathukutty, E. v. E. Raman, A.I.R. 1933 Mad. 674, dissented from ... 424
Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali, (1930) I.L.R. 54 Mad. 212, referred to ... 660
Chhaterbijai Singh v. Damodar Das, (1932) I.L.R. 12 Pat. 181, dissented from ... 438
Chidambara Patter v. Ramaswami Patter, (1903) I.L.R. 27 Mad. 67 (F.B.), distinguished ... 966
Collector of Gorakhpur v. Ram Sundar Mal, (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468, referred to ... 539
Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company, (1932) I.L.R. 59 Cal. 1343 (P.C.), referred to ... 218
Commissioner of Income-tax, Bombay Presidency v. The Saraspur Mills Co., Ahmedabad, (1931) I.L.R. 56 Bom. 129, approved ... 175
Commissioner of Income-tax, Burma, In re v. The Rangoon Electric Tramway & Supply Co., Ltd. (1933) I.L.R. 11 Rang. 70, referred to ... 218
Commissioner of Income-tax, Madras v. Messrs. Massey and Co., Ltd., Madras, (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302, overruled ... 175
Dadaji Bhikaji v. Rukmabai, (1886) I.L.R. 10 Bom. 301, relied upon ... 393
Damodar Das v. Lakhan Das, (1910) L.R. 37 I.A. 147; I.L.R. 37 Cal. 885, referred to ... 810
Dearle v. Hall, (1823) 3 Russ. 1; 38 E.R. 475, discussed ... 142
Deputy Commissioner of Police v. Vedantam, (1935) I.J.R. 59 Mad. 428, relied upon ... 872
Dhirendrarao Krishnarao v. Virbhadrappa, (1934) I.L.R. 59 Bom. 310, relied upon ... 1029
Din Dayal v. Gur Saran Lal, (1920) I.L.R. 42 All. 336, referred to ... 929
Doraswami v. Chidambaram Pillai, (1923) I.L.R. 47 Mad. 63, overruled ... 462
Durga Dai v. Bhagwat Prasad, (1891) I.L.R. 15 All. 356, dissented from ... 189
Dwarkanath Varma v. The King-Emperor, (1933) 64 M.L.J. 466 (P.C.), followed ... 623
Erava v. Sidramappa, (1895) I.L.R. 21 Bom. 424, referred to ... 462
Ganeshi Lal v. Charan Singh, (1930) I.L.R. 52 All. 358 (P.C.), referred to ... 122

CASES—cont.

	Page
<i>Gayanoda Bala Dassee v. Butto Kristo Bairagee</i> , (1906) I.L.R. 33 Cal. 1040, followed and relied upon ...	429, 872
<i>Girwar Narayan Mahton v. Kamla Prasad</i> , (1932) I.L.R. 12 Pat. 117, followed ...	63
<i>Gnanasambanda Pandara Sannadhi v. Velu Pandaram</i> , (1899) L.R. 27 I.A. 69; I.L.R. 23 Mad. 271, referred to ...	810
<i>Gopalakrishnayya v. Gopalan</i> , (1926) I.L.R. 51 Mad. 342, followed ...	297
<i>Gopal Chunder Chatterjee v. Gunamoni Dasi</i> , (1892) I.L.R. 20 Cal. 370, referred to ...	462
<i>Govindarajulu Naidu v. Secretary of State</i> , (1926) I.L.R. 50 Mad. 449, referred to and distinguished ...	703
<i>Hall (H. M. Inspector of Taxes) v. Marians</i> , [1933] 18 T.C. 148, distinguished ...	172
applied ...	386
<i>Harendra Lal Roy Chowdhuri v. Haridasi Debi</i> , (1914) L.R. 41 I.A. 116; I.L.R. 41 Cal. 972 referred to ...	539
<i>Henley & Co., In re</i> , (1878) 9 Ch. D. 469, relied upon ...	429
<i>Jagannath Prasad v. The U. P. Flour and Oil Mills Company, Limited</i> , (1916) I.L.R. 38 All. 347, distinguished ...	1021
<i>Jai Narain v. Rashik Behari</i> , A.I.R. 1931 All. 546, dissented from ...	122
<i>Janaki Nath Hore v. Prabhasini Dasee</i> , (1915) I.L.R. 43 Cal. 178, referred to ...	975
<i>Joel v. Morison</i> , (1834) 6 Car. & P. 501; 172 E.R. 1338, followed ...	403
<i>Kamta Singh v. Chaturbuj Singh</i> , (1929) I.L.R. 8 Pat. 585, referred to ...	122
<i>Kannam Naidu v. Latchanna Dhora</i> , (1899) I.L.R. 23 Mad. 492 approved ...	354
<i>Karuppayya v. Ponnusami</i> , (1932) I.L.R. 56 Mad. 563, approved ...	745
<i>Khodabux Haji v. Emperor</i> , (1933) I.L.R. 61 Cal. 6 followed ...	905
<i>Koti Reddi v. Subbiah</i> , (1918) I.L.R. 41 Mad. 792 (F.B.), distinguished ...	888
<i>Krishnan v. Maruvalamma</i> , (1934) 41 L.W. 353, considered ...	693
<i>Krishna Rao v. The Collector of Kistna</i> , (1914) 26 M.L.J. 210, dissented from ...	108
<i>Krishnasami Panikondar v. Ramasami Chettiar</i> , (1917) I.L.R. 41 Mad. 412 (P.C.), followed ...	975
<i>Lakshmi Achi v. Narayanasami Naiker</i> , (1929) I.L.R. 53 Mad. 188, 198, approved ...	360
<i>Lakshmanacharyulu v. Venkataramanujacharyulu</i> , (1926) 51 M.L.J. 414, referred to ...	72
<i>Lalitagar Keshargar v. Bai Suraj</i> , (1893) I.L.R. 18 Bom. 316, relied upon ...	393
<i>Lilo Sonar v. Jhagru Sahu</i> , (1924) I.L.R. 3 Pat. 853, referred to ...	660
<i>Madden v. Chappani</i> , (1887) I.L.R. 11 Mad. 356, followed ...	1029
<i>Mahanth Ram Charan Das v. Naurangi Lal</i> , (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251, referred to ...	819
<i>Maharaja of Benares v. Patraj Kunwar</i> , (1905) I.L.R. 28 All. 262, followed ...	966

CASES—cont.

	Page
<i>Mahomed v. Ganapati</i> , (1889) I.L.R. 13 Mad. 277, referred to ...	810
<i>Ma Kyway v. Ma Mi Lay and another</i> , (1928) I.L.R. 6 Rang. 682, referred to ...	855
<i>Malkarjun v. Narhari</i> , (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337 referred to ...	462, 929
<i>Mallikarjunadu Setti v. Lingamurti Pantulu, etc.</i> , (1902) I.L.R. 25 Mad. 244, 287 (F.B.), dissented from ...	189
<i>Mangamma Nayakurulu v. Ramadasappa Nayanimvary</i> , (1924) 48 M.L.J. 563, relied upon ...	761
<i>Mansell, Re. Ex parte Norton</i> , (1892) 66 L.T. 245, followed ...	1021
<i>Ma Nu v. Ma Gun</i> , (1924) I.L.R. 2 Rang. 388, referred to ...	855
<i>Mariamnissa Bibi v. Joynab Bibi</i> , (1906) I.L.R. 33 Cal. 1101, relied upon ...	777
<i>Ma Saw Yin v. Hockto</i> , (1926) I.L.R. 4 Rang. 100, followed ...	966
<i>Md. Barkat Ali v. Anjuman Imdad Qarza</i> , A.I.R. 1935 Lah. 330, distinguished ...	895
<i>Meyyappa Chettiar v. Chidambaram Chettiar</i> , (1923) I.L.R. 47 Mad. (F.B.), relied upon ...	304
<i>Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri</i> , (1911) I.L.R. 39 Cal. 232 (P.C.), distinguished ...	944
<i>Moti Lal v. Bhagwan Das</i> , (1909) I.L.R. 31 All. 443, referred to ...	1
<i>Motiram Rosan Lal Coal Company, Limited v. Commissioner of Income-tax</i> , (1932) I.L.R. 12 Pat. 12, approved ...	175
<i>Mottayappan v. Palani Goundan</i> , (1913) I.L.R. 38 Mad. 226, referred to ...	446
<i>Mukand Lal v. Liquidator, Malhotra Bank, Hafizabad</i> , (1933) I.L.R. 14 Lah. 703, referred to ...	895
<i>Municipal Council, Cannanore v. Anandan</i> , (1927) I.L.R. 51 Mad. 601, referred to and followed ...	261
<i>Munugarra Satyalakshmi Narayana v. Munugarra Jugannadham</i> , (1917) 34 M.L.J. 229, referred to ...	549
<i>Murugappa v. Ramasami</i> , A.I.R. 1935 Mad. 893, applied ...	1029
<i>Muthurakku Maniagarar v. Rakkappa</i> , (1913) 26 M.L.J. 66, referred to ...	122
<i>Muthuraman Chetty v. Krishna Pillai</i> , (1905) I.L.R. 29 Mad. 72, referred to ...	398
<i>Nagappa Pillai v. Arunachalam Chetty</i> , (1924) 47 M.L.J. 876, considered ...	564
<i>Nagoor Meera v. Mahadu Meera</i> , (1925) 22 L.W. 820, considered ...	919
<i>Narasimha v. Ramasami</i> , (1890) I.L.R. 14 Mad. 44, referred to ...	6
<i>Narasimhachariar v. Krishnamachariar</i> (1914) 26 M.L.J. 406, referred to ...	1029
<i>Narayana Ayyangar v. Vellachami Ambalam</i> , (1927) I.L.R. 50 Mad. 696 (F.B.), considered ...	564
<i>Narayana Iyengar v. Desika Chariar</i> , (1933) I.L.R. 57 Mad. 35, referred to ...	37
<i>Narayana Chettiar v. Muthu Chettiar</i> , (1926) I.L.R. 50 Mad. 67, referred to ...	975
<i>Narayana Nair v. Kunhi Raman Nair</i> , (1924) 20 L.W. 190, dissented from ...	424

CASES—cont.	Page
<i>New South Wales Taxation Commissioners v. Palmer</i> , [1907] A.C. 179, relied upon ...	429
<i>Panchanada Velan v. Vaithinatha Sastrial</i> , (1905) I.L.R. 29 Mad. 333 (F.B.), discussed ...	777
<i>Panchu Choudhry v. Emperor</i> , (1921) 23 Cr. L.J. 233, referred to ...	623
<i>Paramasivam Pillai, In re</i> , (1915) 28 I.C. 951, referred to ...	805
<i>Pertap Chunder Ghose v. Mohendranath Purkait</i> , (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291, referred to ...	446
<i>Petherpermal Chetty v. Muniandy Servai</i> , (1908) I.L.R. 35 Cal. 551 (P.C.), followed ...	998
<i>Piara Ram v. Ganga Ram</i> , A.I.R. 1924 Lah. 367, distinguished ...	966
<i>Polayya Dora v. Anantha Patro</i> , (1935) I.L.R. 59 Mad. 44, discussed ...	1043
<i>Pukhraj Jeshraj v. Jamsetji Rustum</i> , (1926) I.L.R. 50 Bom. 802, distinguished ...	660
<i>Pyrushotama v. Brundavana</i> , A.I.R. 1931 Mad. 597, referred to ...	549
<i>Pym v. Campbell</i> , (1856) 6 EL. & BL. 370; 119 E.R. 903, referred to ...	446
<i>Queen-Empress v. Jadub Das</i> , (1899) I.L.R. 27 Cal. 295, 303, referred to ...	349
<i>Raghunath Das v. Sundar Das Khetri</i> , (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72, referred to and distinguished ...	462, 929
<i>Raghunathaswamy Iyengar v. Gopal Rao</i> , (1921) 41 M.L.J. 547; A.I.R. 1922 Mad. 206, approved ...	462
<i>Rajagopala Ayyar v. Ramanujachariar</i> , (1923) I.L.R. 47 Mad. 288 (F.B.), approved ...	462
<i>Rajah of Mandasa v. Jagannayakulu</i> , (1931) 63 M.L.J. 450 (F.B.), disapproved ...	826
<i>Rajah of Venkatagiri v. Isakapalli Subbiah</i> , (1902) I.L.R. 26 Mad. 410, followed ...	76
<i>Rajaram v. Central Bank</i> , A.I.R. 1926 Bom. 481, followed ...	63
<i>Raja Shri Prakash Singh v. Allahabad Bank, Limited</i> , (1928) I.L.R. 3 Luck. 684 (P.C.), discussed ...	424
<i>Rajayya v. Annapurnamma</i> , (1925) 50 M.L.J. 662, approved ...	462
<i>Ramabhadrahar v. Srinivasa Ayyangar</i> , (1900) I.L.R. 24 Mad. 85, dissented from ...	122
<i>Ramanathan Chettiar v. Kalimuthu Pillai</i> , (1912) I.L.R. 37 Mad. 163, considered ...	919
— <i>v. Ramanathan Chettiar</i> , (1928) 30 L.W. 995, referred to ...	462
<i>Ramanayya v. Kotayya</i> , (1929) 57 M.L.J. 398, followed ...	293
<i>Ramasami Aiyangar v. Govinda Iyer</i> , (1916) 31 M.L.J. 839, followed ...	161
<i>Rameshwar Singh v. Homeshwar Singh</i> , (1920) 40 M.L.J. 1 (P.C.), relied upon ...	761
<i>Ramineedi Venkata Appa Rao v. Lakkoju China Ayyanna</i> , (1906) I.L.R. 30 Mad. 209, distinguished ...	761
<i>Ramireddi v. Sreeramulu</i> , A.I.R. 1933 Mad. 120, followed ...	36
<i>Ram Surun Singh v. Mussamat Pran Peary</i> , (1870) 13 Moo. I.A. 551, referred to ...	289

CASES—cont.	Page
<i>Rattamma v. Seshachalam Sarma</i> , (1926) 52 M.L.J. 520, considered ...	101
<i>Ravanappa Reddi, In re</i> , (1931) I.L.R. 55 Mad. 343, followed ...	165
—, (1931) I.L.R. 55 Mad. 343, explained and applied ...	1083
<i>Redman, In re. Warton v. Redman</i> , [1901] 2 Ch. 471, relied upon ...	855
<i>Rousillon v. Rousillon</i> , (1880) 14 Ch. D. 351, considered ...	919
<i>Rungiah Gounden & Co. v. Nanjappa Row</i> , (1903) I.L.R. 26 Mad. 780, distinguished ...	761
<i>Rutherford v. Commissioner of Income-tax, Bihar and Orissa</i> , (1930) I.L.R. 10 Pat. 315, referred to and distinguished ...	218
<i>Salar Beg Saheb v. Karumanchi Kotayya</i> , (1925) 23 L.W. 538, applied ...	1050
<i>Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar</i> , (1918) 37 M.L.J. 356, discussed ...	189
<i>Saminatha Ayyar v. Venkatasubba Ayyar</i> , (1903) I.L.R. 27 Mad. 21, referred to ...	805
<i>Scammell G. & Nephew, Ltd. v. Hurley</i> , [1929] 1 K.B. 419, followed ...	888
<i>Secretary of State for India v. Janakiramayya</i> , (1913) I.L.R. 37 Mad. 322, dissented from ...	108
<i>Shankerbhai Manorbhai v. Motilal Ramdas</i> , (1924) I.L.R. 49 Bom. 118, distinguished ...	660
<i>Shanmuga Mudali v. Kumaraswami Mudali</i> , (1925) I.L.R. 48 Mad. 661, considered ...	564
<i>Sheo Tahal Ram v. Binaik Shukul</i> , (1931) I.L.R. 53 All. 747, relied upon ...	919
<i>Shephard, In re. Atkins v. Shephard</i> , (1889) 43 Ch. D. 131, referred to ...	462
<i>Shib Dutta Singh v. Sheikh Karim Bakhsh</i> , (1924) I.L.R. 4 Pat. 320, referred to ...	660
<i>Singa Raja v. Pethu Raja</i> , (1918) I.L.R. 42 Mad. 61, discussed ...	189
<i>Sirdar Gurdyal Singh v. Rajah of Faridkote</i> , [1894] A.C. 670, relied upon ...	919
<i>Sir Jamshed Kanga v. Kaikhushru</i> , (1934) 36 Bom. L.R. 1136 (F.B.), referred to and approved ...	733
<i>Sivasami Odayar v. Subramaniya Aiyar</i> , (1931) I.L.R. 55 Mad. 316, dissented from ...	929
<i>Spooner v. Juddow</i> , (1850) 4 M.I.A. 353, followed ...	703
<i>Sri Sri Radha Gobinda Deb Thakur v. Girija Prasanna Mookherjee</i> , (1931) 35 C.W.N. 912, distinguished ...	745
<i>Subba Rao v. Official Receiver, Guntur</i> , (1935) 42 L.W. 295, approved ...	297
<i>Subbaiya Pandaram v. Mohammad Mustapha Marcayar</i> , (1923) L.R. 50 I.A. 295; I.L.R. 46 Mad. 751, referred to ...	810
<i>Subbier v. Moideen Pitchai</i> , (1923) 44 M.L.J. 588, distinguished ...	966
<i>Subrahmanyam v. Subbayi</i> , 1933 M.W.N. 934, dissented from ...	36
<i>Subraya v. Nagappa</i> , (1908) I.L.R. 33 Bom. 264, referred to ...	297
<i>Sujan Singh v. Hira Singh</i> , (1889) I.L.R. 12 All. 399 (F.B.), discussed ...	424
<i>Sundaram v. Mausam Maruthar</i> , (1921) I.L.R. 44 Mad. 554 (F.B.), relied upon ...	305

CASES—cont.	Page
<i>Surajpal Pandey v. Utim Pandey</i> , (1921) 6 P.L.J. 625, referred to...	975
<i>Surendra Prasad v. Attabuddin</i> , A.I.R. 1922 Cal. 234, referred to ...	975
<i>Swami Kotayya v. Venkata Rangarao</i> , (1934) 68 M.L.J. 148, relied upon ...	760
<i>Tarakanath Mukherji v. Sanatkumar Mukherji</i> , (1929) I.L.R. 57 Cal. 274, 281, approved ...	1
<i>Tarani Dass Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya</i> , (1886) I.L.R. 12 Cal. 608, discussed ...	424
<i>Toyaballi Gulam Husein v. Atmaram Sakharan</i> , (1914) I.L.R. 38 Bom. 631, distinguished ...	966
<i>Tota Ram v. Ram Lal</i> , (1932) I.L.R. 54 All. 897 (F.B.), dissented from ...	360
<i>Tuljaram Row v. Alagappa Chettiar</i> , (1910) I.L.R. 35 Mad. 1 (F.B.), referred to ...	656
<i>Udumalpet Nidhi, Ltd., In re</i> , (1934) I.L.R. 57 Mad. 844, considered...	564
<i>Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu</i> , (1932) I.L.R. 56 Mad. 26, considered ...	564
<i>Vardacharyulu v. Narasimhacharyulu</i> , (1925) 23 L.W. 85, approved.	745
<i>Varada Ramaswami v. Vumma Venkataratnam</i> , (1921) 42 M.L.J. 473, followed ...	399
<i>Veeranan Ambalam v. Ayyachi Ambalam</i> , (1925) 49 M.L.J. 791, considered ...	564
<i>Veeraraghavachariar v. Advocate-General, Madras</i> , (1927) I.L.R. 51 Mad. 31 (F.B.), applied ...	752
<i>Veeraraghavayya v. Kamala Devi</i> , (1934) 68 M.L.J. 67, approved ...	1
<i>Veerayya v. Sreenivasa Rao</i> , (1934) I.L.R. 58 Mad. 908 (F.B.), followed ...	63
<i>Velivalli Brahmaiah, In re</i> , (1930) I.L.R. 54 Mad. 252, referred to ...	72
<i>Venkatakrishna Pathar, In re</i> , (1926) 52 M.L.J. 121, referred to ...	963
<i>Venkatanarashimha Raju v. Chandrayya</i> , (1926) 53 M.L.J. 267, distinguished ...	241
<i>Venkata Narasimha Rao v. Suryanarayana</i> , (1925) 23 L.W. 409, applied ...	1050
<i>Venkatasami Chettiar v. Sankaranarayana Chettiar</i> , (1934) 69 M.L.J. 566, referred to ...	1043
<i>Venkatasiva Rao v. Satyanarayanamurty</i> , (1932) I.L.R. 56 Mad. 212, distinguished ...	241
<i>Venkatramana v. Sanyasayya</i> , (1933) 66 M.L.J. 76, considered ...	564
<i>Venkāt Reddy v. Kunjappa Goundan</i> , (1923) I.L.R. 47 Mad. 551, referred to ...	1043
<i>Veyindramuthu Pillai v. Maya Nadan</i> , (1919) I.L.R. 43 Mad. 107 (F.B.), distinguished ...	399
<i>Vidya Varuthi v. Balusami Ayyar</i> , (1921) L.R. 48 I.A. 302; I.L.R. 44 Mad. 831, applied ...	810
<i>Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiyagarajaswami Devasthanam, Tiruvarur</i> , (1931) 61 M.L.J. 904, dissented from ...	751
<i>Waghela Rajsanji v. Shekh Mastudin</i> , (1887) L.R. 14 I.A. 89, I.L.R. 11 Bom. 551, distinguished ...	944

CASES—cont.	Page
<i>Wajid Ali Khan v. Puran Singh</i> , (1928) I.L.R. 51 All. 267 (P.C.), distinguished	660
<i>Zamindar of Tuni v. Bennayya</i> , (1898) I.L.R. 22 Mad. 155, referred to	805
<i>Zamindarini of Mandasa v. Ryots of Mandasa Zamindari</i> , (1932) I.L.R. 56 Mad. 579, approved	826
CAUSE OF ACTION —Original—Suit on—Right of—If available and when :—See NEGOTIABLE INSTRUMENT	268
CIVIL PROCEDURE, CODE OF (ACT V OF 1908) , SEC. 11—Civil, revision petition or appeal against a judgment—Later final judgment <i>inter partes</i> respecting same title during pendency of— <i>Res judicata</i> , if. <i>Rangachariar v. Rangaswami Ayyangar</i> ... (1936) I.L.R. 59 Mad. 777, <i>Res judicata</i> :— See PROVINCIAL INSOLVENCY ACT (V OF 1920) , SEC. 37... ..	62
... .., SEC. 47—Rateable distribution between rival decree-holders—Question as to—Question arising under sec. 47, if—Application for rateable distribution by one of them—Order dismissing—Appeal from—Competency of. <i>Krishtiah v. Venkata Reddy</i> (1936) I.L.R. 59 Mad. 399	
... .., SEC. 47 AND O. XXI, RR. 89, 90 AND 91—Mortgage decree and sale of mortgaged properties—Payment by purchaser of purchase price—Confirmation of sale—Subsequent suit by a third party against auction-purchaser—Sale held not binding on third party—Auction-purchaser losing possession as a consequence—Subsequent suit by auction-purchaser against decree-holder to recover back purchase price—Competency of—Sec. 47 not a bar to such suit. <i>Macha Koundan v. Kottara Koundan</i> ... (1936) I.L.R. 59 Mad. (F.B.) 202	
... .., SEC. 50, O. XXI, R. 22—Execution of money decree—Sale of property in—Void or voidable—Death of judgment-debtor after proclamation of sale and order for sale but before sale—Sale held without bringing his legal representative on record. <i>Kanchamalai Pathar v. Shahaji Rajah Sahib</i> ... (1936) I.L.R. 59 Mad. (F.B.) 461	
... .., SEC. 63—Applicability—Decrees of same Court against same defendant but in favour of different persons—Transmission for execution of, to Courts of different grades—Sale in execution held earlier by Court of inferior grade and purchase by holder of the decree executed by that Court—Applicability of sec. 63 to case of—Order to be made in such a case—Sec. 63 exception to rule in sec. 73, if. <i>Iswaradas v. Corporation of Madras</i> ... (1936) I.L.R. 59 Mad. 1028	
... .., SEC. 63 :—See EXECUTION APPLICATION	303
... .., SEC. 64—Agreement for sale prior to attachment—Sale deed executed pursuant to, subsequent to attachment—Validity of sale—Unpaid balance of purchase-money owing by vendee—Attaching decree-holder's rights as against. <i>Veerappa Thevar v. Venkatarama Ayyar</i> ... (1936) I.L.R. 59 Mad. 1	

	Page
CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 73 —"The same judgment-debtor"—Meaning of. <i>Rama Krishnan Chettiar v. Viswanathan Chettiar</i> ... (1936) I.L.R. 59 Mad. (F.B.) 93	
Benefit of—Right to:—See EXECUTION APPLICATION ...	303
APPLICATION ... :—See EXECUTION	303
PROCEDURE, CODE OF (ACT V OF 1908), SEC. 63 ... :—See CIVIL PRO-	1028
AND O. XXI, R. 72—Execution petitions—Some filed before date of sale and others within fifteen days of the sale—Rateable distribution—Right to—Executing decree-holder purchasing property with permission of Court—Right to set off—Liability to bring into Court enough amount to rateably distribute in execution petition pending on the date of sale—Civil Rules of Practice—R. 199—Conflict between r. 199 and O. XXI, r. 72, of the Code of Civil Procedure—R. 199 <i>ultra vires</i> to the extent it conflicts with O. XXI, r. 72. <i>Murugappa Chettiar v. Ramasami Chettiar</i> ... (1936) I.L.R. 59 Mad. 342	
CROWN DEBT ... CL. (3):—See	872
SEC. 95—Applicability—Minor plaintiff—Case of—Improper arrest before judgment obtained by next friend—Damages against minor's estate in respect of—Award of—Power of Court. <i>Ramahari Patro v. Govinda Rona</i> ... (1936) I.L.R. 59 Mad. 415	
SEC. 115:—See EXECUTION APPLICATION ...	303
SEC. 141:—See HINDU RELIGIOUS ENDOWMENTS ACT, MADRAS (II OF 1927), SEC. 78 ...	36
O. XXI, R. 2:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXXIV, R. 6 ...	188
O. XXI, R. 16:—See CO-OPERATIVE SOCIETIES ACT, MADRAS (VI OF 1932), SEC. 43 (1) ...	257
O. XXI, R. 17:—See EXECUTION APPLICATION ...	303
O. XXI, R. 22:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 50 ...	461
O. XXI, RR. 58 TO 63—Applicability—Debt attached in execution—Garnishee's objection denying existence—Order disallowing—Applicability of r. 58 to—Failure of garnishee to file a suit under r. 63 to set aside that order—Order conclusive, if. <i>Butchayya v. Krishnamachari</i> ... (1936) I.L.R. 59 Mad. 966	
O. XXI, R. 72:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 73 ...	342

	Page
CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, RR. 89, 90 AND 91:— See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 47 ...	202
O. XXI, R. 90, PROVISOR. Execution sale—Items of property sold separately—Setting aside of sale as to one or some of items sold and confirming of sale as to other or others—Permissibility—Insolvency of judgment-debtor—Interim receiver—Notice to—Omission to give—Validity of execution sale in case of—Notice to executing Court under sec. 52 of Provincial Insolvency Act (V of 1920) not given. <i>Nurasimhamurthy v. Official Receiver, West Godavari</i> . (1936) I.L.R. 59 Mad. 438	
O. XXI, RR. 97, 98 AND 99—Applicability:—See HINDU RELIGIOUS ENDOWMENTS ACT, MADRAS (II OF 1927), SEC. 78 ...	36
O. XXII, RR. 4 AND 11—Legal representatives of deceased defendant or respondent brought on record—Death of one of, and abatement of suit or appeal as against him—Entire suit or appeal, if abates in case of. <i>Muthuraman Chettiar v. Adaikappa Chetty</i> ... (1936) I.L.R. 59 Mad. 660	
O. XXIII, R. 3:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXXIV, R. 6 ...	188
O. XXXII, R. 7—Compromise affecting minor—Leave of Court for—Necessity—Arbitration—Suit referred to—Compromise settling—Leave of Court before acceptance by arbitrators of. <i>Subramania Pillai v. Piraviperumal Pillai</i> ... (1936) I.L.R. 59 Mad. 149	
O. XXXIII, R. 9 (c)—Agreement contemplated by—Champtous agreements only, if. <i>Veeraraghava Rao v. Venkatarasimha Raju Garu</i> ... (1936) I.L.R. 59 Mad. 901	
O. XXXIII, RR. 10 AND 13:—See CROWN DEBT ...	872
O. XXXIV, R. 6—Application for personal decree under—Agreement entered into after final decree—Recognition of, as bar to application under O. XXXIV, r. 6—Permissibility—Agreement relating only to personal liability of mortgagor—Agreement relating also to liability of property directed by final decree to be sold—Composite decree passed in suit awarding personal decree in respect of deficiency arising on sale of hypotheca—Cases of—O. XXIII, r. 3 and O. XXI, r. 2, of Code—Effect of—Application under O. XXXIV, r. 6—Application in execution, if. <i>Palaniappa Chettiar v. Narayanan Chettiar</i> ... (1936) I.L.R. 59 Mad. (F.B.) 188	
O. XXXIV, R. 15:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54 AND 55 (4) (b) ...	910

	Page
CIVIL PROCEDURE, CODE OF (ACT V OF 1908). O. XXXIX, R. 1—Execution of decree—Sale of property in—Injunction restraining—Grant of, on application by party to decree—Permissibility—Decree under execution not appealed against—Appeal in another suit raising issue of liability of property for sale—Pendency of—Injunction sought for on ground of.	
<i>Sankara Ayyar v. Muhammad Ganni Rowther</i> ... (1936) I.L.R. 59 Mad. 744	
... O. XLIV, R. 1, PROVISOR—Leave to appeal in <i>forma pauperis</i> —Application for—Rejection of—Hearing of applicant prior to—Failure—Illegality, if—Court-fee—Allowing of time to applicant for payment of, on rejecting application—Discretion of Court as to—Rejection of appeal on ground of rejection of application for leave to appeal in <i>forma pauperis</i> —Appeal from—Competency of.	
<i>Kanthimathi Ammal v. Ganesa Iyer</i> ... (1936) I.L.R. 59 Mad. 805	
... O. XLVII, R. 1—Plaint—Order rejecting—Review of—Notice to other side prior to—Necessity—Review granted without notice—Earliest opportunity to other side to contest propriety of review—Necessity.	
<i>Vardhanamma v. Muniswami</i> ... (1936) I.L.R. 59 Mad. 975	
CIVIL RULES OF PRACTICE —R. 199—Conflict between, and O. XXI, R. 72 of the Code of Civil Procedure—Which to prevail.—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 73 ... 342	
CONTRACT —Mutuality of:—See MAHOMEDAN LAW ... 942	
CONTRACT ACT, INDIAN (IX OF 1872), SEC. 151 :—See NEGLIGENCE ... 789	
... ss. 251, 253 (5) AND 263—Partner—Apparent or ostensible authority of—Act within scope of—Decree in favour of firm—Assignment of, to a third party, assignment being really a compounding of the claim—Authority as to—Binding nature of assignment on other partners—Dissolution of firm earlier—Approval of assignment subsequently by majority of partners—Effect.	
<i>Nagappa v. Bhagavanji Rasaji Firm</i> ... (1936) I.L.R. 59 Mad. 1036	
CONTRIBUTION —Co-mortgagors:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 82 ... 121	
... Liability as between co-defendants—Suit by a reversioner for possession, mesne profits and costs against various alienees from Hindu widow—Joint decree for possession, mesne profits and costs—Unsuccessful attempts by judgment-debtors to have joint decree changed into separate decree—Implied representation that each is liable for his portion alone—Whole decree executed against one—Suit for contribution by him against others—Right of.	
<i>Venkayya v. Basivireddi</i> ... (1936) I.L.R. 59 Mad. 250	
CO-OPERATIVE SOCIETIES ACT, MADRAS (II OF 1912), SEC. 42 (2) (b) —Liquidator—Powers of, under:—See CO-OPERATIVE SOCIETIES ACT, MADRAS (II OF 1912), SEC. 42 (6) ... 895	

CO-OPERATIVE SOCIETIES ACT, MADRAS (II OF 1912), SEC. 42 (6) —Past member of society—Liability of, to contribute—Determination of question of—Liquidator's power under sec. 42 (2) (b) of Act—Past member who ceased to be member more than two years before liquidation—Liability of, to contribute—Liquidator's decision as to—Suit by member to challenge—Maintainability of—Sec. 42 (6) of Act, if a bar to.	
<i>Vaikunta Bhat v. Sarvothama Rao</i> ... (1936) I.L.R. 59 Mad. 895	
... (VI OF 1932), SEC. 43 (1)—“Decision” under—Enforcement of, in Civil Court—Civil Procedure, Code of (Act V of 1908), O. XXI, R. 16—Change of Presidents of Society after “decision” and before its enforcement—Whether amounts to transfer by operation of law, necessitating separate application to Court passing the “decision”—Indian Limitation Act (IX of 1908), art. 182 (5) (b)—Prior application to Tahsildar to enforce “decision”—Tahsildar not “the proper Court for execution”.	
<i>Abdul Razack v. Kilpatti Co-operative Society</i> ... (1936) I.L.R. 59 Mad. 257	
COSTS —Contribution:—See CONTRIBUTION ... 250	
COURT FEES ACT (VII OF 1870) (MADRAS ACT V OF 1922), SEC. 7 (iv-A) AND (v) —“Value of the subject-matter”—Meaning of—Suit—Prayer for setting aside certain mortgage-deeds and sale-deeds and for possession and for cancellation of deeds—Whether sec. 7 (iv-A) or sec. 7 (v) applies.	
<i>Balireddi v. Abdul Satar</i> ... (1936) I.L.R. 59 Mad. 240	
COURT FEES ACT (VII OF 1870), SEC. 7 (iv) (c), PROVISOR (ADDED BY MADRAS ACT V OF 1922) —Applicability—Mittadar whose title to mitta not disputed—Suit by, for declaration of his right to take water from a river in respect of lands in his mitta free of irrigation cess and for refund of money illegally levied from him.	
<i>Gurumatha v. Secretary of State for India</i> ... (1936) I.L.R. 59 Mad. 962	
... SEC. 17—“Distinct subjects”—Dealings and cost of sending notice of demand—Claims for—Distinct subjects, if.	
<i>Gopalachari, In re</i> ... (1936) I.L.R. 59 Mad. 739	
... SCH. II, ART. 17-A—Landholder—Application under sec. 3 (5) of the Madras Estates Land Act (I of 1908) for registration as—Dismissal of—Suit by unsuccessful applicant—Proper court-fee payable on.	
<i>Athimoola Mudaliar v. Kubra Begam</i> ... (1936) I.L.R. 59 Mad. 882	
... SCH. II, ART. 17-B (Madras)—Rate of widow's maintenance—Suit for reduction of, on ground of change of circumstances—Basis of valuation for purposes of court-fee and jurisdiction.	
<i>Rajammal v. Thyagaraja Ayyar</i> ... (1936) I.L.R. 59 Mad. 159	
CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 147 :—See LIMITATION ACT, INDIAN (IX OF 1908), SEC. 23 AND ART. 120 ... 75	
... SEC. 190 (1) (c)—Magistrate taking cognizance of offence under, upon his own knowledge—Opportunity to accused of saying if he wishes to be tried by him or not—Necessity:—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 246 ... 442	

- CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 195**—Some facts in a complaint disclosing a minor offence under sec. 182, Indian Penal Code—Entire facts disclosing primarily an offence under sec. 211, Indian Penal Code—Former requiring complaint from public servant, latter not in the circumstances—Complaint by a private person under sec. 211, Indian Penal Code—Competency of Court to try.
Muthuvelu Kudumpuran, In re ... (1936) I.L.R. 59 Mad. 1083
- , SEC. 195 (1) (b)—Sanctioned—Necessity for, by Panchayat Court to enable Magistrate to take cognizance of offence alleged to be committed before it—Madras Village Courts Act (I of 1889), sec. 77—Necessity for amending.
Appadurai Nainar, In re ... (1936) I.L.R. 59 Mad. 165
- , SEC. 246—Summons case—Magistrate taking cognizance of—Charge in, of offence triable as a warrant case—Framing of—Legality of—Sec. 190 (1) (c)—Magistrate taking cognizance of offence under, upon his own knowledge—Opportunity to accused of saying if he wishes to be tried by him or not—Necessity of.
Rajaratnam Pillai, In re ... (1936) I.L.R. 59 Mad. 442
- , SEC. 342 (1)—Trial Judge—Matters from which adverse inferences can be drawn against accused—Putting to accused of—Duty as to.
Sangama Naicker, In re ... (1936) I.L.R. 59 Mad. 622
- , SS. 423 AND 439—Accused convicted as a result of a verdict of the jury—Appeal by accused—Revision petition by Crown for enhancement of sentence—Right of convicted person, in showing cause against conviction, to go into the facts of the case—"Notwithstanding anything contained in this section", in sub-sec. 6 of sec. 439 of Code—Meaning of—Trial Judge—Right of, to express his opinion to the jury—Limits of.
Ratnasabapathy Goundan v. Public Prosecutor, Madras. (1936) I.L.R. 59 Mad. 904
- CRIMINAL TRIAL**—Admissions dispensing with proof of facts—Distinguished from admissions which are evidential—Permissibility of—*Post-mortem* report—Use of.
Rangappa Goundan, In re ... (1936) I.L.R. 59 Mad. 349
- CROWN DEBT**—Priority—Pauper suit—Court-fee payable by plaintiff to Government in—Recovery from defendants in suit of—Decree in suit directing—Priority in respect of amount so directed to be paid over other liabilities of those defendants—Crown's right to—Code of Civil Procedure (Act V of 1908), O. XXXIII, rr. 10 and 13, and sec. 73, cl. 3—Applicability and effect of.
Varadachari v. Secretary of State for India ... (1936) I.L.R. 59 Mad. 872
- Priority of, over other debts:—*See* MOTOR VEHICLES TAXATION ACT, MADRAS (III OF 1931) ... 428
- DECREE**—Joint—For mesne profits and costs—Contribution:—*See* CONTRIBUTION ... 250

- DISTRICT MUNICIPALITIES ACT, MADRAS (V OF 1920), SEC. 350**—"Act done in pursuance or execution or intended execution of Act"—Act done with knowledge that it is not authorized by Act, if—Prosecution not authorized by Act—Institution of, with knowledge that it is not so authorized—Suit for damages for—Notice under sec. 350 of Act—Necessity—Prosecution malicious, if—Test of.
Karuppanna Pillai v. Haughton ... (1936) I.L.R. 59 Mad. 887
- DIVORCE ACT, INDIAN (IV OF 1869), SEC. 2**—Marriage in Mysore State—Parties, domiciled subjects of Mysore State—Nullity of marriage—Petition by wife in Madras—Petitioner, *bona fide* resident of Madras—Jurisdiction.
Sumathi Ammal v. Paul ... (1936) I.L.R. 59 Mad. 509
- , SS. 7, 16, 17, CLS. I to 4, 17-A, 18 AND 19—Nullity of marriage—Petition for—Decree to be passed in the first instance—Decree *nisi* and not decree absolute.
Sumathi Ammal v. Paul ... (1936) I.L.R. 59 Mad. (F.B.) 518
- EASEMENTS ACT, INDIAN (V OF 1882), SEC. 7, ILL. (i)**—Owner of land of higher level—Right of, to discharge water on to land of lower level—Nature and incidents of—If such right limited to mere rain water falling directly on land of higher level or water flowing in natural stream over that land—Customary right—Doctrine of a lost grant—If available to infer such a right—Essentials of the doctrine—Ryotwari proprietor—If a "capable grantor" as understood in English Law—"Time immemorial"—Meaning of, in Indian Law.
Nagarethna Mudaliar v. Sami Pillai ... (1936) I.L.R. 59 Mad. 979
- ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 3 (11) (a)**—Rent—Fee over and above rent charged for cost of collecting rent—Rent, if—Sec. 143—Effect of.
Basudeva Doss v. Raja Harischand Jagaddeva Garu. (1936) I.L.R. 59 Mad. 408
- , SS. 3 (4) AND (11), 24, 30 AND 32—Enhancement of rent—What amounts to—Landholder's right to—Conditions—Procedure applicable to claim for enhancement—Landholder's water which overflows and which tenant, has no option of refusing—Use by tenant of—Claim to enhanced rent on ground of—Maintainability of.
Sundaram Pillai v. Karuppayee Ammal ... (1936) I.L.R. 59 Mad. 5
- , SS. 6 (6) AND 130—*Ijaradar*—Rent sale—Purchase of holding by *ijaradar* at—Validity of—Effect of—Lease for *fasi* in which arrears accrued—Expiry of—Sale of holding for rent arrears after—*Ijaradar's* right of—*Ijaradar* continuing to be a landholder at time of sale under a fresh valid lease.
Gosukani v. Sekka Maracayar ... (1936) I.L.R. 59 Mad. 779
- , SEC. 130:—*See* ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 6 (6) ... 779
- , SEC. 143—Effect of:—*See* ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 3 (11) (a) ... 408

	Page
ESTATES LAND ACT, MADRAS (I OF 1908) , SEC. 171—Order of the Revenue Board under—Revision of :— <i>See</i> ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 173	825
Board under— <i>See</i> ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 173.	825
SEC. 172—Power of the Revenue Board under— <i>See</i> ESTATES LAND ACT, MADRAS (I OF 1908), SEC. 173.	825
SEC. 173—Right of suit conferred by—Scope of suit—Grounds on which it can be instituted—Relief obtainable in it—Effect of suit—Record-of-rights—Entry in, of rent settled under ss. 168 to 172—Suit for alteration of—Maintainability of, under sec. 173—Suit not based on any of grounds in sec. 173 (3)—Sec. 171—Order of Board of Revenue under—Revision of—Power of Board under sec. 172—Sec. 172—Power of Board under—Fixing of rate finally—Irregularity of procedure only, if—Right of suit, if conferred by. <i>Zamindar of Khallikote v. Beero Pollai.</i> (1936) I.L.R. 59 Mad. (F.B.)	825
ESTOPPEL —Mortgage—Suit to enforce—Plea in, of mortgage being a sham transaction intended to defraud a third party—Mortgagor's right to set up—Estoppel against. <i>Arunachalam v. Rengaswami</i>	(1936) I.L.R. 59 Mad. 289
EVIDENCE ACT, INDIAN (I OF 1872) , SS. 91 AND 92—Oral evidence that written agreement was not intended to be acted on, whether admissible. <i>Tyagaraja Mudaliyar v. Vedathanni</i>	(1936) I.L.R. 59 Mad. (P.C.) 446
SEC. 91 :— <i>See</i> NEGOTIABLE INSTRUMENT.	268
EXECUTING COURT —Decree under execution—Validity of—Jurisdiction to pronounce upon—Minor—Decree against—Plea of invalidity of, on ground of guardian <i>ad litem</i> having interest adverse to minor. <i>Krishnamurthi v. Imperial Bank of India.</i> (1936) I.L.R. 59 Mad. 642	642
EXECUTION (APPLICATION) —Attachment before judgment—Property subject of—Execution application, filed after decree, asking for sale of—Schedule of property not put into Court along with—Application, when not defective in law by reason of—Code of Civil Procedure (Act V of 1908), sec. 73—Benefit of—Right to—Defects in execution petition, when no bar to—O. XXI, r. 17—Execution petition returned for amendment and re-presented with amendments—Date of presentation of—Attachment before judgment by superior Court—Sale of property subject of, by inferior Court—Execution petition by decree-holder in suit in superior Court—Proper and sufficient, if and when—Attachment before judgment becoming an attachment in execution—Condition of—Order of Court, if a—Sec. 63—Attachment before judgment—Person securing—Right of, to benefit of sec. 63—Order of Court in execution, if a condition of—Sec. 115—Erroneous view of provisions of Code—Court not exercising jurisdiction by reason of—Interference in revision in case of—Sec. 73—Misapprehension of provisions of—Order made under. <i>Dalayya v. Syndara Narayana</i>	(1936) I.L.R. 59 Mad. 303
FATAL ACCIDENTS ACT (XIII OF 1855) —Suit for damages under :— <i>See</i> MASTER AND SERVANT	402

FOREIGN COURT —Jurisdiction of—Submission to—Attachment before judgment in suit in foreign Court—Letter written by or on behalf of defendant requesting plaintiff to allow payment of portion of attached amount to defendant and stating that the balance might be collected by him—Refusal of request of defendant and defendant allowing suit to be decreed <i>ex parte</i> —Submission to jurisdiction, if—Filing of suits by defendants in foreign Court in cases within its jurisdiction—Inference of submission to jurisdiction from—Permissibility of. <i>Ayob Sait v. Thirunavukkarasu</i>	(1936) I.L.R. 59 Mad. 918
FRAUDULENT TRANSACTION —Party to—Plea of his own fraud by—Maintainability of—Mere fraudulent intention evidenced by transaction—Sufficiency of, to preclude him from setting up plea—Intended fraud being effected or substantial part performance of intention to defraud—Necessary, if. <i>Venkataramayya v. Pullayya</i>	(1936) I.L.R. 59 Mad. (F.B.) 998
GOVERNMENT OF INDIA ACT (1915) , SEC. 106 (2) :— <i>See</i> INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 46	702
SEC. 107 AND LETTERS PATENT (MADRAS), CL. 16—Agency Rules, r. 46—Agency District Munsif's Court—If, a Civil Court—Madras High Court—Civil revision petition from a decree of Agency District Munsif's Court to—Jurisdiction. <i>Venkunaidu v. Mahadevu Sanyasi</i>	(1936) I.L.R. 59 Mad. (F.B.) 356
SEC. 112—Operation of :— <i>See</i> MAHOMEDAN LAW	942
HEREDITARY VILLAGE-OFFICES ACT, MADRAS (III OF 1895) , SEC. 5—Potter service inam lands—Growing crops on—Attachment of, in execution—Prohibited, if. <i>Swami v. Satheyya</i>	(1936) I.L.R. 59 Mad. (F.B.) 354
HINDU LAW —Adoption—Nattukottai Chetty community—Religious motive—Presence of—Distinction between them and Jains in the matter of adoptions—Muri—Execution of—Importance of—Formalities, such as feasting and making presents, if necessary ingredients—Orphan—Adoption of—Validity of—Distinction, if any, between such an adopted son and a Dattaka son—Custom assimilating such son to a Dattaka son—Validity of—Property vesting in daughter-in-law—Mother-in-law making adoption—Daughter-in-law not party to suit between mother-in-law and reversioners—Validity of such adoption <i>inter partes</i> . <i>Subramanian v. Somasundaram</i>	(1936) I.L.R. 59 Mad. 1064
Debts—Son's liability to discharge the debts of his father under pious obligation rule—Attachment—Distinction :— <i>See</i> PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 51 AND 52.	296
Joint family—Alienation of joint family property by father—Existence of a son—After-born son—Rights of, to contest the said alienation—Scope and nature of the right—Alienation becoming conclusive so far, as the existing son is concerned—Effect of, on the after-born son. <i>Visweswara Rao v. Surya Rao</i>	(1936) I.L.R. 59 Mad. 667

	Page
HINDU LAW —Joint family, contemplated in Indian Income-tax Act (XI of 1922)—Nature of.—See INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 25 (2)	377
—Joint family—Partition—Suit for—Suma collected by coparcener but not invested by him—Interest on—Liability for. <i>Yasobadra Nainar v. Samanthabadrar</i> ... (1936) I.L.R. 59 Mad. 154	
—Presumptive reversioner—Declaratory suit by—Who are proper parties to and what reliefs can be granted in. <i>Desu Reddiar v. Srinivasa Reddi</i> ... (1936) I.L.R. 59 Mad. 1052	
—Religious Endowment—Temple—Dharmakarta of—Alienation of temple lands not for justifiable purposes by—Void <i>ab initio</i> , if.—See LIMITATION ACT, INDIAN (IX OF 1908), ART. 144	809
—Widow's maintenance—Reduction of—Suit for—Court fee.—See COURT-FEES ACT (VII OF 1870), SEC. II, ART. 17-B (MADRAS). 159	
—See TRANSFER OF PROPERTY ACT, INDIAN (IV OF 1882), SEC. 52	101
HINDU RELIGIOUS ENDOWMENTS ACT, MADRAS (II OF 1927), SEC. 9, CL. 5 —Applicability—Founder's heirs— <i>De facto</i> exercise of hereditary right of trusteeship by—Necessity—Presumptive right of the heirs to such trusteeship—Sufficiency of. <i>Krishnamurthi v. H.R.B. Board, Madras</i> ... (1936) I.L.R. 59 Mad. 245	
—SEC. 78— Delivery of possession to new trustee—Obstruction to, by ex-trustee or stranger—Investigation of—Power of—Discretion as to—Delivery of possession ordered against ex-trustee—Obstruction by stranger—Power of Court to hold enquiry and to decide in favour of either party—Civil Procedure, Code of (Act V of 1908), O. XXI, rr. 97, 98 and 99—Applicability of, to application under sec. 78 of Act II of 1927—Sec. 141 of Code—Applicability and effect of. <i>Seshasayee Ayyangar v. Govinda Pillai</i> ... (1936) I.L.R. 59 Mad. 36	
INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 4 (2) —Foreign profits—Receipt in British India of—Indebtedness in British India—Discharge of, by hundi drawn on assessee's shop outside British India—Receipt of amount of hundi in British India, if—Profits in foreign shop sufficient to cover amount of hundi—"Received", meaning of. <i>Subrahmanyam Chettiar v. Commissioner of Income-tax, Madras</i> . (1936) I.L.R. 59 Mad. 171	
—SEC. 4 (2)—Foreign profits— Remittance to British India of—Donation to temple—Liability to make, outside British India—Discharge of, outside British India, from out of foreign profits—Arrangements for—Inference of—Circumstances justifying—Amount paid—Remittance of foreign profits within sec. 4 (2), if. <i>Ramanathan Chettiar v. Commissioner of Income-tax, Madras</i> . (1936) I.L.R. 59 Mad. 385	

INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 4 (2) —Receipt of income—Date of—Payment first, then a contract to sell and then completion of transaction by execution of a sale deed—Receipt of income in case of, only on date of execution of sale deed. <i>Chidambaram Chettiar v. Commissioner of Income-tax, Madras</i> (1936) I.L.R. 59 Mad. 263	
—SEC. 4 (3) (v) AND (vii), 6, 7 (1) AND 25 (3).—Employer company—Officers' Retiring Fund constituted by—Sum paid to employee out of, on his retirement—Nature of—Liability to assessment of—Applicability of sec. 25 (3)—Conditions. <i>Commissioner of Income-tax, Madras v. Fletcher</i> ... (1936) I.L.R. 59 Mad. 216	
—SEC. 6.—See INCOME-TAX ACT, INDIAN (XI OF 1922), ss. 4 (3) (v) AND (vii)	216
—SEC. 7.—See INCOME-TAX ACT, INDIAN (XI OF 1922), ss. 4 (3) (v) AND (vii)	216
—SEC. 10 (2) (vi)—Buildings and machinery—Purchase by one company from another—Assessment of purchaser—Original cost, whether cost to vendor or purchaser. <i>Commissioner of Income-tax, Madras v. The Buckingham and Carnatic Co., Ltd.</i> (1936) I.L.R. 59 Mad. (P.O.) 175	
—SEC. 24—Liability of partners—Loss of one partner irrecoverable—Debit in independent money-lending business of another partner—Right to set off partner's loss as a bad debt in independent money-lending business. <i>Arunachalam Chettiar v. Commissioner of Income-tax</i> . (1936) I.L.R. 59 Mad. (P.O.) 713	
—SEC. 25 (3)—Applicability— Conditions.—See INCOME-TAX ACT, INDIAN (XI OF 1922), ss. 4 (3) (v) AND (vii)	216
—SEC. 26 (2)—Succession referred to in—Meaning of—Undivided Hindu family, consisting of father and son—Business carried on by—Death of father and manager—Son continuing business on—"Succeeds" to business of father, if—Undivided Hindu family contemplated in Act—Nature of—Assessee singly, if a member of—Assessee and his wife, if together constitute such family. <i>Kasava Rao v. Commissioner of Income-tax, Madras</i> . (1936) I.L.R. 59 Mad. 377	
—SEC. 46—Arrears of income-tax— Proceedings taken by Collector to recover—Jurisdiction of High Court to issue writ of <i>certiorari</i> where the Collector <i>bona fide</i> believed he was acting under sec. 46 of Act—Government of India Act, 1915, sec. 106 (2)—High Court's jurisdiction, if barred by. <i>Thyagaraja Chettiar v. Collector of Madura</i> . (1936) I.L.R. 59 Mad. 702	
INSOLVENCY —Official Receiver— <i>Ex parte</i> decree against—Gross negligence of Receiver in allowing passing of—Suit by creditors of insolvent for declaration that the decree is not binding upon them—Maintainability of—Application by Receiver to set aside <i>ex parte</i> decree—Dismissal of—Provincial Insolvency Act (V of 1920), sec. 56 (4) (c)—Effect of. <i>Rama Vilas Nidhi, Ltd. v. Pera Naicken</i> ... (1936) I.L.R. 59 Mad. 770	

	Page
INTEREST —Land Acquisition Act (I of 1894)—Case not falling under ss. 16 and 17 of Act—Government taking possession of land before payment of compensation money—Interest to the owner of the land on the compensation money for this period—Right to—Principle underlying the grant of. <i>Revenue Divisional Officer, Trichinopoly v. Venkataratna Ayyar.</i> (1936) I.L.R. 59 Mad. 433	
—Liability for:—See HINDU LAW	154
INTERPRETATION OF DEED —Government grant—Successive estates—Vested interest. <i>Chota Raja Saheb v. Sundaram Ayyar</i> ... (1936) I.L.R. 59 Mad. (P.C.) 633	
IRRIGATION CESS ACT, MADRAS (VII OF 1865) AS AMENDED BY AMENDING ACT (V OF 1900) , sec. 1, PROVISIO 2—Ryotwari holder—Involuntary user of water by—Liability for water-cess in respect of—Amendment of Act in 1900—Effect of—Sec. 1, cl. (a)—“Supplied”—Meaning of. <i>Kanniappa Mudaliar v. Secretary of State for India</i> ... (1936) I.L.R. 59 Mad. 107	
JUDGMENT :—See LETTERS PATENT (MADRAS), CL. 15	656
JURISDICTION —Restitution of conjugal rights:—See RESTITUTION OF CONJUGAL RIGHTS	392
—See DIVORCE ACT, INDIAN (IV OF 1869), SEC. 2	509
—See INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 46	702
—See GOVERNMENT OF INDIA ACT (1915), SEC. 107	356
—Submission to:—See FOREIGN COURT	918
LAND ACQUISITION ACT (I OF 1894) —Interest—Principle underlying the grant of:—See INTEREST	433
—SEC. 3 (d)—Special Judicial Officer appointed under—Decision of, under sec. 49 of Act—Not an award—Non-appealability of such decision. <i>Krishnamoorthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam.</i> (1936) I.L.R. 59 Mad. 554	
—SEC. 49—Decision under—Character of:—See LAND ACQUISITION ACT (I OF 1894), SEC. 3 (d)	554
LEGAL PRACTITIONERS' ACT (XVIII OF 1879) , SEC. 12—Pleader—Conviction of, under sec. 121, Indian Penal Code (Act XLV of 1860)—Implies defect of character rendering him unfit to remain in profession. <i>A Second Grade Pleader, In re</i> ... (1936) I.L.R. 59 Mad. (F.B.) 732	
LETTERS PATENT (MADRAS) , CL. 15—Judgment—Pauper appeal—Delay in filing—Order of single Judge excusing, and admitting appeal—Order refusing to, set aside—Judgment, if—Appeal against—Competency of. <i>Ananthanarayana v. Rarichan</i> ... (1936) I.L.R. 59 Mad. 656	
—CL. 15—Second appeal—Decision of single Judge of High Court in—Leave to appeal from—Order of single Judge refusing—Order of Division Bench different from—Right of appeal from second appellate decree, if conferred by. <i>Govinda Rao, In re</i> ... (1936) I.L.R. 59 Mad. 293	

	Page
LETTERS PATENT (MADRAS) , CL. 16:—See GOVERNMENT OF INDIA ACT (1915), SEC. 107	356
LICENCE FEE —Power of Local Board to demand:—See LOCAL BOARDS ACT, MADRAS (XIV OF 1920), SCH. VII, CLS. (p) AND (q)	261
LIMITATION ACT, INDIAN (IX OF 1908) , SEC. 3:—See PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SS. 7 AND 36	1020
—SEC. 5:—See LOCAL BOARDS ACT, MADRAS (XIV OF 1920)	876
—SEC. 19—Acknowledgment of liability in writing—Signature of party making it—Initials equivalent to. <i>Tavudu v. Venkataratnam</i> ... (1936) I.L.R. 59 Mad. 72	
—SEC. 23 AND ART. 120—Applicability—Procession in public street—Right to carry—Suit to establish—Limitation—Starting point of—Magistrate's order under sec. 147, Criminal Procedure Code, prohibiting carrying of such procession until right to do so established in Civil Court—Suit brought more than six years after—Barred, if—Fresh obstruction within limitation period—Valid cause of action, if afforded by—“Continuing wrong,” what is. <i>Ponnu Nadar v. Kumaru Reddiar</i> ... (1936) I.L.R. 59 Mad. 75	
—SEC. 28:—See ADVERSE POSSESSION	51
—ART. 44—Applicability—Hindu joint family—Minor members of—Sale of property of, by their mothers acting as guardians—Suit by surviving minor to recover property subject of—Limitation for—No adult coparceners in existence at time of alienation. <i>Ankamma v. Kameswaramma</i> ... (1936) I.L.R. 59 Mad. 549	
—ART. 109—Applicability of:—See PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SS. 7 AND 36. 1020	
—ART. 120:—See LIMITATION ACT, INDIAN (IX OF 1908), SEC. 23	75
—ART. 144—Alienation of temple lands—Permanent cowle—Payment of rent—Adverse possession. <i>Ponnamkala Desikar v. Periyannan Chetti</i> ... (1936) I.L.R. 59 Mad. (P.C.) 809	
—ART. 181:—See LIMITATION ACT, INDIAN (IX OF 1908), ART. 182 (5)	759
—ART. 182:—See LIMITATION ACT, INDIAN (IX OF 1908), ART. 182 (5)	759

	Page
LIMITATION ACT, INDIAN (IX OF 1908). ART. 182 (5)—Application in accordance with law—Insolvent judgment-debtor whose property has vested in Official Receiver—Execution petition filed against—Application in accordance with law, if—Provincial Insolvency Act (V of 1920), sec. 28 (2)—Effect of—Arts. 181 and 182 of Limitation Act—Applicability of—Decree capable of execution—Laches of decree-holder in applying for execution—Order exonerating defendant from liability under decree subsequently set aside—Capable of being relied upon as affording fresh starting point for limitation in such a case, if. <i>Jagadisan Pillai v. Narayanan Chettiar</i> ... (1936) I.L.R. 59 Mad. 759	
—, ART. 182 (5) (b) :—See CO-OPERATIVE SOCIETIES ACT, MADRAS (VI OF 1932), SEC. 43 (1) ...	257
—, ART. 182 (5)—Step in aid of execution—Decree-holder's application to record payment in part satisfaction of decree, if a. <i>President, Union Board, Pentapadu v. Venkata Srinivasacharyulu.</i> (1936) I.L.R. 59 Mad. 424	
LIQUIDATOR —Power of, under sec. 42 (6) of the Co-operative Societies Act (II of 1912):—See CO-OPERATIVE SOCIETIES ACT (II OF 1912), SEC. 42 (6) ...	895
LOCAL BOARDS ACT, MADRAS (XIV OF 1920) —Surcharge certificate—Profession-tax appeals filed out of time—President placing them before Board—Allowing of appeals and reduction of tax by Board—Diminution of revenue to Taluk Board in consequence of—Surcharge certificate against President in respect of—Legality of—Sch. IV of Act—Appeals provided for in—Applicability to, of sec. 5 of Indian Limitation Act (IX of 1908)—Sec. 213 of Local Boards Act—Effect of—Proceedings arising out of surcharge certificate—Party to—Government, if a proper party—Cl. 7 of the Rules—Effect of. <i>Secretary of State for India v. Sivasankaram Pillai.</i> (1936) I.L.R. 59 Mad. 876	
—, SEC. 213—Effect :—See LOCAL BOARDS ACT, MADRAS (XIV OF 1920), SCH. IV ...	876
—, SCH. IV—Appeals provided for in—Applicability to, of sec. 5 of Indian Limitation Act—Sec. 213 of Local Boards Act—Effect :—See LOCAL BOARDS ACT, MADRAS—SURCHARGE CERTIFICATE ...	876
—, SCH. VII, CLS. (p) AND (q)—Printing press worked entirely by hand—Power of Local Board to demand licence fee for. <i>Siva Bushana Mudaliar v. The President, Panchayat Board, Tiruvallur.</i> (1936) I.L.R. 59 Mad. 261	
LOST GRANT —Doctrine of a—Essentials of :—See EASEMENTS ACT, INDIAN (V OF 1882), SEC. 7, ILL. (i) ...	979
LOTTERY —Chit fund, if and when a—Persons participating in a lottery—Guilty under sec. 294-A, Indian Penal Code (Act XLV of 1860), if and when—Persons subscribing to or purchasing tickets in a lottery—Guilty of offence under, or of abetment of offence under, sec. 294-A, Penal Code, if and when—Subscriber to a lottery—Refund of subscriptions paid—Right of—Indian Trusts Act (II of 1882), sec. 84—Applicability of—Maxim " <i>pari delicto</i> "—Applicability. <i>Sesha Ayyar v. Krishna Ayyar</i> ... (1936) I.L.R. 59 Mad. (F.B.) 562	

	Page
MAHOMEDAN LAW —Minor—Contract of lease of immovable property by guardian on behalf of—Contract beneficial to minor—Contract containing onerous terms—Contract not in excess of powers of guardian under the Guardians and Wards Act (VIII of 1890)—Contract voidable or void—Powers of Mohamedan father acting as guardian to grant leases of minor's property—Covenant for renewal—Nature of—Mutuality of contract—Non-availability of suit for, specific performance as regards certain covenants against minor—Effect of, on the character of the lease as being voidable or void—Absence of total failure of consideration—Liability of lessee for rent—Capacity of minor on coming of age to ratify such contract—Government of India Act (1915), sec. 112—Operation of—"Incident of the contract or dealing" in—Meaning of. <i>Zeebunnissa Begum v. Mrs. Danagher</i> ... (1936) I.L.R. 59 Mad. 942	
MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (MADRAS ACT I OF 1900) , SEC. 6 (3)—Decree for eviction of tenant—Award for compensation for improvements embodied in—Date on which amount valued—Decree not stating anything as to—Effect—Re-valuation with reference to increment in value between date of valuation and date of eviction—Power of executing Court as to. <i>Ammu v. Nagappan Nair</i> ... (1936) I.L.R. 59 Mad. 972	
MALABAR TENANCY ACT (XIV OF 1930) , ss. 3 (o) and (p), 18, 20 (6), 22 and 40 (2)—Melchartdar—Ejectment suit by, against kuzhikanamdar from jenmi or original landlord—Application under sec. 22 by kuzhikanamdar in—Objection under sec. 20 (6) by melchartdar to—Maintainability—Party to application—Jenmi or original landlord, if a necessary party. <i>Sequeria v. Abdul Khader</i> ... (1936) I.L.R. 59 Mad. 419	
MARUMAKKATTAYAM ACT, MADRAS (XXII OF 1933) , ss. 38, 40, 43 AND 50—Severance of status—Doctrine of—Applicability of, to tavazhis under Marumakkattayam Law—Sec. 38 of Act—Suit by tavazhi under—Subsequent petition under sec. 43 of Act, if can defeat. <i>Kunchi Amma v. Minakshi Amma</i> ... (1936) I.L.R. 52 Mad. 693	
MASTER AND SERVANT —Servant—Negligence of—Accident happening during the course of employment—Servant not strictly carrying out the instructions of master—Fatal Accidents Act (XIII of 1855)—Suit for damages under—Master—Liability of. <i>Stanes Motors, Ltd. v. Peter</i> ... (1936) I.L.R. 59 Mad. 402	
MINOR —Decree against—Plea of invalidity—Guardian <i>ad litem</i> having adverse interest :—See EXECUTING COURT ...	642
—Improper arrest before Judgment obtained by next friend—Damages against Minor Estate :—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 95 ...	415
—Liability of Estate of—Personal covenant by guardian :—See TRANSFER OF PROPERTY ACT, ss. 54 and 55 (4) (b) ...	910
—Mahomedan—Contract of lease by guardian on behalf of—Nature and effect of :—See Mahomedan Law ...	942

- MORTGAGE**—Subrogation—Purchaser, of property subject to prior simple and later usufructuary mortgages—Discharge of simple mortgage by—Subrogation to rights of simple mortgagee—Purchaser's right to, as against usufructuary mortgagee—Suit by purchaser to enforce that right—Maintainability of—Transfer of Property Act (IV of 1882), sec. 101 as it stood in 1920—Effect of.
Arumuga Bathan v. Semba Goundan ... (1936) I.L.R. 59 Mad. 1042
- Suit for sale of mortgaged properties by mortgagee without impleading purchaser of equity of redemption of some of the mortgaged properties—Decree—Purchase by mortgagee of all the mortgaged properties—Resistance to possession of the latter properties by purchaser of equity of redemption—Subsequent suit by mortgagee-purchaser—Character and scope of—Limitation.
Sambasiva Ayyar v. Subramania Pillai ... (1936) I.L.R. 59 Mad. 312
- MOTOR VEHICLES TAXATION ACT, MADRAS (III OF 1931)**—Tax payable under, in respect of licence for motor-car—Arrears of—Crown debt, if—Sale proceeds of sale of motor-car of defaulter attached and sold in execution of money decree in deposit in Court—Crown's right to be paid arrears of tax out of, in priority to attaching decree-holder—Ss. 8 and 9 of Madras Motor Vehicles Taxation Act—Effect of—Attachment—Effect in India of.
Deputy Commissioner of Police v. Vedantam. (1936) I.L.R. 59 Mad. 428
- NEGLIGENCE**—Goods consigned under risk-note A—Goods charged under ordinary rates—Taking of risk-note A, if proper—"Misconduct"—Allegation of—Burden of proof—"Misconduct" in risk-note A—What amounts to—Indian Railways Act (IX of 1890), sec. 72, rr. 39, (1), (4), 41 and 42—Indian Contract Act (IX of 1872), sec. 151.
Roshan Umar Karim and Co. v. Madras and Southern Mahratta Railway Co., Ltd. (1936) I.L.R. 59 Mad. 789
- See MASTER AND SERVANT ... 402
- NEGOTIABLE INSTRUMENT**—Promissory note—Contemporaneous execution of, for goods sold and delivered—Recital of consideration in the promissory note—Inadmissibility of the promissory note—Suit based on the original cause of action—Maintainability of—Indian Evidence Act (I of 1872), sec. 91.
Ramasami Pillai v. Murugiah Padayachi ... (1936) I.L.R. 59 Mad. (F.B.) 268
- PENAL CODE, INDIAN (ACT XLV OF 1860)**, SEC. 75—Old offender—Sentence to be passed on
Abdul Gani, In re ... (1936) I.L.R. 59 Mad. 995
- , SEC. 121:—See LEGAL PRACTITIONERS' ACT (XVIII OF 1879), SEC. 12 ... 732
- , SEC. 294-A:—See LOTTERY ... 562
- PRESIDENCY-TOWNS INSOLVENCY (ACT II OF 1909)**, ss. 7 AND 36—Application under sec. 7—Suit for purposes of sec. 3 of Indian Limitation Act (IX of 1908), if—Mortgage with possession by insolvent set aside on application by Official Assignee under sec. 55 of Presidency-towns Insolvency Act—Subsequent application under ss. 7 and 36 of that Act by Official Assignee for recovery of mesne profits from mortgagee—Period for which such profits recoverable—Art. 109 of Indian Limitation Act—Applicability of.
Muthuswami v. Official Assignee of Madras ... (1936) I.L.R. 59 Mad. (F.B.) 1020

- PRESIDENCY-TOWNS INSOLVENCY (ACT II OF 1909)**, SEC. 75, CL. (2) AND SEC. 85—"Support"—Meaning of—(English) Bankruptcy Rule 312 corresponding to old Rule 325—Criminal charge against insolvent—Insolvency Court—Power of, to order payment of sums out of estate of insolvent for conduct of defence.
Alagappa Chettiar v. Official Assignee, Madras. (1936) I.L.R. 59 Mad. 862
- PROVIDENT FUNDS ACT (XIX OF 1925)**, SEC. 5:—See PROVIDENT FUND AMOUNT ... 855
- PROVIDENT FUND AMOUNT**—Nominee's death before nominator—Right to amount on death of nominator—Heir of nominee, if has—Rule of the provident rules a reproduction of sec. 5 of the Provident Funds Act (XIX of 1925).
Mon Singh v. Mothi Bai ... (1936) I.L.R. 59 Mad. 855
- PROVINCIAL INSOLVENCY ACT (V OF 1920)**, SEC. 28 (2)—Effect of:—See LIMITATION ACT, INDIAN (IX OF 1908), ART. 182 (5) ... 759
- , SEC. 37—Annulment of adjudication and vesting of insolvent's property in Official Receiver under—Money decree obtained by creditor of insolvent in suit filed against insolvent and Official Receiver after—Execution of, against property in hands of Receiver—Permissibility—Jurisdiction to deal with insolvent's property—Executing Court, if has—Civil Procedure, Code of (Act V of 1908), sec. 11—*Res judicata*—Jurisdiction—Erroneous decision on question of—*Res judicata*, if and when.
Chinnappa Reddi v. Official Receiver, Guntur. (1936) I.L.R. 59 Mad. 62
- , ss. 51 AND 52—Hindu joint family—Father and manager—Insolvency of—Son's share in joint family property—Father's right to alienate—Official Receiver's right to exercise—Attachment of such share in execution prior to vesting in Receiver—Effect—Attachment of share because of son's liability under pious obligation rule—Attachment of share by reason of son's liability as principal debtor—Distinction.
Official Receiver, East Godavari v. Imperial Bank of India ... (1936) I.L.R. 59 Mad. 296
- , ss. 51 (3) AND 52—Executing Court—Interim receiver's application to—Duty of executing Court in case of—Defiance of provisions of sec. 52 by it—Sale and nullity, if, in case of—Purchaser in good faith at sale—Good title, if acquired by—Effect of sec. 51 (3).
Muthan Chettiar v. Venkitaswami Naicken ... (1936) I.L.R. 59 Mad. 928
- , SEC. 52—Notice to executing Court under, not given—Effect of:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. XXI, R. 90 ... 438
- , SEC. 56 (4) (c)—Effect of:—See INSOLVENCY ... 770
- , SEC. 75 (3)—Order made by District Court in appeal—Meaning of—Appeal—*Ex parte* order of District Court in—Order of that Court refusing to set aside—Order in appeal, if—Appeal from—Competency of.
Basappa v. Hansaji Gulabchand Firm ... (1936) I.L.R. 59 Mad. 1049

	Page
RAILWAYS ACT, INDIAN (IX OF 1890), SEC. 72, RR. 1, 4, 39, 41 AND 42:— <i>See NEGLIGENCE</i>	789
REGISTRATION ACT, INDIAN (XVI OF 1908), SEC. 28:— <i>See REGISTRATION.</i>	539
REGISTRATION —Place of registration—Indian Registration Act (XVI of 1908), sec. 28—Device to evade Act—Sale—Inclusion of land not intended to be conveyed—Validity of sale. <i>Venkatarama Rao v. Appa Rao</i> ... (1936) I.L.R. 59 Mad. (P.C.)	539
RENEWAL —Covenant for—Nature of:— <i>See MAHOMEDAN LAW</i>	942
RESTITUTION OF CONJUGAL RIGHTS —Hindu husband's suit against his wife for—Maintainability of—Marriage not consummated and parties not previously living together—Cause of action for suit—Place where it arises—Jurisdiction to entertain suit—Court having. <i>Venugopal Naidu v. Lakshmi Ammal</i> ... (1936) I.L.R. 59 Mad. 392	392
RYOTWARI HOLDER —Use of water by:— <i>See IRRIGATION CESS ACT, MADRAS (VII OF 1865) SEC. 1, PROVISIO (2)</i>	107
RYOTWARI PROPRIETOR —If a "capable grantor" as understood in English Law:— <i>See EASEMENTS ACT, INDIAN (V OF 1882) SEC. 7, ILL. (i).</i>	979
SCHEME SUIT —Decree in—Provision in scheme part of—Executable, if—Removal of trustee in event of his committing breach of trust or failing to perform his duties—Power of—Reservation to Court as part of a scheme of—Permissibility—Remedy in such a case. <i>Vaithilinga Mudaliar v. Board of Control, Sri Thyagarajaswami Devasathanam, Tiruvarur.</i> (1936) I.L.R. 59 Mad. 751	751
SERVICE INAM —Adverse possession by person not entitled to:— <i>See ADVERSE POSSESSION</i>	51
—Potter—Lands—Attachment:— <i>See HEREDITARY VILLAGE OFFICES ACT (III OF 1895), SEC. 5</i>	354
TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 52 —Maintenance action—Applicability of doctrine of <i>lis pendens</i> to—Decree in suit—Applicability of doctrine after—Hindu widow's suit for maintenance—Charge claimed by her on all properties of family—Applicability of doctrine, if affected by fact of. <i>Ramasami Pillai v. Trichinopoly Co-operative Credit Bank, Ltd.</i> (1936) I.L.R. 59 Mad. 101	101
—, ss. 54 AND 55 (4) (b)—Transfer for a definite sum of money with addition of a covenant by transferee, whether a sale—Vendor's lien—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 15—Personal covenant by guardian—Liability of minor's estate. <i>Zamindar of Polavuram v. Maharajah of Pittapur.</i> (1936) I.L.R. 59 Mad. (P.C.)	910
—, SEC. 82—Scope and applicability of—"Contract to the contrary" in—Meaning of—Co-mortgagors—Contribution between—Co-mortgagor paying less than amount borrowed by him—Right to contribution of—Assignee from that co-mortgagor—Right of. <i>Muthiah Bhagavathar v. Venkatarama Ayyar.</i> (1936) I.L.R. 59 Mad. 121	121

	Page
TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 92 (AS AMENDED BY ACT XX OF 1929), CLS. 1 AND 3 —Applicability and effect of—Mortgagee undertaking to discharge three prior mortgages but discharging only two of them—Subrogation in respect of discharged mortgages—Right of, as against mortgagee under undischarged mortgage—Mortgages prior to date of amendment of sec. 92 by Act (XX of 1929)—Registered instrument giving right of subrogation—Absence of. <i>Lakshmi Amma v. Sankara Narayana Menon</i> ... (1936) I.L.R. 59 Mad. (F.B.)	359
—, SEC. 101—Earlier mortgage—Later mortgage in substitution of—Frustration of—Right to fall back on the earlier mortgage—Conditions to be satisfied—Later mortgage valid in part—Right to fall back on the earlier mortgage—If and when. <i>Polayya Dora v. Anantha Patro</i> ... (1936) I.L.R. 59 Mad. 44	44
—, SEC. 101 as it stood in 1920— Effect of:— <i>See MORTGAGE</i>	1042
—, SEC. 130—Choses in action—Successive assignments of—Priority in case of—Test of—Notice to debtor, if—Proviso to sec. 130—Applicability and effect of. <i>Subramania Ayyar v. Ramasubba Ayyar</i> ... (1936) I.L.R. 59 Mad. 141	141
TRUSTS ACT, INDIAN (II OF 1882), SEC. 84:— <i>See LOTTERY</i>	562
VILLAGE COURTS ACT, MADRAS (I OF 1889), SEC. 77:— <i>See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 195 (1) (b)</i>	165
WORDS AND PHRASES:—	
"Capable Grantor":— <i>See EASEMENTS ACT, INDIAN (V OF 1882), SEC. 7, ILL. (i)</i>	979
"Continuing wrong":— <i>See LIMITATION ACT, INDIAN (IX OF 1908), SEC. 23</i>	75
"Contract to the contrary":— <i>See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 82</i>	121
"Incident of the contract or dealing":— <i>See MAHOMEDAN LAW</i>	942
"Pari delicto":— <i>See LOTTERY</i>	562
"Received":— <i>See INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 4 (2).</i>	171
"Supplied":— <i>See IRRIGATION CESS ACT, MADRAS (VII OF 1865), AS AMENDED BY AMENDING ACT (V OF 1900), SEC. 1, PROVISIO 2</i>	107
"Support":— <i>See PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), SEC. 75</i>	862
"Time immemorial":— <i>See EASEMENTS ACT, INDIAN (V OF 1882), SEC. 7, ILL. (i)</i>	979
WRIT OF CERTIORARI — <i>See INCOME-TAX ACT, INDIAN (XI OF 1922), SEC. 46</i>	702

THE
INDIAN LAW REPORTS
(MADRAS SERIES)

APPELLATE CIVIL.

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

VEERAPPA THEVAR, SINCE ADJUDICATED INSOLVENT, AND
ANOTHER (SEVENTH RESPONDENT AND NIL), APPELLANTS,

1935,
April 24.

v.

C. S. VENKATARAMA AYYAR (PETITIONER—PLAINTIFF),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), sec. 64—Agreement
for sale prior to attachment—Sale deed executed pursuant
to, subsequent to attachment—Validity of sale—Unpaid
balance of purchase-money owing by vendee—Attaching
decree-holder's rights as against.*

Where, pursuant to a valid agreement to sell property made prior to the attachment of the same in execution of a decree, the judgment-debtor conveys the property by a sale deed executed subsequent to the date of the attachment, the sale is not invalid under section 64 of the Code of Civil Procedure and the property cannot be sold in execution of the decree. When there is an unpaid balance of purchase-money owing by the vendee, the attachment fastens to the judgment-debtor's right to recover the money and the decree-holder is entitled to have his decree satisfied out of that money.

Veeraraghavayya v. Kamala Devi, (1934) 68 M.L.J. 67, and
Taraknath Mukherji v. Sanatkumar Mukherji, (1929) I.L.R.
57 Calc. 274, 281, approved.

Moti Lal v. Bhagwan Das, (1909) I.L.R. 31 All. 443, referred to:

* Appeals Against Orders Nos. 136 to 139, 143 and 144 of 1932.

VEERAPPA
THEVAR
v.
VENKATARAMA
AYYAR.

APPEALS against the orders dated 15th December 1931 of the Court of the Subordinate Judge of Tiruvarur in Execution Petition No. 7 of 1931 in Original Suit No. 18 of 1928 on the file of the Sub-Court of Tanjore.

APPEALS against the orders dated 15th December 1931 in Original Suit No. 19 of 1928, Sub-Court, Tanjore of the aforesaid Court in Execution Petition No. 11 of 1931.

T. V. Muthukrishna Ayyar, N. Muthuswami Ayyar, K. V. Ramachandra Ayyar and R. Sundaralingam for appellants.

K. S. Krishnaswami Ayyangar for *V. Rajagopala Ayyar* and *T. V. Ramiah* for respondents.

Cur. adv. vult.

CORNISH J.

The JUDGMENT of the Court was delivered by CORNISH J.—These appeals raise a common point. The three appellants were respondents to a decree-holder's execution petition for the sale of property attached prior to judgment. It appears that a temporary injunction had been obtained to restrain the owner of the property, the later judgment-debtor, from alienating it. The matter was taken to the High Court on appeal, with the result that the order for an injunction was discharged and the property was attached. The High Court order was dated 21st December 1928, and the attachment was made on 26th December 1928. Prior to the attachment the owner of the property had entered into agreements with the appellants, all on the same day, the 26th October 1928, for the sale of the property. In pursuance of these agreements the property was conveyed by sale deeds to the appellants subsequent to the date of the attachment. The lower

Court has found in favour of the validity of the agreements of sale, and this finding is not disputed in appeal. It has also found that there were certain balances of purchase-money payable under the contracts, amounting to Rs. 32,500, Rs. 8,000-0-0 and Rs. 5,412-8-0 respectively, which were unpaid at the date of the attachment. We see no reason for not accepting the correctness of the lower Court's finding on these heads. But the lower Court has ordered the sale of the property in execution for the recovery of these amounts with nine per cent interest which is payable under the contracts. We are of opinion that this order for the sale of the property cannot be justified. The question is covered by the judgment of VENKATASUBBA RAO J. in *Veeraraghavayya v. Kamala Devi*(1), with the reasoning of which we concur. The facts there were that two days prior to attachment there had been an agreement to sell the property. Subsequently a sale deed was executed and the payment of the purchase-money was completed at the same time. The learned Judge rejected the argument founded on section 64, Civil Procedure Code, that the sale was void against the attaching creditor, holding, upon the authority of *Madan Mohan Dey v. Rebati Mohan Poddar*(2) and *Venkata Reddi v. Yellappa Chetty*(3), that the section could not invalidate a sale in pursuance of an agreement to sell made prior to the attachment. In short, an agreement to sell creates an obligation to convey the property, and a later attachment will not override the conveyance made in performance of that

VEERAPPA
THEVAR
v.
VENKATARAMA
AYYAR.
CORNISH J.

(1) (1934) 68 M.L.J. 67, 72. (2) (1915) 21 C.W.N. 158.
(3) (1916) 5 L.W. 234.

VEERAPPA
THEYAR
v.
VENKATARAMA
AYYAR.
—
CORNISH J.

obligation. On the other hand, the attachment holds good in respect of such right as the vendor had in the property at the time of attachment.

"What was and could be attached by the creditor", said VENKATASUBBA RAO J.,

"was the right, title and interest of his debtor at the date of the attachment and that right is as to the unpaid balance of the purchase-money, and the attachment therefore holds good to the extent of that balance."

The judgment of PEARSON J. in *Taraknath Mukherji v. Sanatkumar Mukherji*(1) is to the same effect. In both of those cases the purchase-money had been fully paid, and it was held that the decree-holder was entitled to receive the portion paid subsequent to his attachment. When, as in the present case, there is an unpaid balance of the purchase-money, the attachment fastens to the judgment-debtor's right to recover the money, that is to say, to the charge which the unpaid vendor is given by section 55 (4) (b) of the Transfer of Property Act upon the property. But the property having passed by conveyance from the judgment-debtor cannot be sold in execution of the decree against the judgment-debtor; see *Moti Lal v. Bhagwan Das*(2).

The appeals are accordingly allowed and the order for sale made by the lower Court is set aside. But we make no order as to costs because the decree-holder is entitled to satisfy his decree out of the unpaid purchase-money owing by the appellants, and they should have paid this money into Court when the execution proceedings were taken against them and so discharged themselves of their liability.

A.S.V.

(1) (1929) I.L.R. 57 Calc. 274, 281. (2) (1909) I.L.R. 31 All. 443.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao

S. P. SUNDARAM PILLAI, AUTHORISED AGENT OF
SUBBUTHAYYAMMAL, SENIOR PROPRIETOR AND LANDHOLDER OF
SITHALANGUDI ESTATE, AND ANOTHER (PLAINTIFF AND NIL),
APPELLANTS,

1935,
March 20

v.

KARUPPAYEE AMMAL (DEFENDANT), RESPONDENT.*

*Madras Estates Land Act (I of 1908), ss. 3 (4) and (11),
24, 30 and 32—Enhancement of rent—What amounts to—
Landholder's right to—Conditions—Procedure applicable
to claim for enhancement—Landholder's water which over-
flows and which tenant has no option of refusing—Use by
tenant of—Claim to enhanced rent on ground of—Main-
tainability of.*

When additional rent is claimed on the ground that the land has become more productive by reason of the better irrigation facilities afforded by the landholder, the claim amounts to an enhancement of rent within the meaning of the Madras Estates Land Act.

Under the Madras Estates Land Act no enhancement can be claimed by the landlord except under the special provisions enacted in that respect and one of them is that, if the landholder wishes to enhance the rent, he must do so by filing a suit before the Collector.

Under the Madras Estates Land Act the landlord cannot claim enhanced rent merely and solely on the ground that his water has been used. He must show that the productive power of the land has increased by some positive improvement effected by his agency or at his expense. When the landholder claims enhanced rent when his water has been used, he can make good his claim only by showing a direct connection between the water so used and the improvement he has effected.

* Second Appeals Nos. 1379 to 1390 of 1929, 1319 of 1931 and 292 and 293 of 1933.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.

The definition of the word "rent" implies that the water must be "supplied" or "taken". It is therefore not sufficient to justify the landlord's claim to enhanced rent to show that some water which the landlord could not prevent from overflowing or the tenant had no option of refusing was used by the ryot.

Appalanarasiah v. Chittaradu, A.I.R. 1934 Mad. 454, followed. *Narasimha v. Ramasami*, (1890) I.L.R. 14 Mad. 44, and, *Apparau v. Narasanna*, (1891) I.L.R. 15 Mad. 47, referred to.

APPEALS against the decrees of the District Court of Madura in Appeal Suits Nos. 120 to 131 of 1928, 237 of 1929 and 113 and 112 of 1931 respectively, preferred against the decrees of the Court of the Sub-Collector of Dindigul Division in Original Suits Nos. 190 to 198 of 1927, and 240 to 242 of 1927 and the decrees of the Court of the Deputy Collector of Melur Division in Summary Suits Nos. 437 of 1928, and 1078 and 1077 of 1930 respectively.

T. R. Venkatarama Sastri, R. Gopalaswami Ayyangar and K. Vengusami Ayyar for appellants.

T. L. Venkatarama Ayyar, G. Jagadesa Ayyar and M. Patanjali Sastri for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM J. RAMESAM J.—For reasons which will appear lower down it will be convenient to take up the latest of these second appeals, viz., 292 and 293 of 1933. These second appeals arise out of two suits filed under section 144 of the Madras Estates Land Act (I of 1908). The plaintiff is the same ryot and the defendant is the same landlord in both cases. In Summary Suit No. 1077 of 1930 (Second Appeal No. 293 of 1933) he holds under patta No. 47 and in the other suit, No. 1078 of 1930 (Second Appeal No. 292 of 1933),

he holds under patta No. 27. The suits are filed on the ground that the defendant levied an extra charge for water supplied to the suit holdings in addition to the dry rate to which the lands were admittedly liable. The lands were formerly dry lands. After the Periyar project came, they had the benefit of the Periyar water and the lands were converted into wet lands and on account of this the defendant charged a higher rate. The question in these second appeals is whether this higher rate is leviable. In paragraph three of the plaint, the following allegation is made by the plaintiff :

"The said lands are entirely Periyar-fed and are cultivated only with that water. The landholder has not contributed anything either towards their irrigation facilities or towards their improvement and, for such user of the Periyar water, the Government levies and collects water-rate from the plaintiff."

This paragraph in the plaint is replied to in paragraph five of the written statement :

"The allegation that the lands are entirely Periyar-fed and are cultivated only with that water is false. The defendant has given water facility for raising the second crop and it was only with this defendant's water that the second crop has been raised."

What exactly the water facility given by the defendant is has not been described in this paragraph. The plaintiff also claims, besides the refund of the amount wrongfully levied for water charge, Rs. 100 as penalty for the illegal exaction by the defendant. The survey numbers with which we are concerned are 25, 60 and 61 in Second Appeal No. 292, and 60 and 63 in Second Appeal No. 293. These (other than Survey No. 69) are dry lands converted into wet for which the landholder claims a larger rent even for the first crop which is described as *tirvai jasti*. In this appeal we are concerned only with Survey

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

Nos. 25, 60 and 61, in respect of which both the Courts allowed tirvai jasti. We are not concerned with Survey No. 63 as tirvai jasti in respect of it has been disallowed by both the Courts. I may mention also that fasli jasti was claimed in respect of Survey No. 69; but both the Courts having disallowed it, we are not concerned with it in this appeal. Though Survey No. 60 appears in both, the subdivisions are different in each case. Survey No. 60/2 is concerned in patta No. 27 and Survey No. 60/3 is concerned in patta No. 47, but it is unnecessary to refer to this fact any more. I mention it to avoid confusion. What exactly the additional facility the defendant has given was disclosed in the evidence. There is a tank called the Alathur tank named after the village. This tank is admittedly the irrigation source for certain lands in the village which were always wet lands and which did not include the suit lands. On the west of this tank the Periyar channel runs from north-west to south-east and at one spot it passes very close by the bund of the tank. Apparently whenever the tank fills up beyond the F.T.L., the water overflows and this surplus flow gets into a water-way described as *Marugal* by P.W. 2. I avoided the word "channel" because P.W. 2 says :

"It is not exactly a channel. It is only a marugal. This marugal water goes to Mulloorni Kanmoi."

This water runs parallel to the Periyar channel up to some distance and at one place the Periyar water gets into it through sluice No. 18-A, though P.W. 2 seems to have committed some confusion in stating this because he says : "This

marugal water falls into Periyar at sluice No. 18-A." It is water from the Periyar that falls into the marugal. D.W. 2 says :

"Survey Nos. 60, 61 and 25 are fed by a channel which comes from the Alathur tank and supplemented by Periyar water fifth branch channel through Sluice No. 18 marked in Exhibit 1."

Obviously it is the latter description that is correct as is evident from the judgments of the Courts below. The evidence does not exactly show who the owner of this marugal is, i.e., to whom it can be said to belong. Undoubtedly the Mulloorni tank belongs to the defendant land-lord and the water from the marugal ultimately falls in the Mulloorni tank. That tank is the irrigation source for several lands below it. But Survey Nos. 25, 60 and 61 do not get water from this tank. They get water from the marugal on its way to the tank. Dealing with these facts, the Deputy Collector refers to the plaintiff's witnesses and then to D.Ws. 2 and 3 and says :

"D.W. 2 (the Revenue Inspector) and D.W. 3 (the Village Munsif) also say that Alathur tank surplus water mixed with the Periyar channel water and irrigated these Survey Nos. 25, 60 and 61. So it is clear some water from the Alathur tank has irrigated these fields in question."

He then refers to the plaintiff's contention in reply to this, viz., that in the mixed water, i.e., Alathur surplus plus Periyar water, the Alathur surplus is negligible and the defendant is not entitled to call the surplus water of the tank as his water. After it overflows beyond the F.T.L., it cannot be described as his water. In dealing with this contention of the plaintiff, the Deputy Collector observes :

"The contention that the water after it surpluses is not the defendant's water is not tenable; this surplus water does

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.

RAMESAM J.

not go to any Government tank or to any other stranger's tank but goes only to the defendant's tank and I consider it is still his water and any one who uses that water is bound to pay the defendant for its use."

Accordingly he found that the levy of the first crop charge on these three survey numbers was justified but he found that the charge on some other survey numbers was not justified and gave a decree only for the latter portion and, with reference to the illegal levy on that portion, he decreed also a penalty of rupees five. There was an appeal to the District Judge by the plaintiff in both the suits. The learned District Judge observed :

"It is not quite clear from the evidence whether this surplus channel receives any supply at all from the Alathur tank except at times of flood."

He also added :

"It seems to me highly probable that the point at which the channel takes off from the tank is at or about the full tank level."

Finally he said :

"In all probability the tank would not overflow into the channel except for a short period during the rains."

I accept the last statement as a finding that, except during the north-east monsoon when there may be floods for a short time, there is no surplus water flowing into the channel. He then proceeded to observe that the time of raising the second crop is not the time when surplus water flows. He therefore thought that the imposition of any extra charge for the second crop was illegal. Strictly there was no need for discussing the second crop charge before him because all such second crop charges were disallowed by the Deputy Collector and there was no appeal by the defendant. But as the plaintiff in his appeal was

claiming a higher penalty it may be said that there was necessity for the discussion. So, having agreed with the Deputy Collector that the fasli jasti was illegal, he proceeded to discuss the tirvai jasti. In paragraph five he begins the discussion by saying :

"The position regarding tirvai jasti is somewhat different."

Then he observes that there is no presumption that the wet crops raised on dry lands would be raised at the end of the season. He is of course right in this. After disposing of the question of *res judicata*, he observes that the pattas and muchilikas filed show that the appellant agreed to pay tirvai jasti when a wet crop was raised. But under the Madras Estates Land Act a mere agreement to pay extra charge, if otherwise unjustified, is useless, for a contract, if otherwise not justified, is not binding on the tenant under the Estates Land Act though it would be binding on the tenant under the prior Act (Madras Rent Recovery Act, section 11). The learned District Judge then observed that the evidence of the Revenue Inspector indicates that some water from the respondent's tank went into the channel from which this tirvai jasti cultivation was irrigated and it seems to follow that the charge for tirvai jasti is proper. He accordingly confirmed the decision of the Deputy Collector as to the tirvai jasti. Finally in dealing with the penalty he said :

"I have disallowed the entire charge for fasli jasti which is one of the main items in the suit."

In this there seems to be some misconception because the claim for fasli jasti was a very small

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.

RAMESAM J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

amount and was disallowed by the Deputy Collector himself. It is true that the District Judge's discussion of it cannot be described as irrelevant because the claim for penalty was pressed. But when he said: "I have disallowed the entire charge" it looks as if he was under the impression that he disallowed some more fasli jasti in addition to that disallowed by the Deputy Collector. This is not correct. He enhanced the penalty to rupees fifty in each suit. The tenant has filed these second appeals.

In the second appeals we must proceed on the finding that what gets into the marugal is the surplus water of the Alathur tank and there may be such surplus water only at flood times. This is the finding of the District Judge. There is no evidence as to the ownership of the channel and the water ultimately gets into the Mulloorni tank which belongs to the defendant. If any land is further converted from dry into wet and it becomes possible to cultivate it with wet cultivation by reason of the larger supply from the Mulloorni tank, it may be that the landlord is entitled to some additional rate for rent because, though the water is the Periyar water, it becomes available to the tenants' lands, which were formerly dry lands only by reason of its being stored up in a tank which the landlord maintains and is bound to keep in good repair though the expenses may not be incurred annually. But, as I already observed, Survey Nos. 25, 60 and 61 have nothing to do with the Mulloorni tank. Nor is this the defendant's claim. His claim is because some water is taken from the Alathur tank therefore he is entitled to the additional charge. The

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

Alathur tank is of course a tank in good repair and a tank which the landlord is bound to maintain; and if he maintains the tank for the purpose of supplying water to Survey Nos. 25, 60 and 61 also in addition to the lands for which it was always recognized as the irrigation source, then the landlord is justified in asking for additional rent apart from any question of procedure as to the manner in which he should get the amount of it settled. But in these cases the defendant does not maintain the Alathur tank for the purpose of supplying water to Survey Nos. 25, 60 and 61. It is the irrigation source for some other lands but it happens that water escapes from it as surplus water in flood time and gets into the marugal. On account of this surplusage it cannot be said that the landlord is maintaining this tank for the use of these lands. The principle on which the landlord can claim any extra charge for water is simply this: that he must have either constructed some work or maintained at his own expense some work for the purpose of supplying water to the lands in question. Even if he incurs the expenses occasionally once in three or four years for maintaining the tank as a source of water supply for the particular lands, I think he is entitled to the additional charge. Even in cases where there has been for a long time a tank belonging to the landlord and which has always been maintained from time immemorial but which is the source of supply only for certain lands but not for the disputed lands which are dry lands and afterwards the tank is also made the source of water-supply for the lands in dispute and thereby the lands in dispute are converted from dry into

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

wet, even in such cases, though no additional expense is incurred by the landlord for maintaining the tank, still, as he undertakes a liability to maintain the tank not only for the sake of the old wet lands but also for the sake of the lands now converted from dry into wet, I think he is entitled to some addition to his rent for having undertaken such an obligation for the benefit of these lands also. But none of these propositions of mine helps the defendant in these cases. In the cases now stated by me it can be said that he has effected some improvement for the benefit of these lands. In the present case, as I have already said, the landlord does not maintain the Alathur tank for the sake of the suit lands and there is no other work which he maintains or undertakes to maintain for the sake of the suit lands. That being so, I think he is entitled only to the dry rate and not even to the tirvai jasti. Moreover, the use of the word "surplus" implies that it is water which he cannot retain even if he wishes to. He cannot regulate that water and he has no control over it. The moment it escapes it is not Alathur tank water and from the point of view of Alathur tank it is not the landlord's water. Here I differ from the Deputy Collector. If it gets into some other reservoir which belongs to the landlord, it may then (but not till then) again become the landlord's water, but it does not get into any reservoir before irrigating Survey Nos. 25, 60 and 61. It only flows through the marugal and no claim has been made on the ground that the marugal is the landlord's channel. But, apart from this, I doubt whether flowing water in a channel, until it is actually abstracted and

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

appropriated, can be described as water belonging to the landlord unless perhaps evidence is given that the channel is maintained at the expense of the landlord. Now, we have no evidence either as regards the ownership or maintenance of the marugal. The water in it cannot be described as the Alathur tank water; it can be so described only if the tank is so kept under the control of the landlord and the water so regulated as to let out this portion of the water at his will, i.e., there must be sluices and regulators through which he can let out water when it is wanted and stop it when not wanted. The surplus water is water which he is unable to stop and cannot retain even if he wishes to. Such water cannot be described to be his water.

For the respondent, the decision in *Venkatachalam Chetty v. Aiyamperumal Tevan*(1) was relied on. It was there held that a charge for taking water belonging to the landlord is "rent" and it is not enhancement of rent even if not consolidated with the rent proper. I agree with this proposition, but in applying it to the present case we must be careful to remember the facts of that case. In a case where the water wholly comes from a tank belonging to the landlord and no question of any Government water mixing up with it arises, that case may apply because that is water belonging to the landlord. But in the present case there is no water belonging to the landlord in that sense. In some other sense it may be so described though even this is doubtful on the facts of this case. If it is taken directly from the Alathur tank by being regulated by the landlord,

(1) (1919) I.L.R. 42 Mad. 702.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

it may be described as landlord's water of the Alathur tank. But where it surpluses and it is beyond his control, one may loosely talk of it as the Alathur tank water, and once such an expression is used it may produce the impression that it is landlord's water. But I have already shown that it is not so. Therefore that decision does not apply. There is of course the important fact in this case that this supply of water, coming as a surplus from the Alathur tank, is very insignificant compared to the water directly taken from the Periyar channel. But I did not want to emphasise this portion of the case in the early part of the judgment because it may be said that, if it is landlord's water, however small it is, the landlord is entitled to impose some proportionate addition to his rent. But, if it is not landlord's water in the strictest sense of the term, then no additional charge for water can be imposed. I therefore think that the above decision does not help the respondent. Another case, *Chinnappan Chetty v. The Secretary of State for India*(1), relied on by Mr. Patanjali Sastri, the learned Advocate who appeared in the connected cases, is, in my opinion, irrelevant. That relates to river water and the question was there discussed with reference to the ownership of the water under the Madras Irrigation Cess Act where different considerations arise. I do not propose to discuss it at great length. Some cases under the Madras Rent Recovery Act have been referred to, such as, *Thayammal v. Muttia*(2) which was approved in *Venkatachalam Chetty v. Aiyamperumal Tevan*(3).

(1) (1918) I.L.R. 42 Mad. 239 (F.B.). (2) (1887) I.L.R. 10 Mad. 282.
(3) (1919) I.L.R. 42 Mad. 702.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

In so far as there is a contract, the basis of the Madras Rent Recovery Act is different from the basis of the Madras Estates Land Act. But, if the case arises apart from any contract, I have no quarrel with both the cases, provided there is water which can be described as water belonging to the landlord in the strictest sense of the term. I do not think therefore the case of *Thayammal v. Muttia*(1) helps the respondent. The Full Bench decision in *Doraiswami Gurukkal v. Subramania Gurukkal*(2) does not help the respondent, for in that case the landlord does not seek any enhancement of rent at all. He simply pays water-rate direct to the Government and then seeks to collect it from the tenants. The attempt of the landlord there is not to impose an additional charge but to avoid loss by reason of the Government water-supply. That case must be confined to facts of that kind. Whether any additional categories can be conceived of it is unnecessary to discuss. The case of *Paramasawmi v. Pusala Thevan*(3) is also a case under the Rent Recovery Act.

So far, I have discussed the case from the point of view of substantive law but there is a question of procedure also in the case. Even in a case where the landlord is entitled to an addition to his rent on account of the fact that the new water-supply, even though it be from a Government source, has become available to the tenant by reason of the landlord's constructing a new work or repairing an old work or giving the benefit of an old existing work to a land which had not the

(1) (1887) I.L.R. 10 Mad. 282. (2) (1927) I.L.R. 51 Mad. 266 (F.B.).
(3) (1909) 20 M.L.J. 142.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

benefit of it before, it is still an enhancement of rent if the change is permanent and the landlord has to obtain the sanction of the Collector for such enhancement. It is true that, where the topographical situation has not become permanently changed, i.e., where the landlord has not constructed any work for the sake of the lands in question or where an existing water-source such as a tank has not become attached to the land as a source of irrigation but only in a particular year the tenant asks the landlord for water from his tank and the landlord supplies, the principle of *Venkatachalam Chetty v. Aiyamperumal Tevan*(1) will apply and the addition which the landlord is entitled to claim is not an addition to the rent, for in such a case the landlord is not bound to supply water from his tank. The tenant is not entitled to ask for the water. The tank and the land have not become mutually connected with each other. In such a case the landlord is entitled to give or refuse the water at his will and any payment which he stipulates for when he does supply water cannot be described as rent and he can make his own stipulation. This is the view of PHILLIPS and KUMARASWAMI SASTRI JJ. in *Venkatachalam Chetty v. Aiyamperumal Tevan*(1), and I agree with it. But where the change is permanent and where there is no option for the landlord to give or refuse and the tenant has got a right to ask for the water, in such a case where the construction and maintenance of the work is done by the landlord, he is undoubtedly entitled to ask for additional payment, but it must be

(1) (1919) I.L.R. 42 Mad. 702.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

regarded as part of the rent until another permanent change comes over the situation. The theory of the Madras Estates Land Act is that in such cases the Collector is the proper person to estimate the amount of additional rent to which the landlord is entitled. It cannot be arbitrary. It cannot be any figure which he chooses to fix. It must be something commensurate with the benefit which the tenant receives by reason of the landlord's contribution to the welfare of the tenant and it must be determined with reference to fixed principles and ascertained accordingly. In the present case, I have come to the conclusion that the landlord is not even entitled to any addition because he has neither constructed any work nor does he even maintain any work for the benefit of the suit lands.

I am therefore of opinion that these appeals by the tenant should be allowed even in respect of the tirvai jasti. The second appeals are allowed with costs (rupees twenty-five) (Advocates' fee in each case) except as to the penalty of rupees fifty claimed.

Then there are the memoranda of objections of the landlord. These relate only to the penalty. The Deputy Collector imposed a penalty of rupees five. There was no appeal against that to the District Judge. The District Judge enhanced the penalty to rupees fifty. The landlord now appeals in respect of the whole penalty by way of memorandum of objections. But he is not entitled to appeal in respect of the rupees five because he filed no memorandum of objections in the lower appellate Court and can only object to the other rupees forty-five. I am of opinion that this is

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

not a case of illegal cess being imposed but a case where the landlord seeks to levy additional rent by reason of the supply of the Periyar water through his tank. The question is somewhat difficult and I think that the claim of the landlord was made *bona fide* even if we ultimately decide against him. Anyhow it cannot be regarded as an illegal exaction.

I would modify the order of the District Judge as regards the penalty and restore that of the Deputy Collector. The memoranda of objections are therefore allowed to the extent of rupees forty-five.

Both parties will bear their costs in the memoranda of objections.

Now I will take Second Appeal No. 1319 of 1931. This second appeal arises out of a suit under section 112 of the Estates Land Act to raise an attachment in respect of the suit land taken out by the landlord. In the appeal we are concerned only with Survey Nos. 12, 14, 15, 20, 23 and 25 and the question raised in respect of them is one of *tirvai jasti*. No question of *fasli jasti* arises in respect of seven annas claimed as additional charge for second crop cultivation on some extent of wet land in Survey No. 10 as no second crop has been raised. The patta tendered by the landlord is questioned as improper on the ground that it includes a claim for second crop on wet lands and a claim for water-rate on dry lands converted into wet. The facts are that there is a *kanmoi* belonging to the landlord. It is really two *kanmois* which have become connected with each other and become one. It is even doubtful if the character of the *kanmoi* as

kanmoi is kept up. The allegation in respect of this in the plaint is :

" Periyar channels directly irrigate the plaintiffs' lands though now and then Periyar water also entered the so-called tanks and through ever open and unregulated mud sluices therein irrigates those lands. The tanks themselves are not in a fit condition to hold more than five days' water. The tanks have no other source of supply and they have never been kept under repairs by the defendant in any way ; nor is wet cultivation due to any improvement effected by or at the cost of the defendant."

This allegation means that, except that the Periyar water flows through ground which was at one time a *kanmoi* but which has almost ceased to be such, there is nothing that the landlord contributes to the bringing of water to the tenants' land. I do not say that he should actually construct a new work. If he at least maintains the tank incurring such occasional expenses as the maintenance of the tank requires though they may not be incurred every year, even then he may be entitled to some addition to the rent. But the allegation here amounts to saying that he does not even maintain the tank. The tank has been allowed to fall into disrepair and by natural causes it is gradually losing its character as a tank though for some time one may see traces of some old *kanmoi* there. Now, after such an allegation in the plaint, one would expect the landlord to say that he does something to maintain the tank if really he does it. Paragraph six of the written statement runs thus :

" The suit lands have all along been irrigated from the two *kanmois* situated in the village and the suit lands from time immemorial have been cultivated as *nanja* lands. The Periyar does not directly irrigate the suit lands. The allegations to the contrary in the plaint are incorrect."

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

There is nothing in this plea which could mean that the landlord is now actively keeping the tank in its character of tank and no denial of the allegation in the plaint that the tanks have practically ceased to be tanks and are incapable of holding more than five days' water. The plea is too general and it can only mean that the water is passing through the ground which was at one time two kanmois. P.W. 1 in his evidence says :

"There are two kanmois west to east. There will be only a week's water in these kanmois at present. It has been the case for fifteen years past."

There is nothing in the cross-examination bearing on this portion of the evidence. But it must be mentioned that according to the evidence there is a channel directly from the Periyar system to the suit lands which does not go through the kanmois. All that is said is that some water also gets into the kanmois and then out of it to the suit lands. The plaintiffs assert that they do not need this water which escapes from the kanmois. They are willing that the landlord should stop it if he can. If he does not stop it, it is not their fault. They are content with the water which directly comes to their lands from the Periyar channel. Under such circumstances the water from the kanmois cannot be thrust upon them against their will and additional rate charged. On this matter the Deputy Collector says :

"The fact of direct irrigation from Periyar has not been satisfactorily proved."

He seems to disbelieve P.W. 1. But here it must be noticed that there is no counter-evidence, and P.W. 1 says that, apart from the kanmois, the lands are irrigated from a channel called the

Nallakinathu odai. The Deputy Collector therefore dismissed the suit. In appeal the learned District Judge records his finding thus:

"It is not disputed that the lands in question are irrigated mainly, at any rate, by water from the Periyar system which, to some extent at least, flows through a tank which originally belonged to the landholder. In such circumstances it is, as a matter of fact, almost impossible for the ryot to prove that the land is irrigated solely by Periyar water, and the mere fact that water-rate is payable to Government does not, in my opinion, release the ryot from the obligation with which he was bound prior to the advent of the Government water to pay wet rates when water is taken from the village tank. This is of course in the absence of any contract to the contrary; but there is, in this case, no evidence of any such contract."

The learned Judge then refers to the fact that the appellant's predecessor did not demur to the charges such as are now claimed. He therefore dismissed the appeal. In my opinion, as already observed, if the landlord maintains the tank for the purpose of ensuring a substantial supply of the Periyar water to the tenant, he will be entitled to get an additional rent though the tenant pays some water-rate to Government and I would agree with the District Judge. Of course there is no general rule such as that the tenant need not make a double payment. The substantial questions therefore are—(i) does the tenant get any substantial quantity of water through the tank? and (ii) is this supply ensured to him by the landlord by anything which the landlord does for the supply being so ensured? I am afraid that both these questions should be answered in the negative. The District Judge's finding seems to say that some portion of the water flows through the tank. This is indicated by the words "to some extent at least". How much he does not

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

say. The tenant appellant now says that he does not want this and the landlord may stop it if he can, provided that the water from the main channel is not interfered with. I therefore hold that the landlord may, if he likes, stop any water coming through his kanmois. He is at perfect liberty to do so or he may allow it to flow, but he cannot charge the tenant with additional water-rate. In the first place, looking at the fact that the tank can store water only for seven days according to the evidence, it does not appear that the supply through the tank is substantial. But, even if it is substantial, the landlord can stop it if he likes. At present he is not maintaining any tank for such a supply. The lie of the ground is such that some of the Periyar water gets into the kanmois and flows out of them. No regulation is attempted by any human agency. There are no sluices to supply water when wanted and to stop water when not wanted. Under such circumstances the landlord is not entitled to any additional charge. Of course if the tenant requires that water should flow also through this tank and if the landlord occasionally executes some work in the tank and puts it in proper shape for storing water and for supplying it whenever needed, he may then be entitled to ask for some further additional charge, but he will have first to apply to the Collector under section 30 of the Estates Land Act if such arrangement is permanent. No such thing having been done, now he cannot ask for any additional rate.

The appeal must therefore be allowed to the extent of the new rates imposed with costs throughout.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

I will now take Second Appeals Nos. 1379 to 1390 of 1929. These appeals arise out of suits by the landlord for arrears of rent under section 77. In paragraph 2 of the appellate judgment the learned Judge says :

“ In each case the question at issue is whether the landlord is entitled to levy any extra charge, over and above the old assessment, in respect of the second crop on wet lands or the raising of wet crops on dry lands by the aid of Periyar water brought on to the land *without any contribution from the landholder.*”

The words I have italicised bring out the essential point in all these cases. The real question in these cases is, does the landlord make his own contribution to the work of carrying water from the Periyar system to the tenants' lands? Whether the contribution takes the shape of constructing a new work or maintaining an old tank does not matter, for the maintenance of an old tank requires some expense periodically if not annually. In these appeals there are two sets of lands—one set of dry lands which have now been converted into wet and another set of lands which were formerly wet lands but on which second crop is now raised with the help of the Periyar water. Now, it is found so far as the first set of lands are concerned (and the tenants' case also is), that most of the water comes not from the plaintiff's tank in the suit village of Sithalangudi but from a tank in another village which does not belong to the plaintiff and referred to as Sembakulam drainage water. This is apparently what the learned District Judge means by saying :

“ It is possible that in respect of some of the lands the water may pass through the plaintiff's tank but this apparently is not the case regarding most of them.”

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

If there is any exception to this general statement, the evidence has not cleared up which particular land does not get water from the tank in the other village but gets it only from the Sithalangudi tank. Now, as to the second set of lands, undoubtedly water flows through the plaintiff's tank in Sithalangudi; undoubtedly the landlord maintains this tank; but then the lands were always wet lands and the landlord was always bound to maintain it. It is true, now that the Periyar water comes in, the tenants have been enabled to raise a second crop. But, for this coming in of the Periyar water, the ryots seem to have spent some money to construct a channel for leading the Periyar water into the tank. This is the finding of both the Courts. Thus the landlord has not incurred any additional expense for the bringing in of the Periyar water and as, on the other hand, the tenants themselves have incurred expenses for that purpose, it does not appear that he is entitled to levy any additional charge for the second crop. Even if the landlord has spent some money on the tank by widening it or raising its bunds for storing more water now coming in the shape of Periyar water, it looks as if such additional expense incurred by him may be set off against the additional expense incurred by the tenants. Anyhow, if he proves that the expenses incurred by him outweigh the expenses incurred by the tenants, he may apply under section 30 of the Act to the Collector. At present, it does not appear that he is entitled to any addition to the old wet rate now claimed.

In these appeals, another point has been raised by the learned Advocate for the appellants.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
RAMESAM J.

Mr. Gopalaswami Ayyangar argues that the rates have been paid for thirty years extending back to the period prior to the Estates Land Act and that under such circumstances the principle of the Full Bench decision in *Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi*(1) applies. I do not desire to depart from the Full Bench decision. It is undoubtedly good law. Its effect is to lay down that the Estates Land Act cannot rip up old sores and cannot unsettle rates of rent which had prevailed long before it and have become lawful rates of rent under the Rent Recovery Act on the mere ground that if the whole case arose for the first time under the Estates Land Act the rates would not have been lawful. All this is true. But there are neither facts nor allegations in this batch of cases so as to bring any particular land or particular case within the scope of that ruling. It is not alleged that in respect of any particular land the present rates of rent prevailed for a long time. All that we have got in the whole case justifying the contention is a general statement in the Deputy Collector's judgment:

"The payment for the last thirty years of these rates of assessment will not estop them from raising the question of illegal exactions, etc. . . ."

Thirty years prior to these suits take us to 1897 which is eleven years before the Estates Land Act was passed. It is not clear that what was meant was that all the tenants paid higher rates for all these thirty years. In fact there is no evidence in the record to show when the Periyar water became available to each of the holdings in this batch of cases. All that is meant was that

(1) (1918) I.L.R. 42 Mad. 475 (F.B.).

28 THE INDIAN LAW REPORTS [VOL. LIX

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
RAMESAM J.

some time in the course of the last thirty years, as land after land began to receive the benefit of Periyar water, higher rates of second crop were willingly paid by the tenants. Perhaps there may be one case for which the thirty years is applicable and other cases happened in the course of the thirty years and there is nothing to show that the payment went on for thirty years. There is nothing in the evidence to show that for any particular holding the tenant actually paid the higher rate of rent claimed. The written statement seems to have been drafted anticipating all the possible claims of the landlord and contains no admission that any extra amount was ever paid. Possibly in some cases it was paid. Some such consciousness runs through it. But it is impossible to spell out for which land it was paid, for how long it was paid and when it began. Under these circumstances this contention must be disallowed.

The result is these second appeals fail and are dismissed with costs. (Rs. 150 Advocates' fee.)

VENKATA-
SUBBA RAO J.

VENKATASUBBA RAO J.—The question raised in these cases is whether the ryots having, since the advent of the Periyar water, raised wet crop on dry lands and a second wet crop on wet lands, they are liable to pay the additional rent claimed by the landholder. For the ryots, it is broadly contended that the water used being that obtained from an irrigation source belonging to the Government, they are not liable to pay the extra rate claimed; the zamindar replies that the moment the water, although from a Government source, enters his own land, it becomes as between himself and his ryot his own water, for which he

is entitled to charge water-cess, which becomes a part of the rent and can be treated as such under the Madras Estates Land Act; section 3 (11). The question raised being common to the various second appeals, they have been, on account of its importance, referred to a Bench for decision.

I may mention, for the sake of making the matter clear, that Re. 1-4-0 is the dry rate and Rs. 3 the wet rate in the village. The excess now claimed is Re. 1-12-0 termed *tirvai jasti* in respect of land registered dry but cultivated wet, in other words, the total rate claimed for such land is the usual wet rate of Rs. 3; the excess claimed in respect of the second crop on wet lands is Re. 1-8-0 termed *fasli jasti*, that is to say, the total amount claimed in respect of *mamool* wet lands is Rs. 4-8-0. For the use of the Periyar water, the rates paid by the ryot to the Government are Rs. 5 per acre in respect of dry lands converted wet and Rs. 7-8-0 per acre for wet land (Rs. 5 for the first crop and Rs. 2-8-0 for the second crop). The tenants point out that, as they are paying water-cess for the Periyar water to the Government, they are not liable to pay over again for the same water to the zamindar.

My learned brother has fully dealt with the evidence and, as with his findings of fact I agree, I do not propose to cover the same ground again; I shall content myself with stating what I conceive to be the true legal principle applicable to the facts as found.

First, under the Act no enhancement can be claimed by the landlord except under the special provisions enacted in that respect and one of them is that, if the landholder wishes to enhance

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

the rent, he must do so by filing a suit before the Collector (sections 24 and 30). The facts which determine the landlord's right to enhanced rent are of such a character under the Act that the Legislature has thought it proper to vest the decision not in the Civil but in the Revenue Courts alone and it therefore follows that, if the claim in question is within the meaning of the Act a claim to enhanced rent, that claim must be disallowed. The point to consider then is, does the present claim amount to an enhancement or not? Additional rent is claimed on the ground that the land has become more productive by reason of the better irrigation facilities afforded by the landholder; this is precisely what is involved in the landholder's claim, that he is entitled to enhance the rent by reason of his water being used in the raising of the wet crop on dry land or a second crop on wet land. That such a claim amounts to an enhancement admits, in my opinion, of no question. In *Doraiswami Gurukkal v. Subramania Gurukkal*(1) it was held that, where the Government recovers an amount by way of water-cess from a landholder and the latter in turn seeks to recover it from the ryot, in such a case, the landholder's claim does not amount to an enhancement. The reason is stated to be that the landholder is a mere collection agent for the Government and that the amount collected in truth goes to the Government and does not benefit the landlord. It is not for me to weigh the merits of the rival views put forward in that case, for we are bound by the pronouncement of the majority of the Judges; but the facts

(1) (1927) I.L.R. 51 Mad. 266 F.B.).

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

here are entirely different and the Full Bench case has no application. There is an observation in *Battina Appanna v. Raja Yarlagadda*(1) to the effect that, when new circumstances come into existence which require new adjustments, there can be no question of enhancement. This observation, with great respect, is *obiter* and, in my opinion, remains so, notwithstanding the fact that the actual decision in that case has been approved in the Full Bench ruling referred to above by the majority of the Judges. As regards *Venkatachalam Chetty v. Aiyamperumal Tevan*(2), the expression of opinion is very brief and the grounds for the decision are not set out; and I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of section 30, does not amount to an enhancement.

It will be observed that there is a material difference between the present Act and the Rent Recovery Act, which it replaced. While both the Acts render the Collector's sanction necessary for any enhancement of rent by the landholder, under the old Act contracts to pay enhanced rent (express or implied) were enforceable, whereas under the present Act such contracts cannot be given effect to; see Rent Recovery Act, section 11 (i) and (iv) *proviso* and the present Act, sections 24 and 30. While dealing with the cases under the Rent Recovery Act, this distinction must be borne in mind; but, as regards the point under discussion, the cases under the old Act, such as *Narasimha v. Ramasami*(3) and *Apparau v.*

(1) (1917) 33 M.L.J. 355.

(2) (1919) I.L.R. 42 Mad. 702.

(3) (1890) I.L.R. 14 Mad. 44.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

Narasanna(1), held that a claim to wet rate amounted to an enhancement when the water utilised was from a Government source (Krishna canal), and the value of these decisions remains unimpaired. In a recent judgment of mine, *Appala narasiah v. Chittavadu*(2), I pointed out, after fully discussing the matter, that a claim of this sort amounts to an enhancement and I do not therefore propose to consider the point at further length. The prescribed procedure not having been followed, I must hold that the present claims to enhanced rent are unsustainable.

Secondly, even apart from the question of procedure, I am satisfied that the landholder's claim is not well founded. The landlord's right to rent must be determined solely with reference to the sections of the Estates Land Act and arguments based upon abstract notions as to supposed ownership of water have, in my opinion, no bearing on the point. There is no provision in the Act that a charge or cess is payable for the use of the landlord's water as such. If a landlord desires to enhance the rent, he must bring himself within the terms of section 30, and it is noticeable that the bare fact that the landlord's water has been used is not mentioned there among the grounds justifying the enhancement. Grant that the landlord's water has been used; but that does not of itself furnish a ground for claiming higher rent, for what under the section he is bound to show is that the productive powers of the land have been increased by an "improvement" effected by him or at his expense. It will be seen that the word "improvement" is defined by the Act

(1) (1891) I.L.R. 15 Mad. 47

(2) A.I.R. 1934 Mad. 454.

and it means any work which materially adds to the value of the holding and which "if not executed on the holding, is either executed directly for its benefit or after execution is made directly beneficial to it", and includes (the words that follow are important) (i) "the construction of tanks, wells, water channels and other works for the storage, supply or distribution of water for agricultural purposes" and (ii) "the renewal or reconstruction of any of the foregoing works or alterations therein or additions thereto". What then is the effect of section 30 read with section 3 (4)? The landlord must show that the productive power of the land has increased by some positive improvement effected by his agency or at his expense and the Act gives no countenance to the argument that the landlord can claim enhanced rent merely and solely on the ground that his water has been used. And, as already observed, the word "improvement" is defined as including the constructing and maintaining of tanks, water channels or other similar works, which shows that the pre-requisite for the demand of higher rent is not the use of the landlord's water merely but such water as has been taken or supplied from a tank or channel or other work constructed or effectively maintained by him. Nothing, again, is an improvement unless it *materially* adds to the value of the holding, section 3 (4), and the Act lays down, as to what matters the Collector shall have regard in assessing the benefit which a landlord may claim to have conferred upon his ryot, one such matter being "the increase in the productive powers of the land caused or likely to be caused by the

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

improvement"; section 32. The provisions of the Act thus make it clear that, when the landholder claims enhanced rent when his water has been used, he can make good his claim only by showing a direct connection between the water so used and the improvement he has effected. For the landlord, some cases decided under the old Act (Rent Recovery Act) have been cited, such as, *Thayammal v. Muttia*(1), *Sattappa Pillai v. Raman Chetti*(2) and *Venkata Rao v. Vaithilinga Udayan* (3), but they do not support his contention. In each of these cases, it is clearly mentioned that extra water was taken from "the landlord's tank" which implies that the tank was maintained as an irrigation source by the agency of the landlord; the question now raised is altogether different, whether by the mere flow of the water over the land belonging to the landholder he can claim the extra rate. *Sree Sankarachari Swamiar v. Varada Pillai*(4), another case relied on by the landlord's Counsel, merely follows *Sattappa Pillai v. Raman Chetti*(2) already cited. While therefore these cases, apart from the fact that they were decided under the old Act, do not support the landlord's claim, the Krishna canal cases to which I have referred, *Narasimha v. Ramasami* (5) and *Apparau v. Narasanna*(6), clearly negative his right, and what is more important, those cases indicate that the true test is whether the zamindar has contributed to the cost of the improvement; see *Narasimha v. Ramasami*(5) where the words occur:

(1) (1887) I.L.R. 10 Mad. 282.

(3) (1901) 12 M.L.J. 22.

(5) (1890) I.L.R. 44 Mad. 44, 46.

(2) (1892) I.L.R. 17 Mad. 1.

(4) (1903) I.L.R. 27 Mad. 332.

(6) (1891) I.L.R. 15 Mad. 47, 48.

"Taking it that he (the zamindar) has been at some expense for the minor distribution channels", and the judgment of PARKER J. in *Apparau v. Narasanna*(1) where the learned Judge observes:

"Nor is it found that he has contributed to the cost of the improvements."

Lastly, there is another principle that remains to be considered and that is implied in the definition of the word "rent", which under the Act includes:

"Whatever is payable on account of the use and enjoyment of water supplied or taken for cultivation of land". The water under this definition must be "supplied" or "taken" and from that it follows that it is not sufficient to show that some water, which the landlord could not prevent from overflowing, or the tenant had no option of refusing, was used by the ryot. I must also in this connection repel the argument that the Act so defines the word "rent" as to create a liability on the ryot's part to pay for the water used, for the definition, naturally enough, does not purport to define or create rights; all that it does is to refer to "whatever is payable", leaving undetermined when and in what circumstances any amount becomes payable.

Applying these principles to the facts as found by my learned brother, the landlord's claim to enhanced rent in the several cases cannot be sustained and I therefore agree with the orders proposed in the judgment just delivered by him.

A.S.V.

(1) (1891) I.L.R. 15 Mad. 47, 48.

SUNDARAM
PILLAI
v.
KARUPPAYEE
AMMAL.
—
VENKATA-
SUBBA RAO J.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao.*1935,
February 6.

R. SESHASAYEE AYYANGAR, TRUSTEE OF SRI NAYANITHA KRISHNASWAMI TEMPLE AT MELAKOTTAYUR—
(DECEASED)—AND ANOTHER (RESPONDENT AND NIL),
PETITIONERS,

v.

PUNA RENA GOVINDA PILLAI (DECEASED) AND TWO
OTHERS (RESPONDENTS 1 AND 2 AND FIRST RESPONDENT'S
LEGAL REPRESENTATIVE), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 78—
Delivery of possession to new trustee—Obstruction to, by
ex-trustee or stranger—Investigation of—Power of—Discretion
as to—Delivery of possession ordered against ex-trustee
—Obstruction by stranger—Power of Court to hold enquiry
and to decide in favour of either party—Code of Civil
Procedure (Act V of 1908), O. XXI, rr. 97, 98 and 99—
Applicability of, to application under sec. 78 of Act II of
1927—Sec. 141 of Code—Applicability and effect of.*

By whomsoever the obstruction is offered at the outset, whether by the ex-trustee or by a stranger, in either case the Court has power, under section 78 of the Madras Religious Endowments Act (II of 1927), to deal with the question. The Court is not, however, in every case bound to hold an investigation, for, in the exercise of its discretion, which the section vests in it, it may decline to do so, directing the trustee to seek his remedy in an independent legal proceeding.

Rami reddy v. Sreeramulu, A.I.R. 1933 Mad. 120, followed.
Subrahmanyam v. Subbayi, 1933 M.W.N. 934, dissented from.

The power of the Court under section 78 of the Madras Religious Endowments Act is not exhausted when, upon a petition directed against the ex-trustee, it has made an order directing the delivery of possession. Where the trustee procures such an order in the first instance but complains that

the execution of it is prevented by reason of the resistance offered by strangers, it is within the competence of the Court under section 78 of the Act to hold an enquiry and decide either in favour of the trustee or of the obstructors.

An application under section 78 of the Madras Religious Endowments Act is a proceeding in a Court of civil jurisdiction within the meaning of section 141 of the Code of Civil Procedure and therefore the provisions of Order XXI, rules 97, 98 and 99, are applicable to such a proceeding. Even otherwise, in giving the Court jurisdiction under section 78 of the Madras Religious Endowments Act to make orders for the delivery of possession, the Legislature must be deemed to have impliedly granted the power of doing all acts necessary to the execution of its order.

Narayana Iyengar v. Desika Chariar, (1933) I.L.R. 57 Mad. 35, referred to.

PETITIONS under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the orders of the District Court of West Tanjore at Tanjore dated 2nd November 1929 and passed in Interlocutory Application No. 274 of 1929 and the orders of the said Court dated 22nd November 1929 in Interlocutory Applications Nos. 275 and 792 of 1929 in Original Petition No. 34 of 1928.

S. T. Srinivasagopalachari for petitioners.

K. Narasimha Ayyangar for respondents.

Cur. adv. vult.

JUDGMENT.

These civil revision petitions raise two important questions: (i) as to the scope of section 78 of the Madras Religious Endowments Act and (ii) as to the applicability of Order XXI, rules 97, 98 and 99 of the Civil Procedure Code to a proceeding under that section. A scheme was settled in September 1927 by the Religious Endowments

SESHASAYEE
AYYANGAR
v.
GOVINDA
PILLAI.

* Civil Revision Petitions Nos. 360 to 362 of 1930.

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI

Board in respect of the temple in question under section 57 of the Act. In virtue of that scheme, the petitioner became the trustee and applied to the District Court under section 78 against the ex-trustee (who was the sole respondent to the petition) for being put into possession of the property. On 30th March 1929 the District Judge made an order granting the petitioner's request. In spite of that order, he was unable to obtain actual possession of either the temple or its properties by reason of the resistance offered by two persons, Govinda Pillai and Veeraraghava Ayyangar. Thereupon he applied for delivery as against them, complaining of the obstruction offered, and the question that was raised was, whether it was within the competence of the Court to hold an enquiry and decide either in favour of the petitioner or of the obstructors. The decision of the lower Court, as I understand it, is—the moment an adverse claim is put forward by a third party, the Court's power comes to an end and the trustee must be directed to enforce his remedy by filing a regular suit.

This view, in my opinion, is totally opposed to the plain meaning of the section, which in terms enacts that when resistance is offered, the Court may, on application by the trustee, order the property to be delivered to him. It must be observed that the section is not limited to the obstruction on the part of the ex-trustee alone; but the words are general and apply equally as much where the obstruction is by a third party as when it proceeds from the ex-trustee. Let us suppose that the resistance offered *at the very outset* is by a third party and it is as against him that the trustee is

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI

obliged to file an application in the first instance. Can it be said that the Court, under the wide terms of the section, has no power to make the necessary enquiry? I think not; but from the fact that the Court has such power it does not follow that it is bound to exercise it. The word used in the section being "may", I think that the proper construction is that the Court has a discretion, that is to say, on the particular facts of each case it must decide whether it will enter on an investigation or not. If the adverse claim put forward is of a *bona fide* nature or if difficult and complicated questions have to be gone into, the Court may properly refuse to make an enquiry. I agree with the observations of KRISHNAN PANDALAI J. in this respect in *Ramireddi v. Sreeramulu*(1). Next, if the obstructor is the ex-trustee himself setting up an adverse claim, that the case is even stronger goes without saying. The object of the section, as its very words show, is to enable a trustee to obtain possession when he is resisted in or prevented from obtaining it. Generally speaking, it is not likely that resistance will occur when the claim is admitted and I am not prepared to hold that the Legislature intended that the Court should have no power of deciding just when its intervention would be most needed. Again, as CURGENVEN J. observes in *Guruvammal v. Arumuga Padayachi*(2), the Court performs a judicial and not an administrative function under section 78 and a contention that deprives the Court of every vestige of judicial power must be rejected. But the

(1) A.I.E. 1923 Mad. 120.

(2) (1931) 61 M.L.J. 894.

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI.

respondents rely upon *Subrahmanyam v. Subbayi* (1) where it is observed :

"It seems to me that section 78 was intended to apply only to the admitted endowments and it is not intended that the District Court should enter into questions of title."

I must, with great respect, dissent from this view. The respondents' Counsel next seeks to find support in an observation of mine in Civil Revision Petition No. 1031 of 1927 for his contention negating the Court's power, but it is perfectly clear that the words I used there are not in the least capable of this meaning. I quote my words :

"Now, turning to the house, Mr. Venkataramana Rao for the trustee (the petitioner before us) attempted to argue that the Board decided, while settling the scheme, that the house belonged to the temple and *that on that ground the Court should make an order* under section 78 directing delivery . . . It is impossible therefore on the ground taken by the learned Counsel for the trustee to allow the application in respect of this item."

This is a very guarded statement and, far from deciding the question, I carefully refrained from dealing with it. My conclusion therefore is this : by whomsoever the obstruction is offered at the outset, whether by the ex-trustee or by a stranger, in either case the Court has power to deal with the question ; but it does not follow that the Court is in every case bound to hold an investigation, for, in the exercise of its discretion, which the section vests in it, it may decline to do so, directing the trustee to seek his remedy in an independent legal proceeding.

The question then arises, is the power of the Court exhausted when, upon a petition directed

(1) 1933 M.W.N. 934.

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI.

against the ex-trustee, it has made an order directing the delivery of possession ? In the present case, the trustee procured such an order in the first instance but complained that the execution of it was prevented by reason of the resistance offered by the third parties, i.e., the respondents. Section 141 of the Civil Procedure Code provides :—

"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."

The applications mentioned in section 78 must under the Act be to a District Court and there is therefore no reason to hold that they are not proceedings in a Court of civil jurisdiction within the meaning of section 141 mentioned above. If that be so, the provisions of Order XXI, rules 97, 98 and 99 (dealing with resistance by judgment-debtor or *bona fide* claimant) become applicable and the Court can, in virtue of the power conferred by them, make the investigation. Moreover, as observed by VISCOUNT HALDANE in *National Telephone Company, Limited v. Postmaster-General* (1), when a certain duty is cast upon an established Court, it imports "that the ordinary incidents of the procedure of that Court are to attach". When dealing with certain matters under section 78 of the Act closely akin to the matter in hand, BEASLEY C.J. and BARDSWELL J. in one case and CURGENVEN J. in another, referring to the above observation of HALDANE L. C., extended to the Court exercising jurisdiction under that section such incidental powers as were in each case essential ; *Narayana Iyengar v.*

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

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI.

Desikachariar(1) and *Guruvammal v. Arumuga Padayachi*(2). Even without the aid of section 141 that conclusion was reached in those cases, but the arguments based upon general considerations are reinforced by what has been expressly enacted by that section.

I must therefore hold that the lower Court's view that it had no jurisdiction to make the enquiry is wrong. Although, as already observed, the Court may at its option decline to hold the enquiry, I think that, on the facts of the present case and having regard to the nature of the claim put forward by the respondents (third party claimants), it is extremely desirable that the question should be tried in these proceedings, and I therefore direct that the necessary enquiry shall be made.

The lower Court has revoked the order made in favour of the trustee even as regards the temple. Under section 57 of the Act, no suit of the kind mentioned in it having been filed, the order of the Board settling the scheme became final, and, in the words of the section, it is binding on the Committee, the trustee and all persons having interest. The fact that the obstructor is not an ex-trustee but a third party makes no difference. Section 57 applies only to non-excepted temples and when the Board settles a scheme under that section, that act involves the decision on its part that the temple is a non-excepted one. The order settling the scheme and the decision which it involves are equally binding on all persons having interest and therefore no further enquiry is needed in regard to the temple

(1) (1933) I.L.R. 57 Mad. 35.

(2) (1931) 61 M.L.J. 894.

(as distinguished from its properties) and the lower Court's order as regards it is vacated.

As stated above, an order was originally made in favour of the trustee directing the delivery to him of the temple. But the reason for rescinding that order, in the words of the learned District Judge, is :

"There is a likelihood of breach of peace, if the Amin should effect forcible delivery, in spite of the obstruction by the third parties. Such an experiment is undesirable."

That an order may be defied is certainly no reason for refusing to make what, in the circumstances, is a just and proper order and all I need say is that, if the execution is likely to be attended with a breach of the peace, it is for the proper authorities to take such steps as they may deem necessary.

*

*

*

A.S.V.

SESHASAYEE
 AYYANGAR
 v.
 GOVINDA
 PILLAI.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice Stone.*1935,
February 22.

DASARI POLAYYA DORA (PLAINTIFF), APPELLANT,

v.

ONARASI ANANTHA PATRO AND SIXTEEN OTHERS
(DEPENDANTS ONE TO FIFTEEN, SEVENTEEN AND EIGHTEEN),
RESPONDENTS.**Transfer of Property Act (IV of 1882), sec. 101—Earlier mortgage—Later mortgage in substitution of—Frustration of—Right to fall back on the earlier mortgage—Conditions to be satisfied—Later mortgage valid in part—Right to fall back on the earlier mortgage—If and when.*

Where a second transaction replacing a former mortgage is frustrated, the mortgagee or his successor in interest can fall back upon the earlier mortgage under section 101 of the Transfer of Property Act, even though such a contingency was not contemplated when the second transaction took place; and the principle that, when such a transaction is valid only for certain purposes, one cannot fall back upon the earlier transaction is not applicable to a case when the valid portions of the second transaction are referable to different and distinct parties.

APPEAL against the decree of the Court of the Subordinate Judge of Berhampore dated 6th day of September 1928 and passed in Original Suit No. 80. of 1926.

B. Jagannadha Das for appellant.*V. Suryanarayana* for *V. Govindarajachari* for respondents.*Cur. adv. vult.*

RAMESAM J. The JUDGMENT of the Court was delivered by RAMESAM J.—This appeal arises out of a suit filed on foot of a mortgage (Exhibit A) dated 9th

* Appeal No. 174 of 1929.

January 1912 in favour of the plaintiff for Rs. 1,800. The mortgagors are five brothers. They are the eighth and eleventh defendants, the father of the twelfth defendant, and the thirteenth and eighteenth defendants. Ninth and tenth defendants are the sons of the eighth defendant. Defendants fourteen to seventeen are the sons of the thirteenth defendant. The interests of these five mortgagors in the family property will be hereafter referred to as the shares of the first, second, third, fourth and fifth branches respectively. On 27th May 1913 these five branches mortgaged their properties. The first and fifth branches executed Exhibit I in favour of the seventh defendant (a sister of the first defendant) for Rs. 900, the third branch executed Exhibit I (a) for Rs. 400 in favour of the same person and the second and fourth branches executed Exhibit II in favour of the first defendant. On the same day the five branches leased the properties to the first defendant, the lease being evidenced by two muchilikas, Exhibits J and J (1), Exhibit J being in favour of the first, third and fifth branches and Exhibit J (1) in favour of the second and fourth branches. On 16th May 1914 the first, fourth and fifth branches executed an agreement (Exhibit H) in favour of the first defendant agreeing to sell their shares of the properties to him. On 26th September 1914 all the five branches sold their properties by Exhibit C to the plaintiff, but they continued to be in physical possession of the lands as plaintiff's tenants under the muchilikas, Exhibits F and F (1), dated 24th November 1914. The first defendant on the basis of Exhibit H filed Original Suit No. 32 of 1916 on the file of the

POLAYYA
DORA
v.
ANANTHA
PATRO.
RAMESAM J.

POLAYYA
DORA
v.
ANANTHA
PATRO.

RAMESAM J.

Berhampore Additional District Munsif's Court for specific performance of the agreement, the first, fourth and fifth branches having acted in breach of that agreement by joining in Exhibit C. To this suit the plaintiff was also made a party defendant on the ground that he had notice of the prior agreement (Exhibit H) and therefore his sale deed (Exhibit C) cannot prevail against it so far as the first, fourth and fifth branches are concerned. A decree was passed in favour of the first defendant. In that suit there was a prayer for possession, but a formal decree for possession was regarded as unnecessary, as the first defendant was in physical possession of the lands as tenant under Exhibits J and J (1). We must take it that the effect of the decree was that the first defendant after its date was in possession of the shares of the first, fourth and fifth branches in the suit lands as their vendee, and the plaintiff's sale deed (Exhibit C) became inoperative so far as those shares were concerned. In the present suit the plaintiff claims to recover possession of the shares of the second and third branches by partition with mesne profits, and, as to the shares of first, fourth and fifth branches, he claims to fall back upon Exhibit A seeking such reliefs as the Court may think fit to grant. There are alternative forms of relief claimed by the plaintiff but it is unnecessary to refer to them as the above description of the relief as finally presented before us is sufficient for our purpose. The Subordinate Judge gave a decree for possession of the shares of the second and third branches with profits but, as to the shares of the first, fourth and fifth branches, he dismissed the suit, the reason for his conclusion

being that the mortgage (Exhibit A) was extinguished by the sale deed (Exhibit C) and Exhibit C has not been wholly inoperative. The plaintiff appeals.

The reasons of the Subordinate Judge are contained practically in paragraph 44 of his judgment. He thinks that there was no intention in the mind of the plaintiff to keep Exhibit A alive. It is true that the plaintiff had no intention to keep Exhibit A alive if Exhibit C is completely effective. But it is equally clear that if at the time of Exhibit C it is put to the plaintiff whether he has an intention to keep Exhibit A alive in respect of the share of a particular branch, if for any reason the sale of the share of that branch turns out to be inoperative, his answer must be that he does intend to keep it alive. There can be no other answer from any sane person. The fact that such a contingency was not contemplated does not matter. This is the whole principle of section 101 of the Transfer of Property Act. This is so elementary that it requires neither authority nor further discussion. The Subordinate Judge seems to have been prejudiced by the conduct of the present plaintiff in the former suit for specific performance which is entirely irrelevant. It is enough to refer to the decision in *Har Chandi Lal v. Sheoraj Singh*(1) as authority for the proposition that where the second transaction replacing a former mortgage is frustrated wholly or partially the mortgagee can fall back on the earlier mortgage.

But Mr. Suryanarayana, the learned Advocate for the respondents, seeks to support the judgment

POLAYYA
DORA
v.
ANANTHA
PATRO.

RAMESAM J.

(1) (1916) I.L.R. 39 All. 178 (P.C.).

POLAYYA
DORA
v.
ANANTHA
PATRO.

RAMESAM J.

of the Subordinate Judge in two ways. First he contends that the sale deed was operative to some extent and therefore the plaintiff cannot fall back upon the earlier mortgage. It is true that a party cannot rely on a later transaction and keep it valid for some purpose and also fall back on the earlier transaction and there are cases in the reports illustrating such a position. But in the present case there is no scope for the application of that principle. Exhibit C is really a combination of five sale deeds by the five different branches. It is merely an accident that they are all in one sale deed. As a result of the decree for specific performance three of these sale deeds, i.e., by the first, fourth and fifth branches, have become frustrated. The sale deeds by the second and third branches remain operative. The plaintiff cannot fall back on Exhibit A so far as the shares of the second and third branches are concerned but there is no obstacle to his falling back on Exhibit A so far as the shares of the first, fourth and fifth branches are concerned. The principle that, where the later transaction is operative for some purposes, one cannot fall back on the earlier transaction has nothing to do with portions of the transactions referable to distinct parties. As an illustration of this principle the decision in *Daso Polai v. Narayana Patro*(1) of JACKSON and MADHAVAN NAIR JJ. may be mentioned. There the purchaser put in a claim petition objecting to an attachment by a simple money decree-holder. The claim petition was dismissed with the result that a regular suit by him became necessary to establish his claim

(1) (1933) 65 M.L.J. 819.

POLAYYA
DORA
v.
ANANTHA
PATRO.

RAMESAM J.

against the attaching decree-holder. The purchaser failed to bring such a suit. The result was that, so far as the attaching decree-holder was concerned, his rights to the property in dispute were lost. But he might pay the attaching decree-holder or the judgment-debtor himself might pay him. Subject to the rights of the attaching decree-holder the sale deed remained wholly operative as between the vendor and the purchaser. No part of the sale deed with respect to any particular party to it became ineffective. It remained wholly operative as between the parties to it. Only as against the attaching decree-holder it became useless and that by reason of the plaintiff's own fault. This was pointed out by the learned Judges who therefore held that *Har Chandi Lal v. Sheoraj Singh*(1) would not help the plaintiff. The decision in *Lachhman Prasad v. Lachmeshwar Prasad*(2) is also similarly distinguishable. In that case, at the time of the sale the property was subject to an attachment by a judgment-creditor of the vendor, and the sale could not prevail against him. Subject to his rights the sale was perfectly valid. As between the parties to the transaction no part of it became void. This case is similar to that in *Daso Polai v. Narayana Patro*(3). The two cases, therefore, relied on by Mr. Suryanarayana do not help him. The decision in *Har Chandi Lal v. Sheoraj Singh*(1) itself is authority for the position that where a distinct portion of the second transaction has become frustrated, *qua* that portion the mortgagee can fall back on his earlier mortgage.

(1) (1916) I.L.R. 39 All. 178 (P.C.).

(2) A.I.R. 1922 All. 76.

(3) (1933) 65 M.L.J. 819.

POLAYYA
DORA
v.
ANANTHA
PATRO.
—
RAMESAM J.

The second ground on which Mr. Suryanarayana seeks to support the judgment of the Court below is that, relying on section 101 of the Transfer of Property Act, the mortgagee can use the former mortgage as a shield against some claimant as a defendant only but cannot sue on it as a plaintiff. In support of this he relies on the decision of WALLIS C.J. and SESHAGIRI AYYAR J. in *Arumugasundara Maharajah Pillay v. Narasimha Iyer*(1). The actual decision in that case was that section 101 was not applicable to the case because there was no intermediate encumbrance. SESHAGIRI AYYAR J., at the end of a long paragraph dealing with the main point in the case, makes the observation relied on by the respondents. WALLIS C.J. makes no such observation. It is purely *obiter* for the case. No authority was referred to. The whole paragraph of SESHAGIRI AYYAR J. ending with this particular sentence was quoted with approval by MOORE J. in *Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varu*(2) but the other learned Judge (SADASIVA AYYAR J.) does not make any reference to it. This particular observation was not necessary for the decision itself. It comes in merely as part of a larger quotation which had to be relied on. We are not referred to any cases where such a distinction as is contended for by the respondents was actually applied for the conclusion reached in the case. We do not find any authority to support such a distinction and must reject this contention.

The result is that, in addition to the decree granted by the lower Court in respect of the

(1) (1915) 29 M.L.J. 583.

(2) (1916) 30 M.L.J. 391.

shares of the second and third branches, the plaintiff will have the usual mortgage decree for sale against the shares of the first, fourth and fifth branches for three-fifths share of the mortgage amount which comes to Rs. 5,700-4-0 (and which is less than Rs. 6,000 the maximum valuation given in the plaint) with further interest at the contract rate up to 6th March 1929 and further interest at six per cent on the aggregate amount till date of payment. The date fixed for redemption will be 16th July 1935. The appellant will have costs on Rs. 3,600 throughout as against the first, fourth and fifth branches and also from the first respondent.

G.R.

POLAYYA
DORA
v.
ANANTHA
PATRO.
—
RAMESAM J.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

NIDADAVOLE RAMALINGAM (PLAINTIFF), APPELLANT,

v.

NIDADAVOLE VEERABHADRADU (DECEASED) AND
FOUR OTHERS (DEFENDANTS 1 TO 5), RESPONDENTS.*

1935,
February 19.

Adverse possession—Service inam—Adverse possession of, by person not entitled to or in fact discharging duties of village office—Title by prescription to inam, if acquired by such person against office-holder against whom possession held adversely and his successors in office—Limitation Act (IX of 1908), sec. 28—Applicability of, or of principle of.

A person not entitled to or in fact discharging the duties of a village office cannot by remaining in possession of the service inam attaching to such office adversely to an office-holder

* Second Appeal No. 1263 of 1930.

52 THE INDIAN LAW REPORTS [VOL. LIX

RAMALINGAM
v.
VEERA-
BHADRADU.

acquire title by prescription to the service inam, at any rate, against succeeding office-holders.

Second Appeal No. 392 of 1926 considered and distinguished.

Neither section 28 of the Limitation Act nor the principle thereof applies to cases where, during the period of the alleged adverse possession, no suit for possession could have been instituted in a Civil Court.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Appeal Suit No. 80 of 1928 preferred against the decree of the Court of the Subordinate Judge (Additional) of Rajahmundry in Original Suit No. 10 of 1926.

P. Somasundaram for appellant.

V. Pattabhirama Sastri, K. Umamaheswaram, G. Lakshmanan and G. Chandrasekara Sastri for respondents.

JUDGMENT.

This second appeal is by the plaintiff who sued for possession of certain lands which are admittedly village service inam (for blacksmith's service) in the Pittapur Estate. The plaintiff admits that neither he nor his father was the holder of the office or was doing the service and that the first defendant and after him the second and third defendants are the holders of the office and have been discharging the duties; but he claimed that his father and after his death himself have been in possession of those lands for a long time and that he has acquired a title thereto by adverse possession as against the office-holders, though such possession might not affect the right of the Government to resume the lands.

In view of the omission of the defendants in the written statement to deny the plaintiff's allegations as to the circumstances under which the plaintiff's father came into possession of the suit lands, we may take it that as alleged in the plaint the plaintiff's father must have been put into possession of these lands at a family partition between himself and his brother the first defendant. Whether possession derived under such circumstances should be regarded as permissive or as adverse is not altogether beyond doubt.

It was the prevalent idea for some time, notwithstanding all the provisions of the Regulations or the Statute, that these service inams were in essence family property and, if the office-holder allows some other members of his family to remain in possession, the Court need not necessarily regard such possession as adverse to the office-holder. However, the Court of first instance in this case held the possession to be adverse and the argument before me has proceeded on that footing. The evidence in the case establishes that, from about 1891, the plaintiff's branch has been in possession of these properties. This date is important, because it is undoubtedly within twelve years of the passing of the Madras Proprietary Estates Village Service Act (II of 1894).

On behalf of the appellant, Mr. Somasundaram has criticised the judgment of the lower appellate Court by pointing out that the first and second questions stated as points for decision in the second paragraph of its judgment are not really the questions to be decided in the case. The question is not whether the plaintiff has by

RAMALING
v.
VEERA-
BHADRADI

RAMALINGAM
v.
VEERA-
BHADRADU.

prescription acquired a right to these properties as "private properties", that is, even as against the Government, but whether he has not acquired a right to continue in possession thereof as against the office-holders, until the Government choose to intervene. This criticism is to some extent justified, but I do not think it follows from this that the conclusion of the learned District Judge is not correct. In the seventh paragraph the learned District Judge refers to the argument that section 28 of the Limitation Act cannot be availed of by the plaintiff in this case and that any adverse possession after the Madras Hereditary Village-offices Act III of 1895 (I will add also the Madras Proprietary Estates Village Service Act II of 1894) would be of no avail. Though the learned District Judge does not discuss these questions at length, it is in the next paragraph that he states his conclusion that the plaintiff did not acquire prescriptive title to the suit properties.

Mr. Somasundaram has drawn my attention to a number of authorities throwing light upon these questions; in particular, he has referred me to a recent decision of ANANTAKRISHNA AYYAR J. in Second Appeal No. 392 of 1926, which undoubtedly is to a certain extent in his favour, but, in view of other authorities binding upon me and of one distinction, which I shall presently refer to, between Second Appeal No. 392 of 1926 and the case before me, I have ventured to deal with the matter myself, instead of leaving it to be dealt with by a Bench of two Judges.

The line of cases in this Court which have held that a person not entitled to or in fact

RAMALINGAM
v.
VEERA-
BHADRADU.

discharging the duties of a village office could nevertheless acquire title by prescription to the service inam attaching to such office have proceeded mainly upon the authority of the decision of the Judicial Committee in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(1). That judgment must, if I may say so with respect, be understood in the light of two other pronouncements of their Lordships in *Venkata Jagannadha v. Veerabhadrayya*(2) and *Madhavrao Waman v. Raghunath Venkatesh*(3). They observe that

"it is somewhat difficult to see how a stranger to a watan can acquire title by adverse possession for twelve years of lands the alienation of which was in the interest of the State prohibited."

It is true that their Lordships do not finally decide the question, but, if the observation above cited is justified by principle, as I shall presently endeavour to show, there is no reason for ignoring it. The decision in *Venkata Jagannadha v. Veerabhadrayya*(2) has sometimes been put aside merely with the remark that it dealt with the effect of enfranchisement, but what is relevant to the present discussion is the basis on which that decision was rested by their Lordships. Mr. Somasundaram pressed on me the fact that in that case their Lordships were discussing the karnam's office where the discretion allowed to the authorities in the matter of making the appointment from the family is much wider than in the case of village artisans, and therefore there was justification for the view that the karnam got his office not by hereditary or family right but as a personal appointee. But it is important to notice that

(1) (1899) I.L.R. 23 Mad. 271 (P.C.). (2) (1921) I.L.R. 44 Mad. 643 (P.C.).
(3) (1923) I.L.R. 47 Bom. 798 (P.C.).

RAMALINGAM
v.
VEERA-
BHADRADU.

their Lordships quote with approval a passage from the decision in *Venkata v. Rama* (1) to the following effect :

“ When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass.”

As will be seen from the preamble to Regulation VI of 1831, the underlying idea is that these lands are attached to the office by the State as wages of the office-holder for the time being, and it will be scarcely correct to speak of the office-holder as having “ proprietary ” right or interest therein. It is one thing to say that the office is hereditary but another thing to say that the emoluments are held and enjoyed by the successive holders of the office in a kind of hereditary proprietary right. If the correct view is that the office-holder for the time being is only entitled to the usufruct of the lands, it becomes intelligible why it has always been the policy of the law to prohibit alienation of these lands by the office-holder for the time being and to exclude suits relating to such lands from the cognisance of the ordinary Civil Courts. These two provisions throw light upon the true conception of the nature of the interest possessed by the office-holder in a service inam.

It seems to me that it cannot, consistently with the above considerations, be held that a person remaining in possession of the lands adversely to an office-holder can thereby acquire a right to remain in possession even as against succeeding

(1) (1884) I.L.R. 8 Mad. 249, 259 (F.B.).

RAMALINGAM
v.
VEERA-
BHADRADU.

office-holders. In *Gnanasambanda Pandara Sanadhi v. Velu Pandaram* (1) the suit involved a claim for possession of the trustee's office as well (the possession of the properties being held to go with the office) and, the office being admittedly hereditary, their Lordships held that a succeeding trustee claimed the office only through or under his predecessor, that the predecessor had the full title vested in him as a hereditary tenure and that adverse possession of the office as against the predecessor extinguished the whole hereditary tenure, so that there was nothing to descend on to the successor. When the claim is to the property without reference to the possession of the office, what has to be considered is whether the property is held with hereditary or absolute right, so as to make it possible to say that the succeeding office-holder claims that property through or under the preceding office-holder. In the case of service inams, the answer must, I think, be in the negative. Some of the cases in Madras, which recognize the possibility of acquiring a title by adverse possession to service inam lands, are explicable on the ground that they related to the karnam's office in proprietary estates which for some reason has been specifically excluded from the operation of Regulation VI of 1831 and was not brought under the same policy till 1894 or 1895. The decision in *Neelachalam v. Kamarazu* (2) takes care to refer to this circumstance and, though the decision in *Dhanushkotirayudu v. Venkayala Venkatarathnam* (3) does not in terms state that that case also arose from a zamindari

(1) (1899) I.L.R. 23 Mad. 271 (P.C.).

(2) (1904) 14 M.L.J. 438.

(3) (1919) 38 M.L.J. 320.

RAMALINGAM
v.
VEERA-
BHADRADU.

area, the papers show that that was the fact, and in both those cases the judgment pointed out that the prescriptive title had been completed *before* the coming into force of Madras Acts II of 1894 and III of 1895. The case of *Majavath Alli v. Mujafar Alli*(1) related to a kazi inam, but the learned judges have relied upon the decisions in *Neelachalam v. Kamarazu*(2) and *Dhanushkoti-rayudu v. Venkayala Venkatarathnam*(3) without advertg to the special considerations relied on in those cases. In the judgment in Second Appeal 392 of 1926, no reference has been made by the learned Judge to this aspect of the matter and the earlier decisions are relied on as authority for the general proposition that title by adverse possession could be acquired in respect of any service inam lands as against the office-holder. Even this decision will not however carry the appellant in this case to the extent necessary for his purpose, because, so far as I can gather from the judgment, title by adverse possession was there upheld as against the office-holder against whom the land had been adversely held and the question arising for decision in this case, viz., how far such title would avail *even* against succeeding office-holders did not arise in that case.

On one aspect of the matter, the decisions of this Court are fairly uniform, viz., that neither section 28 of the Limitation Act nor the principle thereof can be applied to cases where, during the period of the alleged adverse possession, no suit for possession could have been instituted in a Civil Court. The language of section 28 applies

(1) (1923) 45 M.L.J. 791.

(2) (1904) 14 M.L.J. 438.

(3) (1919) 38 M.L.J. 320.

RAMALINGAM
v.
VEERA-
BHADRADU.

only to cases of suits for possession in respect of which the period of limitation is thereby provided, that is, by the second Schedule of the Limitation Act. But the Limitation Act does not apply to suits to be brought in Revenue Courts and the decisions in *Pichuvayyan v. Vilakkudayan Asari*(1), *Sreenivasa Varadacharry v. Narasinga Pillai*(2) and *Vanchinatha Iyer v. Rajagopala Iyer and others*(3) have held that where service inam lands have been in the possession of a stranger for more than twelve years he cannot thereby acquire title by prescription, because section 28 of the Limitation Act would not apply to any suit for possession thereof. If the office-holder is out of possession, he will no doubt be bound, even according to the Special Act, to sue for possession in the Revenue Court within a period of three years, and it may be that, if he allowed the three years' period to elapse, he may not be able to get possession even through a Revenue Court; but in the present case the second and third defendants, who are admittedly discharging the duties of the office, have also obtained possession through the Revenue Court in execution of a decree of the Revenue Court in Suit No. 5 of 1920 after their appointment to the office. The plaintiff cannot therefore ask the case to be treated as one of a suit for possession by the office-holder. Nor can he claim relief on the basis of possession and unlawful dispossession because the defendants got possession under the law, in execution of a decree of the Revenue Court. If the plaintiff had been a party to the suit in the Revenue Court that decision

(1) (1897) I.L.R. 21 Mad. 134.

(2) (1911) 9 M.L.T. 430.

(3) (1921) 41 M.L.J. 372.

RAMALINGAM
v.
VEERA-
BHADRADU.

would be conclusive against him, as held by ANANTHAKRISHNA AYYAR J. in *Manikyam v. Chandrasekharudu*(1). As he was not a party to that suit, that decision is not conclusive as against him, but he cannot on that ground claim to be treated as one who has been unlawfully dispossessed by the defendants. The plaintiff must succeed only by proving title to the suit lands and that he can do only by invoking section 28 of the Limitation Act which, as I have already observed, does not apply to this case.

Mr. Somasundaram however contended that a suit by the first defendant for possession against the plaintiff's father would have been cognizable by the Civil Court and that therefore section 28 of the Limitation Act could be availed of by his client. He referred in this connection to the decision in *Yandluri Yellamanda v. Kunchala Chitambaram*(2). That case does not really help him. Where the office-holder could get relief merely on the strength of his possession, as, for instance, against a dispossessor or against a lessee, the position may be different; but where he could get relief only by insisting on his title as office-holder and on the character of the lands as emoluments, the principle of exclusion of the jurisdiction of the Civil Court will undoubtedly apply. In the present case, if the first defendant had sued the plaintiff's father for possession, he would have been met with the answer that the first defendant himself put the plaintiff's father in possession under a partition arrangement and was accordingly not entitled to recover possession. He could have defeated that contention only by

(1) (1930) 58 M.L.J. 542.

(2) (1925) 50 M.L.J. 267.

RAMALINGAM
v.
VEERA-
BHADRADU.

pleading that the land was service inam and that an alienation thereof was void as prohibited by the law. A suit of that kind could therefore have been instituted only in the Revenue Court and not in the Civil Court. That the inam in question in the present suit is within the purview of Madras Act III of 1895 has been decided by the Full Bench in *Kandappa Achary v. Vengama Naidu*(1).

The learned District Judge was therefore right in holding that the plaintiff or his father has not acquired a title to the suit property, at any rate, not one that can prevail against the second and third defendants who have been appointed to the office in the year 1919. The second appeal fails and is dismissed with costs of the second and third respondents. The appellant will pay to Government the court-fee payable on the appeal memorandum.

A.S.V.

(1) (1913) I.L.R. 37 Mad. 548 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Cargnven and Mr. Justice King.

1935,
March 19.

YERUVA CHINNAPA REDDI (PETITIONER), APPELLANT,

v.

RAO BAHADUR P. V. SRINIVASA RAO GARU, OFFICIAL
RECEIVER OF GUNTUR (FIRST RESPONDENT),
RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 37—Annulment of adjudication and vesting of insolvent's property in Official Receiver under—Money decree obtained by creditor of insolvent in suit filed against insolvent and Official Receiver after—Execution of, against property in hands of Receiver—Permissibility—Jurisdiction to deal with insolvent's property—Executing Court, if has—Code of Civil Procedure (Act V of 1908), sec. 11—Res judicata—Jurisdiction—Erroneous decision on question of—Res judicata, if and when.

After the annulment of an adjudication and the vesting of the insolvent's property in the Official Receiver under section 37 of the Provincial Insolvency Act, a creditor of the insolvent filed a suit against him and the Official Receiver and obtained a money decree. The creditor then applied in execution for certain moneys of the insolvent in the hands of the Official Receiver making both the insolvent and the Official Receiver parties to his application. The Official Receiver resisted the application on the ground that he held the money for the benefit of all the insolvent's creditors, that under section 37 of the Provincial Insolvency Act the Insolvency Court alone had jurisdiction to deal with the insolvent's property vested in the Official Receiver and that the executing Court had, therefore, no jurisdiction to deal with it. The executing Court, however, overruled the Official Receiver's contention and allowed the execution application.

Held that, when the property of the insolvent was vested in the Official Receiver under section 37 of the Provincial

* Appeal Against Order No. 182 of 1931.

Insolvency Act, the Insolvency Court retained control of the property and had exclusive jurisdiction to deal with it and that the executing Court had, therefore, no jurisdiction to deal with it.

Veerayya v. Sreenivasa Rao, (1934) I.L.R. 58 Mad. 908 (F.B.), followed.

Held, however, that the decision of the executing Court that it had jurisdiction to deal with the insolvent's property was not a nullity and that in subsequent proceedings in execution of the same decree the Court was debarred by the rule of *res judicata* from giving any contrary decision.

As regards the question whether a decision as to jurisdiction can be *res judicata*, a distinction must be drawn between inherent want of jurisdiction and a want of jurisdiction which can be discovered only after the decision of an issue by the very Court whose jurisdiction is attacked. In the former case, the decree is a nullity and it cannot therefore be *res judicata*; in the latter case, the decree is not a nullity but is only voidable and it is therefore *res judicata* unless it is set aside by the appropriate procedure. The present was a case in which it could not be said that the executing Court had no inherent jurisdiction to entertain the execution application and its decision that it had jurisdiction was, therefore, not a nullity.

Girwar Narayan Mahton v. Kamla Prasad, (1932) I.L.R. 12 Pat. 117, and *Rajaram v. Central Bank*, A.I.R. 1926 Bom. 481, followed.

APPEAL against the order of the Court of the Subordinate Judge of Guntur, dated 13th September 1930 and made in Execution Petition No. 42 of 1929 in Original Suit No. 19 of 1928.

Konda Kotayya for appellant.

K. Ramamurti for *N. Rama Rao* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—One Kolakula Thomasreddi was adjudicated an insolvent in 1924. In November 1927 his adjudication was annulled, and a few days later his property was vested in the Official

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.

KING J.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

Receiver under section 37 of the Provincial Insolvency Act. The appellant here, who was one of the insolvent's creditors, then filed a suit against him (Original Suit No. 19 of 1928) impleading also the Official Receiver and obtained a decree for Rs. 11,466 with interest and costs. In Execution Petition No. 25 of 1928, appellant applied in execution for certain moneys of the insolvent in the hands of the Official Receiver making both the insolvent and the Official Receiver parties to his application. The Official Receiver resisted the application on the ground that he held the money for the benefit of all the insolvent's creditors. His objection was overruled and the application allowed in August 1928. In August 1929 the appellant filed another application (Execution Petition No. 42 of 1929) in execution of the same decree against the same parties for the attachment of certain decrees as the property of the insolvent in the hands of the Official Receiver. His application was opposed by the Official Receiver on the same ground as before. The appellant pleaded that the decision of the Court in Execution Petition No. 25 of 1928 on this matter was *res judicata* but the learned Subordinate Judge held (i) that there was no question of *res judicata* in execution proceedings and (ii) that the subject-matter of the two proceedings was not the same. He then expressed his dissent from his predecessor's order and dismissed the application. Against that order of dismissal the present appeal has been filed.

The first question at issue between the parties was essentially one of law, and must depend upon the effect of a vesting order under section 37 of

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

the Provincial Insolvency Act. That matter has been recently considered by a Full Bench of which one of us was a member in *Veerayya v. Sreenivasa Rao*(1) and it was there held that when the property of an insolvent is vested in the Official Receiver (or any other appointee) under section 37 it is the Insolvency Court which retains control of it, and the Insolvency Court must direct its disposal in the interests of the general body of creditors. On this matter therefore the first Subordinate Judge in 1928 must be held to be wrong, and the second Subordinate Judge in 1929 to be right. But this still leaves the question of *res judicata* untouched, and that is the sole issue before us.

Mr. Kotayya in a very able argument for the appellant has first established the position that the two reasons relied upon by the learned Subordinate Judge are, even when taken together, insufficient for rejecting a plea of *res judicata*. This is clearly laid down in the decisions reported as *Subba Chariyar v. Muthuveeran Pillai*(2) and *Govinda Menon v. Krishna Mannadiar*(3), and has not been disputed before us by the learned Advocate for the respondent.

Mr. Kotayya's next position is that the determination of an issue which depends upon an erroneous decision on a point of law is none the less *res judicata* if the other conditions for the application of that doctrine are satisfied. For this position also *Govinda Menon v. Krishna Mannadiar*(3) can be cited as an authority, and it is further established by *Doorvas Seshadri Aiyar*

(1) (1934) I.L.R. 58 Mad. 908 (F.B.). (2) (1912) I.L.R. 36 Mad. 553.
(3) (1923) 45 M.L.J. 71.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

v. *Govindaswami Pillai*(1), by *Maharaja of Jeypore v. Ramamurty*(2) and by the well-known decision reported as *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(3) where the two learned Judges state the law as follows :—

“ A decision on an abstract question of law in one suit is not *res judicata* so that the law of the land should itself be deemed to have been altered when that question arises in subsequent suits between the same parties; but a legal right found, declared or awarded in favour of one of the parties in one suit, though based on an erroneous view of the law, . . . is *res judicata* when the same legal right is controverted in subsequent suits between the same parties ” ;
and again :

“ Where a decision on a point of law . . . settles a question that arises directly out of conflicting views as to the rights of the parties, it is *res judicata*. ”

This proposition of law is not controverted in the arguments before us.

The learned Advocate for the respondent however takes his stand upon a consideration of jurisdiction. He argues that the decision of the former Subordinate Judge is in effect nothing more than a decision that he, as presiding over the executing Court, had jurisdiction to deal with the insolvent's property—and that a decision as to jurisdiction can never be *res judicata*. In support of this argument he relies upon two cases. The first is a decision of the Privy Council reported as *Maharaja of Jeypore v. Gunupuram Deenabandhu Patnaick*(4). The facts there were that the Zamindar of Jeypore brought a suit against certain defendants in the Court of the Agent to the Governor in Vizagapatam. By consent of the

parties that suit was transferred by the High Court to the District Court of Vizagapatam which proceeded to try and dismissed it on the merits. No appeal was filed by the zamindar. Subsequently in 1900 the High Court held, in another case to which the zamindar was a party, that it had no jurisdiction to transfer a suit from the Court of the Agent to the District Court. The zamindar thereupon filed a fresh suit on the same cause of action as that in the suit dismissed by the District Court. It was held that the decree of the District Court, being given by a Court which had no jurisdiction, could not operate as *res judicata* so as to deprive the zamindar of his right of suit in the Court of competent jurisdiction. We do not think in the light of the discussion which follows that this authority is of any assistance to the respondent. The question of jurisdiction was never in issue between the parties, and it is obvious that neither side could ever have contended that, apart from the transfer, the District Court had any inherent jurisdiction to try the suit.

The second case, however, affords a very close parallel indeed to the present case. It is a decision of a Bench of this Court reported as *Subba Row v. Perumal Reddi*(1). The facts there were that the plaintiffs brought suits against their tenants, the defendants, for the rent due on certain lands for fasli 1321 as small cause suits before the District Munsif of Sholinghur. The defendants pleaded that the land was an “estate” under the Madras Estates Land Act and therefore that it

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

(1) (1921) 40 M.L.J. 556.
(3) (1916) 32 M.L.J. 63.

(2) (1933) I.L.R. 57 Mad. 73.
(4) (1904) I.L.R. 28 Mad. 42 (P.C.).

(1) 1917 M.W.N. 318.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

was only the Revenue Court which was competent to try the suits. This issue was tried by the District Munsif and found against the defendants and decrees for rent were granted. Fresh small cause suits for the rent for faslis 1322 and 1323 were then instituted in the same Court. The same defence was raised and was again tried, the decision this time being against the plaintiffs. In revision petitions to the High Court, it was urged that the former decision was *res judicata*. The High Court held that it was not, even though the decision as to jurisdiction depended upon certain findings of fact, and came to their decision mainly on the ground that the doctrine of *res judicata* does not apply to questions of jurisdiction.

If this proposition, thus broadly stated, is correct, it is very difficult to distinguish the present case from *Subba Row v. Perumal Reddi*(1). Here too, it may be argued with much force that the question was one of jurisdiction between two competing Courts—the executing Court and the Insolvency Court—and here too the executing Court held in the first application that it had jurisdiction and in the second that it had not. But there is no analysis in this decision of the meaning of the word “jurisdiction” and no distinction drawn between inherent want of jurisdiction and a want of jurisdiction which can be discovered only after the decision of an issue by the very Court whose jurisdiction is attacked by the defendant. That distinction has been drawn in later cases which have been cited before us by Mr. Kotayya, and we think it is a fundamental distinction which ought to be recognized.

(1) 1917 M.W.N. 318.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

There are two such cases to be considered. The first is *Girwar Narayan Mahton v. Kamla Prasad*(1). It is concerned with suits for rent by landlords against tenants. A suit was first instituted under section 106 of the Bengal Tenancy Act, and was withdrawn with liberty to bring a fresh suit. The fresh suit was brought not under the Bengal Tenancy Act but in the ordinary Civil Court. It was compromised and a decree passed in terms of the compromise fixing the rate of rent at Rs. 7-8-0 per bigha. Then followed further suits for later rent in the civil Court. The first Court granted decrees at the rate of Rs. 7-8-0 but on appeal the compromise decree was ignored, and the decrees were modified by reducing the rate of rent to Rs. 5 per bigha. The reason for this was a finding that the Civil Court which granted the compromise decree had no jurisdiction to try the suit, being debarred from doing so by section 109 of the Bengal Tenancy Act. It was held by the High Court that in spite of that statutory prohibition the compromise decree was *res judicata*. The bar created by section 109 did not affect the inherent jurisdiction of the Civil Court. It was a matter for that Court itself to decide. The headnote runs as follows :—

“There is a distinction between an inherent want of jurisdiction in a Court and want of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached. A Court, which is empowered by law to try a suit, has power to try it either rightly or wrongly; the validity of a decree does

(1) (1932) I.L.R. 12 Pat. 117.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

not depend on whether it embodies a correct decision. A judgment of a Court having jurisdiction over the subject-matter and the parties to the suit and having territorial and pecuniary jurisdiction, however erroneous, cannot be a mere nullity and cannot be collaterally challenged."

The other case is the judgment, but a long and elaborately reasoned judgment, of a single Judge in Bombay; *Rajaram v. Central Bank*(1). It is an even stronger case as it deals with a matter of territorial jurisdiction. There were two suits considered in that case, one filed in 1924 and the other in 1926 in the same Court in Bombay. According to the law as understood in 1924 that Court had jurisdiction. According to the law as laid down in a Full Bench ruling in 1925 that Court had no such jurisdiction. It was held, nevertheless, that the decree in 1924 was not a nullity, and that in 1926 the question of jurisdiction was already determined in favour of the plaintiff by the doctrine of *res judicata*. The headnote runs as follows :

"The Court having jurisdiction to decide the question whether or not it had jurisdiction has the power to decide that question rightly or wrongly. No doubt a judgment pronounced by a Court without jurisdiction is void, but the rule is subject to the well-known reservation that, when the jurisdiction of a Court is challenged or is constructively the subject of an issue, the Court is competent to determine the question of jurisdiction whether the decision upon the particular question be correct or not and pass a decree and simply because a higher tribunal has in a subsequent suit held contrary on the point of jurisdiction that decree does not become a nullity."

Now it is undeniable that these rulings apply to the present case. It cannot for a moment be maintained that the learned Subordinate Judge in the first application had no *inherent* jurisdiction to

(1) A.I.R. 1926 Bom. 481.

CHINNAPA
REDDI
v.
OFFICIAL
RECEIVER,
GUNTUR.
—
KING J.

entertain it. He had the decree before him, the parties were parties to the decree and no question arose of any want of jurisdiction apart from the interpretation of section 37 of the Provincial Insolvency Act. That issue was raised by the Official Receiver and was decided by the Court against him. The decision may now be seen to be wrong, but the Court was none the less competent to give it, and it is conceded before us that as the law was then understood the Subordinate Judge must have deemed himself bound to give it.

And, as we have already said, we respectfully approve of the principles upon which these two decisions have been based. Other conditions being satisfied, the decision of a Court must, we think, be *res judicata*, unless that decision can be held to be a nullity, i.e., no decision at all. In the present case, we cannot hold that the decision of the learned Subordinate Judge in 1928 is a nullity, and we must accordingly accept the position that the succeeding Subordinate Judge was debarred by the rule of *res judicata* from giving any contrary decision in 1930, allow this appeal with costs throughout, and direct the restoration of the execution petition to file to be disposed of according to law.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao.*1935,
February 26.LANGOJU TAVUDU AND ANOTHER (DEFENDANTS),
PETITIONERS,

v.

VEERINI VENKATARATNAM AND FIVE OTHERS
(PLAINTIFFS), RESPONDENTS.**Indian Limitation Act (IX of 1908), sec. 19—Acknowledgment of liability in writing—Signature of party making it—Initials equivalent to.*

A party's initials are equivalent to his signature under section 19 of the Indian Limitation Act (IX of 1908). The object of the Act is to regard as sufficient what the writer intends to be equivalent to his signature, the form being immaterial so long as it verifies the acknowledgment.

Ammayee v. Yalumalai, (1892) I.L.R. 15 Mad. 261, *Lakshmanacharyulu v. Venkataramanujacharyulu*, (1926) 51 M.L.J. 414, and *Velivalli Brahmaiah, In re*, (1930) I.L.R. 54 Mad. 252, referred to.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif's Court of Rajahmundry in Small Cause Suit No. 1257 of 1931.

C. Rama Rao for petitioners.

P. V. Vallabhacharyulu for respondents.

JUDGMENT.

The question that arises is, whether a party's initials are equivalent to his signature under section 19 of the Limitation Act which says that an acknowledgment of liability in respect of property or right should be made in writing signed

* Civil Revision Petition No. 1271 of 1932.

by the party against whom such property or right is claimed. On principle there seems to be no reason for holding that the word "signed" should be construed as meaning "signed in full". The object of the Act, as I understand it, is to regard as sufficient what the writer intends to be equivalent to his signature, the form being immaterial so long as it verifies the acknowledgment. To ignore the substance and attach importance to the form would be to defeat the plain intention of the Statute, which makes no distinction between "signing" and "signing in full". The word "initial", according to the Oxford Dictionary, means "sign with initials". The question arose under the Indian Succession Act, which enacts that each of the witnesses to the will must sign it, whether a person, who affixes his initials in place of his full signature, sufficiently complies with the Act. WILKINSON J., sitting on the Original Side of the High Court, and COLLINS C.J. and HANDLEY J. on appeal from his judgment, held that a witness's initials amounted to a signature within the Act; *Ammayee v. Yalumalai*(1). The learned appellate Judges say :

"The Act does not provide that the attesting witnesses should sign in full and we know of no authority for the proposition that initials are not signature."

Then follows a sentence which, no doubt, is *obiter*, but to which I attach great importance :

"On the contrary it has been held that they are equivalent to a signature to an acknowledgment under the Limitation Act."

True, no authority is quoted, but that only shows that the matter was too firmly settled to be open to argument.

(1) (1892) I.L.R. 15 Mad. 261.

TAVUDU
v.
VENKATA-
RATNAM.

Lakshmanacharyulu v. Venkataramanujacharyulu(1), where it is said that ODGERS J. took a contrary view, has been cited; but the learned Judge qualifies his statement in such a manner as to make the case not valuable as a precedent. There is a passing reference to this case in the judgment of SUNDARAM CHETTI J. in *Velivalli Brahmaiah, In re*(2), but the question there was, whether the affixing of his initials by a Magistrate satisfied the requirements of the Criminal Procedure Code which uses the word "sign". The Code of Criminal Procedure is scarcely in *pari materia* with the Limitation Act and I am not prepared to regard this case as an authority on the point with which I have now to deal. The lower Court's view therefore is perfectly right, being in accord both with principle and authority.

The objection taken as to the allowing of compound interest is untenable and must be disallowed.

In the result, the civil revision petition fails and is dismissed with costs.

K.W.R.

(1) (1926) 51 M.L.J. 414.

(2) (1930) I.L.R. 54 Mad. 252.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice King.

PONNU NADAR AND FOUR OTHERS (PLAINTIFFS AND APPELLANTS, 4 AND 6), APPELLANTS,

1935,
April 5.

v.

KUMARU REDDIAR AND TEN OTHERS (DEPENDANTS 1 TO 3 AND 5 TO 12), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 23, art. 120—Applicability—Procession in public street—Right to carry—Suit to establish.—Limitation—Starting point of—Magistrate's order under sec. 147, Criminal Procedure Code, prohibiting carrying of such procession until right to do so established in Civil Court—Suit brought more than six years after—Barred, if—Fresh obstructions within limitation period—Valid cause of action, if afforded by—"Continuing wrong," what is.

Three Nadars sued to establish their own right and the right of their castemen to pass in procession over a certain route composed of public streets in their village. The defendants were other castemen of the village who denied the right claimed by the plaintiffs. The occasion for the suit was provided by two attempts in the year 1918 made by the plaintiffs to take marriage processions over the route in question. There was an order of the Joint Magistrate passed under section 147 of the Code of Criminal Procedure in 1900 directing that no organized procession of Shanars or Christians should pass along the route in question until a Civil Court had declared that there was a right to do so. That order was passed on a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. The question was whether or not the Limitation Act applied to the suit and whether or not the suit, which had been instituted more than six years after the Joint Magistrate's order of 1900, was barred by limitation.

Held: (i) The Limitation Act was applicable to the suit.

* Second Appeal No. 410 of 1931.

PONNU NADAR
v.
KUMARU
REDDIAR.

Although the right to use public streets, including the right to go in procession, is a natural right inherent in every member of the public, and cannot be prescribed against or lost, when a suit has to be brought in order to obtain a declaration that such a right exists, the Limitation Act applies to the suit.

(ii) The plaintiffs could not derive a valid cause of action from the alleged occurrences in 1918.

The general rule is that where there are successive invasions or denials of a right, time will run from the first of the series. That rule must be applied in the present case because in 1900 not only were the Nadars prevented from going in procession but an order was obtained disallowing all further processions until the right had been established.

(iii) Section 23 of the Limitation Act was inapplicable to the case.

The order of 1900 did not constitute a "continuing wrong" within the meaning of that section and, even if there was a continuing wrong, the defendant party was not responsible for its continuance.

(iv) Article 120 of the Limitation Act applied to the suit and the suit was barred by limitation.

Rajah of Venkatagiri v. Isakapalli Subbiah, (1902) I.L.R. 26 Mad. 410 followed.

APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Appeal Suit No. 151 of 1929 preferred against the decree of the Court of the Additional District Munsif of Tinnevely in Original Suit No. 273 of 1923.

The second appeal came on for hearing before MADHAVAN NAIR J. when his Lordship made the following

ORDER OF REFERENCE TO A BENCH :—

Plaintiffs are the appellants. They are Nadars by caste, living permanently in the village of Mela Seithalai situated within the zemindari of Ettiyapuram. In the suit out of which this second appeal arises, they claim for themselves individually and for their castemen the right to take marriage processions along the streets marked A, C, D, E, F, F-(1), F-(2)

and G in the plaint plan. The defendants who are other PONNU NADAR castemen of the village, namely the Nayakars, Reddis and Acharis, denied them such right and stated that the exercise of the right is barred by limitation. The plaintiffs allege in the plaint that when they attempted to take a procession they were threatened that they would be murdered, and it may be taken for the purposes of this case that the procession did not start owing to the defendants' hostile attitude. The streets in question have been found by the lower appellate Court to be public streets.

In 1900, when the plaintiffs' castemen living in the same village attempted to carry a Shanar corpse through the streets, an order was passed by Mr. Lionel Vibert, Joint Magistrate, apparently under section 147, Criminal Procedure Code, directing that "no organized procession of Shanars or Christians shall pass through these streets unless and until they have got an order from a Civil Court affirming their right to do so." This order was passed on 19th July 1900. This order not having been set aside, and six years having passed from the date of the order, the defendants now state that the plaintiffs' suit for a declaration of their rights and for a perpetual injunction to restrain the defendants from objecting to the exercise of the right is barred by limitation under article 120 of the Limitation Act. The appellants were not parties to that order, nor are they representatives of the persons who were parties to it.

The short question for determination in this second appeal is, whether, in the circumstances mentioned above, the plaintiffs' suit is barred by limitation under article 120 of the Limitation Act. This point was decided against the plaintiffs-appellants by the lower Courts. If their cause of action started on the date of the order passed by the Joint Magistrate, Exhibit IX, it is clear that the suit is barred by limitation. But it is argued by the appellants' learned Counsel that the article applicable to the case is not article 120; according to him the proper provision that should govern the case is section 23 of the Limitation Act, according to which "in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues." The learned Counsel argues that every moment the defendants continue to

PONNU NADAR
v.
KUMARU
REDDIAR.

threaten the plaintiffs, the acts complained of create what may be called a continuing source of injury and a fresh cause of action arises *de die in diem* so long as the threats or obstructions continue and that the suit is not therefore barred by limitation. The question is whether in the circumstances there may be said to be a continuing wrong in the present case. It is by no means easy to decide the point. A case very similar to the present one, but with reference to a dispute likely to cause a breach of the peace concerning land, arose in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1), and was decided by BENSON and BHASHYAM AYYANGAR JJ. In that case, "certain lands were attached by a Magistrate, in 1886, under section 146, Criminal Procedure Code, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realized some income from them. Both claimants instituted, in 1897, suits in which each claimed the lands as his own, and sought to obtain a declaration of title to them . . ." (see the headnote). It was held that, in so far as the suits were for declaration of title to immovable property and the profits therefrom, they were governed by article 120 of Schedule II to the Limitation Act. They further held that only the relief or remedy by way of declaration being barred and the title still subsisting, the owner's right and remedy in respect of rents and profits derived from the property remained unaffected. It was argued in that case that at every moment of time during which the attachment by the Magistrate continued a fresh starting point of limitation arose in favour of the plaintiffs and that the attachment would be a continuing wrong within the meaning of section 23 of the Limitation Act. This argument was met by the learned Judges in the following manner. They said: "The criterion is not whether the right is a continuing one but whether the wrong is a continuing one." In their opinion, the wrong was not a continuing one because there could not have been any wrong done at all as the Magistrate's order was a legal order when it was passed and the continuance of it cannot therefore be called a continuing wrong. Holding this view, they overruled the contention that section 23 would apply to the case and held that the suit was barred by limitation. Strong reliance is placed by the learned Counsel for the respondents on this decision. Mr. Venkatarama Sastri

seeks to distinguish the present case from this decision on the ground that here we are concerned with the assertion of a right of procession along a highway and not with the assertion of title to property as in the case of *Rajah of Venkatagiri v. Isakapalli Subbiah*(1). Having regard to the principle on which the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1), is based, I think the distinction pointed out by the learned Counsel does not affect the question of limitation decided in that case. Whether it be the right of way that is concerned or a right to property, the Magistrate's order passed under section 147, Criminal Procedure Code, was a legal order in each case and, according to the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1), the continuance of that order cannot be said to be a continuing wrong so far as the application of section 23 of the Limitation Act is concerned. No doubt the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1) results in this anomaly, that while a party cannot get a declaration of title to property he can ask for the recovery of the profits from the Magistrate, who, if that decision is followed to its logical conclusion, will for ever remain as the custodian of that property, looking after it, so to speak, for the purposes of the parties concerned. Mr. Sastri argues that this very anomaly shows that that decision cannot be applied to the present case, for, once the right of procession is barred, the party asking for a declaration of that right is barred for ever from asserting it and cannot ask for anything else as a token of the recognition of his right as the party in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1) could ask for profits arising from the land. To this the answer is given that if the complaining party is not allowed to take processions through the streets, his right to use it for other purposes is not taken away. But I do not think it is necessary to discuss this line of distinction, as, in my opinion, having regard to the principle which is the basis of the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1), the two cases are indistinguishable.

The next argument of Mr. Sastri is that the case of *Rajah of Venkatagiri v. Isakapalli Subbiah*(1) has not been correctly decided. The argument is not without considerable force as it is supported by a judgment of the Calcutta High Court reported as *Brojendra Kishore Roy Choudhury v. Sarojini Ray*(2).

(1) (1902) I.L.R. 26 Mad. 410.

(1) (1902) I.L.R. 26 Mad. 410.

(2) (1915) 20 C.W.N. 481.

PONNU NADAR
v.
KUMARU
REDDIAR.

That case was decided by MOOKERJEE and BEACHCROFT JJ. With respect to the point under consideration, the facts of the case were precisely similar to the facts of the case in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1). The defendants in *Brojendra Kishore Roy Choudhury v. Sarojini Ray*(2) attempted to interfere with the plaintiff's possession of the disputed property and a breach of the peace becoming imminent, proceedings under section 145, Criminal Procedure Code, were instituted and resulted in an order of attachment under section 146, Criminal Procedure Code. The plaintiff sued for a declaration of his title and for recovery of possession. It was held "that it was a case of continuing wrong independent of contract, and consequently, under section 23 of the Limitation Act, a fresh period of limitation under article 120 began to run at every moment of the time the wrong continued". After pointing out the anomalies involved by the logical application of the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1), the learned Judges state their view thus: "In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation under article 120 begins to run at every moment of the time the wrong continues. It is needless for our present purpose to attempt an exhaustive definition of the expression 'continuing wrong'. But it may generally be stated that if the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of the legal injury. Tested from this point of view, what is the position here? The defendants attempted to interfere with the possession of the plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the plaintiffs were deprived of the enjoyment of their property. This state of things has continued,

though it could have been terminated if the defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of section 23 of the Indian Limitation Act. From this point of view, no question of limitation arises." In the light of these remarks, I think, with the greatest respect to the learned Judges, the argument of Mr. Sastri that the legal position enunciated in *Rajah of Venkatagiri v. Isakapalli Subbiah*(1) would require reconsideration, is not without force. There can be no doubt that the point of law involved in this case is very important as it affects the rights of a community to take processions along the King's highway in the exercise of their undisputed right to use the highway, which nobody can question. Can it be said that, because a few people some years ago were prohibited by a Magistrate on a particular occasion from taking a procession along a public street for reasons which then existed, persons now living, who were not even born at that time, should be prohibited from taking processions, because the Magistrate's order which was then passed was not set aside? Should not a distinction be made, as pointed out by the learned Judges of the Calcutta High Court, between continuance of a legal injury and continuance of the injurious effects of a legal injury? In the circumstances, having regard to the importance of the question involved, I refer the case to the decision of a Bench.

PONNU NADAR
v.
KUMARU
REDDIAR.

ON THE REFERENCE :—

T. R. Venkatarama Sastri for *K. Rajah Ayyar* for appellants.

B. Sitarama Rao and *S. K. Sundaram* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—This second appeal arises out of a suit brought by three Nadars, who are brothers,

(1) (1902) I.L.R. 26 Mad. 410.

(2) (1915) 20 C.W.N. 481.

(1) (1902) I.L.R. 26 Mad. 410.

PONNU NADAR
v.
KUMARU
REDDIAR.
—
CURGENVEN J.

to establish their own right and the right of their castemen to pass in procession over a certain route in their village of Mela Seithalai. The defendants are other castemen of the village, such as Nayakars, Reddis and Asaris, who deny that the plaintiffs enjoy this right. The occasion for the suit was provided by two attempts, on 8th November and 13th December 1918, made by the plaintiffs to take marriage processions over the route in question, these attempts, it is said, being met by obstruction and intimidation on the part of the defendants' party. The route over which it is claimed to exercise the right has been found by the lower appellate Court to be composed of public streets.

The question which we have to decide is one of limitation. The dispute has had a somewhat long history, and we have to go back to 1900, when the Nadars of Mela Seithalai village attempted to carry a corpse in procession over the same route. The police reported that there was likely to be resistance on the part of the other caste people, and a breach of the peace, and accordingly the Joint Magistrate, Mr. Vibert, I.C.S., passed an order directing that no organized procession of Shanars or Christians should pass along those streets until a Civil Court had declared that there was a right to do so. It is not disputed that this order was passed under section 147 of the Code of Criminal Procedure, although it may be open to some question whether the occasion was really appropriate for an order of this character, nor is it contended that the order was without jurisdiction and therefore a nullity. The contention of the defendants in the present suit is in brief that

this order being still in force and no suit having been filed within the prescribed period by the Nadars to establish the right in question, the present claim is time-barred. This point has been decided against the plaintiffs by the Courts below and plaintiffs accordingly appeal. We have in the first place to decide whether, in view of what took place in 1900, the plaintiffs can derive a cause of action from the alleged occurrences in 1918. Where there are successive invasions or denials of a right, time will in general run from the first of the series. For this proposition ample authority will be found in *Thirumala Rao v. Kadekar Durgi Shettethi*(1), *Syed Mamshah Thaika v. The Secretary of State for India*(2), *Chathu v. Neelakandhan*(3) and *Krishnaji Anajee v. Anajee Dhondajee*(4). In special cases, where for instance the later invasion is of a different and more serious kind, as a sale following an attachment of property [*Anantharazu v. Narayanarazu*(5)] or where the enjoyment, though disputed, is not actually interfered with [*Muhammad Hanif v. Ratan Chand*(6)], an exception to this rule may be admitted. We think that the general rule must be applied in the present case because in 1900 not only were the Nadars prevented from going in procession but an order was obtained disallowing all further processions until the right had been established. This latter circumstance affords, we think, another and a different ground for declining to accept the contention that the subsequent occurrences created a valid cause of action. At the time that these later processions were

PONNU NADAR
v.
KUMARU
REDDIAR.
—
CURGENVEN J.

(1) (1914) 22 I.C. 883.
(2) (1922) 42 M.L.J. 457.
(3) (1911) I.L.R. 36 Mad. 383.
(4) (1918) 37 M.L.J. 213.
(5) (1929) I.L.R. 54 Bom. 4.
(6) (1921) I.L.R. 3 Lah. 43.

PONNU NADAR
v.
KUMARU
REDDIAR.
CURGENVEN J.

attempted, the Magistrate's order was in force, and the Nadars had no right to go in procession in disobedience of it. It can scarcely be said therefore that they were obstructed in the exercise of a subsisting right, nor ought the Court to recognize as affording a cause of action conduct which involves the infringement of a lawful order. For the application of this principle in somewhat similar circumstance reference may be made to *Ram Sahai v. Binode Bihari Ghosh*(1). In that case, the plaintiffs against whom an order had been made under section 145 of the Code of Criminal Procedure forcibly evicted the defendant from the land and it was decided that they could not enlarge the period of limitation prescribed by law by taking the law into their own hands.

The plaintiffs must accordingly relate back their suit to the order of 1900, by which whatever right they and their fellow-castemen had to go in procession was suspended. Can they escape the apparently unavoidable conclusion that the suit is barred by article 120 of the Limitation Act? Mr. T. R. Venkatarama Sastri for the appellants argues in the first place that to a claim of this character no rule of limitation will apply. He has cited authorities to show that the right to use public streets, including the right to go in procession, is a natural right inherent in every member of the public, and cannot be prescribed against or lost as other rights may be prescribed against or lost. This is no doubt true. But that is not to say that where a suit has to be brought in order to obtain a declaration that such a right exists the Limitation Act has no application.

(1) (1923) I.L.R. 45 All. 306.

Section 5 of that Act lays down that, subject to the provisions contained in sections 4 to 25, every suit instituted after the period of limitation prescribed therefor by the first schedule shall be dismissed. We have been referred to no provision of the Limitation Act which would exempt a suit of this character, and the argument we think loses sight of the fact that although a right may exist the civil remedy available to the party if the right is denied or infringed may be lost by lapse of time. It has not been disputed that if the Limitation Act applies the appropriate article is article 120.

The appellants then take up the further position that the order of 1900 constituted "a continuing wrong", so that the case is governed by section 23 of the Limitation Act which says :

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

We have been referred to two cases one of which supports while the other is against this position; *Brojendra Kishore Roy Choudhury v. Sarojini Ray*(1) and *Rajah of Venkatagiri v. Isakapalli Subbiah*(2). Both these cases related to an attachment of land by the Court under section 146 of the Code of Criminal Procedure, ensuing upon a dispute likely to cause a breach of the peace. No suit was brought within the six years allowed by article 120 of the Limitation Act which, it was agreed, is the correct article applicable, and when a suit for a declaration of title was eventually brought the question of limitation

(1) (1915) 20 C.W.N. 481.

(2) (1902) I.L.R. 26 Mad. 410.

PONNU NADAR
v.
KUMARU
REDDIAR.
CURGENVEN J.

PONNU NADAR
v.
KUMARU
REDDIAR.
CURGENVEN J.

arose. In the Madras case, the learned Judges, criticising the Calcutta judgment in *Chukkun Lal Roy v. Lalit Mohan Roy*(1), which appears to have been based on the view put forward here, as we have said, by Mr. Venkatarama Sastri, that so long as the right to the property is not extinguished a suit for declaration will not be barred, observe :

"The criterion is not whether the 'right' is a 'continuing' one but whether the 'wrong' is a continuing one."

And they think it is impossible to hold that the wrongful denial by the defendant of the plaintiff's title to possession and the procuring by such denial of the attachment by the Magistrate constituted a continuing wrong within the meaning of section 23 of the Limitation Act. A contrary view has been taken in the Calcutta case. The learned Judges seem to have been impressed by the anomaly that although the title to the property would not be extinguished the suit to declare the title would be barred, and, before considering the question really in issue, they adopt the language of Lord ELLENBOROUGH in *Luxmore v. Robson*(2) and say:

"The common sense, the practice, and the general inconvenience of mankind, require that a construction different from that in the case cited should be adopted."

Passing on to consider what is a continuing wrong, they too dissociate themselves from the decision in *Chukkun Lal Roy v. Lalit Mohan Roy*(1). Then they say :

"In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation

(1) (1893) I.L.R. 20 Calc. 906.

(2) (1818) I.B. & Ald. 584; 106 E.R. 21.

under article 120 begins to run at every moment of the time the wrong continues. It is needless for our present purpose to attempt an exhaustive definition of the expression 'continuing wrong'. But it may generally be stated that if the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Tested from this point of view, what is the position here? The defendants attempted to interfere with the possession of the plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the plaintiffs were deprived of the enjoyment of their property. This state of things had continued, though it could have been terminated if the defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of section 23 of the Indian Limitation Act. From this point of view, no question of limitation arises."

The tests proposed by the learned Judges to discover whether a cause of action constitutes "a continuing wrong" are, we have no doubt, correct. There must be not a single wrongful act from which injurious consequences follow, but a state of affairs every moment's continuance of which is a new tort. Further, the person who intentionally produces the state of affairs must be intentionally causing it to continue, though in a position to terminate it at his pleasure. Simple illustrations of ordinary and continuing wrongs are a blow with a stick and wrongful imprisonment respectively. In the one case the injury

PONNU NADAR
v.
KUMARU
REDDIAR.
CURGENVEN J.

PONNU NADAR
v.
KUMARU
REDDIAR.
—
CURGENVEN J.

ceases though the injurious effect may persist. In the other the injury continues and every moment a person is wrongfully imprisoned a fresh tort is committed and a fresh cause of action arises. The commonest examples of continuing wrongs are to be found in interference with water-supply [*Rajrup Koer v. Abul Hossein*(1)] and obstruction to rights of way [*Jurawan Singh v. Ramsarekh Singh*(2), *Nazim v. Wazidulla*(3), *Dwarka Nath Sen v. Tara Prassanno Sen*(4) and *Sreemati Soojan Bibi v. Shamed Ali*(5)]. In such cases, it is always open to the obstructing party to discontinue the obstruction. In *Hukum Chand v. Maharaj Bahadur Singh*(6) the Privy Council applied the same principle to a case where interference with customary worship was concerned. Cases which bear some resemblance to the present circumstance are those of attachment of property. In *Jhabbu v. Musammatt Batul*(7) it has been held that where a wrongful distraint has been levied it is a continuing wrong and time will run from the date on which the party came to know of it. The contrary view has been taken in *Venkataramier v. Vaithilinga Thambiran*(8) where, after observing that the weight of authority in Madras is against the contention, MILLER J. says :

“Where the proceedings which give rise to the cause of action consist in the wrongful distraint, that distraint is not a continuing wrong, though no doubt the injury continues.”

In the present case it is no doubt arguable that some analogy exists between an order which bars a right to take a procession and an obstruction

(1) (1880) I.L.R. 6 Cal. 394 (P.C.).

(3) (1915) 21 C.L.J. 640.

(5) (1892) 1 C.W.N. 96.

(7) (1922) I.L.R. 45 All. 208 (F.B.).

(2) (1933) I.L.R. 12 Pat. 261.

(4) A.I.R. 1923 Cal. 356.

(6) (1933) I.L.R. 12 Pat. 681 (P.C.).

(8) (1913) I.L.R. 38 Mad. 655.

which bars a right of way.. Both, in a sense, create a state of affairs which continues to exist. What we have to find however is the existence of a “continuing wrong”, a wrong, that is, originated by and kept in existence by the opposite party. What in fact appears to have given rise to the Joint Magistrate’s order was a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. So far as that attitude itself is concerned, it is impossible to find in it a continuing wrong, nor do we find it easier to hold that when the Joint Magistrate passed the order with a view to prevent a breach of the peace there was a “continuing wrong” caused by the defendants’ party. There is nothing to show that it was passed at their instance and, even if it were, responsibility for passing it must be taken by the Court and not laid upon the party. Again, once an order was passed, the matter was taken out of the hands of the defendants’ party, and it lay with the Nadars themselves to establish their right by suit. From this point of view too we are not disposed to hold that even if there was a continuing wrong the defendants’ party was responsible for its continuance. Where the applicability of section 23 of the Limitation Act is doubtful the proper course must be, we think, to enforce against the plaintiffs the ordinary principles of limitation and in the present case to apply article 120 in the same manner as article 47 would be applied to the case of an order under section 145 of the Code of Criminal Procedure—time being taken to run from the date of the order. Adopting

PONNU NADA
v.
KUMARU
REDDIAR.
—
CURGENVEN J.

PONNU NADAR
K. KUMARU
REDDIAR.
CURGENVEN J.

this view the persons affected by the order of 1900 had a period of six years within which to establish their right, and we are not greatly impressed by the argument that, if the right itself may be indestructible, the remedy ought not to be held to have been permanently lost by their failure to take action within that time. We must hold in agreement with *Rajah of Venkatagiri v. Isakapalli Subbiah*(1) that the suit is barred under article 120 of the Limitation Act. The second appeal is dismissed with costs of the contesting respondents. We certify for a fee of Rs. 150 under rule 46 of the Practitioners' Fees Rules.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice K. S. Menon.

1935,
August 9.

IN RE MEDAPATI RAMA RAO AND FOUR OTHERS
(ACCUSED), PETITIONERS.*

*Madras Abkari Act (I of 1886), ss. 55 (b), 55 (g) and 58—
Unlawfully manufacturing arrack and being in possession
thereof—Conviction for, sustainable only under sec. 55 (b).*

A person who unlawfully manufactures arrack and is in possession of the arrack so unlawfully manufactured by him cannot be convicted separately under sections 55 (b), 55 (g) and 58 of the Madras Abkari Act (I of 1886). There can, in such a case, be a conviction only under section 55 (b) of the Act, because (i) the offence of manufacturing arrack under section 55 (b) includes the offence relating to possession of the apparatus, etc., for the purpose of its manufacture, viz., the offence comprised in section 55 (g); and (ii) the manufacture itself will give him possession of such arrack.

(1) (1902) I.L.R. 26 Mad. 410.

* Criminal Revision Case No. 115 of 1935 and Criminal
Revision Petition No. 108 of 1935.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Ellore, dated 1st November 1934 in Criminal Appeal No. 66 of 1934, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Ellore dated 13th October 1934 in Calendar Case No. 801 of 1934.

K. S. Jayarama Ayyar for *Y. Satyanarayana* and *S. Srinivasachari* for petitioners.

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

ORDER.

The petitioners have been convicted under sections 55 (b), 55 (g) and 58 of the Madras Abkari Act (I of 1886). Both the lower Courts have, on a consideration of the entire evidence, found that the petitioners unlawfully manufactured some arrack and were in possession of the same, and I am not prepared to say that the finding is wrong. But, as the case is that the arrack found in the possession of the petitioners was manufactured by themselves, the first question is whether they can be convicted separately under sections 55 (b) and 55 (g) of the Act. If it was they who manufactured it, they must naturally be in possession of materials, utensils, apparatus, etc., for the purpose of manufacturing it. The offence of manufacturing it, namely, the one comprised in section 55 (b), therefore, includes the offence relating to possession of the apparatus, etc., namely, that comprised in section 55 (g). There cannot, therefore, be a conviction under section 55 (b), as well as under section 55 (g). Again, if a person unlawfully

RAMA RAO,
In re.

92 THE INDIAN LAW REPORTS [VOL. LIX

RAMA RAO,
In re.

manufactures arrack and is thus in possession of such unlawfully manufactured arrack, I do not think that he can further be convicted under section 58, for the manufacture itself will give him possession of such arrack. In this case, therefore, there can be a conviction only under section 55 (b). The convictions and the sentences under sections 55 (g) and 58 are therefore set aside and the fines imposed thereunder, if already paid, are ordered to be refunded, and the conviction and the sentence under section 55 (b) alone are upheld.

K.W.R.

APPELLATE CIVIL—FULL BENCH.

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

VAYI RAMA KRISHNAN CHETTIAR REPRESENTED BY
AGENT SUBRAMANIA AYYAR (PETITIONER), PETITIONER,

1935,
May 1.

v.

KASI VISWANATHAN CHETTIAR (RESPONDENT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 73—“The same judgment-debtor”—Meaning of.

A legal representative against whom a decree has been passed in respect of a deceased's estate and the deceased person against whom a decree was passed in his lifetime but which is sought to be executed against his property in the hands of his legal representative can be described as “the same judgment-debtor” within the meaning of the expression in section 73 of the Code of Civil Procedure.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the orders of the Court of the District Munsif of Karur, dated 11th July 1932, and made in Execution Applications Nos. 226, 227, 241 and 242 of 1932, respectively, in Execution Petition No. 340 of 1931 in Original Suit No. 514 of 1930.

T. V. Muthukrishna Ayyar for petitioner.—In *Bitthal Das v. Nand Kishore*(1) the object of the Legislature in enacting section 73 of the Code of Civil Procedure is pointed out. *Srinivasa Aiyangar v. Kanthimathi Ammal*(2), which follows *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*(3), does not even refer to *Ramanathan Chettiar v. Subramania Sastrial*(4). It puts a narrow construction on the definition of “judgment-debtor” ignoring the fact that, under section 73

* Civil Revision Petitions Nos. 1685 to 1688 of 1932.

(1) (1900) I.L.R. 23 All. 106. (2) (1910) I.L.R. 33 Mad. 465.
(3) (1901) I.L.R. 25 Bom. 494. (4) (1902) I.L.R. 26 Mad. 179.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.

the judgment-debtor is really the estate. To the same effect is *Nilmani v. Hiralal*(1). The heading of the chapter in which section 73 appears is "Distribution of Assets" and it has no pointed reference to the person. The present prevailing view is that if the estate is properly represented rateable distribution should be ordered. Moreover the respondents cannot approbate and reprobate in the same execution petition.

S. T. Srinivasagopalachari for respondent.—Section 73 should be strictly construed. It should not be construed as a section of insolvency law. For the first time in the Code of 1908 the word "passed" is used in the section dealing with rateable distribution. Under the Code there is no such thing as a decree against an estate. The Court has to see against whom the decree has been obtained and not against whom the decree is executed. Judgment-debtor is defined in section 2, clause 10, of the Code and the decrees obtained by petitioners are not against the "same judgment-debtor". *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*(2) and the cases following the same correctly lay down the law.

Cur. adv. vult.

JUDGMENT.

PANDRANG
ROW J.

PANDRANG ROW J.—The petitioners in these petitions obtained decrees against two sons of the deceased Periaswami Goundan in respect of debts contracted by him. The respondent had obtained a decree against Periaswami Goundan himself in Original Suit No. 514 of 1930, and after his death the same two sons of his were brought on record as his legal representatives and the family properties were sold in execution, and the sale proceeds were in the custody of the executing Court. The respondent had also obtained three other decrees against the same two sons in respect of debts contracted by their father. All the decrees, i.e., those obtained by the petitioners and those obtained by the respondent, were executable

(1) (1917) 27 C.L.J. 100.

(2) (1901) I.L.R. 25 Bom. 494.

against the family properties of the deceased and his sons. The respondent applied for rateable distribution in respect of the three decrees obtained by him against the sons, and his applications were allowed by the Court; but, when the petitioners applied for rateable distribution in respect of the exactly similar decrees obtained by them against the same two sons, the respondent opposed their applications on the ground that they had not obtained decrees against the father, Periaswami Goundan, and his objection was upheld by the same Court and the applications were dismissed. The revision petitions are directed against the order dismissing the petitioners' applications for rateable distribution.

The question for determination in these petitions is whether, in the circumstances mentioned above, the petitioners are entitled to rateable distribution. The only objection made to the claim for rateable distribution is that the decrees obtained by the petitioners were not passed against the same judgment-debtor as in the decree in Original Suit No. 514 of 1930 in execution of which the assets were realized. It is admitted that all the decrees are executable in the same way and against the same properties, but stress is laid on the difference in the names of the judgment-debtors in the decrees as originally passed, and it is contended that this difference in names, though otherwise immaterial, makes all the difference so far as the claim to rateable distribution is concerned. I see, however, no good reason for accepting this contention which is based on a narrow construction of the words "the same judgment-debtor" in section 73 of the Code of Civil

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
PANDRANG
ROW J.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
PANDRANG
ROW J.

Procedure. As observed by STRACHEY C.J. in *Bithal Das v. Nand Kishore*(1):

"The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property."

A similar contention, based on the amendment of section 73 of the Code of Civil Procedure by inserting the word "passed", which was put forward in *Dwarkadas Marwari v. Jadab Chandra Ganguly*(2), was repelled by MUKERJI J. on the ground that, if the Legislature had intended to effect any alteration of the principle enunciated in the Full Bench decision in *Gonesh Das Bagria v. Shiva Lakshman Bhakat*(3), it would have expressed it in terms more clear and specific. The learned Judge referred also to the objects of section 73 of the Code of Civil Procedure as stated by STRACHEY C.J. in *Bithal Das v. Nand Kishore*(1) and observed that those objects

"would not be furthered, but rather defeated, by putting upon the rule the interpretation which the respondent asks us to adopt."

In the Order of Reference in *Gonesh Das Bagria v. Shiva Lakshman Bhakat*(3), MACLEAN C.J. expressed the opinion that the view taken in the earlier Calcutta case, *Deboki Nundun Sen v. Hart*(4), placed too narrow a construction on the

(1) (1900) I.L.R. 23 All. 106, 110.

(3) (1903) I.L.R. 30 Calc. 583 (F.B.).

(2) (1924) I.L.R. 51 Calc. 761.

(4) (1885) I.L.R. 12 Calc. 294.

expression, "the same judgment-debtor", and observed as follows:

"If the language of the section be absolutely clear, the circumstance that such a construction as was put upon it in that case may lead to injustice or to anomaly, or to hardship, could not prevent us from putting such construction upon it. But looking at the whole of section 295 (of the old Code) and especially to that portion of it which deals with the distribution of the assets, where it speaks of 'the judgment-debtor', not using the expression 'the same judgment-debtor', and to the equitable distribution which is aimed at by the section, I am disposed to think that the construction put upon it by the case of *Deboki Nundun Sen v. Hart*(1) is too narrow."

These observations were subsequently affirmed by the Full Bench, and I respectfully adopt them as a safe guide in the endeavour to determine the true construction of the expression, "the same judgment-debtor", found in section 73 of the Code of Civil Procedure.

A different view was taken in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*(2) which was followed in *Srinivasa Aiyangar v. Kanthimathi Ammal*(3). In neither of these two cases was any reference made to the objects of section 73 of the Code of Civil Procedure; in the latter case ABDUR RAHIM J., while referring to the fact that the two decrees were to be realized out of the family property, was of opinion that this fact was not decisive of the question against whom the decrees are made. The earlier Madras cases, *Grant v. Subramaniam*(4) and *Ramanathan Chettiar v. Subramania Sastrial*(5), do not appear to have been considered by the learned Judge; in both these cases the fact that both the decrees

(1) (1885) I.L.R. 12 Calc. 294.

(2) (1901) I.L.R. 25 Bom. 494.

(3) (1910) I.L.R. 33 Mad. 465.

(4) (1898) I.L.R. 22 Mad. 241.

(5) (1902) I.L.R. 26 Mad 179.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
PANDRANG
ROW J.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
—
PANDRANG
ROW J.

were to be realized out of the family property was regarded as deciding the question whether the decrees were against the same judgment-debtor. In *Nilmani v. Hiralal*(1) the fact that both the decrees were capable of execution against the same estate was held to be a sufficient reason for concluding that the decrees may without unduly straining the language of section 73 of the Code of Civil Procedure be regarded as passed against the same judgment-debtor, though they were not really passed against the same persons, and the learned Judges added that they were not disposed to put a narrow construction upon the terms of section 73 so as to defeat the ends of justice.

It is obvious that a strict literal construction of the expression, "the same judgment-debtor", cannot be adopted, in the sense that the decrees must be against the same persons *eo nomine*; it has been held in a series of cases that all the judgment-debtors in each of the several decrees need not be identically the same, and that it is sufficient if there is one judgment-debtor common to all the decrees, and this proposition is not denied by the learned Advocate for the respondent in these petitions. It has also been held, and here too there is no dispute, that even though the person against whom the decrees were passed is the same in name, section 73 will not apply unless that person occupied the same character in all the decrees; for instance, where one decree was passed against A in his personal capacity and another against him as heir of P, the two decrees are not against the same judgment-debtor. It would

(1) (1917) 27 C.L.J. 100.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
—
PANDRANG
ROW J.

therefore seem that the *eo nomine* construction cannot be the right one, and that the expression "the same judgment-debtor" is not so simple and clear in its meaning as to dispense with any reference to the general intention of the section in which it is found. About that intention there can be no doubt; and a construction which defeats that intention no less than the ends of justice should be avoided if the provisions of law are to be interpreted in a reasonable manner. The weight of authority appears to be in favour of the more liberal construction of the expression, "the same judgment-debtor", and I would therefore accept that construction and hold that the petitioners in these petitions are entitled to rateable distribution.

It follows that the petitions should be allowed with costs in Civil Revision Petition No. 1685 to be shared by all the petitioners.

BEASLEY C.J.—I agree.

CORNISH J.—I think these revision petitions should be allowed. There is, in my judgment, nothing illogical in describing as "the same judgment-debtor" the legal representative against whom a decree has been passed in respect of a claim against the deceased and the deceased person against whom a decree was passed in his lifetime but which is sought to be executed against his legal representative. The purpose of bringing the legal representative on record is to enable a suit against a person deceased to be maintained or continued or to enable a decree obtained against the deceased before death to be satisfied by execution out of his estate. And that estate can only

CORNISH J.

RAMA
KRISHNAN
CHETTIAR
v.
VISWANATHAN
CHETTIAR.
—
CORNISH J.

be reached for the satisfaction of a legal claim or judgment-debt through the interposition of the legal representative of the deceased. The claim against the deceased becomes by reason of his death a claim against his estate in the hands of the legal representative. The legal representative appears solely as legal representative, and, if the suit is decreed, the decree must be against him in that character only. His liability under the decree, whether he has been brought on record before decree or whether execution is made after the judgment-debtor's death, is limited to the extent of the deceased's assets which have come into his hands and which have not been duly distributed by him. The notion underlying these principles is that the legal representative takes the place of the deceased and is under the obligation which lay upon the deceased of paying lawful claims against the deceased out of the deceased's assets. This view is in accord with *Nilmani v. Hiralal*(1). It was held in that case that executors A and B and executors B and C of the same testator against whom two separate decrees had been passed in respect of claims against the estate could be regarded as "the same judgment-debtor" within section 73. I think it may be said that the language and the intention of the section equally cover the circumstances of the present case where the decrees are all executable against the heirs as legal representatives of the deceased.

G.R.

(1) (1917) 27 C.L.J. 100.

APPELLATE CIVIL.

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

RAMASAMI PILLAI (FOURTH DEFENDANT), APPELLANT,

v.

1935,
March 15.

THE TRICHINOPOLY CO-OPERATIVE CREDIT BANK,
LTD., AT PUTHUR HIGH ROAD, TRICHINOPOLY, REPRESENTED
BY ITS SECRETARY, V. KRISHNASWAMI PILLAI, AND
FIVE OTHERS (PLAINTIFF AND DEFENDANTS
1, 3 AND 5 TO 7), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 52—Maintenance action—Applicability of doctrine of lis pendens to—Decree in suit—Applicability of doctrine after—Hindu widow's suit for maintenance—Charge claimed by her on all properties of family—Applicability of doctrine, if affected by fact of.

The doctrine of *lis pendens* applies to maintenance actions.

The fact that in a maintenance action the widow claims a charge on all the properties of the family does not affect the applicability of the doctrine of *lis pendens* provided the properties are sufficiently designated so as to make them directly and specifically the subject-matter of the litigation.

Rattamma v. Seshachalam Sarma, (1926) 52 M.L.J. 520, considered.

In a maintenance suit the decree does not terminate the litigation but the *lis* continues even after the decree and a mortgage of the property, the subject-matter of the suit, executed by the judgment-debtor after the decree in the suit is affected by *lis pendens*.

Ramasami Aiyangar v. Govinda Iyer, (1916) 31 M.L.J. 839, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 265 of 1928 (Appeal Suit No. 92 of 1928 on the file of the District Court, Trichinopoly)

* Second Appeal No. 680 of 1929.

RAMASAMI
PILLAI
v.
TRICHINOPOLY
CO-OPERATIVE
CREDIT BANK,
LTD.

preferred against the decree of the Court of the District Munsif of Trichinopoly in Original Suit No. 20 of 1926.

T. V. Muthukrishna Ayyar and N. Muthuswami Ayyar for appellant.

K. Rajah Ayyar for first respondent.

Other respondents were unrepresented.

Cur. adv. vult.

VENKATASUBBA RAO J.—The question we have to decide is whether the suit mortgage is affected by the doctrine of *lis pendens*. In 1912 a suit for maintenance was instituted against the first defendant by a widow of his family. In 1914 a decree was passed in that suit; in 1921 the suit mortgage was executed by the first defendant in favour of the plaintiff; in pursuance of an execution petition filed by the widow on 28th August 1925, the property in question was brought to sale and on 9th December, it was purchased in Court auction by the fourth defendant, to whom in due course a sale certificate was issued in February 1926. The present suit to enforce the mortgage was filed on 22nd December 1925.

The lower Courts have repelled the charges of fraud and collusion both in regard to the mortgage in favour of the plaintiff and the sale to the fourth defendant in the Court auction. The first question that then arises is, was there in the suit, within the meaning of section 52 of the Transfer of Property Act, a right to immovable property directly and specifically in question? That the doctrine of *lis pendens* applies to maintenance actions can on the authorities admit of no doubt. The discussion therefore mainly turned on the

question whether the widow claimed in the suit that her maintenance should be made a charge on any specific immovable properties. Although the plaint in the maintenance action has not been filed, it is perfectly clear from the written statement and the decree to which our attention has been drawn that the widow specifically mentioned the properties and claimed a charge over them. Mr. Rajah Ayyar's contention that the rule of *lis pendens* does not apply, as the charge was claimed on all the properties of the family, is entirely without force. True, if the properties are not specified or if they are enumerated merely for enabling the Court to fix the quantum of maintenance, in either case the doctrine will have no application, but if the property is sufficiently designated so as to make it directly and specifically the subject-matter of the litigation, the fact that the charge is claimed over all the properties of the family can make no difference. If in *Rattamma v. Seshachalam Sarma*(1) decided by DEVADOSS J., on which Mr. Rajah Ayyar relies, is implied a different rule, we must with all respect dissent from it. The contention therefore that the property mortgaged to the plaintiff was not directly and specifically involved in the suit must be overruled.

The next question that arises is, whether in a maintenance suit the decree terminates the litigation or the *lis* must be deemed to continue even after the decree. In *Bhoje Mahadev Parab v. Gangabai*(2), on which the plaintiff's Counsel relies, the facts are these. In 1902 the first defendant obtained a maintenance decree, which

RAMASAMI
PILLAI
v.
TRICHINOPOLY
CO-OPERATIVE
CREDIT BANK,
LTD.
VENKATASUBBA
RAO J.

(1) (1926) 52 M.L.J. 520.

(2) (1913) I.L.R. 37 Bom. 621.

RAMASAMI
PILLAI
v.
TRICHINOPOLY
CO-OPERATIVE
CREDIT BANK,
LTD.
VENKATASUBBA
RAO J.

declared a charge in her favour on the family property; in 1906 the judgment-debtors sold a portion of the property to the plaintiff; the first defendant in 1907 applied to execute the decree; in the execution proceedings one of the lands sold to the plaintiff was put to sale and purchased by the third defendant in 1910; the plaintiff sued for a declaration that the sale to him was not affected by the subsequent execution sale. It was held that the doctrine of *lis pendens* had no application to the case, for the plaintiff purchased the property four years after the decree had been passed and when no execution proceeding was pending, and in such a case (in the opinion of the learned Judge) it could not be said that the purchase by the plaintiff was made during the active prosecution of a contentious suit or proceeding. This case no doubt fully supports the plaintiff, but the principle laid down in it has not been approved by our Court. In *Ramasami Aiyangar v. Govinda Iyer*(1) the question arose whether in a mortgage suit *lis pendens* ceases upon the passing of a decree. SESHAGIRI AYYAR J. observes :

"I think the sounder view is to hold that the property continues to be subjected to *lis pendens* until the actual sale is effected."

Referring to *Bhoje Mahadev Parab v. Ganga-bai*(2) just cited, the learned Judge goes on to say that he is unable to follow the reasoning in that case. BAKEWELL J. in the same case points out :

"Under the English Chancery practice an action for foreclosure or sale continues until an order absolute for foreclosure is made, or, if an order for sale is made, until the

(1) (1916) 31 M.L.J. 839. (2) (1913) I.L.R. 37 Bom. 621.

property is sold and the proceeds are paid to the parties; and the High Court of Calcutta has in effect followed this procedure, which also obtains on the Original Side of this Court under its special rules of practice."

He observes that, if the matter were *res integra*, he would be prepared to hold that a mortgage suit remains pending until the rights of parties are finally adjusted, i.e., until the sale monies are distributed or a final decree is passed under section 90 of the Transfer of Property Act; but he felt himself bound by the decision of the majority in *Mallikarjunadu Setti v. Lingamurti Pantulu*(1), which in his opinion involved the conclusion that a mortgage suit ceased to be actively prosecuted when the decree is passed. SESHAGIRI AYYAR J., however, treating the observations in that case as *obiter*, held, as already stated, that the *lis* continues even after the decree. As regards the actual decision in the case, both the learned Judges agreed that the lease executed by the mortgagor before the sale was inoperative. We are of the opinion that the correct principle is that formulated by SESHAGIRI AYYAR and BAKEWELL JJ. in this case and that the Full Bench decision cannot be regarded as an authority in the contrary sense. In two recent cases, *Abdul Muhammad Rowther v. Seethalakshmi Ammal*(2) and *Aravamudhu Ayyangar v. Zamindarini Srimath Abiramavalli Ayah*(3), the view of SESHAGIRI AYYAR J. has been adopted. One of the sections of the Transfer of Property Act amended by the Amending Act of 1929 is section 52 and the Legislature has refused to give effect to the Bombay view, for the explanation that has newly been

RAMASAMI
PILLAI
v.
TRICHINOPOLY
CO-OPERATIVE
CREDIT BANK,
LTD.
VENKATASUBBA
RAO J.

(1) (1902) I.L.R. 25 Mad. 244 (F.B.). (2) (1930) 33 L.W. 109.
(3) (1933) 66 M.L.J. 566.

RAMASAMI
PILLAI
v.
TRICHINOPOLY
CO-OPERATIVE
CREDIT BANK,
LTD.
VENKATASUBBA
RAO J.

added provides that the suit shall be deemed to continue until complete satisfaction of the decree has been obtained or has become unobtainable by reason of the expiration of any period prescribed by the law of limitation. We must therefore hold, disagreeing with the lower Court, that the *lis* continued after the decree and that the mortgage in favour of the plaintiff is affected by *lis pendens*.

We may here mention that the arrears of maintenance due to the widow at the time of the execution sale amounted to Rs. 253 odd. The fourth defendant purchased the property for Rs. 200 subject to the charge for subsequent maintenance payable to the widow. The plaintiff offers to redeem the property by paying to the fourth defendant the amount of the paramount charge which he recognises, namely, Rs. 253 odd, and says that after redemption, he will similarly hold the property subject to the charge in respect of future maintenance. The position is shortly this: the fourth defendant represents the prior charge-holder and the plaintiff is the subsequent encumbrancer. The latter would ordinarily be entitled to redeem the prior charge, but the result of our holding that his mortgage is affected by *lis pendens* is that he is deprived of that right.

The other contentions raised by Mr. Rajah Ayyar do not require serious notice.

In the result, the second appeal is allowed and the suit as against the fourth defendant is dismissed; the plaintiff will have no relief as against the suit property. We direct each party to bear his costs throughout.

A.S.V.

APPELLATE CIVIL.

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

K. KANNIAPPA MUDALIAR (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
THROUGH THE COLLECTOR OF MADURA DISTRICT (DEFENDANT),
RESPONDENT.*

1935,
March 27.

Madras Irrigation Cess Act (VII of 1865) as amended by amending Act (V of 1900), sec. 1, proviso 2—Ryotwari holder—Involuntary user of water by—Liability for water-cess in respect of—Amendment of Act in 1900—Effect of—Sec. 1, clause (a)—“Supplied”—Meaning of.

The plaintiffs were ryotwari holders of lands registered wet, the source of irrigation assigned by the Government being a shuttered sluice in a channel in the Periyar system. The shutter of the sluice intended to allow two and a half inches of water to pass was found to have been forced open, with the result that water two feet deep passed into the distributory channel irrigating the plaintiffs' lands and flowed on to those lands for about twenty hours. The plaintiffs were in no way responsible for the occurrence in question, the shutter having been forced open, if by human agency, by some persons unknown. The irrigation with the excess water was beneficial to the plaintiff lands.

Held that water from a source different from, or in addition to, that which had been assigned by the revenue authorities as the source of irrigation of the plaintiff lands had been enjoyed, but that, as the plaintiffs had not “used” the water, they were not liable for water-cess under the Madras Irrigation Cess Act (VII of 1865) as amended by the Act of 1900.

Under proviso 2 to section 1 of the Act which relates to ryotwari holders, no cess can be levied unless the land be irrigated by “using” the water without due authority. The employing of the word “use” negatives the idea that the user here intended may be involuntary. The result therefore is that, except in the case of voluntary enjoyment, the ryotwari

* Second Appeals Nos. 518 and 519 of 1930.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

holders coming within proviso 2 are not liable for water-cess under the Act.

The effect of the amendment in 1900 is that clause (a) of section 1 of the Act refers to voluntary enjoyment alone and that under clause (b) of that section in certain cases of involuntary enjoyment the tax may be imposed, provided the irrigation is beneficial to the crops. Where a ryot enjoys the water voluntarily, nothing further need be shown and his liability directly arises under clause (a); but where the enjoyment is involuntary, he can be made liable provided the conditions in clause (b) are satisfied, the chief condition being that the irrigation has proved beneficial. This statement is subject to the reservation that even under clause (b) which refers to the flow into a reservoir, the second part contemplates voluntary user; but in the main what distinguishes clause (b) is the involuntary nature of the enjoyment.

The view of AYLING J. in *Krishna Rao v. The Collector of Kistna*, (1914) 26 M.L.J. 210, and of SADASIYA AYYAR J. in *Secretary of State for India v. Janakiramayya*, (1915) 29 M.L.J. 389, 420, that every provision of the Act applies to both voluntary and involuntary user alike, dissented from.

The word "supplied" in section 1, clause (a), of the Act necessarily connotes that the water was intentionally provided and makes the provision inapplicable when the water flows of its own accord.

APPEALS against the decrees of the District Court of Madura in Appeal Suits Nos. 307 of 1928 and 308 of 1928 preferred against the decrees of the Court of the District Munsif of Tirumangalam in Original Suits Nos. 41 of 1927 and 580 of 1926 respectively.

The above second appeals came on for hearing before VENKATASUBBA RAO J. when his Lordship made the following

ORDER OF REFERENCE TO A BENCH.

These appeals raise a question of difficulty and importance. The suits, out of which they arise, were brought to recover penal water-rate alleged to have been illegally collected from the plaintiffs, in respect of certain ryotwari lands belonging to

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

them. The trial Court gave the plaintiffs a decree, but its decision has been reversed by the learned District Judge.

The plaintiffs' lands are registered wet lands, the source of irrigation assigned by the Government being a shuttered sluice in a channel in the Periyar system. On 3rd July 1925 a lascar of the P.W.D. discovered that the shutter of the sluice intended to allow two and a half inches of water to pass had been forced open, with the result that water two feet deep was passing into the distributory channel feeding the plaintiffs' lands. It was found that the lock of the shutter had been removed, as also the cross-bar. The plaint lands were then partly under seedlings and partly ploughed. The next morning at about 11 a.m. the shutter was replaced. The plea of the Government is that there having been irregular irrigation the penal water-rate was rightly imposed.

First, the view taken by the lower Courts, in regard to there having been a different or an additional source of irrigation, seems perfectly correct. The assigned source is the shuttered sluice and there can be no doubt that the sluice forced open is different from the sluice fitted with a shutter. I therefore agree that water from a source different from, or in addition to, that which has been assigned, has been enjoyed.

Both the Courts below have concurrently found (i) that there is no evidence to fix the responsibility for forcing open the shutter either on the plaintiffs or anyone else and (ii) that the irrigation with the excess water was beneficial to the plaint lands. On these facts the question arises, are the plaintiffs liable to pay penal water-rate?

In the lower Courts (though not here) the Government contended that the facts of the case bring it within section 1 (a) of the Madras Irrigation Cess Act. That applies "when- ever water is supplied or used for purposes of irrigation". There is no question of supply in the present case; the point to decide is, was water "used" for purposes of irrigation? In *Venkatappayya v. The Collector of Kistna*(1) it was held by a Bench of this Court that the use contemplated is a voluntary use, as the term presupposes a freedom either to take or to refuse the water. This case was followed by another Bench in *Krishnayya v. Secretary of State for India*(2), where it was

(1) (1889) I.L.R. 12 Mad. 407.

(2) (1895) I.L.R. 19 Mad. 24.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

pointed out that where a person has no choice in the matter, he cannot be said to have *used* the water within the meaning of the Act; in other words, the option either to take or to refuse the water is necessarily involved in the word "use". According to these two decisions, it would be wrong to penalise a person when there has been augmentation of water even against his own wish. It was subsequent to these rulings that clause 1 (b) was newly inserted by the Amending Act of 1900. That clause was presumably intended to abolish the distinction in certain cases between voluntary and involuntary enjoyment of the water. The question is, has that distinction been done away with only in a limited class of cases or altogether and for all purposes? For the Government it is contended that, on a proper construction, even clause (a) applies as much to involuntary as to voluntary enjoyment. I must confess to some difficulty in accepting this argument. If no distinction was intended to be maintained between voluntary and involuntary enjoyment, why was clause (a) retained at all? That some difference was intended between clause (a) and clause (b) cannot be gainsaid. Under the latter clause, that the irrigation has been beneficial is a necessary ingredient; under the former it is not. If involuntary enjoyment is what both the clauses refer to, can the Government, at its pleasure, rely upon either clause (a) or clause (b) irrespective of the question of benefit? Had the intention been to wipe out the distinction between voluntary and involuntary enjoyment, the proper and natural course would have been to remove clause (a) altogether when the amendment of 1900 was made. That clause having been retained, it may be assumed, as was pointed out in *Secretary of State for India v. Swami Narayana* (1), that the same interpretation must be placed upon the word "used" in clause (a) even subsequent to the amendment, as was done previously. The amendment of 1900 was the result of the two decisions in *Venkatappayya v. The Collector of Kistna* (2) and *Krishnayya v. Secretary of State for India* (3), and yet clause (a) in its original form was retained. From this, as SANKARAN NAIR J. points out, it may be fairly inferred that the judicial interpretation of the term received legislative sanction; see *Secretary of State for India v.*

(1) (1910) I.L.R. 34 Mad. 21. (2) (1889) I.L.R. 12 Mad. 407.
(3) (1895) I.L.R. 19 Mad. 24.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

Janakiramayya (1). What is more, the second proviso to the first section was also newly inserted by the Amending Act. The words there occurring are: "Unless the same be irrigated by using without due authority". It seems right to hold that the identical word occurring in both the proviso and the substantive part must receive the same meaning. If that be so, the proviso strengthens the conclusion that what is contemplated is the voluntary obtaining of the water. If the matter has rested there, I should without much difficulty hold that the act being voluntary is a necessary ingredient under clause (a).

Clause (b) seems, in my opinion, restricted to a limited class of cases. The words "river, stream, channel, tank or work" are qualified by the phrase "from or through adjoining land". In construing the clause, the qualifying words must not be ignored and they have the effect, in my opinion, of limiting the scope of the provision. But then a difficulty arises. In the second part of the clause referring to a reservoir, the word "used" again occurs. Does this mean that, under the first part, which refers to adjacent land, the enjoyment may be involuntary, but that the second part, which deals with a reservoir, requires that there should be a voluntary enjoyment? Is an intention to make this distinction to be imputed to the Legislature? There is yet a further difficulty. At least the first part of clause (b) must, as I have shown, refer to involuntary enjoyment. The second proviso referring to ryotwari holders applies alike to clauses (a) and (b); but that proviso, as already stated, is restricted, if properly construed, to voluntary enjoyment. The result is that the second proviso contradicts the first part of the substantive clause 1 (b); in other words, the provision that the enjoyment may be involuntary in certain cases becomes nullified by the proviso.

The section is thus badly worded. The matter becomes more obscure by reason of the conflict in judicial decisions which, incidentally I may observe, have not adverted to these difficulties. To the cases already mentioned, may be added *Secretary of State for India v. Janakiramayya* (1), *Krishna Row v. The Collector of Kistna* (2) and *Kanakamma v. The Secretary of State for India* (3). In the second of these three cases it is worthy of remark that it is assumed that every part of the Act applies to involuntary enjoyment also.

(1) (1913) I.L.R. 37 Mad. 322, 343. (2) (1914) 26 M.L.J. 210.
(3) (1927) 54 M.L.J. 230.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

Ordinarily, if the case was to be referred to a Bench of two Judges, I should have myself made the order, but they would in their turn in all probability refer the question to a Full Bench. The orders of the learned Chief Justice may therefore be obtained as regards the posting of this case. If it goes before a Full Bench, the questions to be referred will be :

(i) Does section 1 (a) apply both to voluntary and involuntary enjoyment?

(ii) If to voluntary enjoyment alone, were the plaintiffs liable to pay penal water-rate?

In this case, the finding is that the plaintiffs did nothing beyond keeping the usual vents in their ridges open. The closing of those vents would have had the effect of depriving the plaintiffs of even their legitimate supply of water. The distinction made by the learned District Judge between (i) flow which is easily preventible and (ii) flow that cannot be prevented without unreasonable expenditure seems equitable enough, but is it warranted either by the section or the authorities? The Legislature may bear such distinction in mind when enacting a new provision, but the duty of the Courts is to interpret the provision as it stands.

The second appeals came on for hearing in pursuance of the above order of reference before the Bench constituted as above.

S. R. Muthuswami Ayyar for appellant.

Government Pleader (P. Venkataramana Rao) for respondent.

Cur. adv. vult.

VENKATASUBBA
RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—The plaintiffs are ryotwari holders of lands registered wet, the source of irrigation assigned by the Government being a shuttered sluice in a channel in the Periyar system. On 3rd July 1925 a lascar of the P.W.D. discovered that the shutter of the sluice intended to allow two and a half inches of water to pass had been forced open, with the result that

water two feet deep was passing into the distributory channel irrigating the plaintiffs' lands. It was found that the lock of the shutter had been removed, as also the cross-bar. The plaintiff lands were then partly under seedlings and partly ploughed. The next morning at about 11 a.m. the shutter was put back in place, the water having by then irregularly flowed on to the plaintiffs' lands for about twenty hours. The Government, on the ground that there was unauthorised irrigation, collected water-rate from the plaintiffs under the provisions of the Madras Irrigation Cess Act (VII of 1865). The plaintiffs brought the suits, out of which the present appeals arise, claiming a refund of the water-rate, which according to them was illegally collected.

The first question that arises is, did the water flow from a source which is different from, or in addition to, that which has been assigned by the revenue authorities as the source of irrigation of the lands in question? (Section 1, proviso 2). The lower Courts have answered this question in the affirmative and in our opinion rightly. The source assigned to the plaintiffs' lands was not the sluice but the shuttered sluice, and it can hardly admit of doubt that the sluice with the shutter removed is different from the sluice fitted with the shutter and regulated in a particular manner. It must therefore be held that the water that flowed was from a source different from the assigned source.

We shall presently consider the applicability of the several parts of section 1 to the facts of the case in hand; but we may at once mention that clause (b) requires, as a condition precedent to the levy of the cess, that the irrigation is, in the

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
VENKATASUBBA
RAO J.

114 THE INDIAN LAW REPORTS [VOL. LIX

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
—
VENKATASUBBA
RAO J.

opinion of the revenue authorities, beneficial to and sufficient for the requirements of the crop. The lower Courts' view that such an opinion must be deemed to have been expressed has not been assailed and must be accepted as correct. Another fact which needs mention is that the lower Courts have concurrently found that for the occurrence in question the plaintiffs are in no way responsible, the shutter having been forced open, if by human agency, by some persons unknown. On these facts the question arises, was the water-cess legally levied from the plaintiffs?

For the Government it is first contended that the facts of the case bring it within section 1 (a) of the Irrigation Cess Act. That applies "whenever water is supplied or used for the purpose of irrigation". It has not been suggested that any question of the water having been "supplied" arises in the present case. When the providing of the water was not intentional on the part of the Government, to refer to the water as having been "supplied" would be to distort the word from its true meaning. In *Venkatappayya v. The Collector of Kistna*(1) it was held by a Bench of this Court that the expression "supply" implies in its ordinary sense a previous request expressed or implied. Apart from that, as we have said, the word "supplied" necessarily connotes that the water was intentionally provided and makes the provision inapplicable when the water flows of its own accord. Then the question arises, on the facts of the case, can it be said that the water was "used"? In the same case, it was held that the use contemplated by the Act is a voluntary one and that it presupposes a freedom

either to take or refuse the water. This view was affirmed by another Bench in *Krishnayya v. Secretary of State for India*(1) where it was clearly pointed out that, where a person has no choice in the matter, he cannot be said to have "used" the water within the meaning of the Act. According to these two decisions, it would be wrong to penalise a person when there has been augmentation of water even against his own wish. Subsequent to these rulings, the Legislature has by amending the Act in 1900 introduced very important changes. To appreciate the true effect of the amendment, the changes not only in the wording but in the structure of the Act should be carefully noticed. The present section 1 (a) corresponds roughly to section 1 of the Act prior to the amendment and what appears now as the first proviso corresponds to the old section 4. The point to note is that in the old sections 1 and 4 the words that occurred were "supplied" and "used". Those words, as interpreted by the two decisions above cited, had reference to voluntary and not to involuntary user. The word "supply" under those decisions implied a previous request and the word "use" presupposed a freedom to refuse. The Legislature, while re-enacting the provisions in an amended form, has retained the two words "supplied" and "used", and it may be presumed that it has been so done with the object of adopting the legal interpretation put upon those words by the Courts; Maxwell on the Interpretation of Statutes, (1929) 7th edn., page 265.

"There is a well-known principle of construction that where the Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
—
VENKATASUBBA
RAO J.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
—
VENKATASUBBA
RAO J.

interpreted'; that is to say, unless the contrary intention appears." Statute Law by Craies, (1923) 3rd edn., page 153.

The Legislature would have made its meaning clear by the use of apt words had it intended to depart from the construction placed by the Courts on the words in question; on the contrary, as SANKARAN NAIR J. points out in *Secretary of State for India v. Janakiramayya*(1), from the retaining of clause (a) in its original form (so far as this matter is concerned), it may be fairly inferred that the judicial interpretation of the terms "supplied" and "used" received legislative sanction. See also an observation to the same effect in *Secretary of State for India v. Swami Naratheeswarar*(2). While, however, the Legislature gave effect to the view judicially expressed that in cases falling within clause (a) the liability arose from voluntary enjoyment alone, it provided by enacting a new provision in clause (b) that even in respect of involuntary enjoyment, if certain conditions were satisfied, water-cess was leviable. Clause (b) consists of two parts: (i) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation, or (ii) flows into a reservoir and is thereafter used for irrigating any land under cultivation. The word "used" has been carefully omitted from the first part and the expression "irrigates any land" in that part stands in marked contrast with "used for irrigating any land" in the second part. The inference is irresistible that the first part deals with involuntary enjoyment, whereas the second with voluntary

(1) (1913) I.L.R. 37 Mad. 322, 343.

(2) (1910) I.L.R. 34 Mad. 21, 23.

enjoyment, although it may be mentioned that even in the second part, the preliminary process of the water flowing into the reservoir is independent of the volition of any person. In short, the effect of the amendment may be thus stated: clause (a) was retained and it refers to voluntary enjoyment alone; under clause (b) in certain cases of involuntary enjoyment the tax may be imposed, provided the irrigation is beneficial to the crops. The argument that clause (a) refers to involuntary enjoyment also is untenable. If that argument were sound, it would follow that in the case of involuntary enjoyment the Government can at its pleasure rely either upon clause (a) or clause (b) irrespective of the question of the benefit to the crops. Had the intention been to wipe out the distinction between the two kinds of enjoyment, the proper and natural course would have been to remove clause (a) altogether when the amendment of 1900 was made.

The resulting position is both clear and logical. Where a ryot enjoys the water voluntarily, nothing further need be shown and his liability directly arises under clause (a); but, where the enjoyment is involuntary, he can be made liable provided the conditions in clause (b) are satisfied, the chief condition being that the irrigation has proved beneficial; this statement is subject to the reservation, already noticed, that even under clause (b), which refers to the flow into a reservoir, the second part contemplates voluntary user; but in the main what distinguishes clause (b) is the involuntary nature of the enjoyment.

The learned Government Pleader further contends that the facts of the present case bring it even within the first part of clause (b). The

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
—
VENKATASUBBA
RAO J.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

VENKATASUBBA
RAO J.

trial Judge points out that this clause does not apply as the water does not flow to the lands in question "from or through adjoining land". The question is, is the entire part qualified by that phrase or are we to leave that phrase out of account in the case of "direct flow"? The learned Government Pleader urges that "direct flow from or through adjoining land" involves a contradiction and there is a good deal to be said for that position; but we must say that grammatically the phrase "from or through adjoining land" governs and qualifies the entire part. To give effect to the learned Counsel's contention, the first part should be split up suitably in such a manner as to show that the words "direct flow" have no reference to any "adjoining land". The desired result may be achieved by adding the word "flow" after the word "direct", but unless the clause is re-cast, there will still remain some ambiguity. Next, the Government contends that even the facts here disclose the existence of an adjoining land, for the water before it reaches the lands in question is necessarily led along a small distributory channel kept up by and belonging to the ryots themselves (the plaintiffs) and the soil of that channel answers the description of "adjoining land" in the section. According to the learned Government Pleader, it was such land only that was treated as "adjoining land" in *Secretary of State for India v. Swami Naratheeswarar*(1). In regard to the contentions noted above dealing with "adjoining land" in clause (b), it is unnecessary for us to express our final opinion in the view we take of the second proviso to the section with which we shall now proceed to deal.

(1) (1910) I.L.R. 34 Mad. 21, 23.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.

VENKATASUBBA
RAO J.

The object of both the provisos is to lay down that, where the enjoyment can be traced to a legal right, no liability arises; as regards landholders other than those holding under ryotwari settlements, such as zamindars and inamdars, they are protected to the extent of their engagements with the Government and the first proviso deals with exemption from cess in the case of such landholders. As regards holders under ryotwari settlements, it would obviously be wrong to tax them for their enjoyment of water from an authorized source, i.e., a source specially assigned and the second proviso is intended to protect their rights to that extent; but the point to note is that under this proviso, which relates to ryotwari holders, it is specially enacted that no cess shall be leviable, unless the land be irrigated by "using" the water without due authority. The employing of the word "use" negatives the idea that the user here intended may be involuntary.

"It is a sound rule of construction",
said CLEASBY B. in *Courtauld v. Legh*(1),

"to give the same meaning to the same words occurring in different parts of an Act of Parliament"
(cited at page 153 of Craies on Statute Law already referred to). This rule is by no means inflexible and, if special reasons exist, may be departed from; but

"unquestionably the interpreter is bound in general to disclaim the right to assign different meanings to the same words on the ground of a supposed general intention of the Legislature."

Per Lord DENMAN in *The Queen v. Poor Law Commissioners, In re Holborn Union*(2) cited in Maxwell on the Interpretation of Statutes, 7th edn., page 273. Further, how can there be user

(1) (1869) L.R. 4 Ex. 126, 130.

(2) (1838) 6 A. & E. 56, 68; 112 E.R. 21.

KANNIAPPA
MUDALIAR
v.
SECRETARY OF
STATE FOR
INDIA.
—
VENKATASUBBA
RAO J.

“without due authority” unless the user is voluntary? This, in our opinion, clinches the question. The result is that, except in the case of voluntary enjoyment, the ryotwari holders coming within proviso 2 are not liable for water-cess under the Act.

Before concluding, we must point out that the judgment of AYLING J. in *Krishna Row v. The Collector of Kistna*(1), on which the learned Government Pleader relies, does not really help him much. In the first place, that case was concerned with zamindari lands and not with ryotwari holdings. Secondly, the decision proceeded upon an admission wrongly made that the Act draws no distinction between involuntary and voluntary user and thirdly, that admission having been made in regard to the Act itself, the only question that AYLING J. considers is as regards the meaning of the word “taken” in the rules, as distinguished from the Act. We must respectfully dissent from the view, if this is what is involved in AYLING J.’s judgment, that every provision of the Act applies to both voluntary and involuntary user alike. Our attention has also been called to the following observation of SADASIVA AYYAR J.,

“The amendment of 1900 fully established the rights of the Government to levy assessment in respect of water even involuntarily supplied to such ryotwari lands” in *The Secretary of State for India v. Janakiramayya*(2); but, for the reasons already stated, we must express our respectful dissent from it.

In the result, in each of these second appeals, the lower appellate Court’s decree is reversed and that of the first Court is restored and the suit is decreed with costs throughout.

A.S.V.

(1) (1914) 26 M.L.J. 210.

(2) (1915) 29 M.L.J. 389, 420.

APPELLATE CIVIL.

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

THOPPAI M. MUTHIAH BHAGAVATHAR AND FIVE
OTHERS (DEFENDANTS 1 TO 6), APPELLANTS,

1935,
March 1.

v.

T. V. VENKATRAMA AYYAR AND THREE OTHERS
(PLAINTIFF 2, DEFENDANT 7 AND LEGAL REPRESENTATIVES
OF FIRST PLAINTIFF), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 82—Scope and applicability of—“Contract to the contrary” in—Meaning of—Co-mortgagors—Contribution between—Co-mortgagor paying less than amount borrowed by him—Right to contribution of—Assignee from that co-mortgagor—Right of.

Section 82 of the Transfer of Property Act has solely to do with the distribution of the burden on the properties in a case where no other question as to who had the benefit of the money in the beginning or similar complication arises. The question which that section answers is what liability each item of property is subject to. But on the admitted facts of a case it may be that the owner of one item has no right to recover any amount from the owner of the other item or his only right is to recover a far smaller amount than what the proportion will give. The question how much money one man owes another must be first determined with reference to the transactions between them and after that question is decided one has next to see on which item it can be made a charge with reference to section 82. Section 82 deals with the rights of the owners *inter se* and the “contract to the contrary” referred to in that section is a contract between them, i.e., those liable to contribute, and not only a contract between the mortgagor and the mortgagee. From the fact, therefore, that, as between A and B, A receives the whole amount to the exclusion of B, arises the contract (the contract need not be express) that B shall not be liable to contribute; similarly, when each of them receives an

* Second Appeal No. 1850 of 1927.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.

equal moiety, a contract must be implied that they shall bear the burden equally.

Held, accordingly, that A, the owner of an item of property mortgaged by him along with other items belonging to B, was not entitled to claim contribution from B on the ground that one of the items belonging to B bore no share of the amount paid by A to discharge the mortgage, where it was found that the payment for which A could get credit was short of the sum repayable by him, having regard to the portion of the loan received by him; and that an assignee from A did not, in that respect, stand in a better position.

Ramabhadrachar v. Srinivasa Ayyangar, (1900) I.L.R. 24 Mad. 85, and *Jai Narain v. Rashik Behari*, A.I.R. 1931 All. 546, dissented from.

Ganeshi Lal v. Charan Singh, (1930) I.L.R. 52 All. 358 (P.C.), *Muthurakku Maniagaran v. Rakkappa*, (1913) 26 M.L.J. 66, and *Kamta Singh v. Chaturbhuj Singh*, (1929) I.L.R. 8 Pat. 585, referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Appeal Suit No. 30 of 1926 (Appeal Suit No. 784 of 1925 on the file of the District Court of Madura) preferred against the decree of the Court of the District Munsif of Madura Town in Original Suit No. 323 of 1922.

The second appeal came on for hearing before JACKSON J. when his Lordship made the following

ORDER.

Following *Mardan Singh v. Thakur Sheo Dayal*(1) the date for fixing the value is the date of the mortgage.

If the appellant has contributed towards paying off the mortgage on his own behalf with no intention of gratuitously relieving the other mortgagors or owners of the other mortgaged items, he is entitled to compensation under section 70 of the Contract Act. It would be a curious state of the law if, when

(1) (1905) I.L.R. 27 All. 549.

a man clears his holding of an encumbrance, it is to be held that he must also be clearing the holdings of others, and to that extent his clearance of his own holding is diminished. That is not what "contract to the contrary" in the old section 82, Transfer of Property Act, means.

If three properties of equal value are security for a mortgage, they are rateably liable $\frac{1}{3}$, $\frac{1}{3}$, $\frac{1}{3}$; but the mortgagor and mortgagee may contract if they like that the proportions run $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{4}$.

There must be a fresh finding by the District Munsif on these issues :—

(i) Whether the amounts alleged to be paid by defendants 1 to 5 towards the mortgage debt are true and if so can they be taken into account in ascertaining the respective shares of those liable under the mortgage.

(ii) Whether the whole mortgage account should be debited to defendants 1 to 5, as they are the only persons who benefited under the contract.

Fresh evidence is allowed.

Time for submission of finding is two months. Ten days are allowed for objections.

In pursuance of the above order the District Munsif of Madura Town submitted the following findings :—

Issue (i)—The first defendant representing defendants 1 to 5 who form members of a joint family has paid Rs. 500 on 19th May 1910 towards the first bond, dated 27th January 1910 and evidenced by Exhibit I, and Rs. 688 in two instalments of Rs. 588 paid on 14th September 1912 and Rs. 100 paid on 21st September 1912 towards the second bond, dated 7th August 1910 and evidenced by Exhibit IV, and defendants 1 to 5 are entitled to have these amounts taken into account in ascertaining the respective shares of those liable under the two mortgages.

Issue (ii)—There is no justification for debiting the whole mortgage account against the defendants 1 to 5 as they are not the only persons who benefited under the contract.

The second appeal came on for final hearing after the receipt of the findings, and his Lordship, JACKSON J., directed the case to be posted before a

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.

Bench. The second appeal was accordingly posted before the Bench constituted as above.

C. S. Venkatachari, D. Ramaswami Ayyangar, A. Nagaswami Ayyar and P. N. Appuswami Ayyar for appellants.

T. S. Venkatesa Ayyar and K. R. Venkatarama Sarma for respondents.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—This second appeal originally came on before our brother JACKSON J. After hearing the appeal, he called for a finding. After the finding was returned, he directed the case to be posted before a Bench. Accordingly it comes before us for disposal.

The main facts are not now in dispute. On 27th January 1910 the suit properties, of which items 1 to 3 belonged to defendants 1 to 5, and item 4 belonged to one Sundararaja Bhagavathar, were mortgaged for Rs. 2,500. Of this sum, Sundararaja took Rs. 816-7-0 and the defendants drew the rest, viz., Rs. 1,683-9-0. On 19th May 1910 the defendants and Sundararaja each paid Rs. 500 towards the mortgage. On 7th August 1910 there was another mortgage of the same properties by the same mortgagors in favour of the same mortgagee for Rs. 600. This amount was taken by the mortgagors in equal halves. The first defendant paid Rs. 588 on 14th September 1912 and Rs. 100 on 21st September 1912 towards the mortgages. The mortgagee filed a suit (Original Suit No. 119 of 1916) on the two mortgages and obtained a decree. Item 3 consisted of an othi right in favour of the mortgagors. The original owners of the property chose to

redeem that othi. The amount due on the othi at that time was Rs. 680 and this was paid on 9th June 1917 and the third item was redeemed. This payment must also be regarded as a payment by the defendants in partial discharge of their debt due to the mortgagee. In execution of the mortgagee's decree, item 4 was first brought to sale on 28th April 1919 and fetched Rs. 1,270. This amount goes in reduction of Sundararaja's share of the debt because item 4 belonged to him. Here it may be mentioned that item 4 had been sold by Sundararaja to the second plaintiff by a sale deed Exhibit A, dated 24th April 1916, and the second plaintiff deposited a sum of Rs. 1,372-9-0 for setting aside the sale of item 4 and got it cancelled. On 1st August 1919 item 1 was sold for Rs. 2,035 and the mortgage debt was completely discharged. Afterwards the second plaintiff sold item 4 to the first plaintiff. On the ground that, taking the values of the various items mortgaged, item 4 is liable to contribute much less than the amount actually realized from Sundararaja, the present suit was filed to recover a sum of Rs. 548-5-6 made up of Rs. 423-5-4, the excess of the proportionate share for which item 4 should be liable, and interest at one per cent per mensem from the date of the deposit. The District Munsif gave a decree for Rs. 482-10-5. In estimating the value of the various items of properties, he fixed 9th June 1917 as the date on which the valuation should be made for fixing the amount of contribution. There was an appeal by the defendants but it was dismissed by the Principal Subordinate Judge of Madura. Hence this second appeal.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.
RAMESAM J.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
RAMESAM J.

When the case originally came on before our brother JACKSON J., he held that the date of the mortgage should be regarded as the date for fixing the proportions to which the various items are liable. As there was then some dispute as to which of the defendants made the payments already mentioned, the learned Judge called for a finding on this matter. He also called for a finding on another issue which runs thus :

"Whether the whole mortgage account should be debited to defendants 1 to 5 as they are the only persons who benefited under the contract."

On the first issue so remitted a finding has been submitted the effect of which has already been stated by me. On the second issue the District Munsif found that it is not true to say that defendants 1 to 5 took the whole benefit of the mortgage money. It must then have been suggested before him by the plaintiffs that there was an agreement between the defendants and Sundararaja on 12th April 1912 according to which the defendants undertook to pay the whole debt remaining due under the mortgage bonds, and an agreement Exhibit H was produced. At the first trial before the District Munsif when the plaintiff's Vakil attempted to adduce evidence on this matter, it was objected that such a case was not raised in the pleadings and at the original trial further evidence relating to this matter was excluded. But when the finding was called for, the plaintiffs seem to have again relied on Exhibit H and evidence was taken. The defendants' case in reply to Exhibit H was that originally there was an arrangement according to which the parties were jointly trading in rubies and the whole balance of the stock-in-trade was to be taken by

the defendants and also Sundararaja was to pay them Rs. 400 and in consideration of this the defendants undertook to pay the remaining debt due on the mortgages. But Sundararaja never performed his part of the contract, i.e., he never paid any amount and the stock-in-trade was not taken by the defendants. These facts are now found by the District Munsif as pleaded by the defendants. The District Munsif practically found that Exhibit H was never acted upon. Apparently this is the reason why Exhibit H was not referred to or relied on in the plaint. The plaint proceeded solely on the ground that, with reference to the value of the various items, item 4 was liable only to a particular amount whereas more was realized from the owner of that item. It may be observed that the question relating to Exhibit H does not strictly fall within the second issue as drafted by our learned brother JACKSON J. When the finding was returned, JACKSON J. observed that the facts were clear but that the law presented some difficulty. The appellants relied upon *Muthurakku Maniagan v. Rakkappa*(1). The correctness of this decision was doubted in *Kunchithapatham Pillai v. Palamalai Pillai*(2) relied on by the respondents. Referring to these two decisions the learned Judge referred the matter to a Bench.

In my opinion the decision in *Muthurakku Maniagan v. Rakkappa*(1) is not correct and it has been rightly dissented from in *Kunchithapatham Pillai v. Palamalai Pillai*(2). It is inconsistent with the decision of the Privy Council in *Ganeshi Lal v. Charan Singh*(3). But

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
RAMESAM J.

(1) (1913) 26 M.L.J. 66.

(2) (1916) 32 M.L.J. 347.

(3) (1930) I.L.R. 52 All. 358 (P.C.).

128 THE INDIAN LAW REPORTS [VOL. LIX

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.

RAMESAM J.

in my opinion these cases have no bearing on the matter before us.

Both in the lower Courts and before JACKSON J. the case seems to have proceeded solely with reference to section 82 of the Transfer of Property Act, but in my opinion the matter in dispute between the parties cannot be disposed of solely with reference to that section. Where several properties are mortgaged under a mortgage and afterwards the properties happen to be owned by different persons, the question naturally arises how much share of the debt should be borne by each item which is the same thing as saying how much portion of the debt should be borne by the owner of each item. In such a plain case there is no difference between the liability of an item of property and the liability of the person owning the item of property and the decision of the case will naturally turn upon the application of section 82. But this does not mean that there may not be other facts which have got to be considered in deciding the question whether one person has any right to recover any amount from another person. If it is found that he is entitled to recover some amount from the owners of the other items, the question will next arise on what item or items of property such amount should be charged. The latter question has to be decided with reference to section 82 of the Transfer of Property Act but it does not follow that the former question has anything to do with that section. Let us take a simple case in illustration of the above statement. Suppose two persons A and B mortgage their respective properties together and raise a loan of Rs. 1,000. B's property

is worth three times A's property. The whole loan was taken by A. Afterwards the mortgagee sells B's property and recovers the mortgage amount. Can it be said that B is entitled to recover only Rs. 250 from A? If we apply section 82 only, B's property would be liable for three-fourths and A's property would be liable for one-fourth of the debt. But the whole debt was recovered from B's property. So, on the principle of that section, B is entitled to recover only the other one-fourth from A and cannot recover any further amount. Surely this cannot be the law. The truth of the matter is this. Section 82 has solely to do with the distribution of the burden on the properties in a case where no other question as to who had the benefit of the money in the beginning or similar complication arises. It is easy to give an example of such a case. Suppose a joint family consisting of A and B borrowed Rs. 1,000 on a mortgage of two items and spent the money for the family expenses. Afterwards the family becomes separate and A becomes the owner of one item and B becomes the owner of another item, the value of the items being in the ratio of 3 to 1. If they make no specific contract to the contrary, section 82 says that B's item must be liable for three-fourths of the debt and A's for one-fourth of the debt, and if more is recovered from one person he will have the right to contribution. Such a case illustrates the application of section 82 not complicated by any other consideration. In other words, that section has solely to do with the distribution of the burden on the items. The question which that section answers is what liability each item is subject to.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.
RAMESAM J.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
RAMESAM J.

But, on the admitted facts of a case, it may be that the owner of one item has no right to recover any amount from the owner of the other item or his only right is to recover a far smaller amount than what the proportion will give. The question how much money one man owes another must be first determined with reference to the transactions between them and after that question is decided one has next to see on which item it can be made a charge with reference to section 82. For instance, in the first illustration given above, suppose B had paid the whole amount, B is certainly entitled to recover the whole money from A because in the beginning he had not the benefit of any part of the amount borrowed; but, if he asks that this amount should be charged, he can have a charge only for one-fourth of the amount on A's property because from the beginning A's property was charged only for one-fourth of the debt. The fact that by reason of section 82 A's property was subject only to one-fourth of the debt does not disentitle the plaintiff from recovering the whole amount but it only disentitles him to claim a charge on A's property for a sum in excess of one-fourth of the amount. What is stated above is not inconsistent with the decision in *Ganeshi Lal v. Charan Singh*(1). What was sought to be done by the plaintiff on the equities of that case was to get the benefit of a contract to which he was not a party and the benefit of which was not assigned to him. Similarly, in *Muthurakku Maniagaran v. Rakkappa*(2) it cannot be said that the plaintiff stood in the shoes of the mortgagor so as to get the benefit of the contract

(1) (1930) I.L.R. 52 All. 358 (P.C.).

(2) (1913) 26 M.L.J. 66.

made with him when the contract was made after his own purchase. But, in the case before us, we have nothing to do with the question whether one person can get the benefit of a contract between other persons to which he is not a party. The first question before us is whether the plaintiffs are entitled to recover any amount from the defendants. Bearing the above principles in mind, we find on a calculation that the plaintiffs have paid less than the amount originally drawn by Sundararaja and they are not entitled to recover any amount from the defendants. It is immaterial for us to consider whether the defendants have paid more than the amount due by them. As a matter of fact they defended the mortgagee's suit in which Sundararaja did not appear and incurred costs. Therefore they had to pay the costs and, even if they had paid more than their share, the point is immaterial for they are not now suing. The only question before us is whether the plaintiffs are entitled to recover any amount and, on an examination of the accounts, which it is unnecessary to set forth in the judgment as it is merely a matter of arithmetic, I find that the plaintiffs are not entitled to recover any amount.

The learned Advocate for the respondents drew our attention to a decision in *Jai Narain v. Rashik Behari*(1). That decision is a decision of a single Judge. I am unable to agree with that decision as it solely proceeds on section 82 without considering the question and ignoring the question raised in that case as to who had the benefit of the amount borrowed. Section 82 is not an

(1) A.I.R. 1931 All. 546.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
RAMESAM J.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.

RAMESAM J.

authority on the latter question and does not preclude the Court from enquiring into the latter question. Only after the latter question is decided and the amount due from one party to the other is ascertained, we have to resort to section 82, and in its application it is true that only contracts between the mortgagors to the contrary should be attended to and other contracts to which the person seeking contribution is not a party cannot be invoked. I am unable to agree with that decision.

The second appeal is allowed and the plaintiffs' suit dismissed with costs throughout. Civil Miscellaneous Petition No. 129 of 1935 is ordered.

VENKATASUBBA
RAO J.

VENKATASUBBA RAO J.—The question to be decided in this case is, whether the first plaintiff's claim to contribution under section 82 of the Transfer of Property Act can be upheld. The facts, that were admitted in the plaint and regarding which there was no dispute, are the following. Two mortgages were granted in favour of one Subbier in January 1910 and August 1910 for Rs. 2,500 and Rs. 600 respectively. The mortgages were in respect of four items of properties, of which items 1 to 3 belonged to defendants 1 to 5 and item 4 to one Sundararaja Bhagavathar. Each of the two mortgages comprised all the four items; the third item was a mortgage right possessed by the defendants. In 1916 Sundararaja Bhagavathar, the owner of item 4, sold it to the second plaintiff. As already mentioned, in the third item the defendants had only a mortgage right and the owner of that item having deposited in Court the amount due from him, that was adjusted towards the mortgage decree

obtained by Subbier. Thereafter items 1 and 4 were caused to be sold in execution of the decree and the second plaintiff, by depositing into Court the necessary amount, got the sale of the fourth item set aside. It may be mentioned that the second plaintiff has since conveyed the fourth item to the first plaintiff and the claim made in the plaint is, that the second item having borne no share of the payment made, it is liable to contribute in the ratio of its value.

The District Munsif passed a decree in favour of the first plaintiff for a certain sum, which was upheld by the Subordinate Judge. A second appeal having been filed, it came on before JACKSON J. and, on the findings now submitted by the lower Court in pursuance of an order made by him, the following further facts must be taken to have been established. Out of Rs. 2,500 raised under the first mortgage, the defendants received Rs. 1,683-9-0 and Sundararaja Bhagavathar Rs. 816-7-0, and, out of the sum of Rs. 600 obtained under the second mortgage, each of them received Rs. 300. As to the repayments, the case stands thus: the defendants paid in cash three sums aggregating to Rs. 1,188; the amount realized by the sale of item 1 was Rs. 2,035; the sum which, as already stated, the owner of the third item paid into Court, was Rs. 680. Thus, the total amount for which the defendants can claim credit is Rs. 3,903. Similarly, the amount paid in cash by Sundararaja Bhagavathar was Rs. 500 and the amount deposited by the second plaintiff for the setting aside of the sale of the fourth item was Rs. 1,270; that is to say, the aggregate amount

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.
VENKATASUBBA
RAO J.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.
—
VENKATASUBBA
RAO J.

contributed by the first plaintiff and his predecessor is Rs. 1,770. The following two tables show at a glance the proportions of the sums received and repaid :—

			RS.	A.	P.
Amount received 3,100.	re- Rs.	The defendants received ...	1,983	9	0
		The 1st plaintiff's predecessor (Sundararaja Bhagavathar) received.	1,116	7	0
Amount paid 5,673.	re- Rs.	The amount the defendants may be deemed to have contributed ...	3,903	0	0
		The amount for which the 1st plaintiff can take credit ...	1,770	0	0

In the findings submitted, no dates are mentioned showing when the repayments in cash were made ; but there seems to be no ground for doubting the correctness of the statement handed to us by Mr. D. Ramaswami Ayyangar, the defendants' learned Counsel ; at any rate, as regards the dates of the receipts of money subsequent to the decree in the mortgage suit, there can be no dispute. As the amounts paid back by the two parties in discharge of the debt were on different dates, it stands to reason that in order to equalize payments, interest should be computed from the dates they were so repaid and, on a calculation being made, it is found that the defendants paid back an amount *slightly in excess* of what was due by them, having regard to their share of the borrowing ; and it follows from this that the payments for which the first plaintiff could get credit were *slightly short* of the sum repayable, having regard likewise to the portion of the loan received by his predecessor.

In these circumstances the question arises, has the first plaintiff a valid claim to contribution ? The defendants, as shown above, have repaid more than their share ; does the rule of contribution enacted in section 82 require that they should be compelled to pay a further sum ? Let us take an example. A, the owner of property X, and B, the owner of property Y, raise Rs. 1,000 by mortgaging them. The whole amount is received by A and he himself in due course discharges the mortgage by paying Rs. 1,200 being the debt then due along with interest. Can A claim from B Rs. 600 on the ground that X and Y, having been equally worth, are liable to contribute to the debt in the ratio of value ?

Take yet another example. A is the owner of property X worth Rs. 200 ; B of Y worth Rs. 800. Both the properties are mortgaged for Rs. 500 and each of the mortgagors receives Rs. 250. The debt with interest in due course amounts to Rs. 600, of which A repays Rs. 300 and B a similar sum. Can A recover from B Rs. 180 on the ground that, although the mortgagors received equal benefit from the loan, A was liable to repay Rs. 120 only but B Rs. 480, the value of X and Y having been in the ratio of 1 to 4 ?

According to the first plaintiff, the answer in each of these cases should be in the affirmative. That this is contrary to every principle of justice is obvious ; but it is argued that it is the inevitable result of section 82. I find myself unable to accede to this contention. In the first illustration, B's position is no more than that of a surety, but it is nevertheless argued that by virtue of section 82 he is liable to contribute. There can be no

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
Ayyar.
—
VENKATASUBBA
RAO J.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
VENKATASUBBA
RAO J.

contribution, points out Dr. Rash Behary Ghose, if the encumbrance is discharged by the very person who is liable for the debt; in such a case, he merely pays his own debt as he was bound to do. (Law of Mortgages, 5th edn., Vol. I, page 400). To hold that the same result ensues under the Indian law, one need not resort to any doctrine of equity, for the right to resist the claim to contribution in such a case is expressly saved by the words "in the absence of a contract to the contrary" occurring in section 82. The section deals with the rights of the owners *inter se* and it would be proper and natural to infer that the contract referred to is a contract between them, i.e., those liable to contribute, and I must therefore dissent, with great respect, from the view expressed in *Ramabhadrachar v. Srinivasa Ayyangar*(1) that the contract in the section means only a contract between the mortgagor and the mortgagee. That being so, from the fact that, as between A and B, A receives the whole amount to the exclusion of B, arises the contract (the contract need not be express) that B shall not be liable to contribute; similarly, when each of them receives an equal moiety, a contract must be implied that they shall bear the burden equally. Moreover, it is well settled that the right to contribution is controlled by the right of marshalling, as sections 56 and 81 of the Transfer of Property Act show. If A, the owner of two estates X and Y, mortgages them to some person and then sells Y to B, both X and Y, if the principle of contribution is applied, will be liable to contribute rateably to the debt; but section 56 says that B is entitled to have the

(1) (1900) I.L.R. 24 Mad. 85.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
VENKATASUBBA
RAO J.

mortgage debt satisfied out of X so far as it will extend, that is to say, he can have the assets so marshalled as to throw the mortgage in the first instance on the property not conveyed to him. Again, the right to contribution is excluded and is prevented from being given effect to by section 81, which rests upon the principle that a creditor, who has the means of satisfying his debt out of several funds, shall not, by the exercise of his right, prejudice another creditor, whose security comprises only one of the funds. The contention therefore that the right to contribution overrides every other right or equity and that the literal wording of section 82 compels the Court to uphold the claim asserted by the plaintiff is clearly untenable.

The question then arises, does the plaintiff stand in a better position than his predecessor in title Sundararaja Bhagavathar, the original owner of the fourth item? There having been a contract to the contrary, I fail to see why it should be within the power of one of the parties to it to deprive the other of the benefit under it, for the result of taking a contrary view would be that either party could frustrate the contract by merely assigning his property. Further, it is somewhat difficult to conceive that one party can at his will thwart the other by enabling his assignee to call in a statutory right, which *ex hypothesi* never came into existence by reason of there having been, at the very inception, a contract to the contrary. Moreover, there is, I think, a short answer to the plaintiff's claim. If he is not bound by his predecessor's contract, it is, I think, but a necessary corollary that he should not be permitted to take advantage of a payment

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
VENKATASUBBA
RAO J.

by his predecessor. I have said that Sundararaja Bhagavathar made a cash payment of Rs. 500 and, if that sum is excluded, nothing would be due to the plaintiff; indeed, the trial Court's decree in his favour was for a sum less than Rs. 500. The plaintiff's claim, as this fact shows, is inequitable and should not be recognized.

Ganeshi Lal v. Charan Singh(1) (this is the most accurate report of the judgment of the Privy Council), on which the plaintiff relies, scarcely helps him. There, a sum of Rs. 32,000 was left with the purchaser of property K, i.e., Sher Singh, the ancestor of the respondents, to enable him to discharge the mortgage. Perfectly true, but the point to note is, that the appellants, who purchased the other property M, did not pay for an absolute interest in it, but only for the equity of redemption; their Lordships of the Judicial Committee emphasise this aspect in their judgment. Secondly, the sale above referred to in favour of Sher Singh, under which he retained Rs. 32,000, was superseded by another sale in his favour—and this fact again their Lordships specially notice. The representatives of Sher Singh, who satisfied the mortgagee's claim, claimed contribution from the owner of M, and their Lordships, while holding that the claim was rightly rejected by the High Court, observe:

"It would indeed be somewhat surprising if the result were otherwise. The appellants bought subject to the mortgage and paid a price for the property on that footing, and their contention really amounts to this, that having paid for the property on the basis of its being subject to the mortgage they ought now to be allowed to have the benefit of it free from the mortgage. . . ."

(1) (1930) I.L.R. 52 All. 358 (P.C.).

Incidentally I may mention that this case clearly establishes that the contract to the contrary mentioned in section 82 is, as I have said, a contract *inter se* between the several owners liable to contribute, for their Lordships' statement that the benefit of the contract did not pass to the appellants presupposes that the mortgagor, the original party to the contract, could have enforced it against Sher Singh, the other party to it.

But to return to the point with which I was dealing, the judgment shows that it would have been inequitable to allow the appellants, who purchased the property M subject to the mortgage and thus paid only for the equity of redemption, to resist the claim to contribution. I think that is what their Lordships meant when they observed that the benefit of the original contract did not pass to the appellants "in law or *in equity*". I italicise the words "in equity". It is also significant that their Lordships, while referring to *Muhammad Abbas v. Muhammad Hamid*(1), do not disapprove of that decision.

There is another case to which I may usefully refer. In *Kamta Singh v. Chaturbhuj Singh*(2) the facts were these. The mortgagors sold a portion of the mortgaged property to the defendants, the conveyance containing a declaration that the title of the vendors was free from defect and also a covenant that they would make good any loss, should the title prove defective. Subsequently, the mortgagors conveyed a further portion to certain persons referred to as Harbans, for whom the plaintiffs were found to be benamidars; the purchasers did not pay the price but the amount

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
VENKATASUBBA
RAO J.

(1) (1912) 9 A.L.J. 499.

(2) (1929) I.L.R. 8 Pat. 585.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.
—
VENKATASUBBA
RAO J.

was retained with them for the discharge of the mortgage debt. The plaintiffs paid off the amount due under the mortgage and commenced the suit to recover contribution from the defendants, but their claim was disallowed. It will be seen that, as between the mortgagors and the defendants, the sale was not subject to the mortgage and that there was a covenant by the former to make good any loss. Again, so far as the plaintiffs were concerned, they were under a duty, as between them and the mortgagors, to discharge the mortgage debt. Although the contract was in each case with the mortgagors alone and there was no direct contract between the plaintiffs and the defendants, the former's claim to contribution based on section 82 was negatived. This amounts to holding that the benefit under the first contract passed to the defendants and, likewise, the obligation under the second to the plaintiffs. In my opinion, the conclusion of the learned Judges was right. This case was taken on appeal to the Judicial Committee, but, as the judgment of the High Court was confirmed on another ground, the question relating to contribution was not gone into.

As regards *Jai Narain v. Rashik Behari*(1), I must, with great respect, dissent from it. There, it was found that the benefit received by the plaintiff and the defendant, who jointly mortgaged their property, was in the ratio of eight to one. The plaintiff paid the mortgage amount and claimed contribution. The learned Judge gave him a decree for half the amount paid, on the

(1) A.I.R. 1931 All. 546.

ground that the property belonged to the mortgagors in two equal moieties. The reasons given by the learned Judge are: (i) there was no contract to the contrary between the mortgagors *inter se* and, (ii) at any rate, the mortgagee was not a party to the contract. As I have said, I must dissent from this decision.

In the result, the plaintiff's claim fails and his suit is dismissed with costs throughout.

A.S.V.

MUTHIAH
BHAGAVATHAR
v.
VENKATRAMA
AYYAR.

APPELLATE CIVIL.

Before Mr. Justice Cargenven and Mr. Justice K. S. Menon.

N. SUBRAMANIA AYYAR (FIRST RESPONDENT-
PLAINTIFF), APPELLANT,

1935,
May 2.

v.

V. S. R. S. RAMASUBBA AYYAR AND FIVE OTHERS
(APPELLANTS 2 AND 3 AND RESPONDENTS 2 TO 5—DEFENDANTS
3, 8, 2, 5, 6 AND 7), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), sec. 130—Choses in
action—Successive assignments of—Priority in case of—
Test of—Notice to debtor, if—Proviso to sec. 130—
Applicability and effect of.*

Under the English law, priority in the case of successive assignments of choses in action, each one without notice of the earlier one, is determined by the date of the notice to the debtor. But in India no such notice to the debtor is now necessary to perfect the assignee's title. Under section 130 of the Transfer of Property Act, the title vests in the assignee on the execution of the transfer deed, and no further action on his part, such as sending a notice to the debtor, is necessary to complete his title. In such cases, priority has ordinarily to be determined with reference to the date on which the title vested in the transferee, that is, the date of execution of the deed of

* Letters Patent Appeal No. 19 of 1934.

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.

transfer. The application of the rule laid down in *Dearle v. Hall*, (1823) 3 Russ. 1; 38 E.R. 475, to cases coming within section 130 of the Transfer of Property Act is not at all warranted. The proviso to section 130 is only for the benefit of the debtor in case he pays the amount to the transferor before he receives a notice of the transfer from the transferee, and it has nothing to do with the title of the transferee or with priority of claims.

APPEAL under Clause 15 of the Letters Patent against the judgment of BUTLER J. dated 2nd February 1934 in Second Appeal No. 1247 of 1929 (Appeal Suit No. 10 of 1929, Sub-Court, Tinnevely, Original Suit No. 258 of 1926, District Munsif's Court, Tinnevely).

S. Ramaswami Ayyar for appellant.—The contention that priority dates from notice is not open under the Transfer of Property Act. Section 130 of that Act applies to the present case which is one of a hypothecation of an actionable claim, *Muthukrishnier v. Veeraraghava Iyer*(1) and *Gopalakrishna Iyer v. Gopalakrishna Iyer*(2). Section 130 is a deliberate departure from the English law as laid down in *Dearle v. Hall*(3), and from the section of the Transfer of Property Act before the amendment of 1900; see the observations in *Mulraj Khatau v. Vishwanath Prabhuram Vaidya*(4). The decision in *Dearle v. Hall* (3) proceeded on three grounds: (i) negligence of the prior mortgagee, (ii) the rule about reputed ownership as defined in *Ryall v. Rowles*(5), see White and Tudor, Leading Cases, Vol. I, page 90, and (iii) title of the transferee being perfected by notice. The first ground was discarded later on; see *Foster v. Cockerell*(6). The second ground ceased to have any force when the later Bankruptcy Acts confined the rule in *Ryall v. Rowles*(5) to trade debts (cf. the Indian Presidency-towns Insolvency Act, section 52). The third ground was the only one on which the rule in *Dearle v. Hall*(3) was finally rested; see *Dallas, In re*(7) and *Lake, In re. Cavendish, Ex parte*(8). See also *Ward v. Duncombe*(9) where the rule was

(1) (1913) I.L.R. 38 Mad. 297.

(2) (1909) I.L.R. 33 Mad. 123.

(3) (1823) 3 Russ. 1; 38 E.R. 475. (4) (1912) I.L.R. 37 Bom. 198 (P.C.).

(5) (1750) 1 Ves. Sen. 348; 27 E.R. 1074.

(6) (1835) III Cl. & Fin. 456; 6 E.R. 1508.

(7) [1904] 2 Ch. 385.

(8) [1903] 1 K.B. 151, 154.

(9) [1893] A.C. 369.

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.

severely criticised. This ground was recognized by section 25 (b) of the Supreme Court of Judicature Act, 1873, which has been re-enacted by section 136 of the Law of Property Act, 1925. The same principle was followed in framing Chapter VIII of the Transfer of Property Act of 1882, but in 1900 the Chapter was revised in accordance with a different principle, viz., that title is perfected by the transfer independently of notice. The passage in Mulla's Law of Insolvency at page 322 takes no note of the Transfer of Property Act and is only a statement of the English law. The rule in *Dearle v. Hall*(1) can in any case be applied only if the later transferee paid money without actual or constructive notice of the prior transfer and if the trustee of the fund or the debtor had no such notice; see Fisher on Mortgages, 7th edn., pages 513-15. In the present case the finding is that the fifth defendant did not pay any money when he took his mortgage and that he took it in discharge of an earlier promissory note. A fresh advance is necessary; cf. section 78 of the Transfer of Property Act and *Mutual Life Assurance Society v. Langley*(2).

B. Sitarama Rao for respondents.—Section 130 of the Transfer of Property Act does not apply to the present case. That section does not lay down any rule of priority. The question of priority has therefore to be decided in accordance with the English law. [*Narasiah v. Venkataramiah*(3), *The Co-operative Hindusthan Bank, Ltd. v. Surendranath De.*(4) and Mulla's Law of Insolvency, page 329, referred to.] Besides, in the present case, the transfer to the plaintiff was only of five out of six instalments of a chit and therefore of part of a debt. A part of a debt is not an actionable claim under the Transfer of Property Act and the rule as to transfer of actionable claims in section 130 thereof does not apply to such cases; See *Doraiswami Mudaliar v. Doraiswami Ayyangar*(5), *Forster v. Baker*(6) and *Steel Wing Company, In re* (7).

S. Ramaswami Ayyar in reply.—The objection that the transfer to the plaintiff was only of a part of a debt and was therefore invalid was not raised in the lower Courts or before

(1) (1823) 3 Russ. 1; 38 E.R. 475.

(2) (1886) 32 Ch. D. 460, 468.

(3) (1918) I.L.R. 42 Mad. 59.

(4) (1931) I.L.R. 59 Calc. 667.

(5) (1924) 48 M.L.J. 432, 438.

(6) [1910] 2 K.B. 636.

(7) [1921] 1 Ch. 349.

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.

BUTLER J. and it ought not therefore to be allowed to be raised in Letters Patent Appeal.

Cur. adv. vult.

K. S. MENON J. The JUDGMENT of the Court was delivered by K. S. MENON J.—This is an appeal against the judgment of BUTLER J. dismissing the suit brought by the appellant on the basis of a hypothecation bond executed to him by one Chellam Ayyar in respect of the subscription paid by the latter towards a chit fund.

Chellam Ayyar had taken a ticket in a chit fund, which was being managed by a firm known as S.K. S.N., of which the first defendant, the father of defendants 2 and 3 and the grandfather of the fourth defendant, were partners. As Chellam Ayyar was indebted to the plaintiff, he executed the hypothecation bond, Exhibit B, in favour of the plaintiff on 15th August 1919 in respect of the subscriptions he had paid for five instalments in the chit fund. On 5th October 1921 Chellam Ayyar and his brother, Krishna Ayyar, executed another hypothecation bond, Exhibit II, in favour of the fifth defendant in respect of the amounts paid by them for six instalments in the chit fund (including the amount paid for five instalments for which Exhibit B had already been executed). The fifth defendant gave notice, Exhibit IV, to the first defendant on 6th October 1921. The plaintiff also sent notices to the first and third defendants on 26th October 1921 (*vide* Exhibits E-2 and E). The amount of the subscriptions was, however, not payable by the stake-holders, according to the terms of the chit fund, till 14th July 1926. Plaintiff, therefore, sent notices again to the first defendant demanding payment of money in July

1926 (Exhibit H). The fifth defendant also made a demand at about the same time (Exhibit V). Ignoring the claims of the plaintiff, defendants 1 and 8 paid the amount to the fifth defendant and obtained the receipt, Exhibit VII. In this suit by the plaintiff for recovery of the amount from defendants 1 to 3 (the fourth defendant having been exonerated), the fifth defendant contended that the plaintiff was guilty of gross negligence inasmuch as he did not secure the chit fund receipt book and did not give notice to defendants 1 to 4, and that he (the fifth defendant) was entitled to priority over the plaintiff.

The trial Court accepted the contentions of the fifth defendant and dismissed the suit. The lower appellate Court found against the fifth defendant and decreed the suit. BUTLER J. accepted the finding of the lower appellate Court that the plaintiff was not guilty of gross negligence, but held that, as the plaintiff did not give notice of the transfer in his favour to defendants 1 to 3, he was not entitled to priority over the fifth defendant, applying the principle laid down in the case of *Dearle v. Hall*(1), and dismissed the suit. It will, therefore, be seen that the lower appellate Court and BUTLER J. held,—and, we think, for very good reasons—that there was no negligence on the part of the plaintiff. We did not, therefore, allow the fifth defendant to argue it over again.

The only question for decision, therefore, is which of the hypothecations—the plaintiff's or the fifth defendant's—is entitled to priority. Chellam Ayyar's right to receive the amounts subscribed

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.
 K. S. MENON J.

(1) (1828) 3 Russ. 1; 38 E.R. 475.

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.

K. S. MENON J.

by him for the chit fund is certainly an actionable claim. That claim (in respect of the five instalments paid by him) must be deemed to have been effectively transferred by him to the plaintiff when he executed the hypothecation bond, Exhibit B. No other act on the part of Chellam Ayyar or the plaintiff was necessary to complete the title of the plaintiff to recover that amount, for section 130, Transfer of Property Act, lays down :

“ The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights of the transferor, whether by way of damages or otherwise, shall vest in the transferee whether such notice of the transfer, as is hereinafter provided, be given or not.”

There is nothing in this section to warrant the view that the title of the transferee is not complete until a notice is issued to the debtors. The proviso to that section is only for the benefit of the debtor in case he pays the amount to the transferor before he receives a notice of the transfer from the transferee. That proviso has nothing to do with the title of the transferee or with priority of claims. It must, therefore, be held that the plaintiff perfected his title to recover the debt in question on 15th August 1919, the date of execution of Exhibit B. For the same reason the title, if any, of the fifth defendant to recover the same debt must be deemed to have been perfected on 5th October 1921, the date of execution of Exhibit II.

The question then is whether, though the fifth defendant obtained title to recover the debt only two years after the title vested in the plaintiff, he is entitled to priority over the plaintiff, simply

because he happened to give notice of his claim to the debtors, defendants 1 to 3, before the plaintiff did so. Under the English Law, he would certainly be entitled to such priority, and the reason for it is clear. According to the Bankruptcy Law which was in force at the time the case of *Dearle v. Hall*(1) was decided, in case of assignments of choses in action, notice was necessary in order to take the property out of the order and disposition of the bankrupt. The doctrine was extended to other cases also and it came to be held that the title of an assignee of a chose in action was not complete until he gave a notice of the assignment to the debtor. This was subsequently recognized in the Supreme Court of Judicature Act, 1873, [*vide* section 25 (b)]. If, therefore, a notice is essential to perfect the title of an assignee, that assignee who gives notice earlier perfects his title earlier than the one who gives one subsequently, and naturally gets priority over the latter. This makes it clear why, under the English Law, priority in the case of successive assignments of choses in action, each one without notice of the earlier one, is determined by the date of the notice to the debtor. But in India no such notice to the debtor is now necessary to perfect the assignee's title. As already observed, section 130 of the Transfer of Property Act lays down that the title vests in the assignee on the execution of the transfer deed, and no further action on his part, such as sending a notice to the debtor, is necessary to complete his title. In such cases, priority has ordinarily to be determined with reference to

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.
 K. S. MENON J.

(1) (1823) 3 Russ. 1; 38 E.R. 475.

SUBRAMANIA
 AYYAR
 v.
 RAMASUBBA
 AYYAR.
 K. S. MENON J.

the date on which the title vested in the transferee. In cases where the earlier transferee is guilty of gross negligence, or is estopped, and the subsequent transferee takes the assignment without notice of the earlier one, different considerations may arise. But, ordinarily, the date of execution of the deed of transfer should determine priority. We are, therefore, of the opinion that the application of the rule laid down in the case of *Dearle v. Hall*(1) to cases coming within section 130 of the Transfer of Property Act is not at all warranted. We, therefore, hold, differing from BUTLER J., that the plaintiff is entitled to priority over the fifth defendant.

Mr. B. Sitarama Rao then raised another question, namely, that, as the transfer in favour of the plaintiff was only in respect of part of the debt due to Chellam Ayyar, it was invalid and that the transfer did not come within section 130 of the Transfer of Property Act. But, as this objection was not taken either in the lower Courts or before BUTLER J. and as the plaintiff had no opportunity to meet it with necessary evidence, we did not allow it to be argued.

We therefore allow the appeal, set aside the judgment of BUTLER J. and restore that of the lower appellate Court. The respondents must pay the costs of the appellant in this Court and in the second appeal.

A.S.V.

(1) (1823) 3 Russ. 1; 38 E.R. 475.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

SUBRAMANIA PILLAI *alias* PILLAIMUTHU PILLAI
 (PLAINTIFF), APPELLANT,

1935,
 March 19,

v.

S. V. PIRAVIPERUMAL PILLAI AND TWO OTHERS
 (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXII, r. 7—Compromise affecting minor—Leave of Court for—Necessity—Arbitration—Suit referred to—Compromise settling—Leave of Court before acceptance by arbitrators of.

A suit, to which a minor was a party and which was referred to arbitration, was settled by a compromise. The arbitrators accepted the compromise and passed an award in accordance with it.

Held that leave of the Court under Order XXXII, rule 7, of the Code of Civil Procedure was not necessary for the compromise before it was accepted by the arbitrators and that their award was not invalid on the ground that no such leave had been obtained.

APPEAL against the decree of the District Court of Tinnevely, dated 1st November 1929 and passed in Appeal Suit No. 21 of 1929 preferred against the decree of the Court of the District Munsif of Ambasamudram dated 29th October 1928 and passed in Original Suit No. 338 of 1927.

T. M. Krishnaswami Ayyar for *K. V. Ramachandra Ayyar* for appellant.

K. V. Sessa Ayyangar for first respondent.

Other respondents were unrepresented.

JUDGMENT.

The plaintiff is the appellant. The suit out of which this second appeal arises was instituted for

* Second Appeal No. 363 of 1931.

SUBRAMANIA
PILLAI
v.
PIRAVI-
PERUMAL
PILLAI.

a declaration that the decree in Original Suits Nos. 48 and 349 of 1922 are not binding upon him and to have them avoided.

Original Suit No. 48 of 1922 was filed by one Sivasankaram Pillai and his wife (the alleged adoptive father and mother of the plaintiff herein) against his brother's son Piraviperumal Pillai and another for a declaration that certain properties were their own, even though the patta was allowed to stand in the name of the first defendant therein. In the course of the suit both Sivasankaram Pillai and his wife died and the present plaintiff who claimed to be the adopted son came on record represented by his natural father as his next friend. In the same capacity as a minor he filed Original Suit No. 349 of 1922 asking for relief with regard to certain other properties. Both these suits were referred to the arbitration of three men. The arbitrators did not have to take evidence to decide the suits for they were settled by a compromise. The compromise was signed by the plaintiff's father as his next friend but afterwards he wanted to resile from the compromise. When notice was given to him, he did not appear. Finally the arbitrators accepted the compromise and passed an award in accordance with it. In the present suit the plaintiff seeks to set aside the decrees on the ground of gross negligence on the part of the guardian. As a matter of fact it has been found by both the lower Courts that the guardian has not been negligent at all and the compromise cannot be said to be unfair to the plaintiff. The arguments here advanced have not been pressed against the findings of the lower Courts on these matters.

SUBRAMANI
PILLAI
v.
PIRAVI-
PERUMAL
PILLAI.

The main argument of Mr. T. M. Krishnaswami Ayyar on behalf of the appellant is that for the compromise which was entered into before the arbitrators permission of the Court had not been obtained and that therefore it is invalid, having regard to the provisions of Order XXXII, rule 7, Civil Procedure Code. At this stage I may point out that it was not argued in either of the lower Courts nor is there any issue on it that when the award came before the Court the Court did not consider whether the award was beneficial to the minor or not under Order XXXII, rule 7, and that the order passed by the Court is therefore invalid. That argument was never advanced in either of the lower Courts. Here Mr. T. M. Krishnaswami Ayyar has put that argument also before me for consideration. I overruled it on the simple ground that the case before the lower Courts proceeded on the assumption that so far as the decretal orders of the Court were concerned there was no such objection, the objection being based only on the ground, as I have already pointed out, that for the compromise accepted by the arbitrators no sanction of the Court had been obtained. Therefore the only question for consideration in this second appeal is whether the compromise entered into by the parties before the arbitrators before it was accepted by them should receive the sanction of the Court to make their award valid in law. No authority directly bearing on the question has been brought to my notice. One decision in *Chenna Kesavulu v. Veeraswami*(1) was referred to by the learned Counsel for the appellant. But in

(1) (1932) 65 M.L.J. 755.

SUBRAMANIA
PILLAI
v.
PIRAVI-
PERUMAL
PILLAI.

that case the facts show that the arbitrators proceeded beyond the terms of the reference made to them by the Court with regard to all the questions, and the observations have to be accepted in the light of those facts. Towards the later stage of the argument, Mr. T. M. Krishnaswami Ayyar brought to my notice the decision in *Muthalakammal v. Narappa Reddiar*(1). It was held in that case that Order XXXII, rule 7, of the first Schedule of the Civil Procedure Code applies to execution proceedings. It is this Order (Order XXXII, rule 7) which says that before a decree is passed the Court should consider whether the compromise is advantageous or beneficial to the minor. The decision in the case relates solely to the point whether that Order applies to execution proceedings but emphasis is placed on the last paragraph of the judgment. In that case, a compromise of a suit which was passed by the arbitrators was pleaded in defence to the execution of a decree and the question was whether satisfaction of the decree can be recorded or not. It was argued that Order XXXII, rule 7, would apply only to the determination of suits in Court and not with respect to awards passed by the arbitrators and Order XXXII, rule 7, applies to agreement or compromise with reference to a suit, i.e., a pending suit. That argument was overruled by the learned Judges. After overruling the argument in the last paragraph of the judgment, the learned Judges refer to a submission made by the Counsel :

“The learned Advocate for the appellant now applies to us for sanction of the adjustment. The respondent opposes

(1) (1933) I.L.R. 56 Mad. 430 (F.B.).

this on the ground that the award and the decree on the award are collusive. The Subordinate Judge will now enquire into the question whether the adjustment is a proper adjustment and dispose of the matter according to law.”

I understand what the learned Judges meant to order in this paragraph was an enquiry whether the adjustment which was pleaded in defence was a proper adjustment or not, that is to say, whether it was passed by the Court after considering that it is advantageous or beneficial to the minor having regard to the duty placed upon the Court under Order XXXII, rule 7. As I have said at the beginning, that question is not now before me, viz., whether the Court, when it accepted the compromise passed by the arbitrators' award and made that award a decree of the Court in the two suits, Nos. 48 and 349, considered whether it was advantageous or beneficial to the minor or not. The Court can refuse to accept the award on the ground that in its opinion it is not advantageous or beneficial to the minor and this function of the Court will be discharged under Order XXXII, rule 7. This is all what the learned Judges in the last paragraph of their judgment in *Muthalakammal v. Narappa Reddiar*(1) called upon the lower Court to do, i.e., to find out whether that adjustment of the decree is a proper adjustment having regard to the allegations made in the case. The present question whether the compromise was passed by the arbitrators without getting the previous sanction of the Court has nothing to do with the enquiry suggested by the learned Judges in the last paragraph of the judgment. I therefore hold that the compromise in this case

SUBRAMANIA
PILLAI
v.
PIRAVI-
PERUMAL
PILLAI.

(1) (1933) I.L.R. 56 Mad. 430 (F.B.).

SUBRAMANIA
PILLAI
v.
PIRAVI-
PERUMAL
PILLAI.

cannot be said to be bad because at the time when it was approved by the arbitrators no sanction of the Court had been obtained. I have already accepted the findings of the lower Court on the merits of the case that there is nothing to show that the guardian was negligent or that the compromise was not advantageous or beneficial to the minor.

In the result the second appeal is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Stone and Mr. Justice Varadachariar.

1935,
March 27.

T. S. YASOBADRA NAINAR (FIRST DEFENDANT), APPELLANT,
v.

T. S. SAMANTHABADRAN AND TWO OTHERS (PLAINTIFF,
THIRD AND FOURTH DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint family—Partition—Suit for—Sums collected by co-parcener but not invested by him—Interest on—Liability for.

There is no legal or equitable ground for the giving of interest to one member of a joint Hindu family, who has brought a partition suit, upon sums collected but not invested by another member of the family.

APPEAL against the decree of the District Court of North Arcot at Vellore in Original Suit No. 5 of 1926.

A. C. Sampath Ayyangar for appellant.

K. Rajah Ayyar for first respondent.

Other respondents were unrepresented.

* Appeal No. 354 of 1930.

The JUDGMENT of the Court was delivered by STONE J.—This is an appeal from the final decree in a partition suit passed by the learned District Judge of North Arcot. First defendant is the appellant. The appellant raises eight points. He has been throughout the brother in possession of the family estate. The plaintiff is his younger brother.

The first defendant has been made liable for losses resulting from his failure to cultivate the family lands. It is admitted that he has not cultivated them. The one reason that he gave in the course of the trial for his failure to cultivate was that the plaintiff had obstructed him. That reason has been found against and the learned Judge founding himself on past year's income has given to the plaintiff half the income the lands would have yielded if cultivated. We are of the opinion that on this point the appeal succeeds. Had the defendant cultivated the lands and an income been obtained, he would, of course, have been accountable for that income and the plaintiff would have been entitled to half that income. But a member of a joint Hindu family pending partition proceedings is under no legal obligation to another member of the family to do anything by way of cultivation of such property. If, for example, one item of property was a house, he would not be liable because he failed to let the house. The various members have each the same right. The younger brother has not established that the elder brother obstructed his cultivating the lands.

[Portion of the judgment is omitted as not necessary for the report.]

YASOBADRA
NAINAR
v.
SAMANTHA-
BADRAN.
STONE J.

YASOBADRA
NAINAR
v.
SAMANTHA-
BADRAN.
—
STONE J.

There is also a memorandum of cross-objections filed by the plaintiff and under that two points arise. It is said that the first defendant has collected outstandings, has thereby obtained sums of money and he should be made liable on equitable grounds for interest at equitable rates upon such sums as from the date of collection, and two cases were relied upon, *A. W. Inglis v. Sarju Prasad Misser*(1) and *Abdul Jalil v. Md. Abdul Salam*(2); and *Yerukola v. Yerukola*(3) was sought to be distinguished. Had in fact interest been earned, no doubt the plaintiff would have been entitled to his half share of that interest. But the question is whether there is any legal or equitable foundation for the giving of interest to one member of a joint Hindu family who has brought a partition suit upon sums collected but not invested by another member of the family. If so, is the interest that should be allowed, that interest that would have been earned during the partition proceedings had the other member of the joint family put out the moneys collected to interest? *A. W. Inglis v. Sarju Prasad Misser*(1) makes it clear that the Court there proceeded on the basis that it was entitled to presume that the person recovering the money had put that money out to interest. It therefore does not touch the question as to what happens when in fact the conclusion is arrived at that he has not put the money out to interest. In *Abdul Jalil v. Md. Abdul Salam*(2) it was held that on equitable grounds interest could be given where one of the co-sharers collects rent on behalf of

(1) (1923) I.L.R. 3 Pat. 311, 318.

(2) A.I.R. 1932 All. 505.

(3) (1922) I.L.R. 45 Mad. 648 (F.B.).

himself and the other co-sharer and does not pay over in due time the share to the other co-sharer. That case proceeded on the assumption that the co-sharer in question who has been made liable for interest was liable to hand over to the other co-sharer a sum of money at a given date. He was accordingly made liable when he failed to hand over such sum of money at such date. In this case however it is clear that during the partition proceedings there was no item of property and no sum of money that the plaintiff, or indeed the defendant, could say belonged to him, for, whether it belonged to him or not would depend upon what was given to him under the final decree. As KUMARASWAMI SASTRI J. observed in *Yerukola v. Yerukola*(1) :

“Until the properties are actually divided, it cannot be predicated that any particular item of property would fall to any particular member of the joint family, nor can it be said that any particular member of the joint family has a right to insist that each item of property shall be broken up into as many shares as there are sharers and that he should get a particular share of each item. As far as possible, in suits for partition, entire items of family property will be allotted to the members if it can be done without any prejudice to the rights of the others. It may thus well be that where a co-sharer has received the whole or portion of the monies due on a debt due to the family that particular item might be allotted to the member who has so received, or in taking accounts it may well be that one co-parcener who lays claim to a particular item has overdrawn his share and is not entitled to any portion of the family property. Under these circumstances, if a co-parcener should file a suit for a specific share in an outstanding recovered, he will be met with the reply that not only is the suit for that share not maintainable but that the liability of the parties should be adjusted with reference to the taking of the general accounts.”

(1) (1922) I.L.R. 45 Mad. 648, 670 (F.B.).

YASOBADRA
NAINAR
v.
SAMANTHA-
BADRAN.
—
STONE J.

YASOBADRA
NAINAR
v.
SAMANTHA-
BADRAN.
STONE J.

It is clearly impossible in our opinion to hold the first defendant liable on any ground of an implied agency, for, in this position, he is in no way different from a working partner who collects moneys for the partnership and does not re-invest those moneys but keeps them as money in the partnership safe. Mr. Rajah Ayyar quite properly admits that in such a circumstance the capitalist partner would not be able to claim interest on the moneys so collected unless of course he could show that in the taking of the partnership account the moneys had been invested and had earned interest. We therefore think that the cross-appeal on this point fails.

There is a second point. The first defendant was assessed in respect of the joint family income to income-tax and has paid Rs. 2,288. He has been allowed those payments. The plaintiff says that the accounts put in by the first defendant show an income which would carry an income-tax of Rs. 729 only, and that if the first defendant paid Rs. 2,288 he did so at his own risk. The facts appear to be as follows. The first defendant made no return to income-tax and was accordingly assessed to income-tax. At all material times the books were in Court. All that the first defendant had got to do was to produce his books. Then the income-tax authorities would either have accepted those books or they would not. If they had accepted those books, the income-tax would have been Rs. 729. We are of the opinion that where the person in possession of the books and receiving the family income pays an income-tax far in excess of what he would have to pay had he produced the books and those books had been accepted by the income-tax authorities, he should

not be allowed the amount that he so paid but should be allowed the amount that he would have paid if he had acted in a reasonable manner. The first defendant in this case did not act reasonably in two particulars. First of all, he made no income-tax return and thereby called upon himself an official assessment, and, having become assessed, he failed to contest that assessment which he could easily have done by producing the family books. We therefore think that, to the extent of the plaintiff's half share of the difference between Rs. 2,288 and Rs. 729, the cross-appeal succeeds.

In the result, therefore, the appeal partly succeeds and the cross-appeal partly succeeds and neither will carry costs.

G.R.

APPELLATE CIVIL

Before Mr. Justice Venkatasubba Rao.

RAJAMMAL (DEFENDANT), PETITIONER,

v.

S. N. THYAGARAJA AYYAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Court Fees Act (VII of 1870), Sch. II, art. 17-B (Madras)—
Rate of widow's maintenance—Suit for reduction of, on
ground of change of circumstances—Basis of valuation for
purposes of court-fee and jurisdiction.*

A suit to get the rate of maintenance awarded to a widow under a decree reduced on the ground of change of circumstances is governed, for purposes of court-fee, by article 17-B (Madras) of Schedule II of the Court Fees Act (VII of 1870).

* Civil Revision Petition No. 1723 of 1934.

YASOBADRA
NAINAR
v.
SAMANTHA-
BADRAN.
STONE J.

1935,
March 22.

RAJAMMAL
v.
THYAGARAJA
Ayyar.

As regards the valuation of such a suit for purposes of jurisdiction, the plaintiffs must assess the relief they claim on the basis of the value of the benefit they seek to obtain by the filing of the suit. The benefit that would accrue to the plaintiffs would depend upon the duration of the widow's life; and to ascertain the duration of the widow's life, the mortality tables constructed for life insurance purposes must be applied in the absence of proof of special factors existing in the case of the widow, such as deviation from the normal type.

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 Mayavaram in Original Suit No. 108 of 1933, dated 25th August 1934.

K. Narasimha Ayyangar for petitioner.

S. Thyagaraja Ayyar for respondents.

JUDGMENT.

This suit has been brought to get the rate of maintenance awarded under a decree reduced on the ground that circumstances have since changed. The questions raised in the civil revision petition pertain to court-fee and jurisdiction. While section 7 (ii) of the Court Fees Act refers to suits for maintenance, there is no provision in the Act dealing with suits for enhancement or reduction of maintenance. It has been argued that even such suits should be regarded as "suits for maintenance" within the meaning of the Act. The soundness of this argument in regard to suits for enhancement of maintenance need not now be examined; but the difference is fundamental between a suit for maintenance and a suit for a reduction thereof: in one case it is the person that is entitled to the allowance that brings it; in the other, the person liable to pay it. To describe

therefore a suit such as this as a "suit for maintenance", would be to pervert and misapply the words of the statute, and I must therefore reject that contention.

The further contention, namely, that section 7 (iv-A) (Mad.) which refers to "a suit for cancellation of a decree for money" applies, is equally untenable. The object of the present suit is not to get the previous decree cancelled but to get it varied. When a person impeaches a decree on the ground that it was *at no time* binding upon him, the action may properly be regarded as one for the cancellation of that decree; but in such a suit as the present, the plaintiffs, far from impugning the decree, acknowledge its validity. Till another decree is passed varying the previous decree, it is binding upon the parties; all acts done and all payments made under it are valid and cannot, even after the second decree is passed, be questioned. The contention that section 7 (iv-A) applies must therefore be rejected.

The contention again, that by analogy the notional valuation provided by section 7 (ii) for suits for maintenance should be extended to actions of this kind, is equally fallacious. The Legislature has arbitrarily said that in suits for maintenance, the fee payable is to be computed on the amount claimed as payable for one year. This is an artificial rule owing its existence solely to legislative sanction, and to extend such a rule to cases to which the statute does not expressly apply it, would be wrong and opposed to reason. The argument therefore based upon analogy is clearly out of place.

RAJAMMAL
v.
THYAGARAJA
Ayyar.

RAJAMMAL
v.
THYAGARAJA
AYYAR.

The lower Court has held that article 17-A (Mad.) or article 17-B (Mad.) of Schedule II applies in the alternative. The former article refers to a suit "to obtain a declaratory decree where no consequential relief is prayed." I am not prepared to hold that this description applies. The view, however, that article 17-B is applicable seems, in my opinion, well founded. That article refers to a suit

"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."

Having regard to the inadequate and unsatisfactory nature of the provisions of the Court Fees Act, I must hold, in the absence of a more precise provision, that this is the article that applies.

So much for the question of the court-fee that has been raised. Now turning to the point of jurisdiction, I fail to see how, as the lower Court erroneously assumes, the decision on the question of court-fee can conclude the question of jurisdiction. In cases where the court-fee valuation must be adopted for the purpose of jurisdiction also, the two questions need not be separately considered; but here the position is entirely different. Though the Act for court-fee purposes provides an artificial valuation, the plaintiffs for the purpose of jurisdiction are, I think, bound to assess the relief they claim on the basis of the value of the benefit they seek to obtain by the filing of the suit; *Rachappa Subrao v. Shidappa Venkatrao*(1), *Rattayya v. Brahmayya*(2), *Vasireddi Veeramma v. Butchayya*(3) and *Kattiya Pillai v. Ramaswamia Pillai*(4). The question then

(1) (1918) I.L.R. 43 Bom. 507 (P.C.).

(3) (1926) I.L.R. 50 Mad. 646.

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

(4) (1929) 56 M.L.J. 394.

RAJAMMAL
v.
THYAGARAJA
AYYAR.

arises, by what method is this benefit to be assessed? The plaintiffs claim that the maintenance should be reduced by roughly Rs. 500 a year. The benefit that would accrue to them would depend upon the duration of the widow's life. A question of this sort does not seem to have been ever decided, but I think the solution may be sought in the mortality tables constructed for life assurance purposes. In the case of Indian lives, the Government Actuary's Report on Rates of Mortality in India, dated 1920, contains the following passage:

"It is recommended that for the general body of Indian lives assured after medical examination, for whole-life with profits, the ultimate mortality should be represented by a standard table with a constant addition to the age (e.g., +7 for O^{M(5)}, +6½ for H^M or +6 for H^{M(5)}"); see Life Assurance Text-Book by Simmonds and Hooker, 1929 Edn., page 150.

The age of the widow in the present case is said to be about 33 and the expectation of life of such a person is, having regard to the above observation, about that of the standard table for an age seven years older. In the case of a female, the column that is relevant is that headed "O^F" at page 127 of the Journal of the Institute of Actuaries, Vol. 44, part II, April 1910; against the age of 40, the expectation is given as 28.293. The reduction therefore which the plaintiffs seek to obtain will normally hold good for that period, i.e., approximately for 30 years. In other words, the plaintiffs, if they succeed in obtaining the decree they seek, will be saved thirty payments of Rs. 500 each; it is the present value of the thirty future payments spread over thirty years that has to be ascertained. It is unnecessary to make a calculation with precision; the commuted value on any

RAJAMMAL
v.
THYAGARAJA
AYYAR.

computation (that is to say, whatever the rate of interest adopted from 3 per cent to 6 per cent is) is much over Rs. 5,000, i.e., far beyond the limit of the pecuniary jurisdiction of the Munsif's Court. I am aware that special factors existing in the case of a particular individual, such as deviation from the normal type, may render the mortality table inapplicable, but nothing being proved, the ordinary method must be applied. The question I have been called upon to decide is a difficult one, but it is not suggested that a better or safer method is available.

My order therefore is, that the District Munsif on the receipt of the records shall return the plaint for presentation to the proper Court. I make no order as to the costs of the civil revision petition. The defendant's costs in the lower Court incurred so far are fixed at Rs. 50 which the plaintiffs shall pay in any event.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Madhavan Nair and Mr. Justice Burn.

IN RE APPADURAI NAINAR AND TWO OTHERS
(ACCUSED 2 TO 4), PETITIONERS.*

1935,
August 6.

Criminal Procedure Code (Act V of 1898), sec. 195 (1) (b)—Sanction—Necessity for, by Panchayat Court to enable Magistrate to take cognizance of offence alleged to be committed before it—Madras Village Courts Act (I of 1889), sec. 77—Necessity for amending.

Where the relevant paragraph of a complaint instituted in a Magistrate's Court ran as follows:—"With the object of collecting money from me (complainant), accused 1 fraudulently brought into existence a bond, dated 26th May 1931, purporting to have been executed by me, written by accused 2, and attested by accused 3 and 4, and has filed a suit thereon in the Srirangarajapuram Panchayat Court with a view to collect money, and I received summons and plaint copy . . .", *held*, that the above paragraph meant that the bond on which the suit was instituted was fraudulently brought into existence by the parties concerned for the purpose of filing a suit and recovering the money from the complainant and that, having regard to the fact that the bond was alleged to be false, the offence committed would fall under section 193, Indian Penal Code (Act XLV of 1860), and sanction for taking proceedings by the Panchayat Court or of such Court to which it was subordinate was, under section 195 (1) (b), Criminal Procedure Code (Act V of 1898), necessary to enable the Magistrate to take cognizance of the offence.

Parties should not be allowed to evade the provisions of section 195 (1) (b), Criminal Procedure Code, by filing a complaint under another provision of the Indian Penal Code if clearly an offence under section 193, Indian Penal Code, or any other section mentioned in section 195 (1) (b), Criminal Procedure Code, has been committed.

Ravanappa Reddi, In re, (1931) I.L.R. 55 Mad. 343, followed.

Necessity for amending section 77 of the Madras Village Courts Act (I of 1889) by providing that section 476 also of

* Criminal Miscellaneous Petition No. 327 of 1935.

APPADURAI
NAINAR,
In re.

the Criminal Procedure Code would be applicable to proceedings of the Panchayat Court, pointed out.

PETITION praying that in the circumstances stated therein the High Court will be pleased to quash the committal order of the Court of the 2nd class Magistrate of Wandiwash, dated 29th March 1935 and passed in Preliminary Register Case No. 13 of 1934.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioners.

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

MADHAVAN
NAIR J.

The ORDER of the Court was delivered by MADHAVAN NAIR J.—This is an application to quash the commitment of accused 2 to 4 in Preliminary Register Case No. 13 of 1934 on the file of the 2nd Class Magistrate's Court, Wandiwash, in the following circumstances.

A suit on a promissory note alleged to have been executed by the complainant in the case was instituted against him before a Panchayat Court by the first accused. The writer of the promissory note is accused 2, and accused 3 and 4 are the attestors. For the purpose of this criminal miscellaneous petition it may be taken that the suit was dismissed by the Panchayat Court on the ground that the promissory note was a forgery. Subsequent to its dismissal, a complaint with respect to an offence under section 467, Indian Penal Code, (forgery of a valuable security), was filed against the plaintiff in the case who is the first accused and accused 2, 3 and 4 who are, as already stated, the writer and the attestors of the promissory note. On a preliminary objection on behalf of the first accused, the case against him

APPADURAI
NAINAR,
In re.
MADHAVAN
NAIR J.

was not proceeded with for want of a complaint from the Panchayat Court to take cognizance of the offence, and an order was passed to that effect on 23rd November 1934 dismissing the complaint against him. The preliminary objection on behalf of the first accused was based on section 195 (1) (c), Criminal Procedure Code, which says that

“no Court shall take cognizance of any offence described in section 463, Indian Penal Code, (forgery), etc., when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.”

As the Panchayat Court had not filed a complaint, it was argued that section 195 (1) (c) was a bar to proceedings against the first accused, as the offence is alleged to have been committed by him who was a party to a proceeding in the Panchayat Court, and this argument was accepted. The case against accused 2 to 4 was proceeded with, and they have been committed for trial to the Sessions Court.

On behalf of the petitioners, Mr. Jayarama Ayyar argues that no proceeding can be started against them also, because of the bar under section 195 (1) (b), Criminal Procedure Code. His argument is this : that the allegations contained in the complaint against these petitioners amount to an offence under section 193, Indian Penal Code, and section 195 (1) (b) is a bar to the taking of cognizance of such a case without a complaint from the Court wherein the offence was committed. Section 195 (1) (b), Criminal Procedure Code, says that

“no Court shall take cognizance of any offence punishable under (certain specified sections of the Indian Penal Code of

APPADURAI
NAINAR,
In re.
—
MADHAVAN
NAIR J.

which one is section 193), when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.”

The first paragraph of the complaint translated runs as follows :—

“ With the object of collecting money from me, accused 1 fraudulently brought into existence a bond dated 26th May 1931 purporting to have been executed by me, written by accused 2 and attested by accused 3 and 4, and has filed a suit thereon in the Srirangarajapuram Panchayat Court with a view to collect money, and I received summons and plaint copy. ”

The other paragraphs are not relevant for the purpose of this petition. It is argued that it is clearly stated in this paragraph that the promissory note on which the suit before the Panchayat Court was instituted was fraudulently brought into existence by the parties concerned for the purpose of filing a suit and recovering the money from the complainant. If this is the true construction of the paragraph in the complaint, there can be no doubt that the offence alleged falls clearly within the provisions of section 193, Indian Penal Code, and so, without a complaint from the Panchayat Court or of any Court to which such Court is subordinate, the Magistrate cannot take cognizance of the complaint. On behalf of the Public Prosecutor it is argued that the paragraph referred to is not susceptible of any other interpretation than this, viz., that the parties have concocted or fraudulently brought into existence a promissory note and have now filed a suit thereon with a view to recover money. The argument is that the object of concocting the promissory note may not necessarily have been to institute a suit to recover money. The promissory note was concocted and

kept with the parties ; and afterwards a suit was instituted, the concoction of the promissory note not being necessarily with a view to institute a suit upon it. If so, section 193, Indian Penal Code, can have no application and it cannot be said that an offence under section 193, Indian Penal Code, has been committed. We have had the original Tamil read to us. We must accept the construction put upon the paragraph by the learned Advocate for the petitioners. There is nothing in the complaint nor has any circumstance been brought to our notice to show that the object of the fraudulent creation of the promissory note was something other than the institution of the suit by which it was followed. We understand the paragraph to mean that the promissory note was brought into existence for the purpose of filing a suit and realizing the money from the complainant. If so, having regard to the fact that the promissory note was alleged to be false, the offence committed would fall under section 193, Indian Penal Code, and sanction for taking proceedings (which is lacking in this case) of the Panchayat Court, or of such Court to which it is subordinate, is necessary to enable the Court to take cognizance of the offence. No doubt a case of forgery may be alleged against the parties. But it has been held in this Court in *Ravanappa Reddi, In re*(1) that parties should not be allowed to evade the provisions of section 195 (1) (b), Criminal Procedure Code, by filing a complaint under another provision of the Penal Code if clearly an offence under section 193 or any other section mentioned in section 195 (1) (b)

APPADURAI
NAINAR,
In re.
—
MADHAVAN
NAIR J.

(1) (1931) I.L.R. 55 Mad. 343.

APPADURAI
NAINAR,
In re.

MADHAVAN
NAIR J.

has been committed. Following that decision we hold that the Magistrate was not entitled to take cognizance of the case, and the order of commitment must therefore be set aside. We accordingly quash that order.

The position reduces itself to this : here is an instance of persons who are alleged to have committed an offence under section 467, Indian Penal Code. Having regard to the provisions of section 195 (1) (b) and the decision of this Court in *Ravanappa Reddi, In re*(1), no proceedings can be started against them with respect to this offence. Section 77 of the Village Courts Act says that nothing in the Criminal Procedure Code is applicable to Village Courts except section 403. If so, as my learned brother who has referred this case to a Bench states in his order :

"Section 476, Criminal Procedure Code, can have no application and nobody can be prosecuted for fabricating false evidence for use in a Panchayat Court. The combination of all these rulings, viz., *Ravanappa Reddi, In re*(1), *Perianna Muthirian v. Vengu Aiyar*(2) and *Re Parameswaran Nambudri*(3), results in this: here are three persons who seem to have forged a valuable security (an offence punishable with transportation for life), but they cannot be tried because the forgery was committed in order to fabricate evidence for use in a Panchayat Court."

This position is certainly not satisfactory. In our opinion the difficulty can be got over only by suitably amending section 77 of the Madras Village Courts Act, by providing that section 476 also of the Criminal Procedure Code would be applicable to proceedings of the Panchayat Court.

K.W.R

(1) (1931) I.L.R. 55 Mad. 343.

(2) (1928) 56 M.L.J. 208.

(3) (1915) I.L.R. 39 Mad. 677.

INCOME-TAX REFERENCE.

*Before Mr. Justice Madhavan Nair, Mr. Justice Stone and
Mr. Justice King.*

L. C. T. S. P. SUBRAHMANYAM CHETTIAR,
PETITIONER,

1935,
September 18.

v.

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

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign profits—Receipt in British India of—Indebtedness in British India—Discharge of, by hundi drawn on assessee's shop outside British India—Receipt of amount of hundi in British India, if—Profits in foreign shop sufficient to cover amount of hundi—"Received," meaning of.

Discharge of a debt by issuing hundis is well known in commercial circles as the discharge of a debt.

The assessee, who had a shop at Tinnevely in British India and a shop at Penang outside British India, drew hundis on his Penang shop for the repayment with interest of a sum deposited in his Tinnevely shop by a person who carried on money-lending business at Penang. The Penang shop of the assessee paid the amounts of the hundis, the transactions relating to the discharge of the debt and the payments being recorded in the Penang folio of the Tinnevely books and in the Tinnevely folio of the Penang books. The profits in Penang were sufficient to cover the remittances.

Held that the amounts of the hundis should be treated as a remittance of foreign profits in British India within the meaning of section 4 (2) of the Indian Income-tax Act of 1922.

What the assessee did was to use in British India moneys available to him in Penang and this amounts to a receipt in India by the assessee of his gains outside India.

In order to come within the meaning of the term "received" as used in section 4 of the Act, it is not necessary that there

SUBRAH-
MANYAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-TAX,
MADRAS.

must be an actual transfer of the money in question and the receipt of the sum in India.

Hall (H. M. Inspector of Taxes) v. Marians, (1933) 18 T.C. 148, distinguished.

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

M. Subbaraya Ayyar for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The question referred to us is :

“Whether the sum of Rs. 13,730 paid by the Penang firm at Penang to a creditor of the Tinnevely firm can be treated as a remittance of foreign profits in British India.”

The question arises with reference to the inclusion in the additional assessment made upon the petitioner for the year 1932-33 (previous year 13th April 1931 to 12th April 1932) of this sum which is the amount paid by the petitioner's Penang shop in respect of two hundis drawn by him in the following circumstances. In or about July 1931 the trustee of a patasala at Kunnakudi deposited certain monies with the Tinnevely shop of the assessee. The trustee carries on money-lending business outside India at Penang, Rangoon and Thonze. When he applied for repayment of the money, the petitioner issued two hundis on his Penang shop for the amount due with interest, namely Rs. 13,730. The Penang shop paid these amounts on 9th October 1931. The transactions relating to the discharge of the debt and the payments were recorded in the Penang folio of the Tinnevely books and in the Tinnevely folio of

SUBRAH-
MANYAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-TAX,
MADRAS.

MADHAVAN
NAIR J.

the Penang books as mentioned in the reference. The petitioner did not dispute before the Income-tax Officer that the profits in Penang were sufficient to cover the remittances.

The point for determination is whether the amount in question was received in British India in the year of account within the meaning of section 4 (2) of the Income-tax Act. The petitioner contends that it was not so received relying on the authority of the decision in *Hall (H. M. Inspector of Taxes) v. Marians*(1). That case is clearly distinguishable. In that case, a lady who had overdrawn her account in the National Bank of India in London instructed that bank to transfer the loan to her current account with its Colombo branch and this was carried out by cross entries in the books of the two offices. A small credit balance in Colombo was thereupon converted into a debit balance and a few weeks afterwards the overdraft and the interest accrued thereon were discharged out of the proceeds of the sale in Colombo of certain Indian bonds held by her. It was held that the proceeds of the sale of bonds had not been received in the United Kingdom within the meaning of Rule 2 of Case V. On the facts the present case is altogether different from this case. The petitioner's indebtedness to the trustee of the patasala was not transferred to Penang as it was in the English case. What happened here was that the indebtedness in British India was discharged by the issue of a hundi drawn on the Penang shop. Discharge of a debt by issuing hundis is well known in

(1) (1933) 18 T.C. 148.

SUBRAH-
MANYAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-TAX,
MADRAS.
—
MADHAVAN
NAIR J.

commercial circles as the discharge of a debt. In the circumstances of the case the debt remained an Indian debt and it was discharged by the issue of a hundi in India. What the petitioner did was to use in British India monies available to him in Penang and this, in our opinion, amounts to a receipt in India by the assessee of his gains outside India. It was argued that it must be understood that the parties had agreed to have the debt discharged out of India and that therefore there was no constructive receipt of the monies in question in India. The idea of a special arrangement between the parties should be excluded because of the fact that a hundi was issued in India in discharge of the debt.

It was then argued that in order to come within the meaning of the term "received" as used in section 4 of the Income-tax Act there must be an actual transfer of the money in question and the receipt of the sum in India. No authority in support of that contention has been cited to us. The decision in *Commissioners of Inland Revenue v. John Blott*(1), having regard to the facts of the case, does not support this contention.

We would therefore hold that the sum of Rs. 13,730 mentioned in the reference should be treated as a remittance of foreign profits in British India. We answer the question accordingly. The Commissioner will get Rs. 250 for costs from the assessee.

A.S.V.

(1) (1919) 8 T.C. 101, 103.

PRIVY COUNCIL.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
APPELLANT,

v.

THE BUCKINGHAM AND CARNATIC COMPANY, LTD.,
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Indian Income-tax Act (XI of 1922), sec. 10 (2) (vi)—Buildings and machinery—Purchase by one company from another—Assessment of purchaser—Original cost, whether cost to vendor or purchaser.

Under section 10 of the Indian Income-tax Act, 1922, the original cost of buildings and machinery is the original cost to the person by whom the income-tax is payable.

Commissioner of Income-tax, Bombay Presidency v. The Saraspur Mills Co., Ahmedabad, (1931) I.L.R. 56 Bom. 129 and *Motiram Rosan Lal Coal Company, Limited v. Commissioner of Income-tax*, (1932) I.L.R. 12 Pat. 12, approved. *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*, (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302, overruled on this point.

APPEAL (No. 15 of 1935) from a judgment of the High Court (May 2, 1934) upon questions referred to the Court under section 66, sub-section 2, of the Indian Income-tax Act, 1922.

The respondent company acquired the business of five other companies with their buildings and machinery at a price for the buildings and machinery which was less than the original cost to its vendors.

In the course of the assessment of the respondents for 1931-32, the respondent company

* Present: Lord THANKERTON, Sir LANCELOT SANDERSON and Sir GEORGE RANKIN.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
Co., LTD.

claimed to deduct depreciation on buildings and machinery calculated on the original cost thereof to its vendors.

The question as to whether the depreciation should be calculated on the cost of the buildings and machinery to the respondent company or the original cost thereof to its predecessors was referred to the High Court.

The High Court held that the respondent company was entitled to deduct depreciation calculated on the original cost of the buildings and machinery to its predecessors.

The terms of the question referred and the material facts appear from the judgment of their Lordships of the Judicial Committee.

Dunne K.C. and *Hull* for appellant.—Assessee is defined in section 2 of the Act and has the same meaning in section 10. The original cost to the assessee in section 10 means the original cost to the person by whom the tax is payable and not the person from whom he purchased. The decision in *The Commissioner of Income-tax, Madras, v. Messrs. Massey & Co., Ltd., Madras*(1) on this point is wrong, and the decisions in *Commissioner of Income-tax, Bombay Presidency v. The Saraspur Mills Co., Ahmedabad*(2) and *Motiram Rosan Lal Coal Company, Limited v. Commissioner of Income-tax*(3) are right. *Scottish Shire Line, Ltd. v. Lethem*(4) cannot strictly be regarded as an authority in construing the Indian Act. It is a decision on section 3, sub-section 6, of the Finance Act of 1907 corresponding to section 10, proviso (b), of the Indian Act. In England the first provision for depreciation was in the Finance Act, 1878, in section 12, of which the words were, "and belonging to the assessee." In the Finance Act, 1907, a new provision was introduced. The words in section 10 are too plain to be got rid of.

R. Hills for respondents.—In the Finance Act, 1878, the words were, "diminished value". In the Finance Act

(1) (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302.
(2) (1931) I.L.R. 56 Bom. 129. (3) (1932) I.L.R. 12 Pat. 12.
(4) (1912) 6 T.C. 91.

of 1907, the limitation was introduced. The only question dealt with in the reasoning in *Massey's case* was whether the assessee, in the particular year, could take advantage of the allowance of his predecessor; proviso (c) of section 10 did not come into question. *Massey's case* was not appealed against by the authorities. The High Court looked on *Scottish Shire Line, Ltd. v. Lethem*(1) as an authority on section 26, sub-section 3. So far it was right. The wording in the English and the Indian Acts is similar. It would be wrong only if carried further, for then we come to differences in the Acts. The vital point is the taking over of a business. There would be a difference in taking over the business in question from the taking over of a transport business including lorries, etc. Here the successor who is taxed is carrying on, continuing, the same business. It is fair that he should be taxed as his predecessor would have been if he had continued the business. Normally "assessee" means assessee for the taxing year, but original cost to the assessee might mean to the assessee from whom the purchase was made. Proviso (c) to section 10 to a small extent supports *Massey's case*. The aggregate of allowances means to whomsoever made. That goes back to the previous owner.

Dunne K.C. in reply.—The Indian Act, section 3, makes it clear who is meant by "assessee".

The JUDGMENT of their Lordships was delivered by Sir LANCELOT SANDERSON.—This is an appeal by the Commissioner of Income-tax from a judgment and order of the High Court of Judicature at Madras, dated 2nd May 1934, whereby the High Court, upon the hearing of a case referred to it by the appellant under the provisions of the Indian Income-tax Act (XI of 1922), answered certain questions of law raised thereby adversely to the contentions of the appellant.

The questions of law referred to the High Court arose in the course of the assessment of the profits and gains of the business of the respondent company for the tax year beginning on 1st April 1931.

(1) (1912) 6 T.C. 91.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
Co., LTD.

SIR LANCELOT
SANDERSON.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
Co., LTD.
—
SIR LANCELOT
SANDERSON.

The main question arising for determination in this appeal is whether the allowance to be made to the respondent company in respect of depreciation of buildings and machinery used by them for the purposes of their business should be calculated by reference to the cost thereof to the respondent company or by reference to the original cost thereof to certain companies from which such buildings and machinery were acquired by the respondent company.

The material facts, as stated in the case which the Commissioner of Income-tax referred for the opinion of the High Court under section 66 (1) of the said Act, are as follows :—

The Buckingham and Carnatic Company, Limited (hereinafter referred to as “the company”) is a public limited company which was incorporated on 29th November 1920, under the Indian Companies Act, 1913.

The objects of the company were to acquire, take over, amalgamate with, work and carry on the businesses hitherto carried on in Madras and elsewhere by five limited companies which were registered under the Indian Companies Act and the goodwill of the said businesses, to enter into and carry into effect an agreement which had been prepared and was expressed to be made between the said five companies, their liquidators and the company, to carry on the business so to be acquired and generally to carry on the business of cotton spinners.

The said five companies were incorporated on various dates ranging from 1876 to 1888.

The above-mentioned agreement was entered into on 3rd December 1920.

The total cost of the buildings and machinery to the said five companies was as follows :—

	RS.
Dyeing and finishing machinery ...	11,11,748
Other machinery	54,26,856
Buildings	25,73,603

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
Co., LTD.
—
SIR LANCELOT
SANDERSON.

The buildings and machinery were not taken over by the company at the actual cost thereof to the said five companies, but at their written down value on 30th of November 1920, which was as follows :—

	RS.
Dyeing and finishing machinery ...	3,88,797
Other machinery	15,10,845
Buildings	15,55,737

In the year subsequent to the amalgamation, i.e., in 1921–1922, the company was assessed on the entire profits of the said five companies as having succeeded to their business.

During the assessment, the company claimed to deduct depreciation on the buildings and machinery calculated on the original cost thereof to the said five companies.

This claim was disallowed and depreciation, calculated on the written down cost, viz., the actual cost to the company, only was allowed.

From that year onwards the company claimed and was allowed depreciation in respect of the buildings and machinery calculated on the said written down cost *plus* depreciation in respect of any additions made to the buildings and machinery by the company in each year.

In the course of the assessment for 1931–32, the company again claimed depreciation as above on the ground that as it had succeeded to the business of the said five companies it was entitled

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.

SIR LANCELOT
SANDERSON.

to depreciation on the buildings and machinery which had been taken over from the said companies calculated on the original cost thereof to the said five companies.

The claim was based on a decision of the Madras High Court, viz., *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(1), which was given on 29th November 1928.

It appears however that the High Courts of Bombay and Patna had declined to follow the Madras decision.

In view of the conflicting decisions the Assistant Commissioner of Income-tax referred the matter to the Commissioner of Income-tax, Madras, the appellant in this appeal.

The appellant, as already stated, referred the case to the High Court. The first question submitted in the case for the opinion of the High Court was as follows :—

“Question 1.—Whether the Buckingham and Carnatic Company, Limited, which succeeded to the business of the Buckingham Mill Company, Limited, the Carnatic Mill Company, Limited, the Jammalamadugu Press Company, Limited, the Tiruppur Press Company, Limited, and the Tad-patri Cotton Press Company, Limited, is entitled, under section 10 (2) (vi) of the Act, to depreciation allowance on the assets taken over from the five predecessor companies calculated on the original cost of these assets to such predecessor companies or on the value at which these assets were taken over by the Buckingham and Carnatic Company, Limited, from the predecessor companies?”

The appellant agreed with the decisions of the Bombay and Patna High Courts and expressed the opinion that the allowance to be made in

(1) (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302.

respect of depreciation of the assets acquired from the predecessor companies by the company should be calculated by reference to the value at which such assets were acquired by the company.

The appellant proceeded to refer three other questions, which he considered would arise in the event of the High Court adhering to the decision in *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(1). The said three questions were as follows :—

“Question 2.—Whether the Buckingham and Carnatic Company, Limited, is entitled to have the depreciation allowance from the year 1921–22 to 1930–31 re-calculated on the basis of that decision and to claim that the excess depreciation not allowed in those years should be allowed in its subsequent assessments or whether the claim for such excess depreciation lapses altogether?”

Question 3.—Whether the Buckingham and Carnatic Company, Limited, is entitled to claim depreciation on buildings taken over from the predecessor companies in its subsequent assessments at the rates in force each year, till the total of such allowances to the company and its predecessors is equal to the original cost of these buildings to the predecessor companies, or whether the company should be allowed to claim depreciation on these buildings in each of its subsequent assessments at the rates in force each year only for a period not exceeding the life of the assets fixed under the present Act, calculated from the date on which they were first brought into use by the predecessor companies?

Question 4.—In calculating the amount of depreciation allowable in subsequent years to the Buckingham and Carnatic Company, Limited, is the amount allowed to the predecessor companies to be taken into account in applying section 10 (2) (vi) proviso (c) of the Act?”

The High Court held that it had not been shown that the decision in *Massey's case* was

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.

SIR LANCELOT
SANDERSON.

(1) (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302.

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.

SIR LANCELOT
SANDERSON.

incorrect, and answered the questions as follows :—

(1) That the respondent company herein is entitled to depreciation allowance on the machinery and buildings taken over, calculated on the original cost of these assets to the aforesaid five predecessor companies.

(2) That the respondent company is entitled to the aggregate depreciation allowance based upon the original cost to the aforesaid predecessor companies.

(3) That the respondent company is entitled to an allowance for depreciation based upon a percentage on the original cost of the buildings to the predecessor companies.

(4) In calculating the amount of depreciation allowable in subsequent years to the Buckingham and Carnatic Company, Limited, the amount allowed to the predecessor companies shall be taken into account in applying section 10 (2) (vi) proviso (c) of the Act.

The main question is the first. The section of the Indian Income-tax Act, 1922, which relates to this question is section 10, and the material part thereof is as follows :—

“ 10 (1) 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.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

* * * * *

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture, being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed :

Provided that—

* * * * *

(b) where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance,

for depreciation for the following year and deemed to be part of that allowance, or, if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years ; and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be.”

By section 2 (2) of the said Act, “assessee” means a person by whom income-tax is payable. By section 2 (10), “prescribed” means prescribed by rules made under this Act.

No question arises in this appeal as regards the percentage prescribed by the rules.

The answer to the first question in this appeal depends upon the construction which is to be put upon the words in section 10 (2) (vi), “the original cost thereof to the assessee”.

The High Court of Madras were of opinion that the other High Courts had stressed the importance of the words “to the assessee”, and had not given sufficient importance to the words “original cost”, and that as there was an ambiguity the most favourable construction to the company should be given to the words.

The learned Judges expressed the further opinion that the Legislature was not envisaging any case of a successor company, and that what was in mind was the original company.

The case for the company at the hearing before the Board was put in rather a different way. It was contended on the company's behalf that the meaning of the above-mentioned material words was “the original cost thereof to the assessee for the time being” or “the original cost thereof to the assessee at the time of the original cost.”

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.

SIR LANCELOT
SANDERSON.

184 THE INDIAN LAW REPORTS [VOL. LIX

COMMISSIONER
OF INCOME-TAX,
MADRAS

v.
THE
BUCKINGHAM
AND CARNATIC
Co., LTD.

SIR LANCELOT
SANDBERSON.

Their Lordships are not able to accept the construction of the material words adopted by the High Court, or that which was presented on behalf of the company before the Board. Both the above-mentioned constructions involve the insertion in the sub-section of words which are not to be found therein, and are not in the least necessary for an intelligible construction thereof: a method of construction to which their Lordships can give no countenance.

They are of opinion that there is no ambiguity in the provisions of section 10 (2) (vi), and the ordinary and natural meaning of the words used must be taken as the proper construction.

The sub-section provides for the allowance in respect of depreciation of buildings and machinery, which are the property of the assessee, to the extent of the percentage prescribed on the original cost thereof to the assessee. The word "assessee" is used in the sub-section in two places: firstly, with regard to the ownership of the property, and secondly, with regard to the original cost thereof.

In the ordinary and natural meaning of the sub-section, the word "assessee" used in the two connections must refer to the same person. Who then is that person? The answer is given by the sub-section itself, namely, the person who owns the property in question and who is being assessed, and the depreciation is to be based on the original cost of such property to such person, viz., in this case, the company. If there were any doubt about this being the correct interpretation, it would be removed by reference to the definition of "assessee" contained in section 2 (2) of the Act.

The word means the person by whom income-tax is payable, in this case, the company.

It follows therefore that the cost which is to be considered for the purpose of the allowance for depreciation must be the original cost to the person by whom the income-tax is payable, in this case, the company.

In the case of *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(1), three questions were submitted for the High Court's opinion. The third was as to "*res judicata*", to which no further reference need be made. The first two were as follows:—

"(i) Whether Messrs. Massey and Company, Limited, who succeeded to the business of the Madras Engineering Works, Limited, are entitled to carry forward for the purpose of assessment depreciation to which full effect could not be given in the years previous to the succession by Massey and Company, Limited.

(ii) Whether Messrs. Massey and Company, Limited, can be allowed to calculate depreciation on assets taken over from the Madras Engineering Works, Limited, on the original cost of those assets to the latter, or at the value at which they were taken over by Messrs. Massey and Company, Limited."

The High Court, for reasons stated in the judgment of the CHIEF JUSTICE, held that the answer to the first question should be in the affirmative.

The answer to the above-mentioned second question was that the calculation must be made on the original cost to the Madras Engineering Company and not on the value at which the buildings, machinery, etc., were taken over by Massey and Co. It should be noted that no reasons for the decision with reference to the second question were given.

COMMISSIONER
OF INCOME-TAX,
MADRAS

THE
BUCKINGHAM
AND CARNATIC
Co., LTD.

SIR LANCELOT
SANDBERSON.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.
—
SIR LANCELOT
SANDERSON.

In their Lordships' opinion, it is not necessary to express, and they do not express, any opinion as to the correctness of the answer to the first question in the above-mentioned case, but they feel obliged to say that, for the reasons which have been already given, they cannot agree with the answer which the Madras High Court gave to the second question.

In the case of the *Commissioner for Income-tax, Bombay Presidency v. The Saraspur Mills Co., Ahmedabad*(1) the High Court of Bombay refused to follow the decision of the Madras High Court in *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(2) and held :

(i) When an assessee succeeds another in business the words "on the original cost thereof to the assessee" in section 10 (2) (vi) of the Indian Income-tax Act, 1922, refer to the original cost to the person who is being actually assessed and not to the previous owner of the business.

(ii) Consequently, assesseees are entitled to have the depreciation allowance under the said section 10 (2) (vi) of the said Act calculated on the original cost to them and not to the previous owner from whom they have purchased the business.

In *Motiram Rosan Lal Coal Company, Limited v. Commissioner of Income-tax*(3), the High Court of Patna approved of, and followed, the above-mentioned decision of the Bombay High Court, and dissented from the decision of the Madras High Court in *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(2).

For the reasons already stated, their Lordships agree with the decisions of the Bombay and Patna High Courts in the above-mentioned cases on the question now under consideration.

(1) (1931) I.L.R. 56 Bom. 129.
(2) (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302.
(3) (1932) I.L.R. 12 Pat. 12.

In view of that conclusion, it is not necessary for their Lordships to express any opinion on the second, third or fourth questions submitted to the High Court in this case, for, as the Commissioner pointed out in his reference, these questions only arise if it should be held that the decision in the case of *The Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(1), in respect of the matter raised in the first question, was correct.

Their Lordships, therefore, are of opinion that the appeal should be allowed and the judgment and order of the High Court dated 2nd May 1934 should be set aside.

The answer to the first question in the reference should be that the company, which succeeded to the business of the five companies mentioned therein, is entitled under section 10 (2) (vi) of the Act to depreciation allowance on the assets taken over from the five predecessor companies calculated on the value at which those assets were taken over by the company from the predecessor companies, and not upon the original cost of those assets to such predecessor companies.

The company must pay the costs of the appellant in the High Court and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *The Solicitor, India Office.*

Solicitors for respondents: *Sanderson, Lee & Co.*

C.S.S.

(1) (1928) 56 M.L.J. 451 (F.B.); 3 I.T.C. 302.

COMMISSIONER
OF INCOME-TAX,
MADRAS
v.
THE
BUCKINGHAM
AND CARNATIC
CO., LTD.
—
SIR LANCELOT
SANDERSON.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Cornish, Mr. Justice Varadachariar and
Mr. Justice Venkataramana Rao.

1935,
September 25. PALANIAPPA CHETTIAR (SECOND RESPONDENT), APPELLANT,

v.

NARAYANAN CHETTIAR AND TWO OTHERS (PETITIONERS
AND RESPONDENTS 1 AND 3), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—
Application for personal decree under—Agreement entered
into after final decree—Recognition of, as bar to application
under O. XXXIV, r. 6—Permissibility—Agreement relating
only to personal liability of mortgagor—Agreement relating
also to liability of property directed by final decree to be sold
—Composite decree passed in suit awarding personal decree
in respect of deficiency arising on sale of hypotheca—Cases
of—O. XXIII, r. 3, and O. XXI, r. 2, of Code—Effect of
—Application under O. XXXIV, r. 6—Application in
execution, if.*

So long as a decree has not been passed under Order XXXIV, rule 6, of the Code of Civil Procedure, it is open to the Court under Order XXIII, rule 3, of the Code to deal with any arrangement alleged to have been entered into between the parties in respect of the claim of the mortgagee to recover the balance due to him from the defendant otherwise than out of the property sold or to be sold under the decree for sale, and it makes no difference for this purpose whether or not liberty is reserved to the mortgagee in the preliminary or final decree for sale to make an application under Order XXXIV, rule 6.

Where the arrangement alleged relates not only to the personal liability but also to the liability of the properties directed by the final decree to be sold, other considerations may arise, as, for instance, whether the two parts of the agreement are severable. Similarly, different considerations may arise where, as sometimes happens, though irregularly, a composite decree has

* Appeal Against Order No. 52 of 1933.

once for all been passed awarding a personal decree in respect of such deficiency as may arise on the sale of the hypotheca.

Question of the correctness of *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*, (1918) 37 M.L.J. 356, and *Singa Raja v. Pethu Raja*, (1918) I.L.R. 42 Mad. 61, left open.

An application under Order XXXIV, rule 6, of the Code of Civil Procedure is not an application in execution.

Observations to the contrary of BHASHYAM AYYANGAR J. in *Mallikarjunadu Setti v. Lingamurti Pantulu, etc.*, (1902) I.L.R. 25 Mad. 244, 287 (F.B.), and of STRAIGHT J. in *Durga Dai v. Bhagwat Prasad*, (1891) I.L.R. 13 All. 356, dissented from.

APPEAL against the order of the Court of the Subordinate Judge of Devakottai, dated 15th September 1932, and made in Interlocutory Application No. 1078 of 1932 in Original Suit No. 102 of 1927.

The appeal came on for hearing before BEASLEY C.J. and CORNISH J. when their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

BEASLEY C.J.—The point for determination in this appeal is whether the defendants in the suit are entitled to set up an alleged arrangement exonerating them on certain terms in answer to an application by the plaintiff, the mortgagee decreeholder, for a personal decree under Order XXXIV, rule 6, of the Code of Civil Procedure. The learned Additional Subordinate Judge held that the arrangement could not be enquired into as it amounted to an uncertified adjustment out of Court. A preliminary decree was passed in the mortgage suit for Rs. 28,292-8-0 on 14th March 1928 and the time fixed for redemption was 14th June 1928. A final decree was passed on 8th September 1928 for the sale of the suit mortgaged property. A sum of Rs. 7,851-9-0 was given credit to as having been realised by the sale of the first item on 30th November 1923 for Rs. 6,850 privately and the remaining Rs. 1,001 on 28th September 1931 through Court. The sale was held on 28th September 1931 and was confirmed on 18th February 1932. The appellant contends that on 18th February 1932 there was an arrangement between the parties exonerating him

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.

on certain terms. For the appellant, *Babu Lal v. Raghunandan*(1) was one of the cases relied upon. It was held in that case that proceedings started by an application under Order XXXIV, rule 6, of the Code of Civil Procedure are proceedings in the suit and not in execution of the decree. Hence it is argued that being an application in the suit an adjustment could be pleaded and certified. On page 842 in the judgment it is stated: "In view of the scheme of Order XXXIV of the present Civil Procedure Code it is difficult to treat an application under Order XXXIV, rule 6, as an application in execution proceedings, which can, in no sense, be considered to be an application for execution or made in proceedings taken in execution of any decree which precedes it. A final decree for sale directs only the sale of the mortgaged property and cannot itself be considered to be a simple money decree or capable of execution for obtaining satisfaction of the decretal amount by attachment of other property belonging to the judgment-debtor or by process directed against his person. It is clear to us that an application under Order XXXIV, rule 6, of the Code of Civil Procedure starts a proceeding which may end in a simple money decree. It does not seek enforcement of any decree already passed in the mortgage suit."

In *Pell v. Gregory*(2) it was held by the Full Bench that the application for a personal decree is an application for a new decree in the suit as the plaintiff seeks to enforce a right which he had independently of the previous decree. In *A. K. R. P. L. A. Chettyar Firm v. S. Maher Singh*(3) it was held by BROWN J. that an application for a final decree under Order XXXIV, rule 6, of the Civil Procedure Code is not an application in execution proceedings and that such applications are governed by the provisions of section 141 of the Civil Procedure Code. In *Rai Saheb Sundermull v. John Carapiet Galstaun*(4) it was held that, when a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by a personal judgment against the debtor until he has exhausted his remedies against the security, that a personal decree is granted only after the sale has been carried out and the deficiency ascertained and that it is a relief which, ordinarily, will not be given to a mortgagee until that stage has been

(1) (1930) I.L.R. 52 All. 839.

(3) (1930) I.L.R. 8 Rang. 316.

(2) (1925) I.L.R. 52 Cal. 828 (F.B.).

(4) (1931) 62 M.L.J. 170 (P.C.).

reached. It is contended that these cases support the appellant and that the conflict of opinion in cases where an adjustment has been pleaded between the preliminary decree and the final decree are not in point. Mr. Patanjali Sastri for the respondents contends that the suit is pending until the passing of the final decree and that Order XXI, rule 2, applies; and he relies on *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(1), a decision of AYLING and KRISHNAN JJ., who held that an uncertified adjustment of the preliminary decree in a mortgage suit cannot be pleaded in bar of execution of the final decree even though the adjustment took place in pursuance of an arrangement entered into before the passing of the preliminary decree. He contends that *a fortiori* after the passing of the final decree no such adjustment can be certified. He also relies on *Singa Raja v. Pethu Raja*(2), a decision of WALLIS C.J. and SESHAGIRI AYYAR J., where it was held that Order XXXIV, rule 5, Civil Procedure Code, recognises only one method of payment, viz., payment into Court of the amount fixed by a preliminary mortgage decree, and that hence, on default of payment into Court within the time fixed by the decree, the Court is bound on the application of the decreeholder to pass a final decree for sale. It is true that neither of these Madras decisions deals with an application to pass a personal decree after the final decree for sale has been passed. But Mr. Patanjali Sastri argues that, so far as mortgage suits are concerned, the whole scheme of the Code is that an adjustment out of Court after a decree has been passed must first of all have been recorded although he *concedes* that the *application for a personal decree is not one in execution* but contends that that is quite immaterial in view of the Madras cases. The learned Subordinate Judge has decided the matter as being one arising in execution. But that view, although erroneous, by no means disposes of the case in favour of the appellant. When a suit is pending after a preliminary decree and before a final decree no execution can be had on the footing of the preliminary decree. But these considerations may not apply when a final decree has been passed and the mortgaged properties have all been sold. In the present case, the preliminary decree provided and reserved liberty to the plaintiff to apply for a personal decree if the proceeds of the sale

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR

(1) (1918) 37 M.L.J. 356.

(2) (1918) I.L.R. 42 Mad. 61.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.

of the mortgaged property should be found to be insufficient to satisfy the decree and the question is whether after the passing of the final decree the suit can be deemed to be still pending. The view expressed in *Babu Lal v. Raghunandan*(1), to which reference has already been made, certainly is that an application for a personal decree starts a fresh proceeding which may end in a simple money decree and does not seek enforcement of any decree already passed in the mortgage suit; and *Pell v. Gregory*(2) certainly deals with a point exactly similar to the present one. Neither *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(3) nor *Singa Raja v. Pethu Raja*(4) deals with a case similar to the present. They must be taken as binding authority on the question as to whether an adjustment between the preliminary decree and the final decree in a mortgage suit must have been certified. These cases do not dispose of the Calcutta and the Allahabad view that the application under Order XXXIV, rule 6, Civil Procedure Code, starts a fresh proceeding in the suit and that it is not an application to enforce any existing judgment or decree and, in view of the uncertainty there is upon this very important question, in my view, it is necessary that this matter should be disposed of by a Full Bench. The question referred, therefore, is:

“Where a preliminary decree in a mortgage suit has provided and reserved liberty to the plaintiff to apply for a personal decree if the proceeds of the sale of the suit mortgaged property are found to be insufficient to satisfy the decree amount and a final decree for sale has been passed and an application under Order XXXIV, rule 6, Civil Procedure Code, for a personal decree for the balance is made, whether a payment or adjustment come to after the final decree has been passed can be recognised.”

CORNISH J.—I agree with the order of reference proposed by my Lord.

ON THE REFERENCE—

K. Rajah Ayyar and *S. Narasinga Rao* for appellant.

(1) (1930) I.L.R. 52 All. 839.
(3) (1918) 37 M.L.J. 356.

(2) (1925) I.L.R. 52 Calc. 828 (F.B.).
(4) (1918) I.L.R. 42 Mad. 61.

S. Panchapagesa Sastri for *M. Patanjali Sastri*
and *T. K. Sundararaman* for respondent.

Cur. adv. vult.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.

VARADA-
CHARIAR, J.

The OPINION of the Court was delivered by VARADACHARIAR J.—Before dealing with the question referred to us, we think it necessary to make a reservation about two of the cases noticed in the Order of Reference, viz., *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(1) and *Singa Raja v. Pethu Raja*(2). These decisions are there accepted as “binding authority” but their correctness has been assailed before us in another reference which (though part-heard) has had to be adjourned. As we have come to the conclusion that the present question must be answered in the affirmative even on the assumption that *Sambasiva Iyer v. Thirumalai Ramanuja Thathachariar*(1) and *Singa Raja v. Pethu Raja*(2) have been correctly decided, we proceed to answer the reference on that assumption but we do not wish to be understood as accepting their correctness.

The Order of Reference states it as Mr. Patanjali Sastri’s argument that, if, according to *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(1), an agreement or adjustment entered into before the passing of the preliminary decree in a mortgage suit cannot be pleaded in bar of execution of the final decree unless certified or recorded under Order XXI, rule 2, Civil Procedure Code, it must *a fortiori* be the case that an uncertified agreement or adjustment entered into after the final decree cannot be so pleaded. In one sense this contention may be correct, but when it is

(1) (1918) 37 M.L.J. 356.

(2) (1918) I.L.R. 42 Mad. 61.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

sought to be applied in connection with proceedings under Order XXXIV, rule 6, Civil Procedure Code, the argument involves a misreading of those decisions. We may observe in passing that the second defendant, who is the only party who has appealed, relies on an agreement alleged to have been entered into in November 1928 and not on an arrangement of February 1932 (as assumed in the Order of Reference).

In view of the course taken in the argument before us, we are obliged to draw pointed attention to what may seem elementary. A mortgagee's suit for sale may comprise *two* reliefs, one by way of sale of the properties mortgaged and the other by way of a personal decree against the mortgagor for what may remain due after the mortgaged properties have been sold. Though the plaint prays for both the reliefs, the Court is in the first instance expected to deal only with the relief by way of sale. The preliminary decree contains a *declaration* of the amount due on foot of the mortgage and contains *directions* as to what is to happen (i) if the defendant pays the amount into Court and (ii) if the payment is not so made ; but both the directions relate only to the property mortgaged. The plaintiff's right to the *other* relief is not tried either at this stage or even at the stage of the final decree ; so that, the final decree under Order XXXIV, rule 5, Civil Procedure Code, cannot be said to involve any "adjudication" as to this part of the suit and much less to have "completely disposed" of it. (*See* definition of "decree" in the Civil Procedure Code.)

After ascertainment of the deficiency arising on the sale of the mortgaged properties, the Court

(under Order XXXIV, rule 6) takes up this portion of the plaint claim, *tries* the question whether the balance is legally recoverable "otherwise than out of the property sold" and passes a *decree*. Whether called a "supplemental" decree or by any other name, this is the *only* decree on this part of the claim in the plaint.

The terms of Order XXI, rule 2, Civil Procedure Code, must be understood in the light of the scheme of the Code above set forth and with due regard to the scope of Order XXIII, rule 3. If the stage after the sale of the hypotheca and before the passing of the decree under Order XXXIV, rule 6, is a stage when one part of the plaintiff's claim, viz., that relating to the personal decree, is awaiting adjudication, it must *prima facie* be open to the parties to settle it between themselves and have a compromise decree in respect of it passed under Order XXIII, rule 3. In such a case, it is this compromise decree that will be the decree for *further* execution. There is no justification for saying that such a course is precluded by rule 4 of Order XXIII. Comparing the terms of Order XXIII, rule 3, with Order XXI, rule 2, one difference is noteworthy ; under the former the Court may, not merely order the agreement, compromise or satisfaction to be *recorded*, but also *pass a decree* in accordance therewith, whereas under Order XXI, rule 2, the Court can only *record* the adjustment. A Court acting under Order XXI, rule 2, cannot pass a fresh executable decree on the agreement of parties but further proceedings, if any, in execution, as for instance when part satisfaction has been recorded, can only take place on foot of the original decree. It

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

will thus be clear that a settlement between the parties fixing the liability of the defendant under the "personal relief" claim can appropriately be dealt with only under Order XXIII, rule 3, and not under Order XXI, rule 2.

Again, the third clause of Order XXI, rule 2, provides that a payment or adjustment which has not been certified or recorded shall not be recognised by any Court executing "*the* decree". These words can relate only to an adjustment of the decree "under execution" and not to an agreement in respect of a claim which remains to be investigated by the Court—as is the position in respect of the "personal liability" before a decree is passed under Order XXXIV, rule 6. *Ex hypothesi* the stage contemplated by Order XXXIV, rule 6, is reached only after the "final decree for sale" has been completely executed or, for special reasons, the rights under that decree have been given up. There is no longer a decree under execution; cf. *Purna Chandra Mandal v. Radha Nath Dass*(1).

The decision in *Sambasiva Ayyar v. Thirumalai Ramanuja Thathachariar*(2) related to an agreement that the decree even as one directing sale of the mortgaged properties should not be executed. It need scarcely be pointed out that such an agreement directly affects the operation of the "final decree" and does not relate to a claim which remains to be adjudicated on. The decision in *Singa Raja v. Pethu Raja*(3) has no bearing on the question now under consideration, as it turned on the language of Order XXXIV, rule 5, to the effect

(1) (1906) I.L.R. 33 Calc. 867, 873.

(2) (1918) 37 M.L.J. 356

(3) (1918) I.L.R. 42 Mad. 61.

that unless the amount mentioned in the preliminary decree is paid *into Court* a final decree for sale must follow. It says nothing as to what is to happen *after a decree for sale thus passed has been executed*.

It is stated in the Order of Reference as *conceded* before the Division Bench that "the application for a personal decree is not one in execution" but it was suggested before us that this observation must have been made on account of some misapprehension. The learned Advocate who appeared before us on behalf of the respondent contended that an application under Order XXXIV, rule 6, is (quite as much as an application under section 90 of the Transfer of Property Act) "an application for execution of the mortgage decree" and in support of this argument he relied on the observations of BHASHYAM AYYANGAR J. in *Mallikarjunudu Setti v. Lingamurthi Pantulu*, etc.(1) and of STRAIGHT J. in *Durga Dai v. Bhagawat Prasad*(2). As to the Allahabad case, it is sufficient to say that it was a case of a composite decree where the personal decree as well as the decree for sale had been incorporated in the same decree. Further, the basis of that decision as well as of the Full Bench decision in *Oudh Behari Lal v. Nageshar Lal*(3) has been criticised by STANLEY C.J. in *Sham Sundar v. Muhammad Ihtisham Ali*(4) and it has necessitated subtle distinctions being drawn between an application "in execution" and one "for execution" of the decree for sale. [Cf. *Ram Sarup v. Ghaurani*(5); and comment thereon in *Purna*

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

(1) (1902) I.L.R. 25 Mad. 244, 287 (F.B.).

(2) (1891) I.L.R. 13 All. 356.

(3) (1890) I.L.R. 13 All. 278 (F.B.).

(4) (1905) I.L.R. 27 All. 501, 506 (F.B.).

(5) (1899) I.L.R. 21 All. 453.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

Chandra Mandal v. Radha Nath Dass(1)]. Even the Allahabad High Court no longer sticks to the view propounded in the two cases of *Durga Dai v. Bhagwat Prasad*(2) and *Oudh Behari Lal v. Nageshar Lal*(3). .[See *Bubu Lal v. Raghunandan* (4) and *Muhammad Itifat Husain v. Alim-un-nissa Bibi*(5).]

The observations of BHASHYAM AYYANGAR J. in *Mallikarjunadu Setti v. Lingamurti Pantulu, etc.*(6) were *obiter* and were not necessary even for the purpose of sustaining the view of the majority in that case that an application under section 89 of the Transfer of Property Act was one for execution of the decree passed under section 88. We may however point out that WHITE C.J. and MOORE J. were not prepared to concur even in that view. BHASHYAM AYYANGAR J. himself observes on page 288 that the decree under section 90 is "virtually a decree in a suit in the form of an application, which application is made in pursuance of a prayer in the plaint" and he speaks of this decree as a fresh or supplemental decree. The earlier observation of the learned Judge is attributable to his view that, according to the true scheme of the Civil Procedure Code, there could be only one decree in a suit and no such thing as a preliminary decree distinct from a final decree was contemplated. DAVIES J. also proceeded on the same assumption and he could not reconcile himself to the idea "that one part of the decree is final and that another part is not". [See *Mallikarjunadu Setti v. Lingamurti Pantulu, etc.*(6)]

(1) (1906) I.L.R. 33 Calc. 867.

(2) (1891) I.L.R. 13 All. 356.

(3) (1890) I.L.R. 13 All. 278 (F.B.).

(4) (1930) I.L.R. 52 All. 839.

(5) (1918) I.L.R. 40 All. 551.

(6) (1902) I.L.R. 25 Mad. 244, 265 (F.B.).

It is sufficient to say that these assumptions can no longer hold good under the Civil Procedure Code of 1908, which not only provides for the passing of a preliminary decree and afterwards of a final decree but also recognizes that a decree may be partly preliminary and partly final. The foregoing observations of BHASHYAM AYYANGAR J. were dissented from in *Tirumalai Kadirvelusami Naicker v. The Eastern Development Corporation, Ltd.*(1). [See also observations in *Ramanathan Chetty v. Alagappa Chetty*(2).] On this basis there can be no justification for saying that further proceedings taken on the basis of so much of the decree as is preliminary must be deemed to be taken in execution of that part of the decree which is final [cf. *Rama Venkatasubba Iyer v. Shanmukam Pillai*(3) and *Bulkee Bee v. Kaka Hajee Muhammad Ummar Sahib*(4).]

It was next said that the application under Order XXXIV, rule 6, must be deemed to be one in execution in so far as it is made in pursuance of liberty reserved in the preliminary decree. This again rests on a misapprehension as to the effect of the liberty clause. It involves no *adjudication* as to the right to a personal decree for the balance. It is intended merely to make it clear that no inference should be drawn from the omission to deal with it in the preliminary decree or the final decree for sale. This is made clear by the decisions which hold that even in the absence of such a reservation in the preliminary decree the mortgagee will not be precluded from applying for a personal decree under Order XXXIV,

(1) (1917) 33 M.L.J. 382.

(2) (1929) I.L.R. 53 Mad. 378, 382 to 384.

(3) (1913) 21 I.C. 530.

(4) (1925) 50 M.L.J. 39.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

rule 6. [See *Rai Saheb Sundermull v. John Carapiet Galstaun*(1) and *Govindaswami Koundan v. Kandaswami Koundan*(2).] As we respectfully concur in the reasoning in *Pell v. Gregory*(3), we need not repeat it here. On pages 860 and 861, MUKERJI J. refers to the clause in the preliminary decree reserving liberty to apply and rightly points out that no argument could be founded on it.

An observation of the Judicial Committee in *Banku Behari Chatterji v. Naraindas Dutt*(4) must be referred to here. Their Lordships say :

“ His right to a personal decree accrued along with his other rights, when the final decree was made.”

The decree in that case was a *composite* one [see the purport of the decree set out in *Narain Dass Dutt v. Banku Behary Chattopadhyaya*(5) ; see also *Swaminatha Odayar v. Thiagarajaswami Odayar*(6) and Notes of Indian Cases in 54 Madras Law Journal page 1 and remarks in Mitra on Limitation, 6th Edn. page 2120]. The observation even as it stands does not necessarily imply that the right to a personal decree is one derived from the decree for sale or to be obtained in enforcement of it.

In *Hafiz Abdul Rashid v. Lala Mul Chand*(7) the concluding observations at page 240 are perhaps capable of being read as suggesting that proceedings under Order XXXIV, rule 6, work out the *decree for sale* already passed ; if that is what the learned Judges intended, we are with all respect unable to agree in that view.

(1) (1931) 62 M.L.J. 170 (P.C.).

(2) (1927) 53 M.L.J. 489.

(3) (1925) I.L.R. 52 Calc. 828 (F.B.).

(4) (1927) I.L.R. 54 Calc. 500, 505 (P.C.).

(5) (1924) 78 I.C. 1001, 1003.

(6) (1925) I.L.R. 50 Mad. 5.

(7) (1928) I.L.R. 4 Luck. 237.

Our answer to the question referred is that, so long as a decree has not been passed under Order XXXIV, rule 6, it is open to the Court under Order XXIII, rule 3, to deal with any arrangement alleged to have been entered into between the parties in respect of the claim of the mortgagee to recover the balance due to him from the defendant, otherwise than out of the property sold or to be sold under the decree for sale, and it makes no difference for this purpose whether or not liberty is reserved to the mortgagee, in the preliminary or final decree for sale, to make an application under Order XXXIV, rule 6. In view however of the general terms in which the question referred to us has been framed, we would add that, where the arrangement alleged relates not only to the personal liability but *also* to the liability of the properties directed by the final decree to be sold, other considerations may arise, as, for instance, whether the two parts of the agreement are severable. Similarly, different considerations may arise where, as sometimes happens, though irregularly [cf *Jeuna Bahu v. Parmeshwar Narayan Mahtha*(1) and *Falakrishna Pal v. Jagannath Marwari*(2)], a *composite* decree has once for all been passed *awarding* a personal decree in respect of such deficiency as may arise on the sale of the hypotheca.

A.S.V.

(1) (1918) I.L.R. 47 Calc. 370 (P.C.).

(2) (1932) I.L.R. 59 Calc. 1314.

PALANIAPPA
CHETTIAR
v.
NARAYANAN
CHETTIAR.
—
VARADA-
CHARIAR J.

APPELLATE CIVIL—FULL BENCH.

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

1934,
December 19.
1935,
August 1.

V. MACHA KOUNDAN (RESPONDENT), APPELLANT,

v.

V. K. KOTTORA KOUNDAN (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 47 and O. XXI, rr. 89, 90, 91—Mortgage decree and sale of mortgaged properties—Payment by purchaser of purchase price—Confirmation of sale—Subsequent suit by a third party against auction-purchaser—Sale held not binding on third party—Auction-purchaser losing possession as a consequence—Subsequent suit by auction-purchaser against decree-holder to recover back purchase price—Competency of—Sec. 47 not a bar to such suit.

Where a mortgage decree and the sale of the mortgaged property in execution of the mortgage decree are held, in a suit filed by a third party subsequent to the confirmation of the sale, to be not binding on the third party, and as a consequence thereof, the auction-purchaser loses possession of the property, he has a right to recover back the purchase-money from the decree-holder by a separate suit and not by proceedings in the executing Court.

APPEAL against the order of the District Court of North Malabar, dated 23rd August 1929, and made in Appeal Suit No. 536 of 1928 (Execution Application No. 11 of 1928 in Original Suit No. 33 of 1917 on the file of the District Munsif's Court of Vayitri at Calicut).

The appeal came on for hearing and the Court (LAKSHMANA RAO J.) made the following

* Appeal Against Appellate Order No. 54 of 1930.

ORDER:—

This second appeal arises out of an application by the respondent, the auction-purchaser, for return of the purchase money and the undisputed facts are that property belonging to his tarwad was mortgaged by one Kelappan Nambiar to the father of the appellant. The mortgagee obtained a decree for sale against the mortgagor and the hypotheca was brought to sale by the appellant after the death of his father. It was purchased by the respondent and the sale was duly confirmed. The respondent was put in possession and a suit was instituted thereafter by the members of the tarwad against the appellant, the respondent and Kelappan Nambiar, for a declaration that the mortgage decree and sale thereunder were not binding on the tarwad and for possession of the property. The suit was decreed and the respondent was dispossessed on 9th December 1927. The application out of which this appeal arises was filed on 11th January 1928 with a prayer that if necessary the proceeding may be treated as a suit and, so far as is material for the purpose of this second appeal, the appellant resisted it on the ground that, independently of Order XXI, rule 93, of the Code of Civil Procedure, the respondent is not entitled to repayment of the purchase-money. The District Munsif overruled his contention and the District Judge confirmed the order of the District Munsif with a slight modification as to the amount to be refunded.

There is no dispute now regarding the amount to be refunded, and the question for determination is whether the purchaser of immovable property sold in Court auction in pursuance of a mortgage decree is entitled to maintain an application or a suit for recovery of the purchase-money if he is deprived of the property subsequent to the confirmation in his favour on the ground that the judgment-debtor has no saleable interest in it. It has no doubt been held by a Full Bench in *Bindeshri Prasad Tiwari v. Badal Singh*(1) that he is entitled to recover the purchase-money, and, according to the Full Bench decision in *Mehr Chand v. Milkhi Ram*(2), even a purchaser of property at an auction held in execution of a simple money decree can recover the purchase-money, but this is opposed to the majority view in Madras—vide *Pachayappan v. Narayana*(3), *Mohideen*

(1) (1923) I.L.R. 45 All. 369 (F.B.). (2) (1932) I.L.R. 13 Lah. 618 (F.B.).
(3) (1887) I.L.R. 11 Mad. 269.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

Imbrahim v. Mahomed Mura Levai(1) and *Tirumalaisami Naidu v. Subramanian Chettiar*(2), that in the absence of fraud, the purchaser is not entitled to recover the money apart from Order XXI, rule 93, and there is difference of opinion as regards the proper remedy as well. Under the circumstances and in view of the importance of the question, it is desirable that it should be settled by a Bench of two Judges and the appeal is accordingly referred to a Bench.

The appeal came on for hearing in pursuance of the above order before a Division Bench and the Court (SUNDARAM CHETTI and PAKENHAM WALSH JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The facts of this case are briefly set forth in the order of our brother LAKSHMANA RAO J. in referring the questions involved in this case for a decision by a Bench of two Judges. It is unnecessary for us to reiterate these facts. Two questions of law are involved in this appeal:—

(i) Where a mortgage decree and the sale of the mortgaged property in execution of the mortgage decree were held in a suit filed by a third party subsequent to the confirmation of the sale, to be not binding on the third party, and as a consequence thereof, the auction-purchaser lost possession of the property, has he a right to recover back the purchase-money from the decree holder?

(ii) If he has such a right, can he apply to the executing Court under section 47, Civil Procedure Code, for the recovery of the money or is his remedy only by way of a separate suit?

As regards the first question, we find that there is a consensus of judicial opinion to support the view that the auction-purchaser cannot apply for refund of the purchase-money under Order XXI, rule 93, Civil Procedure Code. Whatever his right might have been under section 315 of the old Code of Civil Procedure, Order XXI, rule 93, cannot be availed of by him when once the sale is confirmed by the Court. That he has a right to apply under section 47, Civil Procedure Code,

(1) (1912) 23 M.L.J. 487.

(2) (1916) I.L.R. 40 Mad. 1009.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

for the refund of the money had been held by the Allahabad High Court in *Bindeshri Prasad Tiwari v. Badal Singh*(1). This decision was distinguished in a later decision of the same High Court, that is, *Deputy Shankar v. Mangal Sen*(2) on the ground that in the previous case the decree itself was set aside in a suit subsequently brought. The view taken in *Deputy Shankar v. Mangal Sen*(2) seems to be that, where the decree was not set aside, the auction-purchaser would have no remedy for getting a refund of the purchase-money even in a separate suit. The principle that as regards sales under decree of a Court there is no warranty of title either by the decree-holder or by the Court was upheld, and that is the main ground for holding that the auction-purchaser has no right to recover the purchase-money. The Calcutta High Court in *Rishikesh Laha v. Manik, Molla*(3) negatives the right of the auction-purchaser to recover the purchase-money on the mere ground that the judgment-debtor was found to have no saleable interest, but where the auction-purchaser is shown to have suffered loss through the fraud of the decree-holder or the breach of any duty which he owed to the auction-purchaser, he may be entitled to receive compensation for the loss which was so caused to him. But the actual decision has not been stated in the head-note to that decision. In *Balvant Raghunath v. Bala*(4) it was held that the auction-purchaser, in order to entitle him to ask for a refund of the purchase-money, must get the sale set aside under Order XXI, rule 91, Civil Procedure Code. The learned Judges refer to a considerable change in the law effected by the Code of 1908 by which the statutory right to file a suit for the recovery of purchase-money has been held to have been taken away. A number of decisions of our High Court, namely, *Mohideen Imbrahim v. Mahomed Mura Levai*(5), *Parvathi Ammal v. Govindasami Pillai*(6) and *Tirumalaisami Naidu v. Subramanian Chettiar*(7), have also been referred to in the course of the arguments. In none of these cases was the present question, which arises under the present Code of Civil Procedure, the subject of direct decision. In two of the cases the question had to be decided with reference to section 315 of the old Code, and in the other case, the question was whether,

(1) (1923) I.L.R. 45 All. 369 (F.B.).

(2) (1932) I.L.R. 54 All. 948.

(3) (1926) I.L.R. 53 Calc. 758.

(4) (1922) I.L.R. 46 Bom. 833.

(5) (1912) 23 M.L.J. 487.

(6) (1915) I.L.R. 39 Mad. 803.

(7) (1916) I.L.R. 40 Mad. 1009.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

after the sale was set aside on the ground of material irregularities, the auction-purchaser had a right to recover the purchase-money. There are however observations which would negative the right of the auction-purchaser to claim a refund of the purchase-money either by a suit or in any other manner, subsequent to the passing of the new Code.

The contrary view has been taken in the Full Bench decision reported as *Bahadur Singh v. Ramphal* (1) by a majority of Judges. In a recent Full Bench decision of the Lahore High Court reported as *Mehr Chand v. Milkhi Ram* (2) these questions have been considered at great length, and the view taken is that the auction-purchaser has a right of suit for the refund of the purchase-money in case the judgment-debtor was found to have no saleable interest in a subsequent suit, after the confirmation of the sale, and as a consequence thereof, the auction-purchaser lost possession of the property. Thus we see that not only is there a conflict of opinion among the other High Courts, but there is no decision of our High Court in which these questions arose directly for determination. Considering the importance of the questions of law as set forth above, and also in view of the likelihood of these questions coming up for decision frequently, we think it desirable that an authoritative ruling of our High Court is given, and, for that purpose, we refer the two questions set forth above for decision by a Full Bench.

ON THE REFERENCE—

K.P. Ramakrishna Ayyar for appellant.

K. Kuttikrishna Menon and *K. Appu Menon* for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The facts out of which this civil miscellaneous second appeal arises are these. One T. K. Nambiar mortgaged a property to the appellant's father. The mortgagee sued for the mortgage-money and obtained a decree for sale.

(1) (1929) I.L.R. 5 Luck. 552 (F.B.) (2) (1932) I.L.R. 13 Lah. 618 (F.B.).

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.
—
RAMESAM J.

The appellant as his legal representative executed the decree and in the sale that followed the property was purchased by the respondent for Rs. 825. Meanwhile the junior members of T.K. Nambiar's tarwad sued for a declaration that the mortgage decree and sale were not binding on them and for possession. They obtained a decree and in execution got possession of the property. Thus the respondent was deprived of the possession of the property which he had purchased and he filed an application under sections 47, 147 and 151, Civil Procedure Code, for a refund of the purchase-money. The District Munsif ordered the refund. On appeal the District Judge deducted only the poundage fee and otherwise confirmed the District Munsif's order. The appellant, i.e., the legal representative of the decree-holder in the mortgage suit, has filed this appeal. He contends that the respondent is not entitled to a refund at all even by way of a regular suit; but his chief contention is that the respondent is not entitled to obtain a refund by way of an application in execution. Accordingly these two questions have been referred to the Full Bench in the order I have stated.

Taking the first question, viz., whether the respondent is entitled to a refund at all even by way of a suit, the question depends upon the rights of the parties as they flow out of the circumstances of the case and not upon whether a provision for such a suit is made in the Civil Procedure Code. The Civil Procedure Code is a code of adjective law and cannot create rights of action though it may recognize them or take them away. Forgetting for a moment all technicalities

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.
RAMESAM J.

and the Codes of Procedure, one would think on the facts that the auction-purchaser should have a right of action for money had and received. The facts are that a decree-holder brings a certain property to sale *bona fide* believing it to belong to his judgment-debtor. The Court also under the same belief orders the sale of the property. The auction-purchaser also under the same *bona fide* belief purchases it. Afterwards it turns out that the property does not belong to the judgment-debtor at all. Thus the auction-purchaser purchases nothing though he paid consideration for it under a mistake. The decree-holder gets a certain amount without really having brought any of the properties of the judgment-debtor to sale, i.e., under a similar mistake. Under the circumstances it is unconscionable that the decree-holder should retain the benefit of the money so obtained and the auction-purchaser should lose it, and one would think that the auction-purchaser would have a right of action for money had and received under the general law and not under any code of procedure.

Mr. Ramakrishna Ayyar, the learned Advocate for the appellant, refers to a decision in *Sowdaminee Chowdhraïn v. Kishen Kishore Poddar*(1). This decision was passed under Act VIII of 1859 but the general right was discussed and it was negatived on the ground that there was no warranty by the Court or by the decree-holder.

In *Dorab Ally Khan v. The Executors of Khajah Moheooddeen*(2) the plaintiff sued for refund of the purchase-money on the ground of failure of consideration. Under a writ of *fieri facias* issued

(1) (1869) 12 W.R. 8 (F.B.). (2) (1878) I.L.R. 3 Calc. 806 (P.C.).

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.
RAMESAM J.

to the Sheriff of Calcutta, he seized property without jurisdiction and conveyed it to the plaintiff's predecessor-in-title, who was afterwards deprived of his possession. There was a conveyance by the sheriff and the whole discussion before the Court turned upon the covenants in the conveyance. But on the ground that the sheriff had no jurisdiction to sell property in Oudh, the High Court's judgment was set aside by the Privy Council and the suit was remanded for trial on the merits. I do not think this case can help the appellant. It was not a case of sale under the Civil Procedure Code by the Court. Whatever might be the theory of law in the minds of the framers of the Code of 1859, it is now clear that the Legislature was unwilling to adopt the view of the law laid down in *Sowdaminee Chowdhraïn v. Kishen Kishore Poddar*(1) and *Dorab Ally Khan v. The Executors of Khajah Moheooddeen*(2) and they proceeded to frame the language of the corresponding section in the Codes of 1877 and 1882 (section 315) on a different theory. Section 315 contained a clause: "the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid." It is clear that this clause recognizes the right of the auction-purchaser to obtain a refund of his purchase-money if there is no saleable interest though there is no warranty of title. What is meant is that, though in a Court sale there is not such a warranty as to the extent of title as we find in a private transaction between a vendor and a purchaser, still the Code adopts the view that there is a

(1) (1869) 12 W.R. 8 (F.B.).

(2) (1878) I.L.R. 3 Calc. 806 (P.C.).

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.
RAMESAM J.

limited kind of warranty, viz., that the judgment-debtor possesses some little interest however small it may be. If the judgment-debtor's interest turns out to be nothing, the Court practically makes a promise that the auction-purchaser will have a refund of his purchase-money. This is the theory underlying section 315 of the Code of 1882. If once such a right in the purchaser is recognized, on the principle that every right should be capable of being enforced by a suit, a regular suit lies to obtain a refund of the purchase-money, but the Legislature proceeded to give a remedy in execution also under section 315. Accordingly, under the Code of 1882 Courts have held that, in a case where the judgment-debtor has no saleable interest, the auction-purchaser can obtain a refund of his purchase-money under section 315 or by a regular suit. Where it is sought to be obtained by a suit, it is improper to describe it as a suit under section 315, Civil Procedure Code. As already observed, the right to obtain a refund being recognized by the Code, the remedy by way of suit exists not because the Code gave it but because every right can be enforced by a suit. When the present Civil Procedure Code was passed, the Legislature limited the right of the auction-purchaser to obtain a refund in execution to cases where the sale was set aside by the executing Court under Order XXI, rule 92, i.e., where an application is made under rules 89, 90 or 91. But in cases where the executing Court does not set aside the sale but the sale turns out to be futile by the finding in another litigation—that the judgment-debtor has no saleable interest—this provision, viz., Order XXI, rule 93, cannot apply.

The question that now arises is whether the auction-purchaser can recover the purchase-money at least by a regular suit. It follows from the observations already made that such a suit exists unless it is taken away by an express provision of law. The object of the Code is to provide a speedier remedy in execution under certain special circumstances. The right of suit under other circumstances remains under the general law.

When we look at the decisions, it is true that there is some conflict of authority. In *Mohideen Imbrahim v. Mahomed Mura Levai*(1), *Tirumalaisami Naidu v. Subramanian Chettiar*(2) and *Makar Ali v. Sarfuddin*(3), the right of suit accrued when the old Code remained in force though the suit was brought under the new Code. Accordingly, in the second and third cases it was held that the suit was maintainable. In the first case the learned Judges differed. Though the conclusion of AYLING J. in the first case and the conclusions in the other two cases are correct, I venture to think that the reasoning by which they were arrived at is not sound. The learned Judges who held that the suit was maintainable thought that the right was given by the Code of 1882 and taken away by the Code of 1908. The Code of 1882 did not create the right of suit nor was it taken away by the Code of 1908. The remedy by way of suit exists as a corollary to the recognition of the right to obtain a refund.

In *Parvathi Ammal v. Govindasami Pillai*(4) the sale was set aside on account of a material

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.
RAMESAM J.

(1) (1912) 23 M.L.J. 487.
(3) (1922) I.L.R. 50 Calc. 115.

(2) (1916) I.L.R. 40 Mad. 1009.
(4) (1915) I.L.R. 39 Mad. 803.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

RAMESAM J.

irregularity and the purchase-money was returned to the auction-purchaser but not the poundage. It was held that a regular suit lies to recover the poundage fee, though all the facts occurred under the present Code.

In *Subbu Reddi v. Ponnambala Reddi*(1) it was held that no regular suit lay. The learned Judges followed NAPIER J.'s view in *Mohideen Imbrahim v. Mahomed Mura Levai*(2).

The decision in *Muthukumaraswami Pillai v. Muthuswami Thevan*(3) has no bearing on the present discussion. There the auction-purchaser filed a petition under Order XXI, rule 91, but beyond the thirty days provided by the Limitation Act.

Thus the only Madras case reported in the authorized reports in which all the facts happened under the present Code, viz., *Parvathi Ammal v. Govindasami Pillai*(4), is in favour of the view that a suit lies, though in that case the sale was set aside in execution.

In *Juranu Mahamad v. Jathi Mahamad*(5) it was held that a suit does not lie. But the opposite conclusion was arrived at in the same Court in *Prasanna v. Ibrahim*(6).

In *Rishikesh Laha v. Manik Molla*(7) it was held that a regular suit lies if there are circumstances like fraud but not otherwise.

In *Nannu Lal v. Bhagwan Das*(8) it was held that a suit does not lie.

(1) 1918 M.W.N. 655.

(3) (1926) I.L.R. 50 Mad. 639.

(5) (1917) 22 C.W.N. 760.

(7) (1926) I.L.R. 53 Cal. 758.

(2) (1912) 23 M.L.J. 487.

(4) (1915) I.L.R. 39 Mad. 803.

(6) (1917) 36 C.L.J. 205.

(8) (1916) I.L.R. 39 All. 114.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

RAMESAM J.

In *Bindeshri Prasad Tiwari v. Badal Singh*(1) a Full Bench held that an auction-purchaser can obtain a refund of the purchase-money under section 47, Civil Procedure Code, i.e., in execution, though it is by an application other than one under Order XXI, rule 93. This case has been distinguished in *Deputy Shankar v. Mangal Sen*(2) on the ground that on the facts of that case the decree in execution of which the sale was held was itself set aside in another suit. It may be on account of this distinction that the decision in *Bindeshri Prasad Tiwari v. Badal Singh*(1) must be confined to the special facts of the case. But I do not agree with the decision in *Deputy Shankar v. Mangal Sen*(2) holding that a regular suit does not lie, the only ground for the decision being that there is no warranty in a Court sale.

Amba Lal v. Ramgopal Madhoprasad(3) is also a case where the decree was varied and it affords no guide to us in facts like the present.

The decision in *Balvant Raghunath v. Bala*(4) is like the decision in *Rishikesh Laha v. Manik Molla*(5), the learned Judges holding that fraud or misrepresentation is necessary to sustain a claim for refund in a regular suit.

In *Ram Tuhul Singh v. Biseswar Lal Sahoo*(6) the auction-purchaser sought to obtain a refund not from the person who obtained the payment but from the judgment-debtor on the ground that he had the benefit of the payment to the decree-holder. It was held that the connection of the judgment-debtor with the matter is too remote

(1) (1923) I.L.R. 45 All. 369 (F.B.).

(3) (1932) I.L.R. 55 All. 221.

(5) (1926) I.L.R. 53 Cal. 758.

(2) (1932) I.L.R. 54 All. 948.

(4) (1922) I.L.R. 46 Bom. 833.

(6) (1875) L.R. 2 I.A. 131.

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

RAMESAM J.

and speculative to sustain an action for money had and received. That decision has again no bearing on the matter before us.

In *Nagendra Nath Ghosh v. Sambhu Nath Pandey*(1) and *Maung Naung v. Maung Ba Gyi*(2) it was held that no regular suit lies, the main ground being that there is no warranty.

The whole case-law has been reviewed by the Lahore High Court in *Mehr Chand v. Milkhi Ram*(3) where it was held that an action for a refund of money had and received is maintainable. According to this decision there is an implied warranty in Court sales to the extent that there is some little title in the judgment-debtor and it is not a case of no title at all, though it is still true that there is no warranty of the kind as in private purchase as to the extent of the title conveyed. I agree with this decision.

The result is, in a case where the sale is set aside in execution by an application under rules 89, 90 or 91, the auction-purchaser can obtain a refund on an application under Order XXI, rule 93, Civil Procedure Code. But where the sale turns out to be futile by a finding in another suit the only remedy that the party has is a regular suit and not an application under Order XXI, rule 93. There may be defences in that suit, e.g., that the case was not properly conducted and that the finding is not binding.

I accordingly answer question No. 1 in the affirmative and question No. 2 in the negative.

The respondent tried to argue before us that the present execution application may be regarded as a regular suit. This is not a matter referred

to us and the Division Bench must deal with such an argument.

BEASLEY C.J.—I agree.

KING J.—I agree.

[This case came on for hearing again before a Division Bench of the High Court (PAKENHAM WALSH and VARADACHARIAR JJ.), after the expression of the opinion of the Full Bench, and the Court made the following ORDER :—]

Even in the original application a request was made to treat the petition as a suit. We see no objection to this being done, but it will be necessary that court-fee be paid as for a suit, the same being fixed on the amount claimed in the application in the first Court. We allow one month's time for the present respondent to pay the court-fee payable in the Court of First Instance.

[This case came on for final hearing on 1st August 1935, and the Court delivered the following JUDGMENT :—]

The necessary court-fee has been paid in accordance with the above direction. According to the opinion of the Full Bench the respondent is entitled to the relief given to him by the lower appellate Court. The civil miscellaneous second appeal is therefore dismissed with costs. The lower appellate Court's decree will be treated as a decree passed in a suit and the respondent will be entitled to add to his costs the extra court-fee he had to pay in accordance with our order of 11th February 1935.

G.R.

(1) (1924) I.L.R. 3 Pat. 947.

(2) (1928) I.L.R. 6 Rang. 468.

(3) (1932) I.L.R. 13 Lah. 618 (F.B.).

MACHA
KOUNDAN
v.
KOTTORA
KOUNDAN.

INCOME-TAX REFERENCE.

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

1935,
April 24.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

B. J. FLETCHER BY POWER OF ATTORNEY AGENT
N. RHODES, RESPONDENT.*

*Indian Income-tax Act (XI of 1922), ss. 4 (3) (v) and (vi),
6, 7 (1) and 25 (3)—Employer company—Officers' Retiring
Fund constituted by—Sum paid to employee out of, on his
retirement—Nature of—Liability to assessment of—Appli-
cability of sec. 25 (3)—Conditions.*

The assessee was an employee of a limited company for about twenty-four years till 28th February 1933 when he retired from service. During the period of his employment the company paid him a monthly salary as well as a half-yearly cash bonus out of its profits, and income-tax was collected on those amounts. The company had constituted an Officers' Retiring Fund the constitution and management whereof were governed by certain rules framed by the company, which rules the directors of the company for the time being had full discretion to alter, interpret or add to. An officer who had served the company for the requisite period became entitled to membership of that Fund. He was to be credited with his appropriate share in the contributions made by the company to the Fund; and a pass-book was issued to officers showing how their credit stood in the Fund. One of the Fund rules provided that every bonus should in the first instance be apportioned as between the officers of the company in proportion to the salaries drawn by them respectively at the date of the allotment of such bonus by the company and should be credited in such proportions to such officers in account with the Fund. But the rules did not require that the company should make any contribution to the Fund at any particular period.

* Original Petition No. 27 of 1935.

It was a matter which was left entirely to the pleasure of the company. And the directors of the company had sole control over the investment of the money in the Fund. Under the Fund rules no officer was to have any claim against the company in respect of any bonus or otherwise as regards the Fund until he left the service of the company and should have previously served the company continuously and satisfactorily for the period required of him by the rules (six years in the case of the assessee). In the event of his death during his term of service it was provided that the amount then standing to his credit in the Fund should be paid to his legal representative; but the rules gave him no power of nomination over the amount to his credit in the Fund. In the event of an officer leaving the service of the company or being dismissed before having completed the term of service required of him, the amount standing to his credit was under the rules to be apportioned to the credit of the other officers then in the employ of the company. Nothing contained in the rules was in any way to be taken to restrict the powers of the company from at any time dispensing with the service of, or dismissing, any officer; and an officer whose service was dispensed with or who was dismissed before completing his full period of service was to have no claim whatever against the Fund. The amount allotted each half-year to the credit of the Fund was not treated as expenditure incurred by the company for the purposes of its assessment; but any amount paid out of the Fund to an employee in account with the Fund at the time of his retirement was treated as expenditure incurred by the company in the year of payment for the purposes of its assessment. The amount credited each half-year to the account of the assessee was not treated by him as his income of that year in any of the returns filed by him nor was it ever assessed to tax as income of any year prior to 1932-33. The sums allotted half-yearly by the company to the credit of the Fund were in the rules described as bonuses.

When the assessee retired from service on 28th February 1933, he received a sum of Rs. 36,794 out of the Officers' Retiring Fund of the company. The assessee contended that the said sum was not his income and that he was not liable to any assessment to income-tax during the year 1933-34 under section 25 (3) of the Indian Income-tax Act of 1922 on the ground that he had discontinued his profession in that year.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.

Held by the Full Bench.—The assessee was not entitled to relief under section 25 (3) of the Act.

Held by CORNISH and PANDRANG ROW JJ. (BEASLEY C.J. dissenting).—The sum of Rs. 36,794 paid to the assessee was not income liable to tax.

Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company, (1932) I.L.R. 59 Calc. 1343 (P.C.), referred to.

Per CORNISH J.—The contributions made by the company to the credit of its officers in the Officers' Retiring Fund were not part of the officers' salaries, nor were they a gratuity or profit received by the officers in lieu of or in addition to salary. There is no essential difference between the payment of a lump sum from the Officers' Retiring Fund to an officer on his retirement and the payment of a lump sum from a Provident Fund to an employee on his retirement, or the payment of a sum, with accrued bonuses, payable to the assured under a policy of insurance.

Per PANDRANG ROW J.—The payment made by the company to the assessee was not a payment made by the company as an employer but a payment made by it as trustee, and cannot therefore be assessed to tax under the head of salaries.

In re The Commissioner of Income-tax, Burma v. The Rangoon Electric Tramway & Supply Co., Ltd., (1933) I.L.R. 11 Rang. 70, referred to.

The payment of the sum of Rs. 36,794 to the assessee was in substance and in truth the payment of a lump sum in lieu of pension, i.e., in consideration of his past services, and comes under section 4 (3) (v) of the Act.

Rutherford v. Commissioner of Income-tax, Bihar and Orissa, (1930) I.L.R. 10 Pat. 315, referred to.

Per BEASLEY C.J.—The amount of Rs. 36,794 must be regarded as the aggregate of the sums set apart periodically, that is to say, half-yearly, by the company in respect of present services rendered by the assessee as an addition to salary under section 7(1) of the Act. The fact that they were allowed to accumulate and were paid to him at the end of his service in a lump sum did not make any difference.

Rutherford v. Commissioner of Income-tax, Bihar and Orissa, (1930) I.L.R. 10 Pat. 315, distinguished.

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

M. Patanjali Sastri for Commissioner of Income-tax.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.

T. M. Krishnaswami Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—Two questions are referred to us by BEASLEY C.J. the Income-tax Commissioner, viz.,

"(i) Whether the sum of Rs. 36,794 paid to Mr. Fletcher in 1932–33 was income liable to tax or was a capital sum exempted under clause (v) of sub-section (3) of section 4 or otherwise, and

(ii) Whether Mr. B. J. Fletcher is entitled to relief under section 25 (3) of the Act on the ground alleged by him, viz., that he discontinued his profession in the year of account."

The sum set out in the first question was received by the assessee in the year of account as an employee of the Buckingham and Carnatic Company, Limited, Madras, over and above his monthly pay. This sum he received out of the Officers' Retiring Fund of the Company. It is a fund created by the Company and its constitution and management are governed by certain rules framed by the Company and the directors of the Company for the time being have full discretion to alter, interpret or add to those rules which are before us. The Company allots every half-year a certain sum to the credit of this Fund and this sum is invested and accumulated at the discretion of the directors of the Company. The half-yearly allotment is divided amongst the several officers of the Company eligible to the benefits of the Fund in proportion to their salaries and credited half-yearly to accounts maintained in the names of the several officers. Each officer is given a

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

pass-book in which are entered the amounts so credited to his account with the Fund. The proportionate interest realized on the investments is also credited to this account. No officer admitted to the benefits of the Fund has any claim on the Company in respect of the amount shown at the credit of his account until he shall have previously served the Company continuously and satisfactorily for a prescribed period (six years in the case of the petitioner) and in no case can the amount to the credit of an officer become payable to him until he leaves the service of the Company. The directors of the Company have full discretion to decide which of the officers of the Company shall from time to time be eligible to the benefits of the Fund. They have full power to dispense with the services of or dismiss any such officer and such persons have no claim against the Fund if they have not served for the prescribed period. The amount allotted each half-year to the credit of the Fund is not treated as expenditure incurred by the Company for the purposes of its assessment; but any amount paid out of the Fund to an employee in account with the Fund at the time of his retirement is treated as expenditure incurred by the Company in the year of payment for the purposes of its assessment. The amount credited each half-year to the account of the assessee was not treated by him as his income of that year in any of the returns filed by him nor was it ever assessed to tax as income of any year prior to 1932-33. As before mentioned, the total amount to the credit of the assessee's account with the Fund on the date of his retirement was Rs. 36,794-3-2. This amount was paid

to him by the Company on 29th March 1933 after deducting Rs. 6,496-7-0 on account of income-tax under section 18 (2) of the Act.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

It was contended on behalf of the assessee that this was not a payment of a gratuity coming under the head of "salaries" in section 7 (1) of the Income-tax Act. This payment was variously described by learned Counsel for the assessee as a gift, as being akin to commuted pension, or a windfall. In my opinion, this is in no sense a gift because, provided that the officer has fulfilled the conditions laid down in the rules, on his retirement he has a legal claim to the amount standing to his credit; nor, in my opinion, can it be described as being in the nature of a windfall, such as the payment was held to be in *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(1), where the company on the termination of an agency received a sum of money to compensate them for its cessation and that sum was held not to be taxable income under section 6 (iv) (business) nor under section 6 (vi) (other sources). The case most favourable to the assessee is *Rutherford v. Commissioner of Income-tax, Bihar and Orissa*(2). The facts in that case were that it had been the custom of the Bettiah Raj under the management of the Court of Wards to grant a lump sum to its managers when they laid down their office. This practice had been sanctioned by the Government in the cases of successive managers and it was one of the inducements offered to candidates for the office. It was recognized that there was no legal obligation upon the Raj or the Government to make the payment but having regard to the

(1) (1932) I.L.R. 59 Calc. 1343 (P.C.). (2) (1930) I.L.R. 10 Pat. 315.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

established practice it was nevertheless a matter of reasonable expectation and incentive to accept an onerous office at a comparatively small salary and to perform the duties in an efficient manner. In pursuance of this practice, Mr. Rutherford received a sum of Rs. 75,575 which the income-tax authorities sought to assess but it was held that the sum was in the nature of commuted pension falling within section 4 (3) (v) of the Act and was exempt from taxation, the contention for the Crown having been that the sum paid was a gratuity and not a pension. The learned CHIEF JUSTICE says at page 318 :

"The candidate, therefore, enters upon his office under the Court of Wards with a definite salary and the expectation that he will receive at the end of his service the equivalent of a pension—but he knows that he will not after his retirement be given a series of periodical payments but in lieu thereof he will get a lump sum. In other words, he is to get a pension which will certainly be commuted."

It was found as a fact that, if it were not for the expectation of this gratuity, the Court of Wards would have to pay higher salaries to the officers and further :

"No doubt the Court of Wards do not pay pensions or guarantee gratuities but allow a gratuity in each case as an act of grace. But it is none the less true that the Court of Wards do invariably pay gratuities to their deserving servants on retirement."

It is pointed out in the judgment that it was not possible for the Court of Wards or the Government to offer the candidate a pension consisting of periodical payments because the payment might be repudiated by the owners after the estate was released from the management of the Court and that therefore the practice had been established of treating officers of the Court, if the finances of

the State permitted, in the same manner as Government servants and of paying to them a sum equal to that payable as commutation of pension on the scale set forth for such commutation appended to the Civil Service Regulations plus in very meritorious cases one-fourth of such amount. The facts are different here. But it remains to be seen whether the dissimilarity really makes any difference. In that case, the payment was allowed as an act of grace. In the present case, it is not an act of grace at all but the Company by its rules binds itself, subject to conditions, to pay an amount, although not specified, to its officers who come under the rules, provided they fulfil the conditions, on retirement. Moreover, there is no indication here, as far as I am able to see, that the sum payable is based on any scale for the commutation of pensions such as there was in *Rutherford v. Commissioner of Income-tax, Bihar and Orissa*(1) and there is this fact also that in the rules the sums allotted half-yearly by the Company to the credit of the Fund are described as bonuses and they are apportioned as between the officers of the Company. Throughout the rules the sums are described as bonuses and ultimately the Company is to pay to the officer

"the aggregate amount of his share in the various bonuses that may have been credited to the Fund by the Company during the period of his service with the Company",

whereas there was no such periodical allotment of sums to the managers in *Rutherford v. Commissioner of Income-tax, Bihar and Orissa*(1); and it is of course quite clear that the allotment

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

(1) (1930) I.L.R. 10 Pat. 315.

COMMISSIONER OF INCOME-TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

of a bonus is dependent upon the earning of profits by the Company and bonuses may be increased or reduced or may not be allotted at all. There is no evidence that the officer receives a smaller salary by reason of the fact that there is this payment coming to him on his retirement, nor under the circumstance of the crediting each half-year of the bonuses can a lump sum payment of the Fund be considered as a payment for past services. It is impossible to avoid the conclusion that the allotment is being made for present services and Mr. Patanjali Sastri contends that this sum is, as it is described in the rules, an accumulation of bonuses. It is conceded that in respect of cash bonuses paid to an officer in addition to salary they are assessable to income-tax under section 7 as profits received by the officer in addition to his salary. Hence Mr. Patanjali Sastri argues that this is a receipt of accumulated bonuses by the assessee in addition to his salary. It seems to me that there is much force in this argument. It is difficult to see how this sum can be held to be a sum paid in commutation of a pension. You have, first of all, got to have a scheme of pension in order that a pension can be commuted, and it is only if this was a commuted pension that section 4 (3) (v) can apply. The words of the section are not a sum received "in lieu" of a pension but "in commutation" of it, and I cannot see that the sum can be described as the equivalent of a pension as in the Patna case. Nor can I agree with Mr. T. M. Krishnaswami Ayyar's argument that it is akin to commutation of pension, because he concedes that there must first of all be something here that is akin to a

pension and then the payment must be akin to commutation of such a pension. It is true that the Company pays its officers no pension on retirement and that this is a lump sum payment on retirement but I regret that I am unable to hold that that in itself is sufficient to exempt the money from assessability to income-tax. In my opinion the contention put forward by Mr. Patanjali Sastri for the Income-tax Commissioner is correct and this amount must be regarded as sums set apart periodically, that is to say, half-yearly, by the Company in respect of present services rendered by the assessee as an addition to salary under section 7 (1) of the Act. Instead of being actually paid then, they are allowed to accumulate and are paid to him in a lump sum on his retirement and, being accumulations of sums credited to him for present services, I feel that the fact that they are paid to him at the end of his service in a lump sum does not make any difference; and I regret, therefore, that I am unable to agree with the answers of my learned brothers, CORNISH and PANDRANG ROW JJ., which are about to be given upon this point.

There remains the other question raised, namely, question no. (ii). I am clearly of the view that this question must be answered in the negative. The assessee's contention is that he has received this amount by reason of the vocation carried on by him. The answer to this contention is that he has been assessed under the head of "salary" under section 7 (1) of the Act. Section 6 provides

"The following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—(i) Salaries. (ii) Interest on securities.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
BEASLEY C.J.

COMMISSIONER OF INCOME-TAX, MADRAS (iii) Property. (iv) Business. (v) Professional earnings. (vi) Other sources."

v.
FLETCHER.
BEASLEY C.J. Each of these is dealt with in separate sections of the Act. The assessee has always been assessed under section 7 (1). This income clearly does not fall under any of the classes (ii), (iii), (iv), (v) and (vi). Section 25 (3) was intended to prevent a double assessment. It cannot be intended to apply to a case where income-tax is assessed on salaries in the year in which they are earned. If the section were to apply, it would lead to this very strange and unreasonable result that an assessee who chooses to relinquish his appointment in the eleventh month of the year would escape payment of income-tax on the salary earned by him in these eleven months, whereas, if he continued for one month longer, admittedly he would be assessable on his salary in the whole of the twelve months. Mr. T. M. Krishnaswami Ayyar was quite unable to give any reason why such should be the result. In my view, therefore, as this sum falls to be assessed under section 7 (1) of the Act, section 25 (3) cannot be applied to it. I would, therefore, answer both questions accordingly. In view however of the answers of my learned brothers, question no. (i) must be answered in favour of the assessee. Question no. (ii) is answered in the negative. Costs Rs. 250 to the assessee.

CORNISH J. CORNISH J.—Upon the first question referred, my opinion is that the sum of Rs. 36,794 received by Mr. Fletcher from the Company on his retirement was not income. Income, as their Lordships of the Judicial Committee have explained in *Commissioner of Income-tax, Bengal v. Shaw, Wallace*

and Company(1), connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. If the payment made to Mr. Fletcher can be regarded, as contended on behalf of the Commissioner, as a payment of deferred salary which had been credited to him, but not actually received by him while he was in the service of the Company, it would, I think, be income when he did receive it. It would be salary or a gratuity or profit received by him in addition to his usual salary as much as the cash bonuses paid to him from time to time by the Company were salary. But in my opinion the contributions made by the Company to the credit of its officers in the Officers' Retiring Fund are not part of the officers' salaries, nor are they a gratuity or profit received by the officers in lieu of, or in addition to, salary. This contribution is called a bonus in the rules of the Fund. But the name is not of much significance. It is in fact a voluntary contribution made by the Company to the Fund under the conditions framed by the Fund Rules, and the true character of the contribution must be gathered therefrom. An officer who has served the Company for the requisite period becomes qualified to membership of this Fund. He will be credited with his appropriate share in the contributions made by the Company to the Fund; and it appears that a pass-book is issued to officers showing how their credit stands in the Fund. Rule 2 provides that every bonus shall in the first instance be apportioned as between the officers of the company in proportion to the salaries drawn by them respectively at the date of

COMMISSIONER OF INCOME-TAX, MADRAS
v.
FLETCHER.
CORNISH J.

(1) (1932) I.L.R. 59 Cal. 1343, 1351 (P.C.).

COMMISSIONER OF INCOME-TAX, MADRAS
v.
FLETCHER.
CORNISH J.

the allotment of such bonus by the Company and shall be credited in such proportions to such officers in account with the Fund. But the rules do not require that the Company shall make any contribution to the Fund at any particular period. It is a matter which is left entirely to the pleasure of the Company. And the directors of the Company have sole control over the investment of the money in the Fund.

The rules provide that no officer shall have any claim against the Company in respect of any bonus or otherwise as regards the Fund until he leaves the service of the Company and shall have previously served the Company continuously and satisfactorily for the period required of him by the rules. In the event of his death during his term of service it is provided that the amount then standing to his credit in the Fund shall be paid to his legal representative; but the rules give him no power of nomination over the amount to his credit in the Fund. Then Rule 6 says that, in the event of an officer leaving the service of the Company or being dismissed before having completed the term of service required of him, the amount standing to his credit shall be apportioned to the credit of the other officers then in the employ of the Company. And Rule 7 provides that nothing contained in the rules shall in any way be taken to restrict the powers of the Company from at any time dispensing with the service of, or dismissing, any officer. This rule further provides that an officer whose service shall be dispensed with or who shall be dismissed before completing his full period of service shall have no claim whatever against the Fund.

These conditions imposed upon an officer's right to receive payment from the Fund entirely negative, in my judgment, the notion that the amount credited to him in the Fund is credited to him by way of salary or as a gratuity in lieu of or in addition to salary. If these credits were intended to be an additional remuneration, I cannot imagine why, in the event of an officer's service being dispensed with, for no fault of his own, he should be disqualified by Rule 7 from at least receiving so much as he had earned to his credit up to that date. I think the only feasible explanation is that the bonuses credited to an officer in the Fund are not intended to be salary or gratuity. If the amount received from the Fund by an officer on his retirement is not given to him as salary, it is not income liable to tax under section 7 (1). It is not suggested on behalf of the Commissioner that the sum is taxable under any other head of income.

I am unable to perceive any essential difference between the payment of a lump sum from this Officers' Retiring Fund to an officer on his retirement and the payment of a lump sum from a Provident Fund to an employee on his retirement, or the payment of a sum, with accrued bonuses, payable to the assured under a policy of insurance. The two last-mentioned sums are specifically exempted from taxation by section 4, sub-section (3), clause (v), of the Act. But this exemption is not an arbitrary one. In *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(1) their Lordships have pointed out that none of the sums specified in clause (v), apart from their exemption

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
CORNISH J.

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

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
CORNISH J.

by the Act, could be regarded in any scheme of taxation as income. The reason is that payments such as those mentioned in clause (v) do not come within the meaning of the word "income" as defined by their Lordships. For these reasons my answer to the first of the questions referred is in favour of the assessee.

With regard to the second question, I think that a comparison of section 25 (3) with section 11 of the Act makes it clear that the profits from a profession or vocation mentioned in the first-named section mean the professional earnings which are taxable under section 11 (1). An assessee can only have the benefit of section 25 (3) if he has been assessed for tax on professional earnings. I would therefore answer the second question against the assessee.

PANDRANG
ROW J.

PANDRANG ROW J.—This is a reference made by the Commissioner of Income-tax, Madras, under section 66 (2) of the Indian Income-tax Act (XI of 1922) at the instance of Mr. J. B. Fletcher, who was an employee in the service of the Buckingham and Carnatic Co., Limited, for about twenty-four years till 28th February 1933 when he retired from service. During the period of his employment, the Company was paying him a monthly salary as well as a half-yearly cash bonus out of its profits, and income-tax was being collected on these amounts. The Company had constituted an Officers' Retiring Fund and made rules for its management. The Company allotted every half-year out of its profits a certain sum to the credit of this Fund and invested the same; the amount together with the interest earned was apportioned between such of its officers as were

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

admitted to the benefits of the Fund in proportion to their salaries and the amounts credited to each officer were shown in a separate pass-book given to him. The Company undertook to pay the amount lying to the credit of an officer to him on his leaving its service after having previously served continuously and satisfactorily for a certain period (six years in Mr. Fletcher's case), and, in the event of his death, whether during or after the said period of service, to his legal representatives. In the event of an officer leaving the Company's service or being dismissed before completing the said period of service, he is to have no claim whatever to the amount lying to his credit in the Fund, and the same is to be apportioned to the credit of other officers then in the employ of the Company. The last rule declares the right of the directors of the Company to decide in their discretion which of the officers shall be eligible for the benefits of the Fund, and to make any alteration or addition to the rules, and that the directors' decisions on these points and also as to the meaning of the rules and on all other matters connected with the Fund or its administration shall be final and conclusive.

When Mr. Fletcher retired from the Company's service on 28th February 1933 the amount to his credit in the Retiring Fund was Rs. 36,794-3-2, and when paying this amount to him the Company deducted therefrom Rs. 6,496-7-0 as income-tax, and remitted the amount of tax to the Government of India. Mr. Fletcher objected to this deduction of income-tax on two grounds, viz., that the amount of Rs. 36,794-3-2 paid out of the Retiring Fund was not his income, and that he

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

was not liable to any assessment to income-tax during the year 1933-34 under section 25 (3) of the Act as he had ceased to be in the Company's employ, and thereby discontinued his vocation during that year. These objections were overruled by the Income-tax Officer, and also on the assessee's appeal by the Assistant Commissioner of Income-tax. The same objections are repeated in the questions raised in the present reference, namely,

- (i) Whether the sum of Rs. 36,794 paid to Mr. Fletcher in 1932-33 was income liable to tax, or was a capital sum exempted under clause (v) of sub-section 3 of section 4 or otherwise.
- (ii) Whether Mr. Fletcher is entitled to relief under section 25 (3) of the Act on the ground alleged by him, viz., that he discontinued his profession in the year of account.

The second question does not involve any real difficulty. The words of the sub-section relied upon are themselves clear, and they show that it applies only where the business, profession or vocation which is discontinued is one on which tax was at any time charged under the provisions of the Income-tax Act, 1918. Even on the assumption that Mr. Fletcher's employment as an officer of the Company was a profession or vocation, it was never assessed to tax as such under the Act of 1918; the assessment of his income from such employment was under the head of "salaries", and not under the head of profits from any profession or vocation followed by him. It is not contended that the employment was a business as defined in the Act. It is, moreover, clear that the provisions of this sub-section were meant to apply only to cases in which there had been a double assessment to tax in the year 1922-23 as a result of the change brought about by the Act of

1922—see *A. C. T. Nachiappa Chettiar v. The Commissioner of Income-tax, Madras*(1). It is stated in the reference as a matter of fact, and this statement is not controverted before us, that so far as salaries were concerned there was no such double assessment in the year 1922-23, and that Mr. Fletcher in particular was not assessed to tax in the year 1922-23 in respect of his income in the previous year. Mr. Fletcher's claim to relief under section 25 (3) of the Act cannot therefore be sustained either on the words of that sub-section or on any other ground. The second question must therefore be answered in the negative.

The first question in the reference calls for fuller consideration. It is obvious that the Officers' Retiring Fund was constituted in order to make provision for the employees at the time of their retirement and for their legal representatives in case of their death while in service. The Company allotted certain amounts from its profits to this Fund every half-year and these amounts which were invested and the interest derived therefrom were apportioned among the employees and credited to their separate accounts. There is nothing in the rules of the Fund which contemplates that the Company might at any time take back for its own use or for any other purpose the monies so credited to its employees, even though the monies are actually retained in its own hands. The retention of the monies was only for the purpose of making payments out of the Fund to the employees under the rules, and the Company never had any beneficial interest in the monies

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

(1) (1933) 6 I.T.C. 369, 373.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

credited to the employees. The Company had no doubt full discretion in the matter of allotment, but once the allotment was made its rights were confined to mere administration of the Fund for the benefit of its employees. As monies were allotted every half-year to the Fund from the Company's profits, they were not treated as the Company's expenditure when assessing the Company's profits to tax; in other words, they were included in the profits and taxed as such, and they were shown in the Company's half-yearly balance sheet under "Capital". Considering all the circumstances it would appear that, after the monies were allotted by the Company to the Retiring Fund, the Company invested them and held the accumulations as trustee for its employees, and acted in the same capacity when making payments out of them under the rules. If this contention on behalf of Mr. Fletcher is correct, it follows that the payment made by the Company to Mr. Fletcher was not a payment made by the Company as an employer but a payment made by it as trustee, and cannot therefore be assessed to tax under the head of salaries; see *In re The Commissioner of Income-tax, Burma v. The Rangoon Electric Tramway & Supply Co., Ltd.*(1) and the second sub-paragraph of paragraph 25, Income-tax Manual, page 169 (5th Edition). In the *Rangoon case* there was no doubt an actual transfer of the shares which were purchased from the monies allotted as bonuses to the Managing Director of the Company and the employee. But actual transfer of ownership to the trustee is not always necessary to create a

(1) (1933) I.L.R. 11 Rang. 70.

trust in relation to movable property; under section 5 of the Indian Trusts Act (II of 1882) a declaration of trust is sufficient in such a case, and under section 3 of that Act an obligation annexed to the ownership of property arising out of a confidence declared and accepted by the owner for the benefit of another is a trust. The rules of the Fund framed by the Company are a sufficiently clear declaration of a trust in favour of the employees admitted by the Company to the benefit of the Fund.

On behalf of the assessee, Mr. T. M. Krishnaswami Ayyar next contends that the payment in question is covered by either clause (v) or clause (vii) of sub-section 3 of section 4 of the Income-tax Act. Clause (v) is relied upon in support of the contention that the payment of Rs. 36,794 to Mr. Fletcher is payment of a capital sum in commutation of pension. Mr. Patanjali Sastri argues *contra* that commutation of a pension ordinarily implies a pension, there being no pension in the present case, and that, while commutation of a pension, moreover, involves the consideration of factors such as the age and state of health of the pensioner, and the general rate of interest and the like, no such consideration was required in the present case. There can be no doubt that a pension is a periodical allowance for past services, and that by commutation a lump sum is paid in lieu of the periodical payments: see *The Municipal Council, Salem v. Gururajah Rao*(1). Mr. T. M. Krishnaswami Ayyar, however, relies strongly on *Rutherford v. Commissioner of Income-tax, Bihar and Orissa*(2) in which it

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

(1) (1934) 68 M.L.J. 118.

(2) (1930) I.L.R. 10 Pat. 315.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

was held that a lump sum paid not as pension but expressly as gratuity by the Court of Wards as employer to an employee after the latter's retirement was a capital sum paid in commutation of pension, although no single payment of an instalment of pension was ever made to the employee. The argument that there must first be pension and that the commutation must follow in point of time was characterised by COURTNEY TERRELL C.J. as being not well-founded. The same argument put in slightly different language, viz., that no pension was admissible to the employee and that, therefore, there was nothing to commute, was answered by DHAVLE J. as follows :

"The answer to this contention is that the precise form used is of little moment in interpreting the Income-tax Act. What must be looked at is the real nature of the sum in question, and it is clear from the official correspondence that what was given to the assessee on his retirement from service was but the equivalent of a commuted pension in essence, in spite of the technical reason for which it was recommended and sanctioned under the denomination of gratuity."

Both the learned Judges agreed that what must be considered is the real nature of the transaction. Counsel on both sides in the present case are also agreed that the real nature of the payment must be ascertained for the purpose of deciding the point.

There is no doubt in my mind that the payment of Rs. 36,794 to Mr. Fletcher on his retirement from the Company's service was in substance and in truth the payment of a lump sum in lieu of pension, i.e., in consideration of his past services. The amount depended in part at least on the length of his service, and it was paid, out of what has always been designated as the Officers'

Retiring Fund, under the rules of that Fund. The existence of such a Fund may reasonably be presumed to have been, and to be, one of the inducements offered by the Company to those who sought and still seek to be employed in its service, especially in the absence of any other provision after retirement in the shape of pension. The prospect of getting on retirement after long and approved service a pension or its equivalent, by whatever name it may be called, is one of the important factors which attracts candidates for employment; in short, there are three such important factors, viz., pay, promotion and pension; whatever shape these may take, they do not change in essence. In *Rutherford v. Commissioner of Income-tax, Bihar and Orissa*(1) the position was stated by COURTNEY TERRELL C.J. as follows at page 318:

"The candidate, therefore, enters upon his office under the Court of Wards with a definite salary and the expectation that he will receive at the end of his service the equivalent of a pension—but he knows that he will not after his retirement be given a series of periodical payments but in lieu thereof he will get a lump sum. In other words, he is to get a pension which will certainly be commuted."

The position is more or less the same in the present case. The words "in commutation of" found in section 4 (3) (v) of the Act do not necessarily convey a meaning essentially different from that of the words "in exchange of" or "in lieu of"; the essential idea is substitution or change. If, instead of paying a pension, i.e., a periodical payment for past services, an employer elects from the very outset to pay a lump sum, or, in other words, the pension scheme adopted by an employer

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

(1) (1930) I.L.B. 10 Pat. 315.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

contemplates the payment of a lump sum, instead of periodical payments, as pension, the real nature of the payment is not affected thereby, and what was all the time intended as pension or reward for past service does not lose its character. In short, when a lump sum is paid as pension its receipt by the employee comes within clause (v) of section 4 (3) of the Act.

In view of this conclusion it is unnecessary to consider the alternative claim to exemption under clause (vii) of section 4 (3) of the Act. That clause can apply only when the receipt is not by way of addition to the remuneration of an employee. Mr. T. M. Krishnaswami Ayyar relies in this connection on the decision of the House of Lords in *Seymour v. Reed*(1) to the effect that the payment of the proceeds of a benefit match to a professional cricketer by the Club which employed him is a personal gift and not a profit or perquisite arising from his employment, and therefore not assessable to tax. The facts of the present case are however different ; it is not a solitary gift with which the present case is concerned, but a series of gifts made every half-year out of the employer's profits to the Employees' Retiring Fund and as part of the conditions of employment. The words used in the Indian Income-tax Act are moreover different from those found in the English Income-tax Act, and this difference recalls to one's mind the following observations of their Lordships of the Judicial Committee in *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(2) :

"Their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the

(1) [1927] A.C. 554.

(2) (1932) I.L.R. 59 Calc. 1343 (P.C.).

English Income-tax statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in *pari materia* . . . Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think the problem lies very near the surface of the Act and depends mainly on general considerations."

The observations which follow the above deal with the general question of what "income" is, and they are of considerable importance in the present case which raises the general question whether the payment of Rs. 36,794 to Mr. Fletcher is income liable to tax. Their Lordships had also to consider the argument based on section 4 (3) (v) of the Act, the words of which appear to suggest that the word "income" may have a wider significance than would ordinarily be attributable to it, and they were of opinion that the clause cannot be construed

"as enlarging the word 'income' so as to include receipts of any kind which are not specially exempted".

The character of "income" is described by their Lordships as follows :

"Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources."

The sum of Rs. 36,794 received by Mr. Fletcher on his retirement was not of the nature of a periodical return ; it was a unique receipt, not to be repeated. It is, to my mind, difficult to regard it as "income" in view of what their Lordships of the Judicial Committee have said in the case referred to above. The source from which Mr. Fletcher received the money was the Officers' Retiring Fund, and under the rules of that Fund only one receipt and no more could be

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.
—
PANDRANG
ROW J.

COMMISSIONER
OF INCOME-
TAX, MADRAS
v.
FLETCHER.

expected by him or by any other employee. It was not a source from which periodical monetary returns could come in so far as the employee was concerned. The only return he could expect was a single payment on retirement. I am therefore of opinion that the receipt of the lump sum in question is not income.

It follows from the above that the first part of the first question must be answered in the negative and the second part in the affirmative.

Attorneys for respondent : *Short, Bewes & Co.*
A.S.V

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

JONNAVARAM BALIREDDI (NINTH DEFENDANT),
PETITIONER,

v.

KHATIPULAL SAB alias ABDUL SATAR AND NINE
OTHERS (PLAINTIFF, DEFENDANTS 1 TO 8 AND 10),
RESPONDENTS.*

Court Fees Act (VII of 1870) (Madras Act V of 1922), sec. 7 (iv-A) and (v)—“Value of the subject-matter”—Meaning of—Suit—Prayer for setting aside certain mortgage deeds and sale deeds and for possession and for cancellation of deeds—Whether sec. 7 (iv-A) or sec. 7 (v) applies.

The words “value of the subject-matter” in section 7 (iv-A) of the Court Fees Act mean, in the case of a mortgage deed, the principal amount secured by it, and, in the case of a sale deed, the actual, that is to say, the market-value of the property and not the artificial value prescribed by section 7 (v).

* Civil Revision Petition No. 51 of 1934.

Held accordingly: A suit by a person to set aside certain mortgage deeds and sale deeds executed by his father and for possession of the immovable properties covered by them is governed by section 7 (iv-A) of the Court Fees Act and the fact that a prayer for cancellation of the deeds is also asked for would not take it away from the purview of the said section.

Venkatanarasimha Raju v. Chandrayya, (1926) 53 M.L.J. 267, and *Venkatasiva Rao v. Satyanarayanamurthy*, (1932) I.L.R. 56 Mad. 212, distinguished.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Proddatur in Original Suit No. 1222 of 1930.

Ch. Raghava Rao for petitioner.

M. Ranganatha Sastri for first respondent.

Other respondents were unrepresented.

JUDGMENT.

The suit has been brought by the plaintiff for the setting aside of certain mortgage deeds and sale deeds executed by his father and for possession of the immovable properties covered by them. Section 7 (iv-A) introduced into the Court Fees Act by the Madras Amendment 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, 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 amount or value of the property.”

The plaintiff prays, in the words of this section, for the cancellation of documents securing

BALIREDDI
v.
ABDUL SATAR.

BALIREDDI
v.
ABDUL SATAR. money or other property having money value. Mortgage instruments answer the description of documents securing money; so far as sale deeds are concerned, they are, as I have held in *Doraiswami v. Thangavelu*(1), documents securing "other property" within the meaning of the section. This is what I observed in that case:

"The words 'securing money or other property' are not happy; but the question is: Is this or is this not a suit for cancellation of a document securing property having money value? I think it clearly is. I have no doubt that the release deed in question is a document securing property; in other words, by that document, the property covered by it is made secure to the defendants. Can there be any doubt that a sale deed comes within the terms of this section? The present instrument does not materially differ from a sale deed. By that, the rights of the plaintiffs in the partnership and its property have been transferred for consideration to the defendants. The word 'secure' may mean, according to the Oxford Dictionary, 'to make the tenure of a property secure to a person'. I am, therefore, of the opinion that the proper section applicable is section 7 (iv-A)."

The amount of court-fee payable depends upon "the value of the subject-matter of the suit"—that is what the section says. Where a document securing money is sought to be cancelled, the section goes on to say that the value of the subject-matter shall be deemed to be "the amount for which the document is executed". In the case of a mortgage instrument therefore, the court-fee has to be computed on the amount for which the instrument is executed, in other words, the principal amount secured by it. This is the plain effect of the words of the section, and I fail to see how the method of computation fixed in section 7 (v) can possibly be applied.

(1) A.I.R. 1929 Mad. 668.

BALIREDDI
v.
ABDUL SATAR. Now as regards the sale deeds, the question arises; is the value referred to in the section, the *actual value* of the property, that is to say, its *market value* or the *artificial value* prescribed by section 7 (v)? The last-mentioned section deals with suits for possession and the Legislature has expressly enacted that in such suits the value shall be determined in a particular manner. Clause (iv-A), refers simply to "the value of the property", which means "value" as generally understood, whereas clause (v) prescribes an artificial method of valuation. There is no reason to construe clause (iv-A), in the light of clause (v) which deals with a specific matter; indeed, when the Legislature intends to prescribe an artificial method, it says so in express terms, as clause (iv-C) also shows. I am therefore of the opinion that, in the case of the sale deeds, the amount of court-fee payable must be computed on the market-value of the properties with which they deal. Mr. M. Ranganatha Sastri for the respondents relies upon *Venkatanarasimha Raju v. Chandrayya*(1) and *Venkatasiva Rao v. Satyanarayanamurthy*(2) for his contention that the statutory valuation under section 7 (v) furnishes the true basis. The learned Judges in the former case observe:

"When there is in the Act itself a special rule as to valuing the property in suits for court-fees, we think it is proper to take that method of valuation in preference to any other method to get the value where there is no indication that any other method should be adopted."

With great respect, there is a fallacy, as I have shown, underlying this reasoning. Sitting as a single Judge, I should consider myself bound by

(1) (1926) 53 M.L.J. 267.

(2) (1932) I.L.R. 56 Mad. 212.

BALIREDDI
v.
ABDUL SATAR.

these decisions, but the present case, as I have said, deals with mortgages and sales, whereas the two cases referred to above deal with decrees.

Another question arises, namely, the prayer for cancellation being coupled with that for possession, is the court-fee to be computed under clause (iv-A) or clause (v)? *Sundara Ramanujam v. Sivalingam*(1) bears on this point. There, the suit was for the specific performance of a contract of sale and for possession of the property. It was held that section 7 (x) (a) applied. This is what I observed in my judgment in that case :

"Then it is argued that, as the plaintiff also claims possession in the suit, the suit must be regarded as one for possession. But the specific provision relating to suits for specific performance excludes the applicability of the general provision relating to suits for possession."

Moreover, as pointed out by me in *Ramakrishnayya v. Seshamma*(2) while dealing with a cognate subject,

"the maxim *generalia specialibus non derogant* applies. General words do not derogate from special; conversely, a special law derogates from a general law."

I therefore hold that the section under which the court-fee has to be computed is section 7 (iv-A) and not section 7 (v).

With these observations the case will go back to the lower Court and it is directed to assess the court-fee in accordance with the directions contained in this judgment. If the value of the suit so determined is beyond the pecuniary jurisdiction of the District Munsif's Court, an order will be made by that Court returning the plaint for presentation to the proper Court.

I make no order as to costs.

G.R.

(1) (1923) I.L.R. 47 Mad. 150.

(2) (1934) 68 M.L.J. 369.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

KALLAPALLE KRISHNAMURTHI AND ANOTHER
(PETITIONERS), PETITIONERS,

1935,
April 29.

v.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS
BOARD AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), sec. 9,
cl. 5—Applicability—Founder's heirs—De facto exercise of
hereditary right of trusteeship by—Necessity—Presumptive
right of the heirs to such trusteeship—Sufficiency of.*

The members of the family of the founder of a religious institution have no doubt a *prima facie* hereditary right to the trusteeship of the institution. But that *prima facie* hereditary right is not enough to bring the case within section 9, clause 5, of the Madras Hindu Religious Endowments Act. To bring the case within that clause proof that the members of the family have up to date been exercising the right of trusteeship is also necessary. That interpretation of the clause must be adopted which would take account of the *de facto* exercise of hereditary right and not of a mere presumptive right not exercised for several generations.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of the District Court of Ganjam, dated 8th November 1932 and made in Original Petition No. 53 of 1931.

B. Jagannadha Das for petitioners.

P. V. Rajamannar for P. Venkataramana Rao
(Government Pleader) for first respondent.

C. V. Subramania Ayyar for S. Subramania
Sastri for second respondent.

* Civil Revision Petition No. 749 of 1933.

JUDGMENT.

KRISHNA-
MURTHI
v.
H.R.E. BOARD,
MADRAS.

This revision petition raises a question of some little difficulty. It arises out of an application, made by the petitioners under section 84 of the Madras Hindu Religious Endowments Act, to have an order passed by the Religious Endowments Board on 8th September 1930 set aside and to have it declared that the suit temple is an "excepted" temple whereof the petitioners are the hereditary trustees.

The learned District Judge has found that the suit temple was founded by one of the ancestors of the petitioners, that properties were purchased by the petitioners' ancestors and endowed to the temple, that there were also endowments by the Mohiri zamindar's family but that all the properties were registered in the name of the temple represented by its archaka for the time being. He has also found that there is no evidence to show that the petitioners and their ancestors were acting as trustees of the temple. On these findings, he dismissed the petition.

Mr. Jagannadha Das, on behalf of the petitioners before me, contends that the learned District Judge has not addressed himself to what is really the material question for decision in the case, because in finding whether a temple is an excepted temple or not the Court has only to consider whether the right to the trusteeship is hereditary and not whether in fact such right has been exercised by the members of the founder's family. In the litigation which immediately preceded the present proceedings, i.e., in Original Suit No. 12 of 1928 on the file of the District Court of Ganjam, a claim was put forward by the bairagi

KRISHNA-
MURTHI
v.
H.R.E. BOARD
MADRAS.

archaka that he and his predecessors were the hereditary heads of this institution on the footing that it was a mutt and not a temple. That claim was found against, the Court holding that the institution was a temple and not a mutt and that the bairagis were only archakas and had no hereditary right to the trusteeship. Mr. Jagannadha Das is of course right in his contention that any observations made by the District Judge in that judgment as to the loss of rights by the petitioners' family as the result of non-user do not constitute the matter *res judicata*.

The question still remains, what exactly is the test to be applied for the purposes of the definition in section 9, clause 5, of the Madras Hindu Religious Endowments Act.

A long line of cases, out of which it is sufficient to refer to the decision of the Privy Council in *Gossami Sri Gridhariji v. Romanlalji Gossami*(1), has established that when a person founds a religious institution, the office of trusteeship thereof is held to be vested in him and his heirs in default of evidence that he has disposed of it otherwise. Mr. Jagannadha Das contends that, reading section 9, clause 5, of the Madras Hindu Religious Endowments Act in the light of this line of authority, it must be held that wherever a religious institution is shown to have been founded by an ancestor of the claimant it must be held to be an institution the trusteeship whereof is hereditary within the meaning of that definition and it is therefore an excepted temple. According to the learned Counsel it is immaterial whether members of the family have up to date been

(1) (1889) L.R. 16 I.A. 137; I.L.R. 17 Cal. 3 (P.C.).

KRISHNA-
MURTHI
v.
H.R.E. BOARD,
MADRAS.

exercising the right of trusteeship or not, because their *prima facie* right could be lost only by some other line of trustees acquiring the right by grant or prescription and, if so, that will in turn bring it within another portion of the definition itself, so that in either view the institution will remain an excepted temple, whomsoever the trusteeship might vest in. He further contends that, as in Original Suit No. 12 of 1928 it has been found that the bairagis have acquired no hereditary right to the management of the institution, the *prima facie* hereditary right of the present petitioners' family must be taken to bring the case within section 9, clause 5, independently of the question of actual management by the members of the petitioners' family.

I am free to admit that there is considerable force in this argument, but, having given the matter my best consideration, I am not sure whether the framers of the definition in section 9, clause 5, really had in their mind the kind of presumptive right that the Privy Council speak of in *Gossami Sri Gridhariji v. Romanlalji Gossami*(1). The language of the clause is, "the right of succession to the office of trustee whereof has been hereditary". The words "has been" seem to me to suggest that the right contemplated is one which has continued to be exercised up to date. It is common knowledge that most of the minor temples in villages in this Presidency have at one time or another been founded by private individuals and in theory the presumption laid down in *Gossami Sri Gridhariji v. Romanlalji Gossami*(1) would apply to all of

(1) (1889) L.R. 16 I.A. 137; I.L.R. 17 Cal. 3 (P.C.).

them. But, if the course of enjoyment for all the time known has been such as to negative the exercise of trusteeship rights by the members of the founder's family, it could hardly have been the policy of the Legislature to exclude such institutions from the control given to the Board over non-excepted temples merely on the basis of a presumptive right in the founder's line. No doubt the classification in this Act has to some extent followed and to some extent departed from the classification adopted in the Religious Endowments Act of 1863, but I am inclined to prefer that interpretation of the clause which would take account of the *de facto* exercise of hereditary right and not of a mere presumptive right not exercised for several generations. The question really is, not whether the theoretical hereditary right of the family could have been lost by non-user until and unless it has been acquired by some other set of trustees by prescription, but whether the Legislature contemplated a right in actual exercise at the present day or a mere theoretical right.

In this view, I am not disposed to interfere with the order of the lower Court, but I must add that there is some point in Mr. Jagannadha Das's statement that the temple is too poor to afford the luxury of a paid trustee. The very fact that the Board has appointed one of the petitioners as an honorary trustee shows that there is nothing to be said against him. The record shows that it was at his instance that the second respondent was appointed a paid trustee. It does not appear whether, apart from their legal objection to the jurisdiction of the Board or the Committee, the

KRISHNA-
MURTHI
v.
H.R.E. BOARD,
MADRAS.

KRISHNA-
MURTHI
v
H.R.E. BOARD,
MADRAS.

petitioners ever offered to accept appointment as honorary trustees without anybody else being associated with them. I have no doubt that any such offer made by them when an opportunity arises will be duly considered by the Board or the Committee as the case may be.

The revision petition is dismissed, but, as the question is not free from difficulty and I do not find anything blameworthy suggested against the petitioners, I do not propose to make any order as to the costs of this petition.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Stone and Mr. Justice Varadachariar.

JAVVADI VENKAYYA AND TWO OTHERS (DEFENDANTS
10 AND 11 AND NIL), APPELLANTS,

v.

DWARAMPUDI BASIVIREDDI (PLAINTIFF), RESPONDENT.*

Contribution—Liability as between co-defendants—Suit by a reversioner for possession, mesne profits and costs against various alienees from Hindu widow—Joint decree for possession, mesne profits and costs—Unsuccessful attempts by judgment-debtors to have joint decree changed into separate decree—Implied representation that each is liable for his portion alone—Whole decree executed against one—Suit for contribution by him against others—Right of.

A reversioner filed a suit for recovery of possession of certain lands and mesne profits impleading different alienees relating to different parcels of lands from a Hindu widow, and obtained a joint decree for possession, mesne profits and costs against all the defendants who were entirely unconnected with

* Appeal No. 58 of 1926.

each other, apart from the circumstance that they were all joined as co-defendants as alienees from her. In appeal, defendants made an attempt to have the joint decree changed to a form in which each defendant was to be made responsible only for his respective portion of the decree but were unsuccessful. As a result, the whole of the decree for mesne profits and costs was executed against one of the defendants. In a suit against the other defendants for contribution for their respective shares of the mesne profits and costs paid by that defendant,

held that every principle of equity pointed to the justness of the claim and that under the circumstances there was an implied contract on the part of the other defendants, who had joined that defendant and urged in the appeal that the joint decree should be broken up into several parts, to contribute their share to that defendant who was made liable for the whole of the decree amount which, according to the view they had expressed in the appeal, should not be borne by that defendant except to the extent of his share.

APPEAL against the decree dated 24th October 1925 of the Court of the Subordinate Judge of Narasapur in Original Suit No. 125 of 1922.

Ch. Raghava Rao for appellants.

G. Lakshmanna for respondent.

The JUDGMENT of the Court was delivered by STONE J.—This is an appeal from the decree of the Subordinate Judge of Narasapur. The appellants are defendants 10 and 11. The plaintiff is the respondent. The suit is one in which the plaintiff seeks contribution from the defendants in the following circumstances.

The first defendant in this action was the plaintiff in Original Suit No. 20 of 1916 which was finally disposed of in Appeal No. 362 of 1918. The plaintiff's father and the remaining defendants were the defendants in that suit.

That action was for recovery of possession and mesne profits. The plaintiff to that action was

VENKAYYA
v.
BASIVIREDD

STONE J.

VENKAYYA
v.
BASIVIREDDI.
STONE J.

the reversioner. The defendants were alienees from a widow. There were different alienees relating to different parcels of property. It will be therefore apparent that the action was brought against those various defendants, not because they were in any way legally interconnected but as a matter of convenience. In the result, the plaintiff in that suit obtained a joint decree against all the defendants in that suit for possession, mesne profits and costs. In the appeal, one of the grounds of appeal was that the decree in such cases should not have been joint but that each of the defendants should have been made liable to deliver up possession of the parcel of land of which he was the alienee and to account for the mesne profits in respect of such parcel of land only. That ground of appeal does not appear to have been successfully taken, with the result the joint decree was maintained.

The plaintiff in that suit thereupon elected to proceed against the present plaintiff's father, the seventieth defendant in that suit, for the whole of the mesne profits and costs. The plaintiff's father paid. The plaintiff's father subsequently died and his interest is represented by the plaintiff who seeks in this suit contribution from the other defendants in that action for their share of the mesne profits and costs which the plaintiff's father paid. The suit has been successful. Against the decree given in the lower Court only defendants 10 and 11 appeal and four grounds of appeal are raised.

The first ground of appeal is founded upon paragraph 4 of the written statement of these defendants. The second depends upon the view

VENKAY
v.
BASIVIREI
STONE J.

that there is no contribution between joint tortfeasors, and the third is that these defendants have in fact already paid. All these grounds of appeal have been abandoned. Paragraph 4 is not pressed. The ground of appeal about joint tortfeasors has been given up and the question of fact as to payment, although faintly urged by Mr. Raghava Rao, is obviously hopeless because the evidence is so very feeble on this question of fact that no appellate Court would think of disturbing the conclusion that the evidence is insufficient.

There remains the fourth and substantial ground of appeal which may be expressed as follows:—That in point of law, where a joint decree is made against various co-defendants and payment is enforced against one of them, that one has no right of contribution against the others unless (i) there is an implied contract whereby those who did not pay will be taken to have agreed with the one who has paid that they will reimburse him, or (ii) there is an equity which entitles one who has paid to claim over from those who have not paid their respective shares. It is further urged that, at any rate so far as costs are concerned, there is no right of contribution where one of many defendants has paid all the costs under a decree which gives costs against all the defendants. It will be convenient to deal with the last point first. This is founded upon a passage in Halsbury's Laws of England (First Edn.) Vol. XV, paragraph 993, in the following words:—

“Where co-defendants are decreed to pay the costs of an action one co-defendant cannot by an independent proceeding obtain contribution in respect of such costs against the other.”

VENKAYYA
v.
BASIVIREDDI.
STONE J.

In support of that passage are quoted *Dearsly v. Middleweek*(1) and *Real and Personal Advance Company v. McCarthy*(2). If *Dearsly v. Middleweek*(1) is referred to, it would be found that it is a very short judgment of Mr. JUSTICE FRY, as he then was, purporting to act upon a dictum contained in the judgment passed very recently at that time by the Court of Appeal and reported in the same volume as *Real and Personal Advance Company v. McCarthy*(2). We have searched that judgment in order to discover that dictum and we are unable to find it and Mr. Raghava Rao very properly admits that he too has failed to find it out; and it would seem that, unless there was something said in the Court of Appeal that is not reported, Mr. JUSTICE FRY was acting under a misapprehension. The case before the Court of Appeal reported as *Real and Personal Advance Company v. McCarthy*(2) is in our opinion dealing with an entirely different point and contains no dictum on this point at all. The decision in *Real and Personal Advance Company v. McCarthy*(2) was followed in *Mulla Singh v. Jagannath Singh*(3), but the facts there are quite different from the facts here and it would seem that there the Court very largely relied on the fact that there were no equities justifying contribution. In *Fakire v. Tasaddug Husain*(4) contribution was refused, but there the various defendants were pleading defences that made the defendants antagonistic one against the other. It was therefore not possible to say that when one defendant paid the costs he was in any sense paying on behalf of the others. The others were as much

(1) (1881) 18 Ch. D. 236.

(3) (1910) I.L.R. 32 All. 585.

(2) (1881) 18 Ch. D. 362.

(4) (1897) I.L.R. 19 All. 462.

VENKAYYA
v.
BASIVIREDDI
STONE J.

his opponents as the plaintiff. *Muthuswami Aiyar v. Subramania Aiyar*(1) is another case in which our learned brother CURGENVEN J. has refused contribution in case of costs. But, there, the facts were entirely different; there was only one contesting defendant, alienee, and the other defendants were his tenants and were merely *pro forma* defendants and were *ex parte*. The contesting defendant was the person who fought the case throughout, and in view of the circumstances it could not be said that, when he paid costs, he paid in any sense on behalf of his co-defendants. Here, on the other hand, these various defendants are entirely unconnected, apart from the fact that they happened to be the defendants in the same case. They are not joint tort-feasors. There is no legal link joining the one to the other. One happens to have bought one property and another another parcel of land. It is convenient to try an action which raises the question as to whether the person who has sold these various items of the property to these various persons had power so to do, and, if not, whether the plaintiff is the person who is entitled to recover the property. But, although that is convenient, it does not in any way link up one defendant with another so as to make a payment in satisfaction of the resulting decree a payment in his own sole interest. The only reason why the present plaintiff's father was made to pay the mesne profits derived from parcels of land with which he had no concern but which were in the possession of his co-defendants was the fact that in that previous action a joint decree had been obtained against all the then defendants.

(1) (1931) 61 M.L.J. 638.

VENKAYYA
v.
BASIVIREDDI.
STONE J.

An effort was made to put that right and get a decree in a form in which each defendant was made responsible only for his respective part. That effort failed. It may be that, in principle and pursuant to the line of thought indicated in *Gurudas Kundu Chaudhuri v. Hemendra Kumar Ray*(1), the decree should have been not joint but should have been against each of the defendants in respect of his particular portion of land and the mesne profits in respect thereof; it may be that the costs should have been divided proportionately amongst the various defendants. But that was not done, and, as a consequence, it was possible for the plaintiff in that suit to recover the whole of the mesne profits and the whole of the costs against one defendant, and that he did.

Such being the fact it seems to us to be clear that every principle of equity points to the justice of the present plaintiff's claim. Further, we are of opinion that there was an implied contract on the part of the other defendants who had joined the plaintiff's father in the appeal and urged that this joint decree should be broken up into several parts, a contract to contribute their shares to the one defendant who was made liable for the whole of the decree debt which, according to the view that they had expressed in appeal, should not be borne by him except to the extent of his share.

For these reasons we are of opinion that the learned Judge was right in the view he took and the appeal therefore fails and is dismissed with costs.

* * * *

G.R.

(1) (1929) I.L.R. 57 Calc. 1 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Cornish.

ABDUL RAZACK SAHIB (SECOND DEFENDANT—
SECOND RESPONDENT), APPELLANT,

1935,
August

v.

KILPATTI CO-OPERATIVE SOCIETY, by PRESIDENT,
KRISHNA REDDI, AND ANOTHER (PLAINTIFFS AND FIRST
DEFENDANT—PETITIONER AND FIRST RESPONDENT),
RESPONDENTS.*

Madras Co-operative Societies Act (VI of 1932), sec. 43 (1)—
“Decision” under—Enforcement of, in civil Court—Civil
Procedure Code (Act V of 1908), O. XXI, r. 16—Change
of presidents of Society after “decision” and before its
enforcement—Whether amounts to transfer by operation of
law, necessitating separate application to Court passing the
“decision”—Indian Limitation Act (IX of 1908), art.
182 (5) (b)—Prior application to Tahsildar to enforce
“decision”—Tahsildar not “the proper Court for execu-
tion”.

An application to enforce a “decision” obtained by a Co-operative Society in the Court of the Assistant Registrar of Co-operative Societies was made to the civil Court having jurisdiction over the subject-matter of the decision. The proceedings in which the decision was passed were brought by the Society and in its name, acting through its president, and there was a change of presidents of the Society between the date of the obtaining of the decision and the filing of the application.

Held that Order XXI, rule 16, Civil Procedure Code, was inapplicable to the case, because (i) the Statutory Rules gave no power to the Registrar to enforce the decision; and

(ii) the change of presidents did not involve a transfer by operation of law.

Held further, that a prior application to enforce the “decision” made to the Tahsildar, authorized in that behalf

* Appeal Against Appellate Order No. 184 of 1932.

by the Collector, did not, under article 182 (5) of the Limitation Act, save the application to the civil Court from the bar of limitation, as, neither the Collector acting under Rule XIV (5) (a) of the Rules framed by Government under section 43 (1) of the Co-operative Societies Act, nor the Tahsildar, was a Court.

Bhagwan Das Marwari v. Suraj Prasad Singh, (1924) I.L.R. 47 All. 217, referred to.

APPEAL against the appellate order of the Court of the Subordinate Judge of Vellore, dated 21st April 1932 and made in Appeal Suit No. 83 of 1932 (Appeal Suit No. 177 of 1931 on the file of the District Court, North Arcot), preferred against the order of the Court of the District Munsif of Tirupattur, dated 22nd June 1931 and made in Regular Execution Petition No. 152 of 1931 [Kilpatti Co-operative Claim No. 268 of 1926 (a)].

K. Rajah Ayyar and K. S. Rajagopalachari for appellant.

V. N. Chockalinga Mudaliar for respondents.

JUDGMENT.

The appellant is a member of the Kilpatti Co-operative Society. The Society obtained a "decision" against him in the Court of the Assistant Registrar of Co-operative Societies. This procedure took place by virtue of the rules made by Government under powers of section 43 (1) of the Co-operative Societies Act. The decision was sent to the Tahsildar for enforcement. This was in accordance with Rule XIV (5) of the Statutory Rules, which says:—

"The decision shall be enforced in either of these ways:—

(a) on a requisition to the Collector of the District or on any person authorized by him in this behalf made by the

Registrar of Co-operative Societies, all sums recoverable under the decision shall be recovered in the same manner as arrears of land revenue.

ABDUL RAZACK
v.
KILPATTI
CO-OPERATIVE
SOCIETY.

(b) On application to the Civil Court having jurisdiction over the subject-matter of the decision, that Court shall enforce the decision as if it were a decree of the Court."

Admittedly, the Tahsildar was the officer deputed to act in this behalf by the Collector. The decision of the Registrar was given on 19th July 1926. The requisition was sent to the Tahsildar in June 1927, and kept by him till May 1929, when he returned it. There was then another long interval until 23rd December 1930, when application was made to the Court, that is to say the Munsif's Court, to enforce the decision. Two points were taken in the lower Courts, and they were the principal subject of argument in this appeal. First, it was contended that the second application was misconceived, having regard to Order XXI, rule 16, Civil Procedure Code. Apparently, between the date of the obtaining of the decision and the date of the filing of the second application, there had been a change of presidents of the Society, the first president having died and been succeeded in that office by another. The argument was that there had consequently been a transfer by operation of law, and that, therefore, application to execute should have been made to the Court which passed the decision, i.e., the Registrar's Court. But I think that there is no substance in this point; firstly, because the Statutory Rules give no power to the Registrar to enforce a decision and secondly, because the proceedings were brought by the Society and in the name of the Society, acting through its president, and consequently,

ABDUL RAZACK
v.
KILPATTI
CO-OPERATIVE
SOCIETY.

there was no question of the second president, whose name was transposed for that of the first president, being his legal representative.

A more substantial question raised in the appeal is whether the second application was out of time. It certainly was, unless article 182 (5) (b) of the Limitation Act saves it. Both the lower Courts held that the bar was saved on the ground that the Tahsildar was within that provision "the proper Court for execution".

In my opinion neither the Tahsildar, nor the Collector by whom he was authorized to act, was a Court. Reference may be made to the analogous provisions of sections 68 and 71 of the Civil Procedure Code, which enable decrees to be transmitted to a Collector for execution. Section 71 says that in such matters the Collector shall be deemed to act judicially. But it has been held in *Bhagwan Das Marwari v. Suraj Prasad Singh*(1) that this does not mean that the Collector is a Court. I follow this authority; and, there being nothing in the Co-operative Societies Act Rules to indicate that the Collector is to be deemed to be a Court, I hold that he is not a Court when he acts under Rule XIV (5) (a). It follows that the Tahsildar is equally not a Court.

The application was therefore barred, and this appeal must be allowed with costs throughout.

K.W.R.

(1) (1924) I.L.R. 47 All. 217.

APPELLATE CRIMINAL.

Before Mr. Justice King.

SIVA BUSHANA MUDALIAR (ACCUSED), PETITIONER,

v.

THE PRESIDENT, PANCHAYAT BOARD, TIRUVALLUR
(COMPLAINANT), RESPONDENT.*

*Madras Local Boards Act (XIV of 1920), Sch. VII, cls.
(p) and (q)—Printing press worked entirely by hand—
Power of Local Board to demand licence fee for.*

A Local Board has no authority to demand any licence fee from the owner of a printing press worked entirely by hand, as it is neither "machinery" nor "dangerous to human life", within the meaning of clauses (p) and (q) respectively of Schedule VII of the Madras Local Boards Act (XIV of 1920). *Alampath Krishnan v. Municipal Prosecutor*, (1925) 92 I.C. 873; and *Municipal Council, Cannanore v. Anandan*, (1927) I.L.R. 51 Mad. 601, referred to and followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, (Act V of 1898), praying the High Court to revise the order of the Court of the First Class Bench of Magistrates, Tiruvallur, in Bench Case No. 258 of 1935.

T. C. A. Bashyam and *T. C. A. Thirumalachariar* for petitioner.

K. R. Venkatarama Sarma for respondent.

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

ORDER.

It seems to me that the principle of the rulings reported as *Alampath Krishnan v. Municipal Prosecutor*(1) and *Municipal Council, Cannanore v. Anandan*(2), where it is held that handlooms are

* Criminal Revision Case No. 649 of 1935.

(1) (1925) 92 I.C. 873.

(2) (1927) I.L.R. 51 Mad. 601.

AF SIVA BUSHANA
MUDALIAR
v.
THE
Ci PRESIDENT,
PANCHAYAT
BOARD,
TIRUVALLUR.

not "machinery" requiring the issue of a licence, can easily be extended to the present case where there is a printing press worked entirely by hand. Clause (p) of Schedule VII of the Madras Local Boards Act therefore will not apply. It is argued that clause (q) applies as the running of this printing press is "dangerous to human life". Such a contention seems to me an absurd exaggeration. Clause (q) also does not apply. This petition is therefore allowed, and, as the Local Board had in my opinion no authority to demand any licence fee from the petitioner, the order requiring him to pay it is set aside.

K.W.R.

INCOME-TAX REFERENCE.

*Before Mr. Justice Madhavan Nair, Mr. Justice Stone
and Mr. Justice King.*

K. M. S. CHIDAMBARAM CHETTIAR, MINOR BY MOTHER
AND GUARDIAN VISALAKSHI ACHI BY HER DULY AUTHORIZED
AGENT T. K. SUBRAHMANYA AYYAR, PETITIONER,

1935,
September 18

v.

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

*Indian Income-tax Act (XI of 1922), sec. 4 (2)—Receipt of
income—Date of—Payment first, then a contract to sell and
then completion of transaction by execution of a sale deed—
Receipt of income in case of, only on date of execution of
sale deed.*

The assessee carried on business, *inter alia*, in Klang outside British India. On 3rd April 1929, a sum of Rs. 50,000 was debited to his account in his Klang books as having been paid on that date to one S. The payment admittedly related to the purchase by the assessee of certain house-sites of S adjoining the assessee's house in British India. The contract to sell the house-sites was entered into on 5th April 1929, and the sale deed was executed on 8th May 1929. The payment of Rs. 50,000 made on 3rd April 1929 was not shown in the accounts of the assessee as remittance to him in that year.

Held that the sum of Rs. 50,000 must be considered to have been received by the assessee only on 8th May 1929, and, therefore, during the accounting period, 13th April 1929 to 12th April 1930, and that he was liable to be taxed with respect to that sum, under section 4 (2) of the Income-tax Act of 1922, for the year 1930-31.

The sum of Rs. 50,000 could not be considered to have been received by the assessee on 3rd April 1929.

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

* Original Petition No. 3 of 1935.

CHIDAMBARAM
CHETTIAR
v.
COMMISSIONER
OF
INCOME-TAX,
MADRAS.

M. Subbaraya Ayyar and C. S. Rama Rao
Sahib for petitioner.

M. Patanjali Sastri for Commissioner of
Income-tax.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by
MADHAVAN NAIR J.—The question referred to us
by the Commissioner of Income-tax is : “In what
year was the remittance of Rs. 50,000 (Rupees
Fifty thousand) received?”

This question arises in connection with an
additional assessment imposed upon the petitioner
for the year 1930-31 with respect to this amount.
The accounting year is the period from 13th April
1929 to 12th April 1930. The question is whether
this amount may be considered to have been
received by the assessee during this period in the
following circumstances.

The assessee is a Nattukottai Chetti doing
business in Burma, Klang, Kuala Lumpur, Penang,
etc. On 3rd April 1929, a sum of Rs. 50,000 was
debited to his account in his Klang books as
having been paid on that date to S.A.Rm. Penang,
a money-lending business owned by another
Nattukottai Chetti. The entry does not say in
what connection this amount was paid. But it is
admitted that it relates to the purchase of house-
sites by the petitioner. He was negotiating for
the purchase of certain house-sites adjoining his
house at Kanadukathan which belonged to
S.A. Rm. An agreement to sell land was entered
into between the petitioner and S.A.Rm. on 5th
April 1929. The sale deed was executed on a
later date, on 8th May 1929. The payment of
Rs. 50,000 made on 3rd April 1929 was, it may be
mentioned, not shown in the accounts of the

petitioner as remittance to him in that year. If
that was so shown, we may take it that the Income-
tax authorities would have assessed him for that
amount for the year 1929-30. On these facts, it
was contended by the petitioner that he cannot
be taxed under section 4 (2) of the Income-tax
Act for that sum of Rs. 50,000 on the ground that
he has received that amount during the account-
ing period, his case being that he could be con-
sidered to have received that amount only on 3rd
April 1929 and not at a later date. Of course,
there is no transfer of money in this case, it being
understood that the profits were received in the
shape of two house-sites. The Income-tax
authorities decided that the profits could be said
to have been received only on 8th May 1929 when
the sale deed was executed and not earlier.

The question for us to determine is whether
the money could be said to have been received on
3rd April 1929 or on 8th May 1929. An inter-
mediate position was taken up by the petitioner
before the Assistant Commissioner of Income-tax,
who heard the appeal against the order of assess-
ment. It was argued before him that, if the
amount was not received on 3rd April 1929, at any
rate it should be deemed to have been received
on 5th April 1929, when according to him he
obtained possession of the property, which would
be anterior to the date of the sale deed, 8th May
1929. If that argument is accepted, of course it
will not be possible to assess him for the amount
for the year 1930-31. But the Assistant Commis-
sioner refused permission to the assessee to raise
that point as it was not raised before the Income-
tax authority in the first instance. The point is

CHIDAMBARAM
CHETTIAR
v.
COMMISSIONER
OF
INCOME-TAX,
MADRAS.
—
MADHAVAN
NAIR J.

AB CHIDAMBARAM
CHETTIAR
v.
Cc COMMISSIONER
OF
INCOME-TAX,
MADRAS.
—
MADHAVAN
NAIR J.

now raised before us and it is pressed that an opportunity should be given to the petitioner to enable him to adduce evidence with a view to establish that he came into possession of the house-sites prior to 8th May 1929.

It is clear on a reading of the order passed by the original taxing officer that this question was not raised before him. His agent appeared on behalf of the petitioner and explained the case, and the contentions raised by him are also referred to by the officer. This question of possession has not been referred to at all in the order. On the other hand, it is said that the assessee actually got possession in the accounting year. The point not having been raised before the taxing officer in the first instance, the appellate authority declined to give permission to the petitioner to raise the point as it was one which could be decided only after hearing the evidence. In the circumstances, we think that the refusal by the appellate authority was perfectly justified. We are not inclined to interfere with the discretion of the Income-tax authorities in refusing the petitioner to adduce fresh evidence.

So, the only question remaining to be considered is whether it can be said that the money was received by the petitioner on 3rd April 1929 or on 8th May 1929. It is contended that on the date when the money was paid a valuable contractual right had arisen in favour of the petitioner and therefore it must be considered that the money was remitted in law on that date. The argument no doubt is ingenious. But it appears to us that there is no substance in it. The question, strictly speaking, would arise only in a case where the

contract to sell stands by itself and has not been followed by any execution of a sale deed. In this case, first of all, there is the payment, then the contract to sell and then there is the final completion of the whole transaction by the execution of the sale deed. The simple question therefore is, when was the money received in the shape of the house-sites? In the circumstances, there can be only one answer and that is that it was received only on 8th May 1929. That date falling within the year of accounting, the assessee is liable to payment of income-tax on that amount.

Various other questions are sought to be raised before us, one of which is that the question arises in connection with the sale of land and not with the remittance of money. That question was not raised at any stage of the case and we are not inclined to hear new points now raised before us.

In the circumstances, we hold that the money was received during the accounting period, 13th April 1929 to 12th April 1930, and that the petitioner is liable to pay income-tax on that amount for the year 1930-31. The reference is answered accordingly. The Commissioner will be entitled to get his costs Rs. 250 from the assessee.

A.S.V.

CHIDAMBARAM
CHETTIAR
v.
COMMISSIONER
OF
INCOME-TAX,
MADRAS.
—
MADHAVAN
NAIR J.

APPELLATE CIVIL—FULL BENCH.

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

RAMASAMI PILLAI (PLAINTIFF), PETITIONER,

v.

MURUGIAH PADAYACHI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Negotiable instrument—Promissory note—Contemporaneous execution of, for goods sold and delivered—Recital of consideration in the promissory note—Inadmissibility of the promissory note—Suit based on the original cause of action—Maintainability of—Indian Evidence Act (I of 1872), sec. 91.

The plaintiff sold paddy to the defendants and received for the same a note in the following terms:—"We have taken from you on credit this day 10 kalams of Kuruva paddy at Rs. 3 a kalam for Rs. 30 and we have executed this hand-letter promising to pay the sum of Rs. 30 with interest thereon at 3 pies per rupee per mensem to you or to your order." It was contended that the document was a promissory note and being unstamped was inadmissible in evidence. Moreover it was not given in respect of an antecedent debt but was a contemporaneous document executed at the same time as the sale of the paddy. It was contended that the suit to recover the amount due by defendant was not maintainable as the contents of the note were inadmissible.

Held, by the Full Bench, that the suit was maintainable on the debt.

Held by BEASLEY C.J. (PANDRANG ROW J. concurring) that in all such cases Courts must be guided by what appears on the face of the promissory note and that, if it was expressed in such a way as to leave what was intended by the parties in any way in doubt, the facts must settle the question and that, if it was clear on the face of the promissory note that it was the contract, then no further evidence could be given.

* Civil Revision Petition No. 1765 of 1932.

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 Tiruvarur in Small Cause Suit No. 45 of 1932.

K. S. Desikan for petitioner.

V. Rajagopalan for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The plaintiff in the suit, who is the petitioner here, on 3rd January 1929 sold 10 kalams of paddy at Rs. 3 a kalam, making a total of Rs. 30, to the defendants, the respondents here, and on the same date took from the latter a hand-letter which reads as follows:—

"3rd January 1929. The hand-letter executed in favour of Ramaswami Pillai . . . by Murugayya Padayachi and Kailya Padayachi . . . We have taken from you on credit this day 10 kalams of Kuruva paddy at Rs. 3 a kalam for Rs. 30 and we have executed this hand-letter promising to pay the sum of Rs. 30 with interest thereon at 3 pies per rupee per mensem to you or to your order."

This document was unstamped; and being clearly a promissory note—and this is not contested by the petitioner—it was not admissible in evidence, because it was unstamped. The District Munsif, having rejected the promissory note as evidence, declined to give a decree to the petitioner on the original debt, holding that the hand-letter was not given in respect of an antecedent debt but was a contemporaneous document executed at the same time as the transaction relating to the sale of the paddy. This petition was directed to be posted before a Bench of three Judges in view of the fact that it was suggested that in this High Court there has been a conflict of opinion on the

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.

BEASLEY C.J.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

question as to whether a plaintiff is entitled to fall back upon the original debt where, through insufficiency of stamp or otherwise, a document, which is executed at the same time as the debt sued upon is incurred, is inadmissible in evidence. Some recent decisions of single Judges of this High Court are relied upon in support of the contention that previous Bench decisions of this High Court, viz., *Pothi Reddi v. Velayudasivan*(1) which followed *Sheikh Akbar v. Sheikh Khan*(2), *Muthu Sastrigal v. Visvanatha Pandarasanna-dhi*(3) and the recent case of *Chockalingam Chettiar v. Palaniappa Chettiar*(4), are no longer good law, and that, on the contrary, the views recently expressed by STONE J. in *Murugappa Chetty v. Nachiappa Chetty*(5), by VENKATASUBBA RAO J. in *Chinnayya Naidu v. Srinivasa Naidu*(6) and by WALLACE J. in *Gopala Padayachi v. Rajagopal Naidu*(7) correctly state the law. In *Chinnayya Naidu v. Srinivasa Naidu*(6) VENKATASUBBA RAO J. expresses the opinion that, far from the law being settled in this Presidency by the cases relied upon by the respondents, the preponderance of authority is in favour of the view that, although the execution of the note is simultaneous with the loan, the lender can fall back upon the original consideration. COUTTS TROTTER J. in *Chokkalingam Chetty v. Annamalai Chetty*(8) says :

"The giving of the security does not extinguish but merely suspends the cause of action on the original debt, which revives if the security be not discharged at maturity",

(1) (1886) I.L.R. 10 Mad. 94.

(3) (1913) I.L.R. 38 Mad. 660.

(5) (1934) 67 M.L.J. 30.

(7) A.I.R. 1926 Mad. 1148.

(2) (1881) I.L.R. 7 Calc. 256.

(4) (1934) I.L.R. 58 Mad. 261.

(6) (1934) 67 M.L.J. 912, 916.

(8) (1915) 34 I.C. 417.

and treats this proposition as "fundamental and rudimentary". K. SRINIVASA AYYANGAR J. in the same case says :

"If a bill or a note is given for a contemporaneous debt, there is a difference of opinion, but the better opinion is that even in such a case the bill merely suspends the remedy and does not operate as a discharge."

Whilst I do not agree with VENKATASUBBA RAO J. that the preponderance of authority in this Presidency is in favour of that view, I agree that there is certainly a conflict of opinion. In *Chidambaram Chettiar v. Ayyaswami Thevan*(1), a decision of OLDFIELD and KRISHNAN JJ., it appears from the facts that the loan and the promissory note were contemporaneous and the question was whether, if the promissory note was illegal and void, the lender could be given a decree apart from the note. On page 587 OLDFIELD J. says :

"It is not possible to answer this question without further knowledge of the facts. For, it is impossible on the information given by the District Munsif to decide whether there was any obligation apart from the note, the fact that the loan and the note were contemporaneous not being decisive on the point."

KRISHNAN J. says on page 589 :

"I agree that the second question cannot be answered in the present state of the record as it depends upon facts which have not yet been tried and found. If there is an obligation apart from one under the note *itself*, it may clearly be enforced. The fact that the loan and the note are contemporaneous is not conclusive on the non-existence of such obligation."

In their opinion, therefore, this is a question of fact depending upon whether there was a completed contract independent of the promissory note. The petitioner's contention is that a promissory note is a conditional payment and that,

(1) (1916) I.L.R. 40 Mad. 585

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.

BEASLEY C.J.

therefore, whenever a promissory note is taken, so long as the promissory note is outstanding there is no right of action otherwise than upon the note, but, when the note is not paid at maturity or is dishonoured, the original debt which has merely remained suspended in the meantime is revived and can be sued upon, provided that the promissory note has not been negotiated by the payee. STONE J. in *Murugappa Chetty v. Nachiappa Chetty*(1) is of the opinion that as soon as the promissory note is overdue, provided that it is in the possession of the plaintiff, he can either sue on the note or can put the note on one side and sue on the debt; and he relies upon what was stated by FLETCHER MOULTON L.J. in *In re A Debtor. Ex parte The Debtor*(2). Reliance was also placed by STONE J. upon the decision of the Privy Council delivered by Lord MOULTON, viz., *Payana Reena Saminathan v. Pana Lana Palaniappa*(3), where he expressed similar views. It is, however, to be observed that in that case the contract sued upon, irrespective of that on the promissory notes, was held to be a separate and distinct contract and that both gave rise to mutually exclusive causes of action. There, a sum had been found due by arbitrators and it was provided that part of the amount so found due was to be paid for by the giving of the promissory notes in question, i.e., that was a method of payment. This cannot be taken as a decision upon a contemporaneous loan and document. STONE J., however, does say that it is a question of fact whether the original cause of

(1) (1934) 67 M.L.J. 30.

(2) [1908] 1 K.B. 344, 350.

(3) [1914] A.C. 618.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.

BEASLEY C.J.

action is the note itself or whether there is also another cause of action, and certainly he cannot be understood as deciding that, where the promissory note is the consideration for the contract, any other contract can be sued upon, which of course would be entirely contrary to the provisions of section 91 of the Indian Evidence Act. I will now deal with some of the earlier cases relied upon by the petitioner, both Indian and English. The first of these is *Chokkalingam Chetty v. Annamalai Chetty*(1), already referred to. The head-note reads as follows :

"The giving of an instrument in writing in recognition of an antecedent debt does not extinguish but merely suspends the cause of action on the original debt, which revives if the security be not discharged at maturity, unless such instrument can be regarded as a mere collateral security, in which case it will not operate even as a suspension of the original debt " and *obiter dictum* :

"If a bill or a note is given for a contemporaneous debt, the bill merely suspends the remedy and does not operate as a discharge."

There, COUTTS TROTTER J. was clearly dealing with the case which was before the Court, namely, an antecedent debt followed by the giving of a promissory note and he did not refer to the effect of a contemporaneous loan and promissory note. K. SRINIVASA AYYANGAR J., however, dealt with this question and made the observations which I have quoted earlier in my judgment. Therefore, only one of the Judges there expressed an opinion on this question which was one which did not arise for consideration in that case. I have already dealt with *Chidambaram Chettiar v. Ayyaswami Thevan*(2)

(1) (1915) 34 I.C. 417.

(2) (1916) I.L.R. 40 Mad. 585.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

which makes this question one of fact. I now come to a Full Bench decision of the Rangoon High Court, viz., *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(1), where this question was very fully discussed. There, it was held that, when a promissory note or any other instrument is given by the borrower to the lender in connection with a loan either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken is a question of fact and not of law; that *prima facie* the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only and not as a satisfaction of the debt, unless the parties agree so to treat it, and such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity; that, if the negotiable instrument is given by the borrower to the lender and the negotiable instrument is itself the consideration for the loan, or, if the instrument is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the negotiable instrument by which he must stand or fall, but that, if it is agreed between the parties that the instrument shall be taken merely as collateral security for the repayment of the loan, the lender is entitled to sue upon the original consideration independently of the security and without regard to any rights that he may possess under the instrument; that, if all the terms of the agreement under which the loan was made have been embodied in a negotiable instrument or in any other document, no evidence can be adduced in

(1) (1934) I.L.R. 12 Rang. 500 (F.B.).

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

proof of the terms of the contract except the document itself and, if such document is for any reason inadmissible in evidence, the suit must fail; that normally and *prima facie* a lender is regarded as taking a negotiable instrument only as conditional payment and not in satisfaction of the loan; that, where the handing over of the money and of the instrument is simultaneous, it does not follow that the instrument is the sole repository of the terms of the agreement; and that it is not the time when, but the terms upon which, the loan was made that matters and that is a question of fact to be determined according to the particular circumstances obtaining in each case. Amongst other cases, *Pothi Reddi v. Velayudasivan*(1) and *Sheikh Akbar v. Sheikh Khan*(2) were dissented from. A number of authorities, both English and Indian, were considered. With regard to the former, these are: *In re Romer & Haslam*(3). There, a client had given to his solicitor a negotiable security for the amount of his bill of costs and the solicitor had given the client a receipt in which the negotiable security was expressed to be taken "in settlement" of his bill; and it was held that the giving of the negotiable security was not a payment in the event of it being dishonoured unless there was proof (the onus of which lay on the solicitor) that such was the intention of the parties at the time. On page 300 BOWEN L.J. says:

"It has been established by a series of authorities, which it would be ridiculous to go through seriatim, that a bill of exchange given for a debt amounts to conditional payment of that debt, and is only conditional payment so long as it is

(1) (1886) I.L.R. 10 Mad. 94.

(2) (1881) I.L.R. 7 Calc. 256.

(3) [1893] 2 Q.B. 286.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

running; the payment is liable to be defeated when the bill is dishonoured."

In that case, therefore, there was no question that the negotiable security was taken as a payment of the debt and an antecedent one. In *Day v. McLea*(1) the defendants having broken their contract, the plaintiffs made a claim against them for a sum of money as damages. The defendants sent a cheque for an amount smaller than that claimed stating that it was in full payment of all demands. The plaintiffs kept the cheque stating that they did so on account and brought an action for the balance of their claim and it was held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim but that it was a question of fact on what terms the cheque was kept. This case again was a case of an antecedent debt and it was a question of fact as to whether the cheque was given and received in satisfaction of the claim, and I make the observation also that, when a cheque is given in respect of a debt, *prima facie* it can be presumed that it is intended as a payment. Certainly a cheque cannot be taken as embodying the terms of a contract other than to pay. In *Goddard v. O'Brien*(2) A, being indebted to B in £125 7 s. 9 d. for goods sold and delivered, gave B a cheque for £100 payable on demand which B accepted in satisfaction. This was held to be a good accord and satisfaction. From the facts of that case it would appear that the cheque was dated the 16th August 1880 and that previous to that date the defendant was indebted to the plaintiffs in the sum stated for

(1) (1889) 22 Q.B.D. 610.

(2) (1882) 9 Q.B.D. 37.

goods sold and delivered to him. This therefore was a clear case of a cheque given in respect of an antecedent indebtedness and the cheque was equally clearly given as a payment either in full satisfaction or on account. In *Farr v. Price*(1) there is a very brief statement of the facts and it does not appear whether the debt there in respect of which a promissory note was taken was an antecedent debt or a contemporaneous one; nor does it appear in respect of what the debt was, whether a loan or something else. The decision was mainly upon the question as to whether the promissory note could be received in evidence on account of the stamp which was of a greater value than the correct stamp required and it was held that it was inadmissible in evidence, and Lord KENYON C.J. then observed that, as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given the imperfect promissory note for it. But there is a foot-note to that case which refers to *Tyte v. Jones*(2). There, a promissory note had been given for money lent but when produced in Court was unstamped. Lord KENYON C.J. permitted the plaintiff to recover on a common count for money lent by proving that, when the money for which the note had been given was demanded of the defendant, he acknowledged the debt. In *Cohen v. Hale*(3) a garnishee order was made attaching a debt. At the time the order was made the garnishees

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

(1) (1800) 1 East. 55; 102 E.R. 22.

(2) (1800) 1 East. 58; 102 E.R. 23 (F.N.).

(3) (1878) 3 Q.B.D. 371.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

had given the judgment-debtor a cheque for the amount of the debt. Upon service of the order on the garnishees, they stopped payment of the cheque at the bank, the cheque not having been presented, and it was held that upon the cheque being stopped it was as if it had never been given and that there was, therefore, an existing debt capable of being attached and the garnishee order was effectual. On page 373 COCKBURN C.J. says :

“ It is very true that a man who takes a cheque may be estopped from proceeding to enforce payment of the debt until presentment of the cheque, and if the cheque is ultimately paid the debt is extinguished. All that happens in the meantime is that the right of action is suspended. But when the cheque is presented and dishonoured, the debt, the remedy for which was suspended until presentment of the cheque, may be treated as a debt subsisting all along, just as if the cheque had never been given. The giving of the cheque only suspends the remedy, it does not extinguish the debt.”

Of the Indian cases, *Payana Reena Saminathan v. Pana Lana Palaniappa*(1) has already been referred to and so have the other Indian cases. One other case which is referred to by VENKATASUBBA RAO J. in *Chinnayya Naidu v. Srinivasa Naidu*(2) and was relied upon here is *Gopala Padayachi v. Rajagopal Naidu*(3), to which I have already referred, where WALLACE J. says :

“ When a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the promissory note does not discharge the debt but only suspends the creditor's ordinary remedy during the currency of the promissory note.”

VENKATASUBBA RAO J. proceeds upon the view that it is a well-settled rule of English law that a

(1) [1914] A.C. 618.

(2) (1934) 67 M.L.J. 912.
(3) A.I.R. 1926 Mad. 1148.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

negotiable instrument operates only as a conditional discharge and that it is difficult to conceive that illustration (b) to section 91 of the Evidence Act can have been intended to abrogate or annul that well-settled rule. He adds that the effect of that illustration is no more than to exclude all proof other than the bill itself when the matter to be proved is the contract embodied in that bill. *Prima facie*, no doubt a negotiable instrument operates only as a conditional discharge but, if the promissory note embodies all the terms of the contract, it is difficult to see how any contract other than that can be put in evidence without offending against the provisions of section 91 of the Evidence Act. Upon this question, VENKATASUBBA RAO J. refers to *Pramatha Nath Sandal v. Dwarka Nath Dey*(1). There, the defendant had taken a loan from the plaintiff and executed a document which was held to be a promissory note. At the trial the document was produced but was held to be insufficiently stamped and the Judge refused to admit it in evidence. The appellate Court held that the plaintiff had a cause of action independently of the document. The defendant in his written statement admitted that he borrowed the sum in question from the plaintiff and the appellate Court held that there was an implied contract to repay the money lent even though there was no express promise. *Sheikh Akbar v. Sheikh Khan*(2) was referred to by PETHE-RAM C.J. in the course of his judgment and he explains the decision of RICHARD GARTH C.J., stating that when he spoke of a “deposit” he did not mean a “loan”. What RICHARD GARTH C. J. in that

(1) (1896) I.L.R. 23 Calc. 851.

(2) (1881) I.L.R. 7 Calc. 256.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

case did was to make a two-fold classification—first, where there is a completed cause of action as for goods sold, and, secondly, where the cause of action is the note itself—stating with regard to the latter class, on page 260 :

“When the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months’ date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made on the terms contained in the note, and no other.”

With regard to the former class, he says on page 259 :

“When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person.”

This decision was also referred to by JENKINS C.J. in *Krishnaji v. Rajmal*(1). In that case also there was an independent admission of a loan by the defendant in addition to the hundi which was held to be inadmissible in evidence for want of a stamp and, as in *Pramatha Nath Sandal v. Dwarka Nath Dey*(2), it was held that the plaintiff could still fall back upon the other consideration. Dealing with *Sheikh Akbar v. Sheikh Khan*(3), JENKINS C.J. says :

“It is apparent that the actual *ratio decidendi* was that there was no loan independently of the note”

(1) (1899) I.L.R. 24 Bom. 360. (2) (1896) I.L.R. 23 Calc. 851.
(3) (1881) I.L.R. 7 Calc. 256.

whereas in *Krishnaji v. Rajmal*(1) there was a loan independently of the note. JENKINS C.J. appears also to share PETHERAM C.J.’s opinion with regard to the remarks of RICHARD GARTH C.J., to which reference has already been made, upon the question of the words “loan” and “deposit”. In referring to illustration (b) of section 91 of the Evidence Act, he says :

“It is perfectly true that the terms of the contract contained in the hundi can, apart from the conditions which permit secondary evidence, only be proved by the hundi but this does not prevent proof of the loan independently of the note.”

I do not understand him to mean that, if the whole of the terms of the contract are set out in the document, any evidence other than the production of the document itself is permissible. In *Parsotam Narain v. Taley Singh*(2) AIKMAN J. differs from the view of PETHERAM C.J. in *Pramatha Nath Sandal v. Dwarka Nath Dey*(3) and is of the opinion that RICHARD GARTH C.J. in *Sheikh Akbar’s* case(4) did not intend to draw any distinction between the two classifications stated by him with regard to the nature of the debt, i.e., whether it was a loan or whether it was a deposit, being of the opinion that he used the word “deposit” merely as an illustration. I agree with AIKMAN J.’s view and cannot think that RICHARD GARTH C.J. intended any such distinction. It is difficult to see why such a distinction should have been intended, particularly as a deposit of money with a person to be repaid at a future date with interest is really a loan. AIKMAN J.’s judgment is relied upon by the

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

(1) (1899) I.L.R. 24 Bom. 360.
(3) (1896) I.L.R. 23 Calc. 851.

(2) (1903) I.L.R. 26 All. 178.
(4) (1881) I.L.R. 7 Calc. 256.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.

BEASLEY C.J.

respondents here. PAGE C.J. in *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(1) thinks that in cases in which the parties agree that the negotiable instrument shall be taken as conditional payment only and not in accord and satisfaction of the original debt, section 91 of the Evidence Act has no application, because he has himself never known or heard of an instance in which that term of the agreement has been embodied in the negotiable instrument. I fully agree with his view of the matter which is based upon the instrument not containing all the terms of the contract. Where it does, however, and is itself the consideration of the loan, he is of the opinion that the lender is restricted to his rights under the instrument by which he must stand or fall.

I now propose to refer to the cases relied upon by the respondents. The earliest of these is *Sheikh Akbar's* case(2) which I need not refer to again and which was followed in *Pothi Reddi v. Velayudasivan*(3). The head-note of the latter case reads as follows :

"The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay : Held that the plaintiff could not recover."

On page 96 COLLINS C.J. and PARKER J. say :

"But when a loan is made by plaintiff to defendant and in consideration of that loan the defendant contracts by a promissory note to pay it with interest at a certain date, there

(1) (1934) I.L.R. 12 Rang. 500 (F.B.).
(2) (1881) I.L.R. 7 Calc. 256.
(3) (1886) I.L.R. 10 Mad. 94.

is no cause of action 'for money lent' or otherwise than upon the note, and if for want of a stamp the note is not receivable in evidence the plaintiff's claim must fail."

The promissory note there admitted the receipt of the money and promised to repay the same on a certain date with interest. In *Muthu Sastrigal v. Visvanatha Pandarasannadhi*(1) there was a *varthamanam* which read as follows :

"Amount of cash borrowed of you by me is Rs. 350. I shall in two weeks' time, returning this sum of Rupees three hundred and fifty with interest thereon at the rate of Rupee one per cent per month, get back this letter."

It was held that this amounted to an unconditional undertaking to repay borrowed money and was therefore a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness. The document was inadmissible for want of a stamp, and SADASIVA AYYAR and SPENCER JJ. held that to allow a suit as one on "account for money had and received" concealing the real contract of loan which had been reduced to the form of a document would nullify section 91 of the Indian Evidence Act. *Krishnaji v. Rajmal*(2) was dissented from and *Pothi Reddi v. Velayudasivan*(3) followed. *Somaraju v. Venkatasubbarayudu*(4), *Gura Sahu v. Krishnamma*(5) and *Chandrasekaram Pillai v. Srinivasa Pillai*(6) are all decisions in which the view supporting the respondents' contention has been taken. The recent decision of VARADACHARIAR and BURN JJ. in *Chockalingam Chettiar v. Palanippa Chettiar*(7) also supports that contention; and also the decision of ANANTAKRISHNA AYYAR J.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

(1) (1913) I.L.R. 38 Mad. 660. (2) (1899) I.L.R. 24 Bom. 360.
(3) (1886) I.L.R. 10 Mad. 94. (4) (1924) 20 L.W. 943.
(5) (1932) 36 L.W. 432. (6) (1932) 37 I.W. 723.
(7) (1934) I L.R. 58 Mad. 261.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.J.

in *Alimane Sahiba v. Subbarayudu*(1). In *Nazir Khan v. Ram Mohan*(2), a decision of a Full Bench of the Allahabad High Court, in which a number of authorities are referred to, it was held that, where the promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note, the contract of loan cannot be proved apart from the document itself and the plaintiff's suit must fail if the document itself be inadmissible in evidence. The Lahore High Court also seems to have taken the same view as that of the Allahabad High Court in this case in which reference is also made to the observations of RANKIN C.J. in *Dula Meah v. Moulavi Abdul Rahaman*(3). It is clear that upon this question there is a conflict of opinion. So far as the Madras High Court is concerned, the preponderance of opinion seems to me to support the respondents' argument. But all Courts take the view that with regard to antecedent debts, the position is that the original debt can be sued upon irrespective of the subsequent document or promissory note; and the better opinion with regard to contemporaneous loans and promissory notes is that, where the promissory note is the consideration for the loan, the debt cannot be proved *aliunde*. That view, in my opinion, is clearly the correct view, in view of section 91 of the Evidence Act. With regard to the view expressed in the Rangoon case that *prima facie* a negotiable instrument is given as a conditional payment for a loan, I think that that

(1) (1932) 63 M.L.J. 303.

(2) (1930) I.L.R. 53 All. 114 (F.B.).

(3) (1923) 28 C.W.N. 70.

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
BEASLEY C.

view expresses the matter rather too generally. Certainly in cases where the note is given in payment of goods, which was the position in most of the English cases, that would be so. But dealing with money-lending transactions, I am not disposed to think that this view is entirely correct, and, in a country where borrowing and lending of money is so universal, the *prima facie* rule as stated in English cases cannot be adopted without some qualification. A borrower goes to a person who lends money and asks for a loan. The lender says that he will not lend the money unless the borrower executes a promissory note. The borrower agrees to do so and I imagine in a majority of cases executes the promissory note first and in exchange for it receives the money. Is the lender under these circumstances to be presumed to be receiving the promissory note as a conditional repayment of the money? Or does the promissory note which states that the borrower has received a sum of money and the date of the receipt and a promise to repay it with interest form the contract itself? It is, in my view, difficult to avoid the conclusion that it does. What other term is there which is omitted? PAGE C.J. in *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(1) is of the opinion that the term that the promissory note is taken as a conditional payment is omitted but this presupposes that there was such a term. I fully agree with what has been stated in many of the cases to which reference has been made that the question must be one of fact, but, where it is clear that the promissory note itself contains all the terms, I think that, in the absence of any

(1) (1934) I.L.R. 12 Rang. 500 (F.B.).

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
BEASLEY C.J.

evidence to the contrary, it must be accepted as the contract and that no contract *aliunde* can be proved. A great deal must depend upon what appears on the face of the document. In some cases, the promissory note may state that it is given in payment for goods sold and delivered. Such cases, in my opinion, do not present any difficulty because the presumption there would be that the promissory note was given in conditional payment for the goods sold and delivered. In other cases it may be clear that there was already a completed contract before the promissory note was given. In such cases I agree that evidence of that contract can be given irrespective of the promissory note. The position does seem to me to be different however when the promissory note appears to be part and parcel of the transaction of loan. My view, therefore, is that in all cases Courts must be guided by what appears on the face of the promissory note. If it is expressed in such a way as to leave what was intended by the parties in any way in doubt, then the facts must settle the question. If it is clear on the face of the promissory note that it is the contract, then no further evidence can be permitted.

Turning to the suit document itself, it seems to me that it was given as a conditional payment for the paddy. This being so, the promissory note not having been paid on demand may be treated as dishonoured and the original debt thus revived. The plaintiff was, therefore, entitled to fall back upon the original debt. The petitioner succeeds with costs and the case must go back to the lower Court for disposal according to law.

CORNISH J.—Upon the vexed question whether the payee of a note given for a contemporaneous

loan has or has not a right of action on the debt, I prefer to reserve my opinion, because it seems to me that that question cannot be said to arise for decision on the facts of this case. Of course if there is evidence that a note was agreed to be taken in satisfaction of the debt created by the loan, there is no difficulty in restricting the payee's right of action to the note. But I am unable to appreciate why that position should be assumed to be established by the circumstance of the loan and the note being contemporaneous transactions. It would seem to be contrary to what was stated by Lord ESHER in *In re Romer & Haslam*(1) as

“perfectly well-known law which was acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it”.

But, as I have already stated, I think that on the facts disclosed it is not necessary to decide the question. Therefore I confine my judgment to the particular facts of this case. On the construction of the plaint I think that the suit must be held to have been brought upon the debt on account of which the unstamped note had been taken by the plaintiff. The document is referred to as a hand-letter, which shows a consciousness on the part of the plaintiff or his legal adviser that the document unstamped could not be relied upon as a promissory note. The material allegations in the plaint, as I read them, are that there was a sale of paddy by the plaintiff to the defendant and that the defendant gave to the plaintiff for the sum due with interest a document which purported to be a note. In these circumstances, if the

RAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
—
CORNISH J.

(1) [1893] 2 Q.B. 286.

BAMASAMI
PILLAI
v.
MURUGIAH
PADAYACHI.
CORNISH J.

note had been a valid instrument, it seems to me that the case would fall within the well-established rule that when a creditor takes a bill or a note or a cheque on account of a debt, it is a qualified or conditional payment; that is to say, the instrument is received in payment subject to the condition that it will be duly honoured. The debt remains unaffected, though the cause of action is suspended while the instrument is running. Thus, in *Cohen v. Hale*(1), COCKBURN L.C.J. stated :

"When the cheque is presented and dishonoured, the debt, the remedy for which was suspended until presentment of the cheque, may be treated as a debt subsisting all along, just as if the cheque had never been given."

A creditor may indeed accept a negotiable instrument in satisfaction of his debt. But in the present case there is not the shadow of a plea in the defendants' written statement that the note was given and accepted in satisfaction of the debt; on the contrary, the mainstay of the defence in the pleading and at the trial apparently was that the note was an invalid instrument, treating the suit as brought on the note. It can make no difference whether the note is invalid or dishonoured as regards the creditor's right of action upon the debt on account of which the document is purported to have been given. In my judgment, therefore, the suit was maintainable on the debt independently of the unstamped and inoperative note; and it follows that I agree that the revision petition should be allowed.

PANDRANG ROW J.—I agree entirely with my Lord, the CHIEF JUSTICE.

G.R.

(1) (1878) 3 Q.B.D. 371.

APPELLATE CIVIL.

Before Mr. Justice Cornish and Mr. Justice Stodart.

MUTHU K. R. A. R. P. L. ARUNACHALAM CHETTIAR
AND ANOTHER (PLAINTIFFS), APPELLANTS,

1935,
September 30.

v.

RENGASWAMI CHETTIAR AND SIX OTHERS
(DEFENDANTS), RESPONDENTS.*

Estoppel—Mortgage—Suit to enforce—Plea in, of mortgage being a sham transaction intended to defraud a third party—Mortgagor's right to set up—Estoppel against.

Where the object of a mortgage is to defraud a third person and the mortgagee is cognisant of and indeed a party to that intended fraud, the mortgagor is not estopped from pleading and proving against his mortgagee seeking to enforce the mortgage that it was a sham transaction, a device to defeat a possible attachment of the properties by a creditor.

Ram Surun Singh v. Mussamut Pran Peary, (1870) 13 Moo. I.A. 551, referred to.

APPEAL against the decree of the District Court of Madura in Appeal No. 61 of 1930 preferred against the decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 14 of 1928.

D. S. Venkatachari for *P. S. Sarangapani Ayyangar* for appellants.

K. Rangaswami Ayyangar for *M. R. Venkata-rama Ayyar* for respondents.

JUDGMENT.

CORNISH J.—This second appeal arises out of a mortgage suit which was dismissed, both the lower Courts holding that the mortgage was not supported by consideration. It has been suggested before us that the burden of proving want of

CORNISH J.

* Second Appeal No. 1285 of 1932

ARUNACHALAM
v.
RENGASWAMI.
CORNISH J.

consideration had been wrongly put upon the plaintiff mortgagee. If this was so, it would be a ground for interfering in second appeal, for there can be no doubt that, in a suit by a mortgagee against his mortgagor to enforce a mortgage, the onus of proving a plea of no consideration rests on the mortgagor. But we are satisfied from a perusal of the judgments that in the discussion of the evidence in the case this rule has not been lost sight of. It appears to us that the lower Courts have accepted the defendants' evidence that the mortgage was not supported by consideration and have rejected the plaintiffs' evidence to the contrary. The point which has been strenuously argued on behalf of the appellants relates to the competency of the defendants' plea. The mortgage, Exhibit N, was executed on 22nd May 1923 and registered three days later, on 25th May. The consideration is said to be Rs. 2,000 for discharging debts contracted for the expenses of the father's obsequies and for discharging sundry debts contracted for the expenses of the mortgagors' family. And the money is stated to have been received on that day, that is, on the date of the mortgage instrument, from one Muthuswami Iyer, the mortgagee's agent. Paragraph 6 of the written statement runs thus :

" These defendants state that, shortly prior to the execution of the plaintiff mortgage bond, they had entered into the contract with Palaniappa Chetty (plaintiffs' father) for securing to him all the properties of the defendants' family for accommodating them with the loan of Rs. 25,000 and, as certain creditors threatened to attach the family properties, the late Palaniappa Chetty and his agent Muthuswami Iyer, . . . advised the said defendants to execute several documents in respect of the various family properties for the purpose of safeguarding the same against the said creditors by preventing the

attachment and thus facilitating the carrying out of the contract of the loan of Rs. 25,000 aforesaid."

In paragraph 7, they state that in pursuance of such advice they

" executed the suit mortgage document with all kinds of recitals which the said agent proposed in order to give an air of reality to the mortgage which was an entirely fictitious and sham transaction, and not intended to be enforced at all, but only intended to scare away creditors "

In short, the defendants set up the plea that the mortgage was a sham transaction, a device to defeat a possible attachment of the properties by a creditor. As a matter of fact, a creditor filed a suit on 23rd May 1923 on a promissory note executed by the defendants, but he was persuaded not to attach and no attachment before judgment was made. It has not, however, been proved that the creditor was induced not to attach by reason of Exhibit N, the suit mortgage deed. The question is whether the defendants are estopped from setting up a case which rests on their fraudulent conduct. It has been argued that this is a fit case to apply the maxim *Nemo allegans turpitudinem suam est audiendus*. This maxim has been applied in a number of cases, for example, *Kamayya v. Mamayya*(1), *Subbaraya Chetty v. Subbaraya Chetty*(2) and *Parthasarathy Reddiar v. Kandaswami Mudaliar*(3). But can it stand in the way of a mortgagor's right to plead and prove against his mortgagee that the mortgage which is sought to be enforced against him was without consideration because it was a sham transaction? The question appears to be answered by the Privy Council ruling in *Ram Surun Singh v. Mussamut Pran Peary*(4). It was held there that

(1) (1916) 32 M.L.J. 484.
(3) (1923) 45 M.L.J. 161.

(2) (1926) 24 L.W. 500.
(4) (1870) 13 Moo. I.A. 551.

ARUNACHALAM
v.
RENGASWAMI.
CORNISH J.

ARUNACHALAM v. RENGASWAMI. it was competent to the defendant in a foreclosure suit to plead that the statement made by him in a previous suit relating to the mortgage was false and intended as a fraud on a third party. The law on the subject has been succinctly laid down in authoritative text-books, such as Taylor on Evidence and Smith's Leading Cases. In Taylor on Evidence, Vol. I, section 93, it is stated :

"It seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or immoral purpose."

And later on there is this passage :

"Indeed, the better opinion seems to be that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void *ab initio*."

It seems to us that that passage is very appropriate to the facts of the present case. From the evidence it is clear that the object of this mortgage deed was to defraud a third person and that the mortgagee was cognisant of and indeed a party to that intended fraud. But we are of opinion that this circumstance will not operate to estop the mortgagor from pleading the real nature of the transaction against the claim of the mortgagee upon the instrument.

For these reasons, we think that this is not a case in which we should interfere in second appeal. The appeal is accordingly dismissed with costs.

STODART J.—I agree and I have nothing to add.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Stodart.

IN RE MAGALAM GOVINDA RAO (APPELLANT), PETITIONER.*

1935,
August 6.

Letters Patent (Madras), Cl. 15—Second appeal—Decision of single Judge of High Court in—Leave to appeal from—Order of single Judge refusing—Order of Division Bench different from—Right of appeal from second appellate decree, if conferred by.

Even if an order of a single Judge of the High Court refusing to grant leave to appeal from his decision in a second appeal could be regarded as a judgment under the first part of Clause 15 of the Letters Patent (Madras), an order to a different effect by a Division Bench on appeal therefrom would not suffice to give the applicant a right of appeal against the second appellate decree, because, under the second part of Clause 15, the second appellate decree will be appealable only on a certificate granted by the Judge who heard the second appeal. Clause 15 does not confer the power to grant leave to appeal both on the original Court and on the appellate Court.

Ramanayya v. Kotayya, (1929) 57 M.L.J. 398, followed.

PETITION praying that in the circumstances stated therein the High Court will be pleased to issue an order granting leave to the petitioner to prefer a Letters Patent Appeal against the order of the High Court dated 15th January 1935 and made in Civil Miscellaneous Petition No. 76 of 1935 for leave to prefer a Letters Patent Appeal against the judgment of the High Court dated 6th December 1934 and passed in Second Appeal No. 66 of 1933 preferred to the High Court against the decree of the District Court of Bellary in Appeal Suit No. 75 of 1931 (Original Suit No. 599 of 1929, District Munsif's Court, Hospet) and against the

* Serial Register No. 11994 of 1935.

GOVINDA RAO,
In re.
order of the High Court dated 25th April 1935 in Civil Miscellaneous Petition No. 1744 of 1935 for review of the order of the High Court in the above Civil Miscellaneous Petition No. 76 of 1935.

Appellant in person.

VARADA-
CHARIAR J.

The ORDER of the Court was pronounced by VARADACHARIAR J.—This petition arises out of Second Appeal No. 66 of 1933 which was dismissed by our learned brother, MADHAVAN NAIR J. After the dismissal of the second appeal, the petitioner applied to the learned Judge, by Civil Miscellaneous Petition No. 76 of 1935, for leave to file an appeal under the Letters Patent, and he dismissed it, stating that he could not find any ground for granting the leave asked for. Another petition asking for review of this order was also dismissed by him. The petition before us asks that we may grant leave to appeal against the judgment of MADHAVAN NAIR J. in the second appeal, “despite his Lordship’s refusal to grant leave” in Civil Miscellaneous Petition No. 76 of 1935. In the course of the argument before us, the petitioner has suggested that this may at least be treated as an appeal against the order refusing to grant leave. We do not see that on either ground we can grant the petitioner’s request.

The petitioner who himself argued his case before us admits that a decision of a Division Bench of this Court in *Ramanayya v. Kotayya*(1) is against him, but he contends that that judgment was given mainly on the authority of English cases and does not take note of the fact that an order refusing to grant leave may be regarded as a

(1) (1929) 57 M.L.J. 398.

judgment within the meaning of the first part of Clause 15 of the Letters Patent and treated as appealable. The petitioner agrees that, so far as the decision in the second appeal is concerned, it could not be made subject to a further appeal except in accordance with the second part of Clause 15. Neither section 96 nor section 100 of the Civil Procedure Code will give him a right of appeal from the decision in the second appeal. Even if an order refusing to grant leave could be regarded as a judgment under the first part of Clause 15, an order to a different effect by a Division Bench on appeal therefrom would not suffice to give him a right of appeal against the second appellate decree, because, under the second part of Clause 15, the second appellate decree will be appealable only on a certificate granted by the Judge who heard the second appeal. The petitioner insists that the clause does not use the word “only”, but it is difficult to see what other meaning the clause could bear, when read in the light of the fact that from the first part of Clause 15 the judgment passed in the exercise of appellate jurisdiction over subordinate Courts is excluded. There is no provision here similar to that contained in section 75 (3) of the Provincial Insolvency Act, and other similar enactments, where the power to grant leave to appeal is conferred both on the original Court and on the appellate Court. We see no reason to differ from the view taken by the learned Judges in *Ramanayya v. Kotayya*(1). The petition is accordingly dismissed.

A.S.V.

(1) (1929) 57 M.L.J. 398.

APPELLATE CIVIL.

Before Mr. Justice Stone and Mr. Justice Pandrang Row.

1935,
August 28.

THE OFFICIAL RECEIVER, EAST GODAVARI, RAJAH-
MUNDY, REPRESENTING THE ESTATE OF GRANDHI SATTIRAJU
(ADJUDGED INSOLVENT) (FOURTH RESPONDENT), APPELLANT,

vs.

THE IMPERIAL BANK OF INDIA AT RAJAHMUNDY AND
ANOTHER (PETITIONER AND FIFTH RESPONDENT), RESPOND-
ENTS.*

Provincial Insolvency Act (V of 1920), ss. 51 and 52—Hindu joint family—Father and manager—Insolvency of—Son's share in joint family property—Father's right to alienate—Official Receiver's right to exercise—Attachment of such share in execution prior to vesting in Receiver—Effect—Attachment of share because of son's liability under pious obligation rule—Attachment of share by reason of son's liability as principal debtor—Distinction.

In execution of a decree passed against the father and manager of a joint Hindu family personally and against his son and nephew in respect of their shares in the joint family property, the family property, that is to say, the interest therein both of the father and manager and of his son and nephew, was attached. The father then became an insolvent. The Official Receiver took charge of his properties. He communicated with the executing Court claiming the whole of the attached property and sought to stop the sale. But the executing Court held the sale, on the basis that the same was not to affect the rights of the Official Receiver to the sale proceeds. On a question arising as to whether the Official Receiver was or was not entitled to such part of the sale proceeds which represented the interests of the son and nephew in the joint family property,

held that the Official Receiver was not entitled to the part of the sale proceeds representing the interests of the son and nephew in the joint family property.

* Appeal Against Order No. 245 of 1934.

The right to alienate the joint family property for payment of his debts which the father and manager of a joint Hindu family normally possesses and which passes to the Official Receiver on his becoming an insolvent ceases once the son's interest in the family property is attached in execution of a decree against him. Once the right of the father is gone, the power of the law to transfer that right to the Official Receiver in insolvency is gone too, because there is nothing to transfer. There is in this respect no difference in principle between a case where the son's interest is attached because he is held to be liable under the pious obligation rule and a case where the son's interest is made liable because he is himself the principal debtor.

Gopalakrishnayya v. Gopalan, (1926) I.L.R. 51 Mad. 342, followed.

Subba Rao v. Official Receiver, Guntur, (1935) 42 L.W. 295, approved.

Subraya v. Nagappa, (1908) I.L.R. 33 Bom. 264, referred to.

APPEAL against the order of the District Court of East Godavari at Rajahmundry dated 23rd November 1933 and made in Execution Application No. 241 of 1933 in Original Suit No. 76 of 1931.

G. Lakshmanna and G. Chandrasekhara Sastri for appellant.

O. T. G. Nambiar for first respondent

Second respondent was unrepresented.

The JUDGMENT of the Court was delivered by STONE J.—This is an appeal against an order passed by the learned District Judge of East Godavari in an execution application and it is an order that raises a point of some interest. The facts can be shortly stated. The action was brought by what I will call the execution-creditor against the father and manager of a joint Hindu family and his son and nephew. In that action,

OFFICIAL
RECEIVER,
EAST GODA-
VARI
v
IMPERIAL
BANK
OF INDIA.

STONE J.

OFFICIAL
RECEIVER,
EAST GODA-
VARI
v.
IMPERIAL
BANK
OF INDIA.
—
STONE J.

the plaintiff was successful and obtained a decree against the father personally and against the son and nephew in respect of their shares in the joint family property. Following upon that decree, the judgment-creditor attached the family property, that is to say, the interest therein, both of the father and manager and of his son and nephew. The next step was that the father became an insolvent. The Official Receiver took charge of his properties. He communicated with the executing Court claiming the whole of the attached property and sought to stop the sale. The executing Court decided to continue the sale and everything thereafter has proceeded on the basis that the sale took place without in the least affecting the rights of the Official Receiver to the sale proceeds, that is to say, if the Official Receiver has a right in respect of the whole property, the whole of the sale proceeds are his and, on the other hand, if he has a right in part, he is entitled to part of the sale proceeds. The learned District Judge has held in fact that the Official Receiver is not entitled to such part of the sale proceeds which represent the interests of the son and nephew in the joint family property.

It is urged before us that the Official Receiver is entitled to the whole of the sale proceeds on the ground that the action was in respect of the father's debts, that the father had subsequently become an insolvent and that the judgment-creditor should be in no better position than the general body of creditors, that the attachment has not affected the sale, for the relevant time is when the petition was filed, and that sections 51 and 52 of the Provincial Insolvency Act apply. In our

opinion, however, the legal position that arises in circumstances such as these can be shortly expressed as follows :—

Section 52 provides :

“Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the Receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.”

That section in our opinion relates to a decree which was issued against the property of a debtor. Section 51 restricts the rights of a creditor in execution in the following terms :

“Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition.”

Both these sections are concerned with the property of the debtor. The question we have to determine is, what does the property of the debtor include? We apprehend that the property of the debtor includes all personal assets including his rights, and one of such rights is the right of the father and manager of a joint Hindu family to alienate the joint family property, which right passes together with his other valuable rights to the Official Receiver on his becoming an insolvent. Did this right, which the father and manager of a joint Hindu family normally possesses, exist in the circumstances of this case? If it did, then it

OFFICIAL
RECEIVER,
EAST GODA-
VARI
v.
IMPERIAL
BANK
OF INDIA.
—
STONE J.

passed on to the Receiver ; if it did not, then it did not pass on to the Receiver. In *Subraya v. Nagappa*(1) it was held that

“ when the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of Court under section 276 of the Code of Civil Procedure (1882), his father is deprived of the power of alienation of that interest in satisfaction of his own debts.”

From that it appears to follow that, once a decree has been followed by an attachment of the son's interest in the joint family property, the normal power of the manager of that property to alienate it for payment of debts from the moment of attachment ceases to be his right. Therefore, the right in him having ceased, it cannot be transferred on his insolvency to the Official Receiver.

This appears to be the ground on which a Bench of this Court (RAMESAM and DEVADOSS JJ.) in *Gopalakrishnayya v. Gopalan*(2) considered the position that arises on the insolvency of the father of a joint Hindu family as regards the power of the father to sell the son's share in the family property. Although that right passes to the Official Receiver, it was held in those circumstances :

“ If the son's share was attached by a creditor, the Official Receiver has no power to sell the share after attachment, but the attaching creditor is entitled to proceed with the execution by selling the son's share.”

They observe :

“ Only the power of the father to sell the shares of the sons passes to the Official Receiver. But the power is subject to the same qualification as it is in the father's hands. In this case the son's shares have been attached and, after such

(1) (1908) I.L.R. 33 Bom. 264.

(2) (1926) I.L.R. 51 Mad. 342.

attachment, the Official Receiver cannot exercise the power of sale.”

More recently, my learned brother had to consider a similar point in the case of *Subba Rao v. Official Receiver, Guntur*(1), and he held that

“ when a Receiver is appointed by the Insolvency Court on a petition in which the father of a Hindu joint family is sought to be adjudicated an insolvent, the property of that insolvent is vested in the Receiver, but the shares of his undivided sons do not actually vest in the Receiver, but only the father's power to sell such shares. When such shares of the sons have been attached before the vesting in the Receiver had taken place, there can be no vesting of even this power to sell the sons' shares in the Receiver and the Receiver in insolvency is not therefore entitled to apply under section 52 of the Provincial Insolvency Act for delivery of the entire property.”

Now it is urged before us that, though it is sound law that, where the attachment which affects the son's interest arises out of a case in which the son is sued as a person primarily liable, it does not apply where the son's interest is attached in a case in which the father is sued as a person primarily liable and the sons are merely joined in order to have a decree passed against them so that in execution proceedings the sons will not be at liberty to oppose the execution on the ground that their shares should not have been made liable because the debt of the father was illegal or immoral. But, in our opinion, there can be no difference in principle between a case where the son's interest is made liable in an action brought by the plaintiff with whom the father has contracted and a case where the sons' shares are made liable in an action in which the plaintiff

(1) (1935) 42 L.W. 295.

OFFICIAL
RECEIVER,
EAST GODA-
VARI
v.
IMPERIAL
BANK
OF INDIA.
—
STONE J.

sues the sons in respect of the sons' own contractual liability. Because in the first case the only reason why a decree can make liable the son's interest is that under the Hindu Law the son is liable under the pious obligation rule for his father's debts. His liability in such a case is not contractual, but it is nevertheless a liability and a liability that is imposed upon him by law and is one which placed him subject to certain exceptions and safeguards in the position of a person that is responsible in the eye of the law for his father's debts as if he had himself contracted.

We can see therefore no difference in principle between a case where the son's interest is attached because he is held to be liable under the pious obligation rule and a case where the son's interest is made liable because he is himself the principal debtor. In both cases the son's interest is made liable. In both cases, assuming the attachment has begun, the son's interest is attached. Once the son's interest is attached, then the father's right to alienate the joint family property in order to pay the father's debts is gone. Once the right is gone, the power of the law to transfer that right to the Official Receiver in insolvency is gone too, because there is nothing to transfer. In our opinion therefore the learned District Judge arrived at a correct conclusion and this appeal must be dismissed with costs.

Attorneys for first respondent—*Moresby and Thomas.*

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Stodart.

KONCHADU DALAYYA (PLAINTIFF—PETITIONER),
PETITIONER,

1935,
July 25.

v.

MALLA SUNDARA NARAYANA AND SEVEN OTHERS
(DEFENDANTS—RESPONDENTS), RESPONDENTS.*

Execution application—Attachment before judgment—Property subject of—Execution application, filed after decree, asking for sale of—Schedule of property not put into Court along with—Application, when not defective in law by reason of—Code of Civil Procedure (Act V of 1908), sec. 73—Benefit of—Right to—Defects in execution petition, when no bar to—O. XXI, r. 17—Execution petition returned for amendment and re-presented with amendments—Date of presentation of—Attachment before judgment by superior Court—Sale of property subject of, by inferior Court—Execution petition by decree-holder in suit in superior Court—Proper and sufficient, if and when—Attachment before judgment becoming an attachment in execution—Condition of—Order of Court, if a—Sec. 63—Attachment before judgment—Person securing—Right of, to benefit of sec. 63—Order of Court in execution, if a condition of—Sec. 115—Erroneous view of provisions of Code—Court not exercising jurisdiction by reason of—Interference in revision in case of—Sec. 73—Misapprehension of provisions of—Order made under.

In a case in which property had been attached before judgment and a decree was passed subsequently, the decree-holder filed an application for execution asking for sale of the property already attached before judgment. The last column in that execution application referred to the attachment before judgment but, though the column referred to a schedule attached to the petition, the schedule was not in fact put into Court along with the execution petition.

* Civil Revision Petition No. 943 of 1932.

DALAYYA
v.
SUNDARA
NARAYANA.

Held that the execution application was not really defective in law, as it referred to the attachment before judgment which had been ordered by that very Court.

Even if there are defects in an execution petition, the petitioner will be entitled to the benefits of section 73 of the Code of Civil Procedure if the petition is in substantial compliance with the law.

Abdul Salam v. Veerabhadra Raju, (1929) I.L.R. 52 Mad. 760, referred to.

Under the provisions of Order XXI, rule 17, of the Code of Civil Procedure, when an execution petition returned for making certain amendments is re-presented with the necessary amendments, it must be deemed to have been a valid presentation on the date of the original presentation itself.

Where property attached before judgment by a Sub-Court was brought to sale by a District Munsif's Court in execution of the decree in a suit on the file of that Court, and the plaintiff in the Sub-Court suit, after obtaining a decree, filed an execution petition in that Court praying that the amount realised under that sale might be called for and distributed by the Sub-Court, rateably amongst various decree-holders,

held that the execution petition was itself a proper and sufficient execution application to satisfy the requirements of law.

So far as the property sold by the District Munsif's Court was concerned, the only method of execution that the plaintiff in the Sub-Court suit could have pursued was to ask the Sub-Court to send for the sale proceeds.

An order of Court in execution is not necessary for treating an attachment before judgment as an attachment for purposes of execution. From the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment available for purposes of execution.

Observations of the Judges constituting the majority in *Meyyappa Chettiar v. Chidambaram Chettiar*, (1923) I.L.R. 47 Mad. 483 (F.B.), relied upon.

There is nothing in principle or authority to warrant the view that a person who has obtained an attachment before judgment cannot avail himself of section 63 of the Code of Civil

Procedure till some order has been passed by the Court upon his application for execution.

When the lower Court refuses to exercise the powers vested in it by law and holds on an erroneous view of law that a case does not fulfil the requirements of the provisions of the Code, the High Court has jurisdiction to interfere in revision.

Sundaram v. Mausam Maruthar, (1921) I.L.R. 44 Mad. 554 (F.B.), relied upon.

Where the High Court is satisfied that the lower Court has proceeded on a clear misapprehension of section 73 of the Code, it is not justified in driving the petitioner to a separate suit merely on the ground that that remedy may also be open to him.

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 Berhampore dated 7th December 1931 and made in Execution Application No. 128 of 1931 in Execution Petition No. 52 of 1931 in Original Suit No. 12 of 1930.

G. Lakshmanan and G. Chandrasekhara Sastri for petitioner.

B. Jagannadha Das for eighth respondent.

Other respondents were unrepresented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This revision petition arises out of an application under sections 63 and 73 of the Code of Civil Procedure by the decree-holder in Original Suit No. 12 of 1930 on the file of the Court of the Subordinate Judge of Ganjam. Pending Original Suit No. 12 of 1930, the plaintiff had obtained an attachment before judgment of certain properties of the defendant. The decree was passed on 23rd March 1931 and on 3rd July 1931 he filed an application for execution as well as Execution Petition No. 52 of 1931 out of which the present civil revision petition arises.

DALAYYA
v.
SUNDARA
NARAYANA.

VARADACHARIAR J.

DALAYYA
v.
SUNDARA
NARAYANA.
—
VARADA-
CHARIAR J.

In the execution application he asked for sale of the properties already attached before judgment. The last column in that execution application refers to the attachment before judgment, but we must take it that, though the column refers to a schedule attached to the petition, the schedule was not in fact put into Court along with the execution petition. In Execution Petition No. 52 of 1931, however, the decree-holder stated that the properties thus attached before judgment in Original Suit No. 12 of 1930 had been brought to sale by the District Munsif's Court of Sompeta in execution of the decree in Original Suit No. 81 of 1930 on the file of that Court, and he accordingly prayed that the amount realised under that sale may be called for and distributed by the Sub-Court, rateably amongst various decree-holders. We find from the endorsements on the Execution Petition No. 52 of 1931 that on 6th July the learned Subordinate Judge intimated the fact of this application to the District Munsif of Sompeta and asked that the money might be sent over to the Sub-Court or be retained in the District Munsif's Court pending further orders from the Sub-Court. We later on find a note of intimation from the District Munsif of Sompeta that the money was retained in his Court pending the orders of the Sub-Court.

The main execution application was returned for production of the copy of the order of attachment before judgment and the schedule and, when it was re-presented, it was again returned for amendment of certain errors in the schedule. It was finally re-presented on 31st August 1931 when the Subordinate Judge passed an order thereon calling for sale papers.

In the present proceedings, we are concerned only with the sale proceeds realised in the Sompeta District Munsif's Court by sale of some of the properties attached before judgment.

It would appear that the sale took place on 23rd June 1931 and the money was deposited in the District Munsif's Court on 6th July 1931. The question is whether, on these facts, the case falls under section 63 of the Code of Civil Procedure or not. Incidentally the learned Subordinate Judge has discussed the effect of section 73 of the Code of Civil Procedure also and he was of opinion that the plaintiff's application for execution must be deemed to have been admitted only on 31st August 1931, when it was re-presented after all the necessary corrections, and it was only after the order for sale papers was made on that date that the attachment before judgment must be deemed to have become an attachment in execution, i.e., on 31st August. As the sale proceeds had been paid into the District Munsif's Court so long ago as 6th July, it followed, according to him, that the case would not be covered by section 63 or section 73 of the Code.

We are unable to agree with this view. If it were necessary to base our decision on the presentation of the main execution application, we should have been prepared to hold that the execution application presented on 3rd July 1931 was not really defective in law, as it referred to the attachment before judgment which had been ordered by that very Court. We may also refer in this connection to *Abdul Salam v. Veerabhadra Raju*(1) where it was held that even if there

DALAYYA
v.
SUNDARA
NARAYANA.
—
VARADA-
CHARIAR J.

DALAYYA
v.
SUNDARA
NARAYANA.
—
VARADA-
CHARIAR J.

were defects in the execution petition the petitioner will be entitled to the benefits of section 73 if the petition was in substantial compliance with the law. In any event, under the provisions of Order XXI, rule 17, when the execution petition was re-presented with the necessary amendments, it must be deemed to have been a valid presentation on the date of the original presentation itself. In the present case, it seems to us to be scarcely necessary to rely upon the formal application for execution, because on the same day Execution Petition No. 52 of 1931 was also presented and, so far as the properties sold by the Sompeta District Munsif's Court on 23rd June are concerned, the only method of execution that the present plaintiff could have pursued was to ask the Sub-Court to send for the sale proceeds. To that extent Execution Petition No. 52 of 1931 is itself a proper and sufficient execution application to satisfy the requirements of law.

It is no doubt true that section 63 of the Code of Civil Procedure requires that the property must be under *attachment in execution* of decrees of more Courts than one. But we are unable to agree with the learned Subordinate Judge that the property must be deemed to be under "attachment in execution" so far as the Sub-Court decree was concerned, only when the order was made on 31st August calling for sale papers. Order XXXVIII, rule 11, of the Code of Civil Procedure provides that, when an attachment before judgment has been made and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of that

DALAYYA
v.
SUNDARA
NARAYANA.
—
VARADA-
CHARIAR J.

property. It was at one time held that an attachment before judgment is so radically different in character from an attachment in execution that some of the provisions in the Code relating to attachment in execution should not be applied to attachment before judgment. Difficult questions of this kind have arisen under Order XXI, rule 57, and article 11 of the Limitation Act. It is however unnecessary to deal with the earlier cases in view of the decision of the Full Bench of this Court in *Meyyappa Chettiar v. Chidambaram Chettiar*(1). The learned Subordinate Judge refers to some of the observations of the learned Judges in that case and also to the observations in other cases which suggest that it might be possible to treat an attachment before judgment as becoming an attachment in execution only after some order in execution had been passed by the Court. These *dicta*, it seems to us, must be read in the light of the circumstances and the facts of the cases in which they were made. As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court. The more reasonable view seems to us to be to hold that, from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment available for purposes of execution. Far from the observations in the Full Bench case being opposed to this view we find that on a careful examination the observations of the three learned Judges who

(1) (1923) I.L.R. 47 Mad. 483 (F.B.).

DALAYYA
v.
SUNDARA
NARAYANA.

VARADA-
CHARIAR J.

constituted the majority in the Full Bench case support the above view. For instance, at page 501 COUTTS TROTTER J. (as he then was) observes :

"The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree ; and I am myself unable to escape from what seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment, which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution."

(See also page 502.) RAMESAM J. similarly says at page 505 :

"In my opinion, the effect of Order XXXVIII, rule 11, is, though it does not say so in so many words, that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution."

In the judgment of WALLER J. also, the reference to Order XXI, rule 17, at page 522 indicates that the learned Judge was thinking of the date of the presentation of the petition ; and this is confirmed by his reference at page 523 to the opinion of WALLIS C. J. in an earlier case and by the following sentence at page 524 :

"When once it has been found that for one purpose an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is, to my mind, inevitable that the conversion operates for all purposes."

We do not therefore think that there is anything in principle or authority to compel us to hold that a person who has obtained an attachment before judgment cannot avail himself of section 63 of the Code of Civil Procedure till some order has been passed by the Court upon his application for execution.

On behalf of the respondent, Mr. Jagannadha Das raised a question as to the expediency of our interfering in revision in the circumstances of

this case. He did not maintain that this Court had no jurisdiction to interfere in revision ; and, in the face of the principle recognized by the Full Bench in *Sundaram v. Mause Mavuthar*(1), it could hardly be maintained that, when the lower Court refuses to exercise the powers vested in it by law and holds on an erroneous view of law that a case does not fulfil the requirements of the provisions of the Code, this Court could not interfere in revision. His point was that, as the person to whom rateable distribution is refused has his remedy by way of separate suit, this Court should not interfere in revision. He also pointed out that, as the monies realised in the Sompeta District Munsif's Court have since been distributed to various decree-holders, difficult questions may arise as to the way in which they can be got back. The answer to the first part of his argument is that the present case falls under section 63 and not under section 73 of the Code of Civil Procedure. Further, where we are satisfied that the lower Court has proceeded on a clear misapprehension of that section we do not think we will be justified in driving the petitioner to a separate suit, merely on the ground that that remedy may also be open to him. As to the effectiveness of our order and the extent of relief that the petitioner could get in the present proceedings on remand, we do not wish to say anything at this stage. That will depend upon various facts and events that might have happened meanwhile, and it will be for the lower Court to give the petitioner whatever relief may be practically possible and proper in the circumstances ; all questions bearing upon the

DALAYYA
v.
SUNDARA
NARAYANA.
—
VARADA-
CHARIAR.

(1) (1921) I.L.R. 44 Mad. 554 (F.B.).

DALAYYA
v.
SUNDARA
NARAYANA.

reliefs which the petitioner could get on remand are left open.

The order of the lower Court is set aside and the case is sent back for disposal on the merits after considering the other points raised in the counter-petition. The costs of this revision petition will abide and follow the result.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Stone.

SAMBASIVA AYYAR (PLAINTIFF), APPELLANT,

v.

SUBRAMANIA PILLAI AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

1935,
May 9.

Mortgage—Suit for sale of mortgaged properties by mortgagee without impleading purchaser of equity of redemption of some of the mortgaged properties—Decree—Purchase by mortgagee of all the mortgaged properties—Resistance to possession of the latter properties by purchaser of equity of redemption—Subsequent suit by mortgagee-purchaser—Character and scope of—Limitation.

A mortgage debt became due in 1909 and S.A., the mortgagee, filed a suit on his mortgage on 31st July 1919, impleading the mortgagors and a sub-mortgagee as parties, obtained a decree on 27th November 1919, brought the mortgaged properties to sale and purchased the same in Court auction on 5th April 1926. He sought possession of the properties purchased by him on 8th January 1928. He then for the first time came to know that the equity of redemption of his mortgagors in two of the properties mortgaged to him had been, prior to the filing of the suit by him, purchased by certain third parties, S.P. and others, in Court auction in

*Appeal No. 65 of 1932.

proceedings taken against his mortgagors. S.P. and the others were not impleaded in the mortgage suit by S.A., since the latter was not aware of the purchase by the former, with the result that S.A. did not get possession of those two properties and the right of S.P. and the others to redeem the mortgage had not been adjudicated upon. S.A. filed a suit against S.P. and the others for delivery of possession of these two properties and alternatively for the payment of the amount, and, failing which, for the sale of the two properties. During the course of the auction-proceedings which culminated in the purchase of the two properties by S.P. and the others, certain statements had been made in the notice of sale, the sale certificate and petition, to the effect that S.P. and the others were buying the properties which were described as subject to a mortgage in favour of S.A. and that S.P. and the others acknowledged that they had purchased and obtained delivery of the same so described.

Held, that the above statements did not amount to acknowledgments sufficient to save limitation inasmuch as they did not amount to unconditional acknowledgments of a subsisting mortgage.

Held further: S.A. fulfilled two capacities, viz., one *qua* mortgagee and another *qua* purchaser of the items mortgaged to him.

If S.A. filed the suit against S.P. and the others on foot of the original mortgage in his capacity as mortgagee, he could sue for the whole of the mortgage amount impleading besides the mortgagor the purchasers of the equity of redemption in the mortgaged properties, viz., S.P. and the others, in which case S.P. and the others would have to redeem the whole of the mortgage debt though they purchased only a few of the items mortgaged, but the cause of action for such a suit would date from the date of the mortgage.

If S.A. filed the suit against S.P. and the others in his capacity as purchaser, he would not be entitled to sue for the whole of the mortgage debt but only for the proportionate amount to which the items purchased by S.P. and the others were liable, and the latter would have the right to redeem those items by paying the proportionate amount for which the items purchased by them were liable. In such a case, the cause of action could not be earlier than the date of the purchase of the mortgaged properties by him and probably the date of the cause of action would be when he was resisted in his attempt to obtain

SAMBASIVA
AYYAR
v.
SUBRAMANIA
PILLAI.

SAMBASIVA
AYYAR
v.
SUBRAMANIA
PILLAI.

possession of those two items by S.P. and the others, and that, in this view, the suit by S.A. would not be barred by limitation.

APPEAL against the Decree of the Court of the Subordinate Judge of Tanjore dated the 29th day of October 1931 and made in Original Suit No. 7 of 1930.

K. P. Ramakrishna Ayyar and T. S. Venkata-rama Ayyar for appellant.

K. Rajah Ayyar for third respondent.

Cur. adv. vult.

JUDGMENT.

STONE J.

STONE J.—In this appeal brought by the plaintiff the question for determination is whether the Subordinate Judge was right in upholding the defence of limitation.

The relevant facts are as follows. The plaintiff-mortgagee sued in Original Suit No. 55 of 1919 on a mortgage making the mortgagors and a sub-mortgagee parties. It subsequently transpired that as to two of the properties they had been sold in Court auction. The mortgagee at the time of the suit was unaware of this fact.

The plaintiff in Original Suit No. 55 of 1919 obtained a decree and purchased the properties in Court auction. He derived no advantage because, the earlier purchasers not having been joined, their prior right was still outstanding. He then joined them and sued again. That suit is said to be barred unless the earlier purchasers can be deemed to have acknowledged the mortgage liability within the necessary period.

The critical date is June 20th, 1931. There is a document, Exhibit F, which may be sufficient acknowledgment. It is not necessary to consider

whether it is or not, because it is long after the critical date, having been executed on 30th July 1927. It was chiefly relied upon in argument to show the intention underlying the earlier documents that were relied upon.

The learned Subordinate Judge was in our opinion right when he said in paragraph 9 of his judgment :

“An acknowledgment to be effective must amount to an unequivocal admission of a subsisting debt, i.e., subsisting at the time of the acknowledgment.”

Here the acknowledgment relied upon is Exhibit D coupled with Exhibits C and II. It is also sought to couple it with Exhibit F. It is our clear opinion, however, that in construing Exhibit D one cannot give words therein a different meaning from their clear intent by looking at a document which came into existence eight years later.

There thus remain for consideration Exhibits C, D and II.

Exhibit C is a sale certificate. This certifies that the auction-purchaser (defendant) purchased at a sale by public auction the lands. It includes the following expression : “The sale has been made subject to the mortgage decree charge over the abovesaid properties and some other properties for Rs. 4,000 created in favour of (plaintiff herein).” The term “mortgage decree charge” is admittedly inaccurate. We proceed on the basis that it should be “mortgage”.

Exhibit D is a petition filed by the auction-purchaser. In it he makes the following allegations. Paragraph 3 : “At a sale by public auction I purchased the properties described hereunder

SAMBASIVA
AYYAR
v.
SUBRAMANIA
PILLAI.
—
STONE J.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

STONE J.

for Rs. 153, and in support of it I obtained a sale certificate" (Exhibit C).

The schedule which describes the properties is unaccountably omitted from the printed papers. We are told it is the same as the schedule printed to Exhibit E. We have, however, had the relevant schedule translated and find the words in point should read as follows :

"The sale was held subject to the mortgage decree charge for Rs. 4,000 created over the above-said properties and some other properties in favour of (plaintiff) . . . " "I, the auction-purchaser, have accepted the delivery of possession of the property as described above . . . "

Exhibit II is the notice of sale. It describes the subject-matter of the sale. In the column headed "description of property to be sold" are the words "the estimated value thereof subject to the mortgage right mentioned in column 4 . . . is," The fourth column details the plaintiff's mortgage.

From the foregoing it is clear that the auction-purchaser was buying a property which was described as subject to a mortgage and acknowledged that he had purchased the property so described and had obtained delivery of the property so described. The question is whether that is a sufficient acknowledgment of an existing mortgage debt.

In support of the contention that it is, a large number of authorities were cited. We do not propose to examine all these, as many of them decide questions that are not in dispute, including the proposition about which we never entertained a doubt that an unconditional acknowledgment

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

STONE J.

of a subsisting debt implies a promise to pay. That question is not the question here. The question here is whether there is an unconditional acknowledgment of a subsisting mortgage.

It may, however, be desirable, before passing to a consideration of the authorities that are sufficiently in point to merit examination, to state the authorities cited. These are: *Sanwal Das v. Ali Mahdi*(1), *Sidhari Ram v. Gargi Din*(2), *Har Narayan v. Sheo Prasad*(3), *Swaminatha Odayar v. Subbarama Aiyar*(4), *Kalidas Chaudhuri v. Prasanna Kumar Das*(5), *Daso Polai v. Narayana Patro*(6), *The Official Assignee of Madras v. Subramania Aiyar*(7), *Maniram Seth v. Seth Rupchand*(8), *Hiralal Ichhalal v. Narsilal Chaturbhujdas*(9), *Sukhamoni Chowdhurani v. Ishan Chunder Roy*(10), *Md. Rafi v. Kirfa Ramji*(11), *Uppi Haji v. Mammavan*(12), *Emmett Re ; Jenkins v. Emmett* (13), *Ramabhadra Naidu v. Kadiriyasami Naicker*(14), *Girish Chander Lahiri v. Sasi Sekhaheswar Roy*(15) and *Madan Lal v. Bhagwan Das*(16).

On an examination of the above it will be found that it has been consistently held that where the circumstances are such that the person making a representation has his mind directed to the question of the existence of the debt or not, and he represents that the debt exists or he represents facts only consistent with the inference that he

- | | |
|---------------------------------------|---|
| (1) (1924) 85 I.C. 330. | (2) (1923) 89 I.C. 118. |
| (3) (1912) 18 I.C. 95. | (4) (1926) 51 M.L.J. 856. |
| (5) (1919) I.L.R. 47 Calc. 446. | (6) (1933) I.L.R. 57 Mad. 195. |
| (7) (1923) 46 M.L.J. 1. | (8) (1906) I.L.R. 33 Calc. 1047 (P.C.). |
| (9) (1913) I.L.R. 37 Bom. 326 (P.C.). | (10) (1898) I.L.R. 25 Calc. 844 (P.C.). |
| (11) A.I.R. 1933 All. 99. | (12) (1893) I.L.R. 16 Mad. 366. |
| (13) (1906) 95 L.T. Rep. 755. | (14) (1921) I.L.R. 44 Mad. 483 (P.C.). |
| (15) (1905) I.L.R. 33 Calc. 329. | (16) (1899) I.L.R. 21 All. 235 (F.B.). |

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

admits the existence of the debt, such representation will be deemed a sufficient acknowledgment. Here, it is observed, the defendant did not sign the sale proclamation; the representations in the notice are therefore not his. In the certificate of sale he is not the representing party and in the petition he is merely stating the terms under which the sale was held and the nature of the possession received. Suppose in point of fact it transpired that the sale proclamation was wrong and that at the material date there was no mortgage in fact, would he have been accountable to the mortgagee for the alleged mortgage amount? In principle it is clear that he would not. Apart from principle, the matter is concluded, so far as this Court is concerned, by the decision of the Judicial Committee in *Izzat-un-nisa Begam v. Partab Singh*(1). If it should transpire that there is no mortgage, the purchaser benefits. It might well be that there is no mortgage and that the sale proclamation is still accurate so far as the facts are known at the time. In the case cited, the property at the date of sale did appear to be bound by a mortgage but the mortgage was subsequently held to be invalid. Sale proclamations do not conclude questions of title.

In *Sanwal Das v. Ali Mahdi*(2) the sale proclamation was signed by the person said to have acknowledged. That of course makes all the difference. If a man says "this property is subject to a mortgage", he acknowledges the mortgage. But if another says to him "I sell this subject to a mortgage", and he buys, he does not

(1) (1909) I.L.R. 31 All. 583 (P.C.).

(2) (1924) 85 I.C. 330.

acknowledge the mortgage. If he did, the above decision would have been the other way.

Sidhari Ram v. Gargi Din(1) is still further away. There, the suit was a redemption suit and the defendant was claiming, if at all, as mortgagee. *Har Narayan v. Sheo Prasad*(2) is a case such as would have arisen here had the plaintiff been able to rely on Exhibit F. It does not touch the question of whether the other documents together constitute an acknowledgment. *Kalidas Chaudhuri v. Prasanna Kumar Das*(3) is quite different from this case. There was an enquiry and the purchaser was in the same position as the seller who acknowledged liability, for both were bound by the findings. So also is *Daso Polai v. Narayana Patro*(4). In *Hiralal Ichhalal v. Narsilal Chaturbhujdas*(5) not only was the acknowledgment the act of the person sought to be bound but the suit was a redemption suit, i.e., the act was done in circumstances only consistent with the view that the person acknowledging had his mind directed to the question of liability.

In the circumstances here present we are clearly of the opinion that the learned Subordinate Judge was right in the view he took on the question of limitation as raised before him, and we see no reason to disagree with the reasons he has given for taking that view.

There remains another point which we must advert to. One piece of property was in the possession of the plaintiff-appellant to the time of trial. Consequently, as he had in respect of that

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

(1) (1923) 89 I.C. 118.

(2) (1912) 18 I.C. 95.

(3) (1919) I.L.R. 47 Calc. 446.

(4) (1933) I.L.R. 57 Mad. 195.

(5) (1913) I.L.R. 37 Bom. 326 (P.C.).

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

land all that he wanted, he did not seek and indeed could hardly seek any remedy in respect of that. Subsequently he lost possession of that to a third party. He now asks for the joinder of that third party to this order alleging that otherwise he might be barred and anyhow will have to incur fresh court-fee expenses. On the view we now take, the point does not become of any importance, but, as the matter was argued we mention our conclusion on this branch of the argument. In our view, in circumstances such as these, as at present advised, we are of the opinion that his cause of action dated from the dispossession and the first evil feared does not arise; as to the second, we know not under what principle a stranger can be added as a party to a suit under a fresh cause of action after the suit has been decreed in order to save court-fee expenses. This relief must accordingly be refused.

The above, however, does not in our opinion exhaust the matter. It will be observed that on the facts here present the result so far arrived at results in a conclusion that can only be regarded as unjust. It remains for consideration whether this unjust result cannot be avoided without doing violence to legal principles.

Clearly to see how unjust the result is, it is necessary to marshal the various steps that have occurred with dates. These steps and dates are as follows :—

The mortgage debt became due under the terms of the mortgage in 1909.

The defendant first came on the scene and first became liable to be sued by the plaintiff by his

purchase in Court auction of the property, described as subject to a mortgage, on 31st July 1918. No one suggests that the mortgagee had actual or constructive notice of that sale and, even if he had, he certainly could not have joined that person in any action on the mortgage until 31st July 1918. On 7th February 1919 delivery of possession was given to the auction-purchaser.

On 31st July 1919 the action upon the mortgage was brought against the original mortgagor. It is not suggested that up to that date the mortgagee had notice, actual or constructive, of the purchase in Court auction. That fact was not disclosed in the pleadings.

On 27th November 1919 a decree was obtained in the mortgage suit. Execution of that decree appears to have been much delayed and on 5th April 1926 the decree-holder purchased in Court auction.

Having purchased he sought possession on 8th January 1928 and then for the first time learnt of the possession of the defendant when his possession was resisted.

On 26th November 1929 he brought the present action asking, as his principal ground of claim, for delivery of possession, alternatively for payment of the amount due, failing which, sale.

The defence at present under consideration is limitation and it is put thus: This is an action on the mortgage and consequently article 132 of the Limitation Act applies and accordingly the action was barred twelve years from the date the money became due.

If this is sound, it clearly imperils practically all simple mortgages when the mortgagee sues only

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

towards the end of the period of limitation, for, in such a case, the mortgagor can sell without notice, actual or constructive (e.g. by registration), and the mortgagee is then without effective remedy. His remedy against the mortgagor is infructuous, because the mortgagor has got rid of his equity of redemption, and his remedy against the purchaser (though only the purchaser of the equity of redemption) is barred, because, before he can know of the existence of that purchase, the twelve years have expired. Thus, to put an extreme case, suppose the period of limitation ends on 1st January and the mortgagee waits until 31st December, the mortgagor can effectively defeat him by selling his equity on 30th December. Thus, although the time is, as against the mortgagor, twelve years, in the case put, as against the purchaser, it is less than two days and for these two days he is unaware of the existence of the purchaser. Before 30th December the purchaser could not be sued because he was in no way interested, and after 1st January he cannot be sued. In between he cannot be sued because his existence is not known. This, if correct, is a perfectly general principle. It could be taken advantage of without any fraud and it is destructive of the security which a mortgagee ought to have. In our opinion, having had the advantage of a full and able argument from Mr. K. Rajah Ayyar, this result inevitably follows if the action against the purchaser is an action on the mortgage of exactly the same content as an action brought against the mortgagor.

Before we come to examine whether that is so, we observe that here the mortgagee, in ignorance

SAMBASIVA
 AYYAR
 v.
 SUBRAMAN
 PILLAI.
 ———
 STONE J

and proper ignorance (different consideration arises if he knew or ought to have known) of the existence of any third party right, sued on the mortgage for a mortgage decree against the only person interested in the equity of redemption, so far as he was aware, viz., the mortgagor. He sued in time.

One thing is clear. The purchaser being a stranger to that suit cannot have his rights adversely affected by that suit. Apart from that principle, however, he is, like the rest of the world, subject to the rights which that judgment confers upon the decree-holder.

What are those rights? They include the right to call upon the mortgagor to redeem, failing which to bring the property to sale and, having bought, to obtain possession.

All these steps have been taken and properly taken. What follows? Suppose, after he had bought, a complete stranger was found in possession. Clearly a new cause of action springing from the judgment, perfected by the taking of the steps which give to the mortgagee the right to possession, would arise.

To what extent is the purchaser in a different position from the rest of the world? He is in a different position to this extent and, in our opinion, to this extent only. He has purchased the equity of redemption. What rights flow from that? He has the rights which his mortgagor had, substantive not adjective rights, viz., to have the option of retaining the property on paying the mortgage debt. That is what he bought and paid for. That right cannot be affected by a suit to

SAMBASIYA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

which he was not a party. But apart from that he is in no better case than a trespasser. No one would argue that the cause of action against a trespasser for possession, though founded on a title that commences with the mortgage, that is crystallized by the mortgage decree and perfected by the purchase in execution, is an action on the mortgage. Nor would anybody doubt that, when suing originally upon the mortgage, the mortgagee would have to join not only the mortgagor but any third party purchaser from the mortgagor of whom he was aware or run the risk of being time-barred. The difference between that case and this is that there the suit is upon the mortgage. There would be no other claim possible. But here that cause of action has been pursued. Thereafter a new cause of action begins.

The matter may be tested in another way. Suppose the purchaser on the sale following upon the mortgage decree had been a third party and not the mortgagee and suppose that purchaser had found a trespasser in possession. Would he have had no right to claim possession? Clearly he would have had a right. That right would not be founded on the mortgage but on the purchase. Why should not a mortgagee-purchaser have the same right, i.e., a right *quâ* purchaser as well as a right *quâ* mortgagee?

It is said that this would result in a conclusion as intolerable as the one above examined, for it would mean that the mortgagee could go on for ever pursuing now the mortgagor, then the mortgagor's purchaser, then that purchaser's purchaser and so on *ad infinitum*. This is not so. The new

cause of action would be barred within the appropriate period. This action was brought within that period.

It remains to consider whether on the decided cases there is either a decision binding upon us or such a volume of authority in a contrary sense as to make it impossible for us to come to the above conclusion. The cases cited were numerous but only some are sufficiently in point to make it necessary to examine them in detail.

In *Surendralal Kundu v. Ahammad Ali*(1) it was held that the purchaser in Court auction, held in execution of a mortgage decree given in an action to which the purchaser of the equity of redemption was not made a party and in which the equity of redemption was wholly unrepresented, had no remedy against such purchaser twelve years after the money became due. That is, in such circumstances article 132 applies. That case is distinguishable from this in a most important particular. There, at the time of action brought upon the mortgage, the mortgagee knew of the existence of the purchaser of the equity of redemption. With that knowledge he chose to sue a person not interested in the equity of redemption. That case was decided on the principle that, if a mortgagee chooses to sue the wrong person, i.e., the person known to him to have no interest, the whole suit is misconceived, the resulting decree is nothing but a nullity. Stress was laid on the fact of knowledge and choice. Quite different considerations arise where there is no knowledge and accordingly no choice. If A, landlord of property B, let to tenant C, chooses to sue X in

SAMBASIYA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

(1) (1933) I.L.R. 60 Calc. 1193.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

ejection, the resulting decree cannot amount to very much, and, if he then sues C out of time, C can raise the statute against him.

In *T. C. Bose v. Obedur Rahman Chowdhury*(1) the facts at first sight appear comparable, but on examination there is seen to be a vital difference. There, the respondent was the purchaser in a Court auction held in execution of the mortgage decree. The mortgagee in the mortgage suit had only made the mortgagors parties and had not joined the appellant who had purchased the equity. It does not appear from the report whether the mortgagee was aware of the purchase or not. The Court put the auction-purchaser in possession. Then the prior purchaser claimed possession and his claim was upheld on the ground, which we conceive to be sound, that the mortgage decree obtained in a suit to which that purchaser was not a party could not affect his rights. Accordingly his possession was upheld. Then the respondent sued on the mortgage for redemption of the mortgage and it was held that article 132 applied (with which conclusion we also respectfully agree). Then the respondent asked to be allowed to amend so as to claim possession. That was refused on the ground that the claim for possession had already been adjudicated upon and the matter was *res judicata*. We do not feel called upon to express any opinion on this last point, but obviously, if, in a claim for possession, the action is still to be regarded as an action on the mortgage, the same period of limitation as before would apply and the amendment would not get the plaintiff out of the difficulty he found himself in owing to the form of the action.

(1) (1928) I.L.R. 6 Rang. 297.

We find nothing in this case in conflict with the view now expressed. Indeed, the learned CHIEF JUSTICE points out that between such parties the remedies that can be sought are not the same as in an action on the mortgage. The purchaser of the equity cannot be called upon to repay the money according to the contract. He points out that the claim then made for sale in default fails directly under article 132 from which the rest follows. But here the primary claim is for possession.

In *Lachmi Narain Das v. Hirdey Narain*(1) the Court (MUKERJI and BOYS JJ.), relying on *Hargu Lal Singh v. Gobind Rai*(2) and *Madan Lal v. Bhagwan Das*(3) and refusing to follow *Babu Lal v. Jalakia*(4), came to the conclusion that the decree and subsequent sale had no effect at all against the prior purchasers because those prior purchasers were not parties to the mortgage suit. With great respect we feel that with this we are unable to agree. The mortgage decree and the subsequent sale gives rights against all the world and it is idle for third parties to say they were not parties to the mortgage suit. We prefer to put it thus, as above. The decree and the sale cannot lessen the rights of the prior purchaser. That is a different proposition. We think that, on such a contest as then arose, the plaintiff was entitled to a qualified decree for possession, the qualifying condition being that the defendant should retain his rights intact. Those rights were to retain possession on redeeming. There are differences in the facts between the above case and this which make

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

(1) (1926) 24 A.L.J. 661. (2) (1897) I.L.R. 19 All. 541 (F.B.).
 (3) (1899) I.L.R. 21 All. 235 (F.B.). (4) (1916) 14 A.L.J. 1146.

SAMBASIVA
 AYYAR
 v.
 SUBBRAMANIA
 PILLAI.
 ———
 STONE J.

it unnecessary for us to dissent from the conclusion then arrived at, but that case and the cases there relied upon, do, as a step in the argument, take a different view on the above point from the view we now take; that point is an essential step in the chain of reasoning and we are constrained therefore to differ, with all respect, from the opinions there expressed. We prefer the view taken in *Babu Lal v. Jalakia*(1), a decision of the same High Court.

In a recent case in this High Court, *Chandramma v. Seethan Naidu*(2), the question to be decided was whether an amendment should be allowed. The date of the mortgage was 1909, the date of the purchase of the equity was 1912, the action was brought in 1926 and the amendment was sought in 1927. The purpose of the amendment was to turn it into a suit for sale. It will be seen that the amendment would have to be refused on the view we take, for the suit was barred not only in 1927 but also in 1926 and the action was not for possession but for sale. The then purchasers of the equity were not left out in ignorance. The Court then, following *Venkat Reddy v. Kunjappa Goundan*(3), 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

(1) (1916) 14 A.L.J. 1146.

(2) (1930) 61 M.L.J. 316.

(3) (1923) I.L.R. 47 Mad. 551.

SAMBASIVA
 AYYAR
 v.
 SUBBRAMANIA
 PILLAI.
 ———
 STONE J.

the mortgage decree but from the date the money is due. We respectfully agree. The question here is, however, whether a suit on the mortgage exhausts the possible grounds of actions against a person that the mortgagee could not have joined in the mortgage suit because he was, without any fault on his part, unaware of his existence. The above case merely re-affirms what was decided by the Full Bench of this High Court in *Mulla Vittil Seethi v. Achuthan Nair*(1) and what is not now disputed, viz., that a mortgage decree cannot affect the rights of third parties, whether a purchaser of the equity or a second mortgagee.

Pugh v. Heath(2) is distinguishable. It is concerned with English law and the effect of a foreclosure decree.

In *Babu Lal v. Jalakia* (3) a property was mortgaged to A, then to B, by C. A sued C without impleading B. B sued C without impleading A. B obtained a decree and sold to X who got possession. Then A sold and bought. In a suit by A against B and C for payment, alternatively, for possession, it was pointed out that the action was not a suit on the mortgage nor a suit to foreclose that mortgage. It was a suit brought after the mortgage had been extinguished upon a different cause of action, namely, the plaintiff's failure to obtain actual possession of the property purchased at the sale of July 30th, 1912. Whether we should go the whole length of concurring in that view when a person sues on a mortgage leaving out interests which he knows exist, or not, we certainly think, on the facts here present, there is

(1) (1911) 21 M.L.J. 213 (F.B.). (2) (1882) 7 A.C. 235, 238.

(3) (1916) 14 A.L.J. 1146.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

and must be a cause of action in addition to the action on the mortgage against a person who could not have been sued on the mortgage because his existence was not known.

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*(1). It may indeed be sued on despite the decree, according to the decision in *Venkat Reddy v. Kunjappa Goundan*(2), as to which we express no opinion, though we observe it purports to follow *Sukhi v. Ghulam Safdar Khan*(1) 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*(2) 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.

Cases of subrogation, which go to show that, on the payment by way of redemption of the mortgage amount (after decree obtained in a suit between mortgagee and mortgagor) by a second mortgagee, a new cause of action accrues by way of subrogation to the person so paying, are not, we feel, sufficiently in point to make an examination of such cases, of which *Gopi Narain Khauna v.*

(1) (1921) I.L.R. 43 All. 469, 475 (P.C.). (2) (1923) I.L.R. 47 Mad. 551.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 ———
 STONE J.

Bansidhar(1) is an example, desirable. Nor are subrogation cases, such as *Sreemati Rajkumari Debi v. Mukundalal Bandopadhyaya*(2), which go to show that the person subrogated stands for the purpose of limitation in the shoes of the person to whom he is subrogated. Those cases proceed on the footing that the rights are derived from the mortgage and the action is on the mortgage and the appropriate article therefor is 132 from which the rest follows. Here we are of the opinion that the right to possession is derived from the purchase, which in turn can be relied on, because it follows upon an action upon the mortgage, which action was brought in time and was not a nullity though imperfect as against the prior purchaser of the equity.

So also cases such as *Jogeshwar v. Moti*(3), where the principle of *lis pendens* applies, do not assist. Here the purchase was before suit and no question of *lis pendens* arises.

The case of *Raj Nath v. Narain Das*(4) relied upon by the defendant here does not in our opinion assist him. It is a Full Bench decision of the Allahabad High Court. It decides that, where a suit on a mortgage, admittedly in time, is brought against a trespasser who has been in possession adverse to the mortgagor, article 132 and not article 144 (the application of which would have barred the suit) is the proper article. The learned CHIEF JUSTICE there observes (at page 571) :

“I may point out at the commencement that the suit is not a suit for possession of immovable property. It is precisely the suit that is mentioned in article 132. I may also

(1) (1905) I.L.R. 27 All. 325 (P.C.). (2) (1920) 25 C.W.N. 283.

(3) (1921) 66 I.C. 631 (F.B.). (4) (1914) I.L.R. 36 All. 567 (F.B.).

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

point out that the plaintiffs, on the admitted facts, could never have brought a suit for possession of the property against anyone under article 144 until after a suit under article 132 had been first brought. In my opinion a suit can always be brought under article 132 against all persons in possession whose possession is subsequent to the date of the mortgage, provided that the suit itself is brought within twelve years from the time upon which the money became due."

It does not in the least follow from the above that no suit other than a suit on the mortgage can be brought; it establishes that a suit on the mortgage must be brought before the suit for possession can lie. But, if brought, then the decree-holder may have another cause of action founded not on the mortgage but on his right to possession. Here a suit on the mortgage has been brought and we cannot regard that suit as a nullity. Part of the cause of action then litigated, viz., the part founded on the contract to repay, could only lie against the mortgagor. It has resulted in a decree and that decree has been perfected by sale. As above observed, neither decree nor sale can destroy the rights of persons not parties. But the defendant here has this property subject to the mortgage. If he had not, clearly the plaintiff would have an ordinary action for possession available. But, as the defendant has acquired that equity of redemption, a right, and as that right cannot be lessened by a decree in an action to which he was not a party, in an action for possession, the only possible order would be a conditional order for possession which would preserve his right to redeem. It is not the plaintiff who prays in aid rights flowing from the mortgage—his rights flow from the purchase. It is the defendant who claims as the purchaser of a property from a mortgagor and who thereby can claim the right to redeem.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 STONE J.

It is well established by authorities binding on us that suits brought by simple mortgagees against mortgagors, or persons claiming under mortgagors, to enforce the mortgage by sale are suits governed by article 132; see *Vasudeva Mudaliar v. Srinivasa Pillai*(1) followed in *Vyapuri v. Sonamma Boi Ammani*(2). But, though here the plaintiff was a mortgagee, he is also a purchaser, and, having brought his action on the mortgage (which he was perfectly entitled to do, for, despite the sale by the mortgagor, the mortgagee had remedies under the mortgage which confers contractual rights, which he retained against the mortgagor even after the sale by the mortgagor) and having executed the decree and having purchased, he then became entitled to new rights.

We do not decide this case upon any general ground such as was involved before the Judicial Committee in *Mussumat Raneesurno Moyee v. Shooshee Mokhee Burmonia*(3) or upon any supposed rule suspending for a time the operation of the statute. The cases are fully considered in *Sarat Kamini Dasi v. Nagendra Nath Pal*(4), at page 1005 *et seq.* They do not in fact touch upon the facts of this case.

We do not accordingly find anything in the authorities relied upon by the defendants that precludes us from taking the view we do, and accordingly this appeal will be allowed. The consequential relief will accordingly be as is stated in my learned brother's judgment.

(1) (1907) I.L.R. 30 Mad. 426, 433 (P.C.).

(2) (1915) I.L.R. 39 Mad. 811, 829 (F.B.).

(3) (1868) 12 M.I.A. 244, 253, 254.

(4) (1925) 89 I.C. 1000, 1005.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 RAMESAM J.

RAMESAM J.—I have had the advantage of perusing the judgment of my learned brother and I agree with the conclusion and the reasons given. It is unnecessary for me to give any additional reasons so far as the first two points are concerned, but, so far as the third point is concerned, viz., what is the cause of action for a second suit by a mortgagee against a purchaser of the equity of redemption, the latter not having been impleaded in the first suit and his purchase in execution sale having turned out to be imperfect, as this is a very important point and as there is very little direct authority on the point, I would like to add a few words.

Where the mortgagee brings a suit against the mortgagor but without impleading the prior purchaser of the equity of redemption—whether by reason of his ignorance of the fact of such purchase or with knowledge of it—and purchases one of the mortgaged items in execution sale, one consequence is very clear and is so thoroughly established by the authorities that it is unnecessary to deal with it at great length. Most of the authorities are collected in the judgments in the Full Bench case, *Nagendran Chettiar v. Lakshmi Ammal*(1). The purchaser of the equity of redemption, though he purchased the property subject to the mortgage and though he cannot get an absolute title in the property purchased, cannot be affected by the proceedings to which he was not a party. In the circumstances of the case he must still have the right to redeem the mortgage. Such opportunity of redemption must be given to him. But I wish to add another proposition

(1) (1933) I.L.R. 56 Mad. 846 (F.B.).

which perhaps is not so much dealt with in the authorities and which seems to me to be equally clear.

A mortgagee who takes a mortgage of property naturally expects that he will be able to work out his mortgage according to the circumstances existing at the time of the mortgage. It is reasonable on his part to suppose that he would not be adversely affected by transactions behind his back effected after his mortgage. That a sale of the equity of redemption made by the mortgagor after his mortgage and behind his back should throw obstacles in the way of his working out his security is as inequitable to him as that the purchaser of the equity of redemption should be affected by proceedings taken behind his back. In this case both the circumstances have happened. We have to see that each party is not adversely affected by the transaction or the proceeding of the other. In these circumstances a new situation arises which is not perhaps the fault of either party. The mortgagee had to bring a suit impleading the purchaser of the equity of redemption. Such a suit has two purposes. From his own point of view he wishes to cure the defect of his former proceedings which have turned out to be imperfect. From the point of view of the purchaser of the equity of redemption the mortgagee is in fairness bound to give him an opportunity to redeem the mortgage. From this double point of view such a suit has to be brought. That such a suit lies is now established by the authorities already referred to. The question that now arises is, when does the cause of action for such a suit arise? The best way of discussing such a

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

RAMESAM J.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

RAMESAM J.

question would be by dissociating the mortgagee and the purchaser in execution sale. That is, let us first imagine a case where one of the mortgaged items was purchased by a person other than the mortgagee in execution sale. Now it is clear that he has got a right and is under the duty of bringing a suit against the prior purchaser of the equity of redemption from the double point of view already mentioned, i.e., to cure the defect of his own title and to give an opportunity to the prior purchaser to redeem. In such a case the purchaser is not entitled to sue for the whole of the mortgage amount but only for the proportionate amount to which the item purchased by him is liable and the prior purchaser of the equity of redemption has got the right to redeem that item by paying such proportionate amount. Such a suit cannot therefore be for recovering the whole of the mortgage amount. Now what is the date of the cause of action for such a suit? It cannot be earlier than the purchase in execution sale. Probably the exact date of the cause of action would be when the purchaser in execution sale was resisted in his attempt to obtain possession by the prior purchaser of the equity of redemption. The interval would not in general be very material. It will be ridiculous to say that in such a suit the cause of action arises on the date of the original mortgage because the prior purchaser of the equity of redemption did not exist at the time. It is the combination of new circumstances and the creation of a new situation and the equities arising out of such a situation that give the cause of action for this suit, for which the cause of action, as I said, cannot be earlier than the date of

the purchase. The purchaser does not sue any assignee of the mortgagee strictly so-called nor can such a suit be described to be a suit based only on the mortgage.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

RAMESAM J.

The next stage in the argument would be, should the mortgagee be in a worse position if he is the purchaser, simply because he was the mortgagee that brought the suit without impleading the purchaser of the equity of redemption? I do not see why he should be. In my opinion, he has got two capacities—first, his capacity as mortgagee and, secondly, his capacity as purchaser. If he relies on his capacity as mortgagee, it is open to him now to bring a suit which in strictness he ought to have brought in the very first instance, viz., a suit impleading besides the mortgagor the purchaser of the equity of redemption. In such a suit the purchaser of the equity of redemption has to redeem the whole of the mortgage though he purchased only one of the items mortgaged. There is no reason to split up the mortgage for purposes of redemption. But such a suit runs the risk of being barred by limitation. The mortgagee by dropping his capacity as purchaser and going back to his capacity as mortgagee and filing a suit on the original mortgage has one advantage and one disadvantage. The advantage is that he can insist on the purchaser of the equity of redemption redeeming the whole mortgage. The disadvantage is that his suit is very often barred by limitation. In such a suit the purchaser cannot claim to redeem by payment of a proportionate share of the mortgage amount on the ground that the mortgagee has purchased one of the items, for the mortgagee does not sue by reason of the

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.

RAMESAM J.

cause of action afforded by the purchase. An example of such a decision is *Venkat Reddy v. Kunjappa Goundan*(1), with the result of which I agree, for that suit was filed on the mortgage. But such a suit furnishes only one of the alternative remedies of the mortgagee. If he relies on his capacity as purchaser, he gets a new cause of action from the date of resistance which in the present case is January 1928. In this suit the purchaser of the equity of redemption can claim to redeem by paying a proportionate part of the mortgage amount; but the date of the cause of action for such a suit is not the date of the mortgage, but the date of resistance or the date of purchase, if the fact of the prior purchase was already known to the mortgagee-purchaser. Thus the mortgagee is in a converse situation in the second suit. The disadvantage of the former kind of suit becomes an advantage, i.e., there is no fear of the bar of limitation. The advantage of the former suit becomes a disadvantage. He cannot insist on the payment of the whole of the mortgage money. The purchaser of the equity of redemption can claim to redeem by paying a proportionate share of the mortgage amount. The reason for this is clear. The mortgagee by his purchase in execution sale has split up the mortgage and he relies on the purchase in this suit. As I have already remarked in the Full Bench decision in *Nagendran Chettiar v. Lakshmi Ammal*(2), the purchaser in execution sale "did purchase something". It would not be strictly accurate to say that he purchased nothing. No doubt his purchase was imperfect and something more had

(1) (1923) I.L.R. 47 Mad. 551. (2) (1933) I.L.R. 56 Mad. 846, 861 (F.B.).

SAMBASIVA
 AYYAR
 v.
 SUBRAMANI
 PILLAI.

RAMESAM J

to be done by him to get the fruits of his mortgage. For instance, by his first suit and the execution proceedings the original mortgagor's equity of redemption is at an end. Even after selling the equity of redemption the original mortgagor has still the right to redeem. For instance, there may be cases where the mortgage is of more than one item. The mortgagor afterwards sells one of the items. In such a case he is interested in redeeming the mortgage by paying down the whole amount due though he himself does not possess one of the items mortgaged. We can well see that in such a case the mortgagor may be so much interested in redeeming because the items in his possession are very valuable and he will thereupon have a claim for contribution from his vendee of the item sold. We can conceive other reasons why the mortgagor may be interested in redeeming even after the sale of one item. Anyhow it is legally certain that the mortgagor can redeem the mortgage in such a suit and if the sale in execution is complete his equity of redemption is extinguished. So it cannot be said that the first suit and execution sale have no legal consequences. The purchase by the mortgagee is good against the whole world except against the prior purchaser of the equity of redemption, and when they meet face to face, the mortgagee-purchaser relies on the fact of his purchase and the prior purchaser of the equity of redemption can claim to redeem by paying the proportionate part of the mortgage amount. I agree with the decision in *Babu Lal v. Jalakia*(1), and dissent from the decision in *Lachmi Narain*

(1) (1916) 14 A.L.J. 1146.

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 RAMESAM J.

Das v. Hirdey Narain(1). In *Chandramma v. Seethan Naidu*(2) the question of limitation did not directly arise but the only suggestion made on the question of limitation was that time would run from the date of the mortgage decree, and no other contention was put forward. That decision is not an authority against the conclusion reached by me in this case. So also in the decision in *T. C. Bose v. Obedur Rahman Chowdhury*(3) the alternative contention was that time ran from the date of the mortgage decree. The present point was not suggested. So, that decision is distinguishable, but, if it is not distinguishable, I am unable to agree with it. There, if the purchaser sued for a proportionate part of the mortgage money, his suit ought not to be barred, on the ground indicated by me above which was not then urged. These are all the decisions that have come nearest to the point raised in this case.

It is hardly necessary for me to add that the very first suit by the mortgagee to recover the mortgage money cannot have a larger period than twelve years from the time when the money became payable merely because there is a purchaser of the equity of redemption or a trespasser on the property. To hold otherwise would be that a series of sales or trespasses may have the effect of indefinitely postponing limitation. This is the decision in *Raj Nath v. Narain Das*(4) with which I entirely agree but which does not touch this case. There is no question of any new situation or new equities arising in such a case.

(1) (1926) 24 A.L.J. 661.

(2) (1920) 61 M.L.J. 316.

(3) (1928) I.L.R. 6 Rang. 297.

(4) (1914) I.L.R. 36 All. 567 (F.B.).

SAMBASIVA
 AYYAR
 v.
 SUBRAMANIA
 PILLAI.
 —
 RAMESAM J.

I am not to be understood as agreeing with the decision in *Gobindachandra Ghosh v. Jamaluddin Mandal*(1) where at the time of the first suit the mortgagee was aware of the prior purchaser of the equity of redemption. It is unnecessary to express an opinion on the matter in this appeal.

I must express my indebtedness to Mr. K. Rajah Ayyar for his very able and full argument which has served considerably to clear up the legal position in my mind.

The result would be that the mortgagee in this case is entitled to recover the portion of the mortgage amount to which the item purchased by defendants 1 to 3 is proportionately liable unless the defendants redeem. Before passing a redemption decree we call upon the lower Court to ascertain the amount to which this item is proportionately liable having regard to the value of all the items mortgaged. For the rest of the mortgage amount the mortgagee will have to take a similar action against the purchaser of the other item or items of which he obtained possession as mentioned in paragraph 6 of the plaint and from which he was afterwards dispossessed during the pendency of the suit.

G.R.

(1) (1933) I.L.R. 60 Calc. 777.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao.*1935,
April 9.

A. M. A. MURUGAPPA CHETTIAR BY AGENT
K. PONNUSAMI KALINGAROYA GOUNDAN
(FIRST RESPONDENT), PETITIONER,

v.

S. M. A. M. RAMASAMI CHETTIAR AND FOUR OTHERS
(PETITIONER AND RESPONDENTS 2 TO 5), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 73 and O. XXI, r. 72—Execution petitions—Some filed before date of sale and others within fifteen days of the sale—Rateable distribution—Right to—Executing decree-holder purchasing property with permission of Court—Right to set off—Liability to bring into Court enough rateably to distribute in execution petition pending on the date of sale—Civil Rules of Practice—R. 199—Conflict between r. 199 and Order XXI, r. 72, of the Code of Civil Procedure—R. 199 ultra vires to the extent it conflicts with O. XXI, r. 72.

In execution of a decree for Rs. 4,000 and odd a person brought to sale certain properties and purchased them with the leave of the Court under O. XXI, r. 72, of the Code of Civil Procedure, for Rs. 3,315 and without paying any amount into Court set it off against his decree amount. On the date of sale certain execution petitions of other parties were pending and certain other execution petitions were filed within fifteen days of the date of sale.

Held that, when the purchase price is either equal to or less than the decree amount, the right of the decree-holder (purchasing with permission) to set off is controlled only to this extent, namely, that he is bound to bring into Court such sums alone as are due to those decree-holders whose applications for execution were pending on the date of the sale in order that the same might be rateably distributed to them under section 73 of the Code and that the persons who filed their applications after the date of sale were not entitled to rateable distribution.

Rule 199 of the Civil Rules of Practice, to the extent to which it is opposed to and inconsistent with the provisions of

* Civil Revision Petitions Nos. 1191 to 1193 of 1933.

the First Schedule of the Code of Civil Procedure, is inoperative.

PETITIONS under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 24th July 1933 and made in Execution Applications Nos. 378, 379 and 380 of 1931 respectively in Execution Petition No. 464 of 1929 in Original Suit No. 142 of 1929.

K. V. Ramachandra Ayyar for petitioner.

K. S. Desikan for first respondent.

Cur. adv. vult.

JUDGMENT.

The question that arises is whether the respondents are entitled to rateable distribution under section 73, Civil Procedure Code. The petitioner in execution of his decree brought to sale certain properties and purchased them himself with the leave of the Court under Order XXI, rule 72. The amount due to him under the decree was Rs. 4,000 and odd and, as the highest bidder, he purchased the properties for about Rs. 3,315. This he set off against the decree amount, that is to say, he did not deposit any sum in Court.

Order XXI, rule 72, provides :

(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

The purchase price having been less than the sum due to him under the decree, the petitioner

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

was entitled to set off the price against the decree amount ; but that right is, as the rule just quoted shows, "subject to the provisions of section 73". Now, turning to that section we find that all such persons as had applied for the execution of their decrees before the assets were received by the Court are entitled to rateable distribution. In rule 72, clause 2, extracted above, the use of the word "may" in the first part of it and "shall" in the second part is, in my opinion, significant. The decree-holder, when the amount of his bid is either equal to or less than the decree amount, may at his option set off against it the purchase price. The use of the word "may" shows that he has such liberty, of which he may at his pleasure avail himself or not ; if he chooses to take advantage of it, the Court has no option (that is the effect of the word "shall") but to enter up satisfaction of the decree in whole or in part as the case may be. Several decree-holders had obtained decrees against the judgment-debtor in question and there were, pending on the date of the sale, petitions filed by some of them (either three or four, the exact number does not matter). Rule 72, clause 2, referred to above shows, as already stated, that the petitioner's right to set off is subject to the provisions of section 73, that is to say, he is bound to bring into Court such amounts as may be payable to the rival decree-holders whose execution petitions were pending on the date of the sale. The correctness of that position, the petitioner does not question and indeed he has acquiesced in the order of the lower Court in so far as it has directed him to bring in the amounts payable to the decree-holders to whom I have just referred. But the

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

difficulty arises in this way. Subsequent to the sale but before the expiry of the fifteenth day therefrom, three other decree-holders (the respondents before me) applied for execution and the question to be decided is whether the lower Court's view that they are also entitled to rateable distribution is correct. It is necessary to quote here two further provisions.

Order XXI, rule 84 :

(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

Order XXI, rule 85 :

The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72.

The second clause of rule 84, though the word there used is "may", must be construed in such a way as to be consistent with rule 72, clause 2, with which I have just dealt, and with the proviso to rule 85 where the word that occurs is "shall". To construe the rule differently would lead to the anomaly that, where a decree-holder is entitled to set off, the Court, as regards the twenty-five per cent, may, at its option, require him to deposit it, but, as regards the balance of the purchase-money, it has no such option and cannot compel him to bring it into Court. The scheme of these various provisions is perfectly plain. Where the purchase

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

price is either equal to, or less than, the decree amount, the right of the decree-holder (purchasing with permission) to set off is controlled only to this extent, namely, that he is bound to bring into Court such sums alone as are due to those decree-holders whose applications for execution were pending on the date of the sale. For the respondents, Mr. K. S. Desikan argues that, if there is a single person entitled on the date of sale to rateable distribution, there is a duty cast upon the decree-holder to bring into Court the entire purchase price. This contention renders the right to set off, expressly conferred by the provisions, illusory and I am therefore unable to accept it. The literal wording of rule 199 of the Civil Rules of Practice which says :

“ Provided that, if there are several decree-holders entitled to rateable distribution, the purchase-money shall be paid into Court ”,

lends some support to the learned Counsel's argument, but those words I must reject as being repugnant to the provisions already mentioned. Under section 121 of the Civil Procedure Code, the rules in the First Schedule must be regarded as a part of the body of the Code, but the High Court may alter or annul them by following the procedure prescribed in Part X, and section 128 goes on to enact that the High Court has power to make rules not inconsistent with those in the First Schedule. Rule 199 of the Civil Rules of Practice (the rule in question) occurs in the body of the rules made under the previous Code of Civil Procedure, to which section 157 of the present Code applies. That section says that the rules made under the repealed Code shall have operation only “ so far as they are consistent with this

Code”, i.e., the present Code. I am therefore prepared to hold that rule 199 to the extent to which it is opposed to, and inconsistent with, the provisions of the First Schedule, cannot take effect. *Re, The District Munsif of Tiruvallur*(1) does not, in my opinion, lay down any general rule in the opposite sense. The inconvenience and hardship that results, should the contrary view prevail, is obvious. Let us suppose that the amount due to the decree-holder purchaser is Rs. 20,000 and to the rival decree-holder Rs. 400 (i.e., one fiftieth of the other amount). Let us further suppose that the amount of the bid is Rs. 10,200. The decree-holder would then be entitled to Rs. 10,000 and the opposite party to Rs. 200. According to the respondents' contention, although the amount due to the other person is only Rs. 200, the decree-holder is nevertheless bound to bring into Court the entire sum of Rs. 10,200. It is with a view to avoid this result that the various provisions to which I have referred have been enacted ; it would be a barren formality to require the decree-holder to bring in the Rs. 10,000 to which he himself is entitled. I am therefore of the opinion that the only amount that the petitioner was bound to bring into Court was the sum due to those decree-holders whose execution applications were pending on the date of the sale.

Where there has been a set-off of the nature described, the assets are realized within the meaning of section 73 on the date of the sale itself. It has been so held in *Bhyraraju Ramaraju v. Lakshmiah*(2), where it is pointed out,

“ the whole of the amount must be deemed to have been received or realized *eo instanti* the sale is made”,

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

(2) A.I.R. 1931 Mad. 103.

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

a view that has also been adopted in *Sait Punnamchand Chatrabhan v. Satyanandan*(1).

The respondents' Counsel then contends—granting that the petitioner was bound to bring into Court only the sum due to those decree-holders whose execution applications were pending on the date of the sale, even then, the bringing into Court of such sum amounts to a receipt of the assets within the meaning of section 73. He puts his argument thus: the amount which the decree-holder is bound to bring in must be deposited within the fifteenth day of the sale; whether it is in fact so deposited or not, by some fiction the amount must be regarded as having been brought in on the last day of the period; therefore (that is the argument) when a rival decree-holder presents a petition after the date of the sale but before the fifteenth day, he must be deemed to have presented it before the receipt of the assets. There is in this argument a fallacy. The bringing in of the money does not constitute “realization” or “receipt” within section 73; the money is brought in for the benefit of those persons alone whose applications were pending on the date of the sale. Decree-holders who come in later, i.e., after the date of the sale but before the expiry of the fifteenth day, cannot, by calling the deposit “realization” or “receipt”, claim rateable distribution.

In the result, the orders of the lower Courts are reversed and each of these petitions is allowed with costs which will not include Counsel's fee.

G.R.

(1) (1933) 65 M.L.J. 569.

APPELLATE CRIMINAL.

Before Mr. Justice Cornish and Mr. Justice K. S. Menon.

IN RE RANGAPPA GOUNDAN AND ANOTHER (ACCUSED)
APPELLANTS.*

1935,
December 3

*Criminal trial—Admissions dispensing with proof of facts—
Distinguished from admissions which are evidential—
Permissibility of—Post-mortem report—Use of.*

Except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial.

In a murder case, no consent or admission by the accused's Advocate to dispense with the medical witness can relieve the prosecution of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death; and the conviction that has taken place in the absence of such evidence cannot stand.

A *post-mortem* report is not evidence, and can only be used by the witness who conducted the *post-mortem* enquiry as an aid to memory.

Queen-Empress v. Jadub Das, (1899) I.L.R. 27 Calc. 295, 303, referred to.

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the prisoners in Case No. 93 of the Calendar for 1935.

V. L. Ethiraj and *R. Sadasivan* for first accused.

N. Somasundaram for second accused.

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

*Referred Trial No. 134 of 1935; Criminal Appeals Nos. 625 and 626 of 1935.

RANGAPPA
GOUNDAN,
In re.
CORNISH J.

The JUDGMENT of the Court was delivered by CORNISH J.—The two appellants have been convicted of the murder of one Sinne Goundan on the 4th March last, and have been sentenced to death.

The case for the Crown is that the man was murdered by the appellants near a hut in some cotton fields where the three had gone that night to watch their crops. All three men were cultivators.

It is common ground that the two appellants called for the deceased at his house that evening, about nine o'clock, to accompany them to the fields, and that he went away with them.

In consequence of information given to the police by the two appellants at five o'clock next morning, a constable arrived upon the scene and found the dead body of Sinne Goundan lying in the cotton field, about fifty or sixty feet away from the hut. It was also seen there by the Village Munsif, Prosecution Witness 9, who arrived later.

But an extraordinary thing happened at the trial. We are told that the medical witness, who had made a deposition before the Committing Magistrate, was present in Court. But the Public Prosecutor asking the defence Advocate if he wished to examine this witness, and the defence Advocate answering in the negative, the witness was not called. The result was that no evidence was given at the trial with regard to the injuries received by Sinne Goundan, or to the cause of death, or whether the injuries received by him were responsible for death. Section 509, Criminal Procedure Code, is not intended to be applied where the medical witness is present in Court, and it does not even appear that his deposition in the Magistrate's Court was given in evidence. It

is an elementary rule that, except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial. (See Phipson on Evidence, seventh edn. page 19.) Therefore, no consent or admission by the prisoner's Advocate to dispense with the medical witness could relieve the prosecution of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death. The consequence was that an essential element of proof of the crime alleged against the two accused was wanting, and the conviction which has taken place in the absence of this evidence cannot stand.

The learned Sessions Judge referred to the autopsy made upon the body as establishing beyond doubt that the man was murdered. But a *post-mortem* report proves nothing. It is not even evidence, and can only be used by the witness who conducted the *post-mortem* inquiry as an aid to memory. These propositions have already been stated in *Queen-Empress v. Jadub Das*(1).

The question is whether a re-trial should be ordered or whether, acting under section 428, Criminal Procedure Code, we should direct the medical witness's evidence to be taken. The second course would obviously be the preferable one. But, as we have come to the conclusion that the other evidence in the case is so unsatisfactory that it leaves considerable doubt of the guilt of the two accused, there is no necessity to call for the medical evidence to be taken.

RANGAPPA
GOUNDAN,
In re.
CORNISH J.

(1) (1899) I.L.B. 27 Calc. 295, 303.

RANGAPPA
GOUNDAN,
In re.

CORNISH J.

[His Lordship discussed the oral evidence and proceeded :]

Now, undoubtedly, there is a strong case of suspicion against the accused. They were the persons in whose company the deceased was last seen alive, and he met his death that night near the shed which the accused and the deceased admittedly occupied that night. The suggestion is that the First Information Report (Exhibit E) which they made early next morning to the police was for the purpose of screening themselves at the expense of others. In this statement they say that while they were sleeping in the hut they were aroused by the deceased's cries, and saw the deceased on the threshing floor outside the shed being beaten by Prosecution Witnesses 5, 6, 7 and another named person. The report further says that when they raised an alarm they were threatened by the assailants, so they waited until the assailants made off and then went to the injured man and gave him a drink of water.

The learned Sessions Judge regarded this statement as "obviously false", which means, we suppose, that it is demonstrably untrue.

[His Lordship discussed the evidence in regard to the First Information Report (Exhibit E) and proceeded :]

We do not for one moment accept the contents of Exhibit E as true. But we think that they have not been shewn to be so obviously untrue as to raise the presumption that the accused had sought to foist their guilt on to others by means of a false charge.

There remains the evidence of the disclosure of the blood-stained articles—the splinter from the

hut by accused 1, and the carpet, sheet, stick, and spear (Material Objects I to IV) by the two accused from the garden of the fourth Prosecution Witness's father-in-law at Karunaipalayam. The accused deny that they disclosed these things. But we see no reason to disbelieve the evidence of the Police Inspector and Prosecution Witness 14 on this matter. The stick and the spear, which was the deceased man's weapon, had been concealed in manure heaps. This is the strongest piece of evidence in the case against the accused. Unfortunately, there is no evidence of the statement made by the accused which led to the discovery of these things. All that the Inspector says is:

"At 7 p.m. after both accused had made a statement to me, they took me to Karunaipalayam."

Anything said by the accused to the police officer which led to the discovery of these things would have been admissible and might have been of the greatest importance. But we have not got it. We think that the discovery of these articles of the accused raises a grave suspicion against the accused. But suspicion will not justify a conviction, and, as we have already indicated, the other evidence in the case is not, in our judgment, sufficient to support the conviction.

We accordingly allow the appeals, set aside the convictions, and direct that the appellants be set at liberty.

K.W.R.

RANGAPPA
GOUNDAN,
In re.
CORNISH J.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Pandrang Row, Mr. Justice Wadsworth and
Mr. Justice Venkataramana Rao.

1935,
November 25.

GOKAVARAPU SWAMI (RESPONDENT), PETITIONER,

v.

MANDA SATHEYA AND ANOTHER (PETITIONERS),
RESPONDENTS.*

*Madras Hereditary Village-offices Act (III of 1895), sec. 5—
Potter service inam lands—Growing crops on—Attachment
of, in execution—Prohibited, if.*

The attachment, in execution of a decree, of growing crops
on potter service inam lands is prohibited by the Madras
Hereditary Village-offices Act (III of 1895).

Kannam Naidu v. Latchanna Dhora, (1899) I.L.R. 23 Mad.
492, approved.

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 Razole dated
20th February 1934 and made in Execution Appli-
cation No. 869 of 1933 in Small Cause Suit No. 251
of 1933.

C. Rama Rao for petitioner.

K. Kameswara Rao for respondents.

PANDRANG ROW J.—The JUDGMENT of the Court was delivered by
PANDRANG ROW J.—The question that arises
for decision in this petition is whether the attach-
ment of the standing crop on the potter service
inam land in execution of the decree obtained by
the decree-holder in a small cause suit is contrary
to law in view of section 5 of the Madras Heredi-
tary Village-offices Act III of 1895. There is

* Civil Revision Petition No. 1199 of 1934.

no doubt that the land is potter service inam land
and that the office of village potter is one of the
offices included in section 3 of Madras Act III of
1895. The point was decided definitely so long ago
as 1899 in *Kannam Naidu v. Latchanna Dhora*(1)
and the learned Judges who laid down the law in
that case were Judges to whose opinion a great
deal of weight must be attached and one of them
was a Judge of great revenue experience. The
correctness of that ruling has not been questioned
so far as we are aware up till now though more
than twenty five years have elapsed. The two
decisions by single Judges* which have been
referred to in the course of argument do not
seem to have anything to do with emoluments
attached to the village-office of the kind men-
tioned in section 3 of Madras Act III of 1895.
They do not moreover consider the question
whether growing crops on village service inam
lands are part of the emoluments attached to the
offices. We also note that, before Madras Act III
of 1895 became law, the enactment which laid down
the law on this subject was Regulation VI of 1831
which makes it very clear that it was the emolu-
ments arising from the land that were annexed to
the village-offices in question and that it was these
emoluments which arise from the land which
were declared inalienable and not attachable. It
would appear therefore that for a period of nearly
a century it has been understood generally that
growing crops on village service inam lands are
exempt from attachment by reason of the fact that

SWAMI
v.
SATHEYA.
—
PANDRANG
ROW J.

(1) (1899) I.L.R. 23 Mad. 492.

* [*Kamayya v. Jasraji & Co.*, A.L.R. 1933 Mad. 953, and Civil Revision
Petition No. 1419 of 1927.]

SWAMI
v.
SATHEYA.
PANDRANG
ROW J.

they are annexed to, and in fact formed part of, the emoluments attached to the village-offices in question. We see no reason whatever to disturb what has been regarded as settled law for such a long period. The question, therefore, must be decided in the affirmative, that is to say, that the attachment of growing crops on potter service inam lands is prohibited by Madras Act III of 1895. It follows from this that the decision sought to be revised is right and that the revision petition must fail. It is accordingly dismissed with costs.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Pandrang Row, Mr. Justice Wadsworth
and Mr. Justice Venkataramana Rao.*

ADHIKARI VENKUNaidu (FIRST DEFENDANT),
PETITIONER,

v.

MAHADEVU SANYASI AND THREE OTHERS (PLAINTIFFS ONE
AND TWO AND DEFENDANTS TWO AND THREE), RESPONDENTS.*

*Government of India Act (1915), sec. 107, and Letters Patent,
(Madras), Cl. 16—Agency Rules, r. 46—Agency District
Munsif's Court—If a civil Court—Madras High Court—
Civil revision petition from a decree of Agency District
Munsif's Court to—Jurisdiction.*

Under rule 46 of the Agency Rules, the parties to a suit for settlement of partnership accounts which was pending in the Agency District Munsif's Court at Rayagada agreed to refer the suit to arbitration. The panchayat that was constituted passed an award which was finally made a decree of Court, after overruling the objections of certain parties to the award. A petition was filed in the High Court to revise the decree. Objection was taken to the maintainability of the civil revision petition in the High Court.

* Civil Revision Petition No. 780 of 1933.

Held that the Agency District Munsif's Court is a civil Court which is also subject to the appellate jurisdiction of the High Court and as such the High Court had powers under section 107 of the Government of India Act and Clause 16 of the Letters Patent to entertain the civil revision petition.

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 decree of the Court of the Agency District Munsif of Rayagada in Original Suit No. 62 of 1931.

Kasturi Seshagiri Rao for petitioner.

B. Jagannadha Das for first and second respondents.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—This is a petition to revise the decree of the Agency District Munsif of Rayagada, dated 31st December 1932, in Original Suit No. 62 of 1931, a suit for settlement of partnership accounts between the plaintiffs and the defendants and for recovery of the amount due to the plaintiffs. During the pendency of the suit both parties agreed to refer the suit to arbitration under rule 46 of the Agency Rules. The panchayat that was constituted passed an award for a certain amount in favour of the plaintiffs. The defendants filed certain objections to this decision but the objections were overruled and a decree was passed in terms of that decision.

A preliminary point is raised by the respondents in this revision petition to the effect that this Court has no jurisdiction to entertain the revision petition. This objection is apparently based on the ground that the Agency Rules themselves contemplate revision petitions being

VENKUNaidu
v.
MAHADEVU
SANYASI.

1935,
November 25.

PANDRANG
ROW J.

VENKUNaidu
v.
MAHADEVU
SANYASI.
—
PANDRANG
ROW J.

entertained by the Agent, any further revision petitions being entertained by the Government who may refer them if necessary to the High Court. It is contended that these provisions in the Agency Rules are inconsistent with the power conferred on the High Court by section 107 of the Government of India Act and Clause 16 of the Letters Patent. We are however unable to see any inconsistency between the Agency Rules and the provisions relating to the power of superintendence possessed by the High Court. Section 107 of the Government of India Act and Clause 16 of the Letters Patent are very clear on the question of jurisdiction. The first provides that wherever there is appellate jurisdiction the High Court shall have powers of superintendence, and the second provides that the High Court shall be a Court of appeal from all civil Courts in the Presidency. The Agency District Munsif's Court of Rayagada is a civil Court and it is also subject to the appellate jurisdiction of the High Court. On these grounds the jurisdiction of the High Court is undoubted and we have no hesitation in dismissing the preliminary objection of the respondents.

On the merits however we see no reason to interfere in revision. The decree was one passed in accordance with the decision of the arbitrators and there is no reason to suppose that the decision was unjust or inconclusive.

The petition is accordingly dismissed with costs.

G.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Cornish, Mr. Justice Varadachariar and
Mr. Justice Venkataramana Rao.*

NADUVILE MARATHE IKKALI AMMA'S DAUGHTER
TAVAZHI MANAGER LAKSHMI AMMA
(DEFENDANT), APPELLANT,

1935,
September 18.

v.

KURUPPATH AMMALU AMMA'S SON SANKARA
NARAYANA MENON (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882), sec. 92 (as amended by
Act XX of 1929), cls. 1 and 3—Applicability and effect
of—Mortgagee undertaking to discharge three prior mort-
gages but discharging only two of them—Subrogation in
respect of discharged mortgages—Right of, as against
mortgagee under undischarged mortgage—Mortgages prior
to date of amendment of sec. 92 by Act XX of 1929
—Registered instrument giving right of subrogation—
Absence of.*

The appellant was a usufructuary mortgagee of property which was subject to three prior simple mortgages which he undertook to pay off. He paid off the first two mortgages, but he did not pay off the third mortgage. The third mortgagee brought a suit for sale on the footing of his mortgage, and the appellant set up in that suit a claim to be substituted for the two prior mortgagees whose debt he had discharged. The mortgages in question were antecedent in date to the amendment introduced by section 92 into the Transfer of Property Act.

Held by the Full Bench, that the appellant was not entitled to subrogation in respect of the two prior mortgages discharged by him.

If section 92 of the Transfer of Property Act as amended by Act XX of 1929 was retrospective and was applicable to the case, the third clause of that section was fatal to the appellant's

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.

claim inasmuch as the mortgagor had not by a registered instrument agreed that the appellant should be subrogated to the rights of the mortgagees whose debt he had discharged. The third clause of section 92 applies to all persons who acquire an interest in the mortgaged property by advancing moneys to discharge prior incumbrances and is not restricted to persons other than purchasers or mortgagees. The first clause of that section must be construed in the light of the third clause. The first clause applies to cases in which a person who has a *pre-existing* interest in property pays off a prior charge on that property for the protection of his own interest and the third clause to cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt.

If section 92 of the Transfer of Property Act is not applicable, the appellant's claim must equally fail on the general principle that a later purchaser or mortgagee who undertakes to pay two prior incumbrances, but pays only one and not the other, cannot resist the claim of the incumbrancer not so paid by setting up the discharge of the other incumbrance as a shield and claiming priority in respect of it.

Lakshmi Achi v. Narayanasami Naiker, (1929) I.L.R. 53 Mad. 188, and *Abdul Razak Rowther v. Abdul Rahiman Sahib*, (1933) 65 M.L.J. 390, approved.

Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons, (1933) 64 M.L.J. 606, considered.

Tota Ram v. Ram Lal, (1932) I.L.R. 54 All. 897 (F.B.), dissented from.

Balbhadra v. Sheomangal, A.I.R. 1931 All. 347, referred to.

APPEAL against the decree of the Subordinate Judge of South Malabar at Palghat in Appeal No. 32 of 1932 (Appeal Suit No. 99 of 1932, District Court, Calicut) preferred against the decree of the Court of the District Munsif of Alatur passed in Original Suit No. 25 of 1931.

K. Kuttikrishna Menon for appellant.

P. S. Narayanaswami Ayyar for respondent.

JUDGMENT.

CORNISH J.—The question raised in this second appeal is whether the appellant, who was defendant in the suit, was entitled to subrogation in respect of two mortgages discharged by him for the mortgagor.

The appellant had been given a usufructuary mortgage of property which was subject to three prior simple mortgages in consideration of an advance of Rs. 8,000 made by him to the mortgagor, the appellant undertaking to pay off these prior mortgages. As a matter of fact he paid off the two first mortgages, but he did not pay off the third mortgage. The third mortgagee brought a suit for sale on the footing of his mortgage, and the appellant set up in this suit a claim to be substituted for the two prior mortgagees whose debts he had discharged. The lower appellate Court rejected this claim, holding that it was not sustainable in the face of section 92 of the Transfer of Property Act. It should be mentioned that the mortgages in question were antecedent in date to the amendment introduced by section 92 into the Act.

The case has been argued on the assumption that section 92, as held by a Full Bench in *Tota Ram v. Ram Lal*(1), is retrospective. Assuming that it is, I think that the third paragraph of the section is fatal to the appellant's claim. This paragraph runs :

“ A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed,

(1) (1932) I.L.R. 54 All. 897 (F.B.).

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
CORNISH J.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
CORNISH J.

if the mortgagor has by a registered instrument agreed that such person shall be subrogated."

The appellant has advanced money to the mortgagor with which mortgages have been redeemed. But it was argued that some person other than a mortgagee is intended. But the section does not say so; and there is no apparent reason why a person who has advanced money for the purpose named in the section should not be regarded as within the section simply because the mortgagor has given him a mortgage to secure the advance made. But in such a case the right to subrogation is made by the section a matter of express contract between the mortgagor and the person who has advanced him the money. There is no right of subrogation unless the mortgagor has by registered instrument agreed that the person advancing the money shall be subrogated in respect of the mortgage or mortgages discharged. No such agreement is forthcoming in this case.

But, assuming that section 92 is not applicable, I think that the appellant's claim must equally fail. I do not propose to analyse the numerous cases which have been cited, because, in my opinion, the correct principle to be gathered from the authorities is stated in *Abdul Razak Rowther v. Abdul Rahiman Sahib*(1) as follows :

"The general principle is that a later purchaser or mortgagee who undertakes to pay two prior incumbrances but pays only one, and not the other, cannot resist the claim of the incumbrancer not so paid by setting up the discharge of the other incumbrance as a shield and claiming priority in respect of it."

(1) (1933) 65 M.L.J. 390, 399.

No doubt the same two learned Judges in an earlier decision in *Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons*(1) appear to have overlooked this principle. But the later statement must be accepted as correct. It will be found to have been expressed in much the same language by RAMESAM J. in *Lakshmi Achi v. Narayanasami Naiker*(2).

The question whether a mortgage paid off is kept alive or extinguished depends upon the intention of the parties, and this intention, in the absence of any declared intention, is to be inferred from the circumstances; *Mohesh Lal v. Mohunt Bawan Das*(3). In that case, their Lordships discussed the equity which is to be applied. Quoting an English authority, they said :

"If there is no reason for keeping it (the incumbrance) alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." In the present case, the appellant's undertaking to pay off all the mortgages would, I think, indicate an intention that the whole debt with which the property was encumbered was to be extinguished. That is the proper view of the mortgagor's intention when he made his bargain with the appellant. In the absence of any particular circumstance to the contrary, there is no room for inferring that the appellant was intended to be substituted for the three mortgagees whom he had contracted to pay. But in any case no such inference can be drawn in favour of the appellant when in breach of his contract he has

(1) (1933) 64 M.L.J. 606.

(2) (1929) I.L.R. 53 Mad. 188.

(3) (1883) L.R. 10 I.A. 62; I.L.R. 9 Cal. 904.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
CORNISH J.

364 THE INDIAN LAW REPORTS [VOL. LIX

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.

VARADA-
CHARIAR J.

paid off only two of the three mortgages which he had undertaken to discharge.

For these reasons, I hold that the appellant's claim to a right of subrogation fails, and that the second appeal should be dismissed with costs.

VARADACHARIAR J.—The only point for decision in this second appeal is whether, in the circumstances stated in my learned brother's judgment, the appellant who holds the usufructuary mortgage (Exhibit I), dated 17th May 1927, is entitled to claim priority over the plaintiff's rights under the mortgage deed (Exhibit A), dated 3rd March 1922.

In *Lakshmi Achi v. Narayanasami Naiker*(1) it was observed by RAMESAM J. that

"where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and the vendee pays off only one of them, he cannot claim priority in respect of it over the others though he may claim such priority in respect of some other debts, the payment of which by him was not contemplated."

If this statement of the law is correct and if the principle enunciated with reference to a "purchaser" is also applicable to a mortgagee who is directed to discharge certain prior mortgages—this was assumed in *Abdul Razak Rowther v. Abdul Rahiman Sahib*(2)—the appellant's claim of priority cannot be sustained. On behalf of the appellant, Mr. Kuttikrishna Menon has contended that the proposition enunciated in *Lakshmi Achi v. Narayanasami Naiker*(1) is not correct and that in any event it ought not to be extended to a mortgagee. He has also contended that, whatever might have been the position prior to 1930, the matter must now be taken to be settled in the

appellant's favour by section 92 of the Transfer of Property Act as amended by Act XX of 1929, which he claims should be held to have retrospective operation, though the discharge of the prior mortgages in this case was made in 1927. On behalf of the respondent, it has been argued that the principle enunciated by RAMESAM J. is correct and is equally applicable to the case of a mortgagee, that Act XX of 1929 is not retrospective in its operation and that even under section 92, as amended, the appellant will not obtain priority, as the case must be held to be governed by the third clause and not by the first clause of that section.

The argument based on section 92 may first be disposed of. In the view I take of the construction of that section, it is not necessary to come to a decision in this case on the question of its retrospective operation. It is true that in *Tota Ram v. Ram Lal*(1) a Full Bench of the Allahabad High Court held that the provision had retrospective effect, but a contrary opinion has been expressed by a Bench of this Court in *Kanje and Mooljee Bros. v. Shanmugam Pillai*(2). I would only add that, in deciding how far an inference in favour of "retrospective operation" is to be drawn from the fact that section 63 of Act XX of 1929 expressly excludes retrospective operation in respect of certain specified sections, the remarks of Lord HATHERLEY in *Gardner v. Lucas*(3) might have to be borne in mind, viz., that it may well be a provision inserted *ex majore cautela*. With reference to the concluding words of section 63 of

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.

VARADA-
CHARIAR J.

(1) (1932) I.L.R. 54 All. 897 (F.B.).

(2) (1932) I.L.R. 56 Mad. 169.

(3) (1878) 3 App. Cas. 582, 599.

(1) (1929) I.L.R. 53 Mad. 188, 198.

(2) (1933) 65 M.L.J. 390.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

Act XX of 1929, the learned Judges of the Allahabad High Court observed that in that case nothing had already been done before the 1st day of April 1930 in any pending proceeding and no remedy or proceeding was being affected by the new provisions. I beg leave to doubt the correctness of this statement. If the learned Judges were right in their view that the law was the same even prior to Act XX of 1929, or that Act XX of 1929 must only be understood as having *declared* the previous law (with a view to set conflicting decisions at rest), no exception could be taken to their relying on Act XX of 1929, because there will then be no question of "*retrospective operation*" at all. If, on the other hand, Act XX of 1929 must be held to have changed the law prevailing prior thereto, it is difficult to agree that the learned Judges were giving full effect to the concluding words of section 63 of Act XX of 1929, because in that case the suit was undoubtedly pending when the Act of 1929 came into force and that section not merely provides that the Act shall not affect "anything already done" in any pending proceeding but goes on to say that such proceeding may be continued "as if this Act had not been passed".

Turning now to section 92 as amended, the appellant contends that the present case must be held to be governed by the first clause in view of the generality of its language; and here again strong reliance is placed on the decision in *Tota Ram v. Ram Lal*(1). There can be little doubt that the proper method of interpreting the first clause is to construe it in the light of the third

(1) (1932) I.L.R. 54 All. 897 (F.B.).

clause of the same section. It will be seen from the report of the Special Committee which considered the bill that they assumed that under the previous state of the law a transferee from a mortgagor who has undertaken to discharge a prior mortgage debt cannot by the mere fact of paying off a prior mortgage claim subrogation, though in certain circumstances the Court may presume an intention on his part to keep alive the security thus paid off by him. To meet such cases, they recommended the provision now enacted as the third clause of section 92 whereunder a person advancing money to a mortgagor to pay off a prior mortgage shall be subrogated to the rights of the mortgagee thus redeemed only if "the mortgagor has by registered instrument agreed that such person shall be so subrogated". This provision corresponds to what is described by MOOKERJEE J. in *Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh* (1) as "conventional" subrogation; and it gives effect to the decisions in *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(2), *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(3) and *Vanmikalinga Mudali v. Chidambara Chetty*(4) subject to the condition that the right of subrogation must be provided for by an agreement in writing registered; c.f. *Wrexham, Mold and Connah's Quay Railway, In re*(5). In the present case, the right to subrogation is claimed not as the result of an agreement between the parties but only on general principles of equity. The learned Judges of the Allahabad High Court

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

(1) (1907) I.L.R. 36 Cal. 193, 218.

(2) (1901) L.R. 29 I. A. 9; I.L.R. 29 Cal. 154 (P.C.).

(3) (1912) L.R. 39 I.A. 68; I.L.R. 39 Cal. 527.

(4) (1905) I.L.R. 29 Mad. 37.

(5) [1899] 1 Ch. 440, 463.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

make no reference to the third clause of section 92. Mr. Kuttikrishna Menon contends that the third clause must be held to apply only to cases in which a person advances money without taking a mortgage therefor. I am unable to agree that that is the true construction of that clause. There is a well-established distinction between cases in which a person who has a *pre-existing* interest in property pays off a prior charge on that property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. It seems to me that the first clause of section 92 must be held to relate to the first type of cases above referred to and the third clause to the second type.

Mr. Kuttikrishna Menon next contended that the Allahabad Full Bench decision is an authority in favour of the appellant even independently of Act XX of 1929. In this connection he also relied upon the decision of a Bench of this Court in *Chidambaram Nadan v. Muni Nagendrayyan*(1) and upon certain observations in the judgment in Second Appeal No. 401 of 1925. In the Referring Order in this case, MADHAVAN NAIR J. also mentions the apparent conflict between *Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons*(2) and *Abdul Razak Rowther v. Abdul Rahiman Sahib*(3).

So far as the two recent decisions reported in the Madras Law Journal are concerned, I may observe that the conflict must be held to be not so

(1) (1920) 39 M.L.J. 445.

(2) (1933) 64 M.L.J. 606.

(3) (1933) 65 M.L.J. 390.

much as to the rule of law to be applied as to the application of it to particular circumstances; because both the decisions were pronounced by the same Bench and in the later case they accept the rule stated by RAMESAM J. in *Lakshmi Achi v. Narayanasami Naiker*(1). It is not necessary for me to canvass whether the circumstances in *Bappu v. Venkatachalapathi Ayyar, Lakshmana Ayyar & Sons*(2) would not also have justified the application of the same rule because we are only concerned with the correctness of the principle enunciated in *Lakshmi Achi v. Narayanasami Naiker*(1). So far as we can gather from the judgment, the decision in *Lakshmi Achi v. Narayanasami Naiker*(1) does not appear to have been brought to the notice of the learned Judges and it seems to me unaccountable that when referring to the Privy Council decision in *Ayyareddi v. Gopalakrishnayya*(3) the learned Judges should have lost sight of the express reservation made on page 195 that the rule as to keeping alive the discharged mortgage for the benefit of the owner "would not apply if the owner of the property had covenanted to pay the later mortgage debt". The decision in *Chidambaram Nadan v. Muni Nagendrayyan*(4) does not conflict with the decision in *Lakshmi Achi v. Narayanasami Naiker*(1) because the right to subrogation was there recognized only as *against* a person whose debt the later mortgagee had not covenanted to discharge. The judgment in Second Appeal 401 of 1925, though it contains some observations on

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

(1) (1929) I.L.R. 53 Mad. 188, 198.
(3) (1923) I.L.R. 47 Mad. 190 (P.C.).

(2) (1933) 64 M.L.J. 606.
(4) (1920) 39 M.L.J. 445.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

Govindasami Tevan v. Doraswami Pillai(1), does not bear on the question now under consideration.

The Allahabad Full Bench point out that section 101 of the Transfer of Property Act deals only with cases in which there is a possibility of merger by reason of the prior mortgage interest and the residuary ownership vesting in the same person and that observations made in cases relating to discharge of prior mortgages by a person who has become "owner" of the property ought not to be applied to a case of discharge by a puisne mortgagee, because in the latter case no question of merger can arise. It is true that section 101 will in terms apply only to an "owner" paying off a prior charge and not to a mortgagee paying off a prior charge; but in the judgments in *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(2) and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(3) the Privy Council base their conclusions only on the theory or presumption of an "intention to keep alive" even in cases when the prior charge has been discharged by a mortgagee. In *Mohesh Lal v. Mohunt Bawan Das*(4) also, the discussion proceeded on similar lines. The reference to this case in *Tota Ram v. Ram Lal*(5) and in *Md. Shafi-qullah v. Md. Samiullah*(6) as the case of a purchaser whose interest it may be to extinguish the mortgage is somewhat misleading; for their Lordships discuss the question of intention not

(1) (1910) I.L.R. 34 Mad. 119.
(2) (1901) L.R. 29 I.A. 9; I.L.R. 29 Cal. 154.
(3) (1912) L.R. 39 I.A. 68; I.L.R. 39 Cal. 527.
(4) (1883) L.R. 10 I.A. 62; I.L.R. 9 Cal. 961.
(5) (1932) I.L.R. 54 All. 897, 900 (F.B.).
(6) A.I.R. 1929 All. 943, 946.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

merely from the point of view of Mangal (the purchaser) but also from the point of view of the plaintiff who was the mortgagee that lent the money utilised to pay off the prior mortgage in favour of Latchiminarain.

On page 900 in *Tota Ram v. Ram Lal*(1) the learned Judges recognize that in the majority of cases in that Court it has been held that a third mortgagee paying off the first mortgage in similar circumstances was not entitled to be subrogated to the position of the first mortgagee. To the cases cited by them I may add *Balbhaddra v. Sheomangal*(2). But they refer to *Shiam Lal v. Bashir-ud-din*(3), *Chhote Lal v. Bansidhar*(4), *Vanmikalinga Mudali v. Chidambara Chetty*(5) and *Jagatdhar Narain Prasad v. A. M. Brown*(6) as taking a contrary view. With due respect, I may point out that in none of these cases was subrogation claimed or allowed as against a person whose debt the later mortgagee had undertaken to pay. This distinguishing circumstance seems to have escaped the notice of the learned Judges.

The discussion at the bottom of page 901 and the top of page 902 suggests that they proceeded on the assumption that subrogation has been denied in similar cases only on the strength of the theory of agency, viz., that, in paying off the prior charge, the purchaser or puisne incumbrancer merely acted as the agent of the mortgagor. The observation already extracted from the judgment of the Privy Council in *Ayyareddi v. Gopalakrishnayya*(7) shows that that is not the

(1) (1932) I.L.R. 54 All. 897 (F.B.). (2) A.I.R. 1931 All. 347.
(3) (1906) I.L.R. 28 All. 778. (4) (1926) 24 A.L.J. 570.
(5) (1905) I.L.R. 29 Mad. 37. (6) (1906) I.L.R. 33 Cal. 1133
(7) (1923) I.L.R. 47 Mad. 190, 195 (P.C.).

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

true basis of the rule but an inference derived from or a disability founded on the fact that the person claiming subrogation has covenanted to discharge the debt due to the very person against whom he seeks to claim priority. Among the Indian authorities, some cases hold that a covenant to discharge several pre-existing mortgages indicates an intention to extinguish them all [*Govindasami Tevan v. Doraswami Pillai*(1), *Peria Thiruvadi Ayyangar v. Pokutti Janaki*(2) and *Muhammad Sadiq v. Ghaus Muhammad*(3)] or to treat them as a consolidated debt without reference to the dates when they were incurred; *Lakshmi Achi v. Narayanasami Naiker*(4). It is sometimes said that a presumption most beneficial to the person paying off the prior charge can be made only when two courses were open to him in law, but no such option can be recognized in favour of a person who has bound himself by covenant to pay off another encumbrance also [*Balbhaddra v. Sheomangal*(5)] for it will in effect be to permit him to benefit by breaking his own contract; *Surjiram Marwari v. Barhamdeo Persad*(6). Again it has been said that subrogation is only a rule of "equity" and it cannot be allowed where its application will lead to injustice or inequitable results; *Bisseswar Prosad v. Lala Sarnam Singh*(7). Whichever of these views be held to be the true basis of the rule, it can make no difference whether the subrogation is claimed by a purchaser or a puisne incumbrancer, so long as there is a covenant between him and his transferor that the transferee

(1) (1910) I.L.R. 34 Mad. 119.

(2) (1923) 45 M.L.J. 698.

(3) (1910) I.L.R. 33 All. 101, 103 (F.B.).

(4) (1929) I.L.R. 53 Mad. 188, 199.

(5) A.I.R. 1931 All. 347, 348.

(6) (1905) 2 C.L.J. 288, 291, 299.

(7) (1907) 6 C.L.J. 134, 138.

should discharge the debt due to the person whom he seeks to postpone. There is no doubt a difference between a covenant in a sale deed about payment of consideration and a similar covenant in a mortgage deed, in that the latter covenant may not be specifically enforced and even damages for its breach may ordinarily be nominal, but it is none the less a legal covenant which may, in certain circumstances, sustain a claim for substantial damages; see Appeal Suit No. 114 of 1923; see also *The Manchester and Oldham Bank, Limited v. W. A. Cook and Co.*(1) and Arnold on Damages, Ch. VII, quoting from *South African Territories v. Wallington*(2), and *Prehn v. Royal Bank of Liverpool*(3).

In the Allahabad Full Bench case the learned Judges say (at the bottom of page 901) that there appears to be no difference between the case of a purchaser or mortgagee paying off a prior charge out of his own funds and at his own choice and the case where he pays off the prior charge out of funds forming part of the consideration for the transfer in his favour. With all respect, I am unable to agree; in the former case, there will be no occasion for suggesting an inference or disability founded on the fact of a covenant to discharge the intermediate mortgage as well, whereas in the latter case the question can arise whether, out of the consideration amount, the transferee has agreed to pay off not merely the prior charge but also the debt due to the intermediate incumbrancer against whom priority is claimed.

(1) (1883) 49 L.T. N.S. 674.

(2) [1897] 1 Q.B. 692, 696, 697.

(3) (1870) L.R. 5 Ex. 92.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VARADA-
CHARIAR J.

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.

I am of opinion that the rule as stated in *Lakshmi Achi v. Narayanasami Naiker*(1) and *Abdul Razak Rowther v. Abdul Rahiman Sahib*(2) is correct and well founded in principle. I agree that the second appeal must be dismissed with costs.

VENKATA-
RAMANA
RAO J.

VENKATARAMANA RAO J.—I agree with [the judgments just delivered. As laid down by their Lordships of the Privy Council in *Ayyareddi v. Gopalakrishnayya*(3) :

“It is now settled law that where in India there are several mortgages on property, the owner of the property, subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property covenanted to pay the later mortgage debt.”

Therefore, if, as in this case, a person advances money or covenants to discharge three incumbrances, payment of two prior incumbrances cannot be availed of by him as a shield against the third; vide *Lakshmi Achi v. Narayanasami Naiker*(1). The principle of subrogation cannot be invoked in such a case for, as explained in *Govindasami Tevan v. Doraswami Pillai*(4),

“the object of the transaction was not to keep alive a mortgage against the puisne incumbrancer but to discharge the puisne incumbrance as well.”

This was undoubted law before the amendment of the Transfer of Property Act. But Mr. Kuttikrishna Menon contends that this rule of law

would apply to the case of a purchaser but not to that of a mortgagee. I see no distinction in principle; vide *Balbhaddra v. Sheomangal*(1).

The next argument of Mr. Kuttikrishna Menon is that section 92 of the amended Transfer of Property Act is retrospective and under the first clause of that section his client's right to subrogation cannot be questioned, and he is supported in this view by the Full Bench decision in *Tota Ram v. Ram Lal*(2). Assuming section 92 to be retrospective, I am, with due respect, unable to agree with the interpretation placed on the first clause. The first and third clauses of section 92 must be read together. The first clause enunciates no new principle (*vide* section 74 of the Transfer of Property Act since repealed). It applies to all persons who have an interest in the equity of redemption and are under no personal obligation to discharge prior incumbrances. The third clause has been enacted to confer a benefit on persons who advance money to discharge an incumbrance only “if the mortgagee has by a registered instrument agreed that such persons shall be subrogated”. The clause is intended to apply to all persons who acquire an interest in the mortgaged property by advancing moneys to discharge prior incumbrances and there is no warrant for restricting the scope of that clause to persons other than purchasers or mortgagees as contended by Mr. Kuttikrishna Menon. The distinction between the two classes of cases aforesaid, viz., those who have an existing interest in the property and those who acquire an interest therein by advancing money, is well recognized in the law

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.

VENKATA-
RAMANA
RAO J.

(1) (1929) I.L.R. 53 Mad. 188, 198. (2) (1933) 65 M.L.J. 390, 399.

(3) (1923) I.L.R. 47 Mad. 190, 194 (P.C.).

(4) (1910) I.L.R. 34 Mad. 119.

(1) A.I.R. 1931 All. 347.

(2) (1932) I.L.R. 54 All. 897 (F.B.).

LAKSHMI
AMMA
v.
SANKARA
NARAYANA
MENON.
—
VENKATA-
RAMANA
RAO J.

relating to subrogation. The Privy Council decision in *Jagmohan Das v. Jugal Kishore*(1) illustrates this clearly. A purchaser covenanted to pay half the amount of the money due on a prior mortgage but he was compelled to pay the whole and the right of subrogation was allowed only as to half the amount he had not covenanted to pay. In respect of this half he would now come under the first clause of section 92 and in respect of the other half under the third clause if he obtains a registered instrument securing the right. Clauses 1 and 3 unmistakably indicate that the Legislature has kept this distinction in view. The Allahabad Full Bench decision fails to note this and consider the third clause and the principle underlying it. To give effect to the contention of Mr. Kuttikrishna Menon would be to enable every purchaser or mortgagee who enters into a contract to discharge a particular incumbrance to commit a breach thereof and profit by his own wrong and thus violate the equitable principles on which the doctrine of subrogation is based, and it is impossible to attribute this intention to the Legislature. There is no registered instrument as required by the third clause in this case and the appellant's claim is unsustainable.

A.S.V.

(1) (1931) 36 C.W.N. 4 (P.C.).

INCOME-TAX REFERENCE.

*Before Mr. Madhavan Nair, Officiating Chief Justice,
Mr. Justice Stone and Mr. Justice King.*

JUPUDY KESAVA RAO, BANKER, RESIDING AT
BHIMAVARAM, WEST GODAVARI DISTRICT, PETITIONER,

1935,
October 2.

v.

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

Indian Income-tax Act (XI of 1922), sec. 26 (2)—Succession referred to in—Meaning of—Undivided Hindu family consisting of father and son—Business carried on by—Death of father and manager—Son continuing business on—“Succeeds” to business of father, if—Undivided Hindu family contemplated in Act—Nature of—Assessee singly, if a member of—Assessee and his wife, if together constitute such family.

What is contemplated by section 26 (2) of the Indian Income-tax Act of 1922 is not merely succession in the management of business by another person. The word “succession” as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner.

An undivided Hindu family consisting of the assessee and his father carried on a business. The father, the manager of the family, died and after his death the assessee continued to carry on the business.

Held that the assessee could not be said to have “succeeded” to the business of his father within the meaning of section 26 (2) of the Act and was not therefore liable to be assessed under that section.

The undivided Hindu family which was carrying on business has not been “succeeded” in such capacity by the assessee, as the assessee was himself in part the owner of the property already, and as such there has been no transfer of

* Original Petition No. 147 of 1934.

KESAVA RAO v. COMMISSIONER OF INCOME-TAX, MADRAS. ownership in the business as he has become entitled to it by survivorship.

Quaere (i) whether the assessee singly could not be conceived of as a member of an undivided Hindu family ;

(ii) whether the assessee and his wife who was alive did not taken together constitute an undivided Hindu family ; and

(iii) whether the undivided Hindu family contemplated in the Income-tax Act is an undivided Hindu coparcenary.

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

P. V. Vallabhachari for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

MADHAVAN NAIR O.C.J.—The question referred to us is :

In the circumstances of this case is the petitioner herein liable to be assessed under section 26 (2) of the Indian Income-tax Act ?

The circumstances are these : The petitioner, J. Kesava Rao, and his deceased father, J. Gangayya, constituted a Hindu undivided family deriving income from money-lending business. Gangayya was the manager of the family and the assessments used to be levied on him as representative of the family. For the assessment of the year 1932-33 (accounting year 1931-32) notice was issued to Gangayya under section 22 (2) of the Income-tax Act on 9th April 1932 and he filed his return on 20th May 1932 showing a net income of Rs. 12,755. Gangayya died on 15th July 1932 before assessment could be levied on him. After his death the petitioner continued to carry on the business. Notices were

then issued to him under sections 22 (4) and 23 (2) of the Act. He complied with these notices and was finally assessed to income-tax on a total taxable income of Rs. 50,550. The Income-tax Officer did not levy on him super-tax on the excess over Rs. 30,000 of the total income on the assumption that the petitioner like his father represented a Hindu undivided family.

The petitioner appealed to the Assistant Commissioner objecting to the amount of the assessment. In the course of the appeal he learnt that the petitioner had no children or brothers. In the circumstances he considered that the assessment should have been made on the petitioner as an individual and not as a Hindu undivided family since, in his opinion after the death of the petitioner's father in July 1932 the Hindu undivided family ceased to exist and the petitioner became the sole surviving member of the original Hindu undivided family. He therefore issued a notice to the petitioner under section 31 (3) proposing to treat him as an individual and levy super-tax accordingly. The petitioner contended that himself and his wife constituted a Hindu undivided family and that therefore the assessment made on him as a Hindu undivided family was correct. The objection was overruled and the super-tax was levied accordingly. The question arising for decision is whether in these circumstances the petitioner is liable to be assessed under section 26 (2) of the Indian Income-tax Act.

Sub-section (2) of section 26 of the Income-tax Act runs as follows :

“Where, at the time of making an assessment under section 23, it is found that the person carrying on any business,

KESAVA RAO v. COMMISSIONER OF INCOME-TAX, MADRAS.

MADHAVAN NAIR O.C.J.

KESAVA RAO
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.

MADHAVAN
NAIR O.C.J.

profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

In support of his contention that he is not liable to assessment under the above section the petitioner urges two points. In the first place, he contends that, inasmuch as he got the entire business by survivorship under Hindu Law, he cannot be said to have "succeeded" to the business within the meaning of that term as used in the section. In other words, he argues that there cannot be a succession by a person to something of which he was in part the owner already. His next contention is that for the application of the section a person carrying on any business, profession or vocation should be succeeded in such capacity by another person, that he alone or he and his wife would constitute a Hindu undivided family just as he and his father constituted one before, and that, the Hindu undivided family remaining the same both before and after the death of his father, the terms of the section are not satisfied and that therefore he is not liable to be assessed under it. If either of these points is decided in his favour, he would succeed in the reference.

The Counsel for the Commissioner meets the above points by saying that the petitioner, considered as an individual which he now unquestionably is, is a person distinct from the undivided Hindu family of which before the death of his father he was a member, that he cannot by himself alone or even with his wife constitute a joint Hindu family, that he has

succeeded to the business in the sense in which the term "succeeded" is ordinarily understood and that he is therefore liable to be assessed under section 26 (2).

Both the questions raised are not free from difficulty. Section 26 (2) has not been very happily worded. The terms "the person carrying on any business, profession or vocation has been succeeded in such capacity by another person" may well suggest that what is contemplated is merely succession in the management of business by another person; but obviously that cannot have been the intention of the Legislature. It appears to us that the word "succession" as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner. If this view is correct, as we think it is, then it seems fairly clear that the undivided Hindu family which was carrying on business has not been "succeeded" in such capacity by the petitioner, as the petitioner was himself in part the owner of the property already, and as such there has been no transfer of ownership in the business as he has become entitled to it by survivorship. No authority relevant for deciding the point has been cited by either side. The decision in *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1), relied on by the Commissioner, in which it was held that in cases where there has been a partition of an undivided Hindu

KESAVA RAO
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.

MADHAVAN
NAIR O.C.J.

382 THE INDIAN LAW REPORTS [VOL. LIX]

KESAVA RAO
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.
—
MADHAVAN
NAIR O.C.J.

trading family section 26 applies, does not help him, for those are not cases where one party gets the property of another by survivorship. It would therefore follow that the petitioner has not "succeeded" to the business of his father within the meaning of section 26(2) of the Act and is not therefore liable to be assessed under that section.

In the above view it is not necessary to decide the point whether the petitioner himself or with his wife does not constitute an undivided Hindu family—the second point raised in the case. However, as the point was argued for some time, we will briefly refer to the arguments. The petitioner's Counsel is prepared to argue that the petitioner by himself would constitute an undivided Hindu family; but in the present case, he contends, it is not necessary for him to go so far as the petitioner has his wife living and they together, he argues, would certainly come within the description of an undivided Hindu family. This argument is not without force, and would seem to have some authority to support it. Strictly speaking, it is not difficult to conceive of the petitioner singly as a member of an undivided Hindu family; that he was a member of an undivided family when his father was living cannot be disputed; that family has never been divided and the petitioner, though he is the only one living now, may well be said to represent in his person the undivided Hindu family. But it is not necessary to pursue this line of thought, as, as already stated, the petitioner has his wife living, and do they not taken together constitute an undivided Hindu family? If a son is born to

them, there cannot be any doubt that there would come an undivided Hindu family into existence and so it is said that potentially there is an undivided family now in existence. On the other hand, it is urged that when the original undivided family is reduced to a single member the property of the family loses its character of joint family property and that the sole remaining member is reduced to the position of an individual owning those properties and that his wife does not in any manner form a member of an undivided Hindu family. It is argued that the wife or widow of a coparcener has only a right of maintenance and has no substantial rights to the property of the family. This argument assumes that the term "undivided Hindu family" should be limited to a family of coparceners. The petitioner's contention seems to be supported by an observation of RAMESAM J. in *Vedathanni v. Commissioner of Income-tax, Madras*(1). In that case, the first question referred to the High Court was whether the maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under section 14 (1) and other sections of the Act. In deciding that point the learned Judge expressed the view that the contention, that even where the family is reduced to a single male member there is still a joint family, at any rate where there are a number of widows and other persons entitled to maintenance, is not untenable. This question did not directly arise for decision before the learned Judge. After the arguments were over, Mr. Sastri on behalf of the Income-tax

KESAVA RAO
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.
—
MADHAVAN
NAIR O.C.J.

(1) (1932) I.L.R. 56 Mad. 1 (S.B.).

KESAVA RAO
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.
—
MADHAVAN
NAIR O.C.J.

Commissioner brought to our notice a judgment of the Calcutta High Court in *In re Moolji Sicca and others*(1) which seems to support the view that he has been contending for, namely, that the undivided Hindu family contemplated in the Income-tax Act is an undivided Hindu coparcenary. In the present case it is not necessary to decide which of the above contentions should be accepted, as we have decided the first point raised by the petitioner in his favour and that is enough to dispose of the case.

We would accordingly answer that in the circumstances of this case the petitioner is not liable to be assessed under section 26(2) of the Indian Income-tax Act. He is entitled to his costs of Rs. 250 and the refund of Rs. 100 deposited by him.

A.S.V.

(1) (1934) 3 I.T.R. 123.

INCOME-TAX REFERENCE

Before Mr. Madhavan Nair, Officiating Chief Justice,
Mr. Justice Stone and Mr. Justice King.

K. V. A. L. RAMANATHAN CHETTIAR AND ANOTHER,
PETITIONERS,

1935,
October 2.

v.

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

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign profits—Remittance to British India of—Donation to temple—Liability to make, outside British India—Discharge of, outside British India, from out of foreign profits—Arrangements for—Inference of—Circumstances justifying—Amount paid—Remittance of foreign profits within sec. 4 (2), if.

The members of a Hindu family which became divided into three branches agreed amongst themselves at the time of the partition to pay a sum of Rs. 41,842-8-0 for the construction of a temple at a place in British India. That amount was paid to the temple by means of a hundi drawn by K.V.A.L.A.L., one of the three branches, on his shop at Quala Lampur, outside British India. The hundi stated that the said sum of Rs. 41,842-8-0 was to be paid at the rate of exchange then prevailing at Quala Lampur. The trustees of the said temple received the hundi in British India but sent it on to Singapore for collection. The whole of the amount was paid by K.V.A.L.A.L. on behalf of the entire family and was collected and credited at Singapore to the account of the trustees. The assessee, the manager of another branch of the family, carried on the business of banking in British India, Quala Lampur and other places, but his family resided in British India. To pay his one-third share of the sum of Rs. 41,842-8-0 to K.V.A.L.A.L., the assessee instructed his agent at Quala Lampur by letter to pay the amount representing his third share with interest to K.V.A.L.A.L. at Quala Lampur. The agent accordingly paid the amount by means of a cheque issued on the

* Original Petition No. 252 of 1933.

RAMANATHAN CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS. Mercantile Bank of India, Quala Lampur, in favour of K.V.A.L.A.L., Quala Lampur, and debited to the assessee's "urkadai" account.

Held that the sum representing the assessee's one-third share of Rs. 41,842-8-0 could not be considered to have been received in British India within the meaning of section 4 (2) of the Income-tax Act of 1922 and that the assessee was not liable to be charged with income-tax on the said sum.

The assessee had no legal debt to discharge in British India with respect to the amount in question. The liability of the family to pay the temple was not a legal debt. The contribution was only in the nature of a donation. Even if the liability could be treated as a legal debt, by arrangement the discharge of it must be understood to have been transferred to outside British India where it was ultimately discharged.

Hall (H.M. Inspector of Taxes) v. Marians, (1933) 18 T.C. 148, applied.

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

P. R. Srinivasan for petitioners.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

MADHAVAN NAIR O.C.J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR O. C. J.—The Income-tax Commissioner has referred to this Court the following questions for decision :

(i) Whether, on the admitted facts of the case, the sum of Rs. 14,313 was assessable to income-tax as a remittance of foreign profits under section 4 (2) of the Income-tax Act.

(ii) Whether, on the facts of the case, the initial presumption that the sum of Rs. 14,313 must be deemed to be a remittance of petitioner's foreign profits has not been fully rebutted and the assessment of the said sum legal or warranted by the provisions of the Income-tax Act.

The facts are these : One K.V.A.L. family became divided into three branches ; K.V.A.L.R.M., K.V.A.L.A.L., and K.V.A.L.M. The petitioner,

Ramanathan Chettiar, is the manager of the K.V.A.L.R.M. branch of the family. He carries on the business of banking in Madras, Quala Lampur and other places. His family is residing at Kottaiyur in Ramnad District.

RAMANATH CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADR. MADHAVAN NAIR O.C.J.

In this case, we are concerned with the assessment of the petitioner for the year 1931-32, the year of account being 13th April 1930 to 12th April 1931. During this period, a sum of Rs. 14,313 was debited to the "urkadai" account of the petitioner in his Quala Lampur ledger. The present reference relates to his liability to pay income-tax with respect to this amount.

At the time of the partition on 11th January 1929, it was decided that the K.V.A.L. family should give a sum of Rs. 41,842-8-0 for the construction of a Sivankoil at Kottaiyur. This amount was paid to the temple by means of a hundi drawn by K.V.A.L.A.L., one of the three branches, on his shop at Quala Lampur. The hundi is in these terms :

"Quala Lampur K.V.A.L.A.L. Somasundaram Chettiar shall pay to the person who presents this document the said sum of Rs. 41,842-8-0 at the rate of exchange then prevailing at Quala Lampur to the order of the trustees of the Tiruppani, viz., (1) A.M.A.S. Subbiah Chettiar and (2) K.V.S.V. Alagappa Chettiar with interest from 21st Thai, Sukla, at the Quala Lampur current rate of interest and get back this with the receipt of this amount duly acknowledged." (See Exhibit G).

This sum of Rs. 41,842-8-0 was paid by K.V.A.L.A.L. on behalf of the entire family. One-third of this amount, that is the amount involved in this reference, represents the petitioner's share of the contribution. From the finding submitted by the Commissioner after the first hearing of this reference, it appears that the Sivankoil

388 THE INDIAN LAW REPORTS [VOL. LIX

RAMANATHAN
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.
—
MADHAVAN
NAIR O.C.J.

trustees received the hundi in British India and sent it to M.S.M.S., Singapore, for collection. They got the money for it from K.V.A.L.A.L., Quala Lampur. In order to pay his share to K.V.A.L.A.L. who had paid the whole amount to the temple, the petitioner instructed his agent at Quala Lampur by letter to pay one-third of Rs. 41,842-8-0 with interest to K.V.A.L.A.L. at Quala Lampur. The agent accordingly paid the amount by means of a cheque issued on the Mercantile Bank of India, Quala Lampur, in favour of K.V.A.L.A.L., Quala Lampur, and debited it to the petitioner's "urkadai" account.

The petitioner contends that the circumstances show that what he had to pay was only a donation and not a legal debt, that, from the facts that the liability to pay, whatever its nature was, was transferred to be discharged out of British India and that the payment was made actually outside India, an arrangement to pay the amount in question outside India should be inferred and that therefore the payment outside British India should not be treated as a constructive or notional remittance into British India of the amount which could be assessed under section 4(2) of the Act. On the other hand, the learned Counsel for the Income-tax Commissioner says that in the circumstances it must be held that this sum was brought into British India in order that it might be paid to the temple and that the petitioner has therefore been rightly assessed to income-tax. The question is which view is right.

In the first place, we are not satisfied that the petitioner had any legal debt to discharge in British India with respect to this amount. No

doubt the family had agreed amongst themselves that it should pay the sum of Rs. 41,842-8-0 for the construction of the temple and that the petitioner had to pay one-third of that amount. This contribution was only in the nature of a donation which the family had intended to make to the temple. Further, there is no evidence to show that the liability should be discharged in British India. On the other hand, the facts lead to the inference that the parties arranged amongst themselves that the amount should be paid outside British India. It is true that the Sivankoil trustees received the hundi in British India but it was sent to M.S.M.S., Singapore, for collection and the amount was collected and credited at that place to the account of the trustees. On the face of it the hundi is a foreign bill payable outside British India. It is drawn on the Quala Lampur firm of K.V.A.L.A.L. which is outside British India at the rate of exchange prevailing at that place. Immediately after the issue of the hundi, the petitioner wrote to his agent a letter in which he said :

"As K.V.A.L. has drawn a hundi on K.V.A.L.A.L. of that place for payment of Rs. 41,842-8-0 with current rate of interest at that place for Tiruppani work of Sivankoil of this place, pay K.V.A.L. Somasundaram Chettiar our one-third share of the amount at the time of the payment of the principal and interest of the hundi"

Accordingly, as already stated, the payment was made by the petitioner's agent by a cheque issued on the Mercantile Bank of India. From the facts that the actual payment of the amount was made outside British India, and the liability to pay was also outside British India, it may be inferred that there was an arrangement to pay

RAMANATHA
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.
—
MADHAVAN
NAIR O.C.J.

RAMANATHAN
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.

MADHAVAN
NAIR O.C.J.

the amount outside British India and not in British India. In this view the amount in question cannot be considered to have been received in British India within the meaning of section 4 (2) of the Income-tax Act. In our opinion this case falls within the principle of the decision in *Hall (H. M. Inspector of Taxes) v. Marians*(1). In that case, the respondent's wife, who lived with her husband in London, was entitled to a share of the profits of a business carried on in Colombo. Her share was paid into her current account with the Colombo branch of a bank which was registered in the United Kingdom and had its office in London. On her instructions, these profits were invested in Indian bonds. Between May 1926 and April 1930, she borrowed certain sums from the bank's head office in London. In April 1930 she instructed the bank to transfer the loan to her current account with its Colombo branch; this was carried out by cross-entries in the books of the two offices. A small credit balance in Colombo was thereupon converted into a debit balance. A few weeks afterwards the overdraft and the interest accrued thereon were discharged out of the proceeds of the sale in Colombo of Indian bonds. The respondent was assessed to income-tax under Rule 2 of Case V of Schedule D for the year 1931-32 in a sum which included the amount of the overdraft transferred from the London office of the bank to the Colombo branch and discharged as beforementioned. The Crown contended that, when the proceeds of the sale of the bonds were credited to the Colombo account, the debt due to the bank from the respondent's wife was extinguished and

(1) (1933) 18 T.C. 148.

RAMANATHAN
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX, MADRAS.

MADHAVAN
NAIR O.C.J.

this constituted a sum received by her in the United Kingdom from a remittance within the meaning of Rule 2 of Case V. This contention was overruled and it was held that the proceeds of the sale of bonds had not been received in the United Kingdom within the meaning of the rule. The case under consideration is in our opinion a stronger one than the case just mentioned. The liability of the family to pay the Sivankoil in the present case is not a legal debt; even if it is treated as one, by arrangement the discharge of it must be understood to have been transferred to outside British India where it was ultimately discharged as in the case just mentioned. In the circumstances we think the petitioner is not liable to be charged with income-tax on the sum of Rs. 14,313. The second question does not need a separate answer.

The petitioner is entitled to costs of Rs. 250 and the return of the deposit of Rs. 100.

A.S.V.

APPELLATE CIVIL.

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

1935,
October 28.

V. G. VENUGOPAL NAIDU (RESPONDENT), APPELLANT,

v.

LAKSHMI AMMAL AND ANOTHER (APPELLANTS),
RESPONDENTS.*

Restitution of conjugal rights—Hindu husband's suit against his wife for—Maintainability of—Marriage not consummated and parties not previously living together—Cause of action for suit—Place where it arises—Jurisdiction to entertain suit—Court having.

A Hindu, residing within the jurisdiction of the Vellore District Munsif's Court, sued his wife in that Court for restitution of conjugal rights. The parties were married in Bangalore and were of full age at that time. The marriage had never been consummated and the parties had never lived together in British India. The wife resided in Bangalore.

Held that the cause of action for the suit arose within the jurisdiction of the Vellore District Munsif's Court and that Court had jurisdiction to try the suit.

As the parties were of full age at the time of the marriage, *prima facie* the husband was entitled to require the wife to live in his house. The breach without lawful cause of the duty of the wife to reside with her husband is the cause of action in the suit for restitution of conjugal rights and the cause of action arises in the place where there has been that breach, namely, in the husband's home. The fact that the wife has not previously lived with her husband within the jurisdiction cannot make any difference.

A suit for restitution of conjugal rights will lie even where the marriage has not been consummated and the parties have not previously lived together.

* Letters Patent Appeal No. 28 of 1934.

Lalitagar Keshargar v. Bai Suraj, (1893) I.L.R. 18 Bom. 316, and *Dadaji Bhikaji v. Rukmabai*, (1886) I.L.R. 10 Bom. 301, relied upon.

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.

APPEAL under Clause 15 of the Letters Patent against the judgment of BUTLER J. dated 28th February 1934 and passed in Second Appeal No. 900 of 1932 preferred to the High Court against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit No. 48 of 1932—Appeal Suit No. 196 of 1931, District Court of North Arcot—Original Suit No. 115 of 1930, District Munsif's Court, Vellore.

A. Ramaswami Ayyar for appellant.

T. R. Srinivasa Ayyar for *A. C. Sampath Ayyangar* for respondents.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—This is a Letters Patent Appeal BEASLEY C.J. from the judgment of BUTLER J. The facts are that the appellant here was the plaintiff in a suit in the Vellore District Munsif's Court. He there sued his wife, the first respondent here, for restitution of conjugal rights and he also claimed an injunction against the second defendant, her father, restraining him from instigating the first defendant to stay away from her husband and from preventing her returning to him. In the District Munsif's Court five issues were framed one of which was whether that Court had jurisdiction to try the suit. The learned District Munsif held that he had jurisdiction to try it. The defendants' Vakil had no instructions to go on with the case so far as the other issues which dealt with the merits were concerned, and the

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.

BEASLEY C.J.

learned District Munsif took *ex parte* evidence on behalf of the plaintiff and gave him a decree as prayed for. There was an appeal to the Subordinate Judge of Vellore and, whilst agreeing with the District Munsif on the question of jurisdiction, he remanded the suit in order that the defendants might be given an opportunity to adduce evidence so that the suit could be disposed of on the merits. The case then came up on second appeal to the High Court and the only point argued was the question of jurisdiction.

The material facts are as follows. The parties were married in Bangalore in 1929 and were of full age at that time. The marriage admittedly has never been consummated and the parties have never lived together in British India. As both the defendants reside in Bangalore they were outside the jurisdiction of the District Munsif's Court, Vellore, and therefore the appellant was entitled to sue in Vellore, only if the cause of action wholly or in part arose there. BUTLER J. was of the opinion that no part of the cause of action arose in Vellore on the ground that the parties had never lived together within the jurisdiction and therefore it could not be said that the wife had absented herself from her husband's house. For the appellant it is contended that the cause of action was the wife's refusal to live with her husband and that it was immaterial whether she had previously lived with her husband within the jurisdiction. The question is, what is the cause of action in a suit for restitution of conjugal rights? In *Lalitagar Keshargar v. Bai Suraj*(1) the plaintiff sued his wife for restitution of

(1) (1893) I.L.R. 18 Bom. 316.

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.

BEASLEY C.J.

conjugal rights in the Court of the Subordinate Judge of Borsad within whose local jurisdiction the plaintiff resided. The defendant contended *inter alia* that the Subordinate Judge of Borsad had no jurisdiction to entertain the suit on the ground that she was living outside his jurisdiction. The Subordinate Judge dismissed the suit for want of jurisdiction. On appeal by the plaintiff the decree was confirmed. On second appeal it was held, reversing the decree, that the Court of Borsad had jurisdiction as the cause of action in a suit by a husband for restitution of conjugal rights consists in the wife's absenting herself from her husband's house without his consent and it must therefore be deemed to arise at his house. It is true that in this case the parties had at one time lived together within the jurisdiction, that is to say, in the husband's house; but nevertheless this case is of importance as stating what the cause of action is. SARGENT C.J. says that

"the cause of action arises from the duty of the wife to reside with her husband unless he has been guilty of some matrimonial offence which justifies her, in the eye of the law, in living apart from him."

If that is a correct statement of the law, as undoubtedly it is, then it is the breach without lawful cause of the duty of the wife to reside with her husband that gives rise to the cause of action; and it does not seem to me that the fact that the wife has not previously lived with her husband within the jurisdiction can make any difference. For instance, if the parties are living together in Calcutta and the husband receives an appointment in Madras, comes here to take up that appointment and secures a residence here, it is the duty of his wife to reside with her husband here and, if she

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.
—
BEASLEY C.J.

refuses to join her husband in his residence here, can it be said that the husband is not entitled to file his suit in Madras but must file his suit in a Court in the jurisdiction of which she may then happen to be? In my opinion, clearly not. But, for the respondents it was contended that in the present case the parties have never lived together at all anywhere. This case is distinguishable from the case of *Lalitagar Keshargar v. Bai Suraj*(1); but it has been held that a suit for restitution of conjugal rights will lie and that the wife can be ordered to take up her residence with her husband even where the marriage has not been consummated and the parties have not previously lived together. That case is *Dadaji Bhikaji v. Rukmabai*(2). There, A, a Hindu, aged nineteen years, was married in one of the approved forms of marriage to B, then of the age of eleven years, with the consent of B's guardians. After the marriage, B lived at the house of her step-father, where A visited from time to time. The marriage was not consummated. Eleven years after the marriage, the husband called upon the wife to go to his house and live with him and she refused and it was held that the suit was maintainable. It was there contended that a decree for restitution of conjugal rights implies that the marriage has been consummated and that what was really being asked for was a decree for "institution" of conjugal rights and that there was no authority for such a decree. In that case, reference was made to *Weldon v. Weldon*(3) where

(1) (1893) I.L.R. 18 Bom. 316.

(2) (1886) I.L.R. 10 Bom. 301.

(3) (1883) 9. P.D. 52.

SIR JAMES HANNEN cites the words of Blackstone as follows :

"The suit for restitution of conjugal rights is brought whenever either the husband or the wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again",

and SARGENT C.J. after this citation is of the opinion that

"the gist of the action for restitution of conjugal rights is that married persons are bound to live together, and that one or other has withdrawn himself or herself without lawful cause, as it was not contended that consummation was necessary by Hindu law any more than it is by English law to complete the marriage. It necessarily follows that whether the withdrawal or 'subtraction', as Blackstone terms it, be before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed."

I myself cannot see any distinction between the case of a wife who has never allowed her husband conjugal rights and refuses to do so and a wife who has done so and thereafter refuses to do so. It is true that there has been no case apparently in England where a wife has been ordered to go to her husband where the marriage has never been consummated; but the position is quite different in India where the parties are Hindus, and it is often the custom for the wife after marriage to continue to live under her parents' roof until she attains puberty when she joins her husband. That is not the English custom. In Mayne on "Hindu Law and Usage" on page 121 there is the following passage :

"*Prima facie*, the husband is the legal guardian of his wife, and is entitled to require her to live in his house from the moment of the marriage however young she may be. But this right does not exist where, by custom or agreement, the wife is to remain in her parents' house, until puberty is established or

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.
—
BEASLEY C.J.

VENUGOPAL
NAIDU
v.
LAKSHMI
AMMAL.
—
BEASLEY C.J.

in some tribes even afterwards. Such a custom is neither immoral nor opposed to public policy."

In the present case, as the parties were of full age at the time of the marriage, *prima facie* the husband was entitled to require the wife to live in his house and no agreement to the contrary was attempted to be set up in her written statement. It is the duty of husband and wife to live together *prima facie* in the place where the husband has a residence. In this case that was within the jurisdiction of the Vellore District Munsif's Court. In breach of her duty she lived with her parents in Bangalore. There has been a breach of the duty on the wife's part and it seems to me that the cause of action must be held to have arisen in the place where there has been that breach, namely, in the husband's home. This clearly gave the District Munsif's Court at Vellore jurisdiction to try the suit. I however agree with BUTLER J. that the suit is not maintainable against the second defendant. The Letters Patent Appeal must accordingly be allowed with costs here and in the second appellate Court, the order of the second appellate Court set aside and that of the Subordinate Judge restored.

STODART J.—I agree and I have nothing to add
A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Burn.

VISWANATHAM KRISHTIAH (PLAINTIFF), APPELLANT,

1935,
September

v.

YARRABANDA PEDDA VENKATA REDDY AND THREE
OTHERS (DEFENDANTS 1 TO 3 IN ORIGINAL SUIT NO. 112 OF
1932 IN DISTRICT MUNSIF'S COURT, KURNOOL, AND DECREE-
HOLDER IN ORIGINAL SUIT NO. 26 OF 1930, SUB-COURT,
KURNOOL), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 47—Rateable
distribution between rival decree-holders—Question as to—
Question arising under sec. 47, if—Application for rateable
distribution by one of them—Order dismissing—Appeal from
—Competency of.*

Where the question as to whether the amount realised by a sale of properties in execution should be rateably distributed between rival decree-holders relates only to a dispute between such decree-holders and the judgment-debtors are not in any way interested in the question, the question is not one which arises under section 47 of the Code of Civil Procedure and no appeal lies against an order dismissing an application for rateable distribution by one of such decree-holders. The fact that that decree-holder had before obtaining judgment attached the property does not make him a representative of the judgment-debtor so as to make the dispute one between parties to the suit within the meaning of section 47.

Varada Ramaswami v. Vumma Venkataratnam, (1921)
42 M.L.J. 473, and *Ayisa Bivi Ammal v. Jokara Bivi*, (1925)
49 M.L.J. 375, followed.

Veyindramuthu Pillai v. Maya Nadan, (1919) I.L.R.
43 Mad. 107 (F.B.), distinguished.

APPEAL against the order of the District Court, Kurnool, dated 28th September 1933 and made in Civil Miscellaneous Petition No. 388 of 1933 in

* Appeal Against Order No. 481 of 1933.

KRISHNIAH
v.
VENKATA
REDDY.

Execution Petition No. 7 of 1932 in Original Suit No. 26 of 1930 on the file of the Court of the Subordinate Judge, Kurnool.

V. S. Narasimhachar for appellant.

V. Govindarajachari for fourth respondent.

Other respondents were unrepresented.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The decree-holder in Original Suit No. 112 of 1932 on the file of the District Munsif's Court of Kurnool is the appellant before us. He obtained a money decree against respondents 1 to 3. Against the same respondents the fourth respondent before us had obtained a decree in Original Suit 26 of 1930 on the file of the Sub-Court of Kurnool. He applied by Execution Petition No. 7 of 1932 for attachment of the properties of the judgment-debtors on 26th October 1932. The sale of the properties was adjourned to 22nd August 1933. On that date, the appellant filed Execution Petition No. 638 of 1933 in the District Munsif's Court for execution of his decree. On the same date he filed an application for rateable distribution in the District Court of Kurnool. The question was whether he was entitled to rateable distribution. The lower Court dismissed his application and this appeal is against that order of dismissal.

A preliminary objection is taken that no appeal lies as the dispute in this case relates solely to questions between two rival decree-holders and the judgment-debtors are not interested in the dispute in any manner. The amount sought to be obtained by execution of the decree by the fourth respondent is a sum of Rs. 4,333-1-6. The sale of the properties fetched Rs. 3,525. The

amount of the decree of the appellant is Rs. 500 with costs. It is clear that the judgment-debtors are not in any way interested in the question as to whether the amount realised by sale of the properties should be rateably distributed between the rival decree-holders. In a case like this, where the question relates only to a dispute between rival decree-holders in which the judgment-debtors are not interested, it has been held by this Court that the question is not one which arises under section 47 of the Civil Procedure Code and the decision is not therefore liable to appeal; see *Varada Ramaswami v. Vumma Venkataratnam*(1). See also the decision in *Ayisa Bivi Ammal v. Jokara Bivi*(2). The appellant's learned Counsel seeks to distinguish these cases by saying that in his suit the decree-holder had before obtaining judgment attached the property and, since he had so attached it, he gets an interest in the property and he becomes a representative of the judgment-debtor; and so the dispute is between parties to the suit within the meaning of section 47. No authority in support of this contention has been brought to our notice. Reference has been made to certain observations in the decision in *Veyindramuthu Pillai v. Maya Nadan*(3) where the learned Judge held that an auction-purchaser is a representative of the judgment-debtor. Having regard to the fact that that case is not one which arises under section 73, we are not inclined to extend the principles mentioned in that decision to this case. In our opinion this case must be governed by the

KRISHNIAH
v.
VENKATA
REDDY.
—
MADHAVAN
NAIR J.

(1) (1921) 42 M.L.J. 473.

(2) (1925) 49 M.L.J. 375.

(3) (1919) I.L.R. 43 Mad. 107 (F.B.).

KRISHNIAH
v.
VENKATA
REDDY.

decisions in *Varada Ramaswami v. Vumma Venkataratnam* (1) and *Ayisa Bivi Ammal v. Jokara Bivi* (2) referred to above. If so, the appeal is incompetent.

We are asked also to treat this appeal as a revision petition and deal with it on that basis. To our minds it does not appear that there is any question of jurisdiction involved in this appeal.

We uphold the preliminary objection and dismiss the appeal with costs.

A.S.V.

APPELLATE CIVIL.

1935,
August 27.

Before Mr. Justice Cornish and Mr. Justice Varadachariar.

STANES MOTORS, LTD., BY MANAGING DIRECTORS
MESSRS T. STANES & CO., LTD. (DEFENDANT), APPELLANT,

v

VINCENT PETER, MINOR BY HIS NEXT FRIEND AND MOTHER
MRS. RUTH AARON PETER AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Master and servant—Servant—Negligence of—Accident happening during the course of employment—Servant not strictly carrying out the instructions of master—Fatal Accidents Act (XIII of 1855)—Suit for damages under—Master—Liability of.

D gave instructions to his driver, to take his car to *C* and bring it back after *C* had finished with the same. *C* used the car and asked the driver to bring it back next morning at 8 a.m. The driver took the car later that night on an errand of his own instead of taking it back to *D*'s bungalow. The next morning the driver took the car from his house at 7-30 a.m. and went in the direction of *C*'s bungalow which was about 2 mile off. In the course of this journey, on account of his

(1) (1921) 42 M.L.J. 473.

(2) (1925) 49 M.L.J. 375.

*Appeal No. 2 of 1935.

negligence, he caused the death of a person. The widow and the son of the deceased filed a suit against *D* to recover compensation under the Fatal Accidents Act.

Held that *D* was liable in damages for the negligence of his driver since, at the time when the accident happened, the driver was in the course of the employment of *D*, and the circumstance that the driver deviated the previous night from the strict instructions of *D* would not relieve the latter of his liability.

Joel v. Morison, (1834) 6 Car. & P. 501; 172 E.R. 1338, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 139 of 1933 (Original Petition No. 120 of 1932).

S. Doraiswami Ayyar for appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami Ayyar* for respondents.

THE JUDGMENT of the Court was delivered by CORNISH J.—This appeal arises out of a suit to recover compensation under the Fatal Accidents Act. The plaintiffs are the widow and the infant son of the deceased whose death was caused by the alleged negligence of the appellant's motor-driver, one Babjee. At the time of the accident the car was being driven by a fitter in the employment of the appellants, Babjee being in the car reclining in the back seat. He says he was asleep at the time of the accident and had no knowledge that the fitter was driving the car, until he was aroused by the shock of the impact. This very improbable story has been disbelieved by the lower Court. There can be no doubt that Babjee entrusted the driving of the car to the fitter who was not authorised by his employers to drive their car and who, on his own admission, had no experience as a driver. Indeed the learned

STANES
MOTORS, LTD.
v.
PETER.

CORNISH J.

STANES
MOTORS, LTD.
v.
PETER.
CORNISH J

Counsel for the appellants does not dispute that the accident was due to the negligence of the driver. The substantial question argued is whether the negligent act was committed by the driver while he was in the course of his employment.

The true facts to be derived from the evidence are that the car was taken by the driver to Mr. Catling, a customer of the appellant-firm, whose car was undergoing repairs, on Saturday the 23rd April 1932, and that the instructions of the manager of the appellant-firm, Mr. Dupan, to the driver were that he should bring the car back to Mr. Dupan's bungalow when Mr. Catling had finished with the car. The car was taken at 5-30 p.m. that evening to Mr. Catling and he used it till 9-30 p.m. that night. The lower Court has accepted the driver's story that Mr. Catling told him to bring the car the next morning (Sunday) at eight o'clock. This evidence was not contradicted by any other witness, and the probability is that the story is true. Having finished with Mr. Catling at 9-30 p.m. on Saturday night, the driver took the car back to the appellant's works and drove away with it at about 10 p.m. This is according to the evidence of the watchman. As the works were closed at 6 p.m. the car could not be left there in the garage for the night. The driver went to his house in the car, had his food, and drove off to a drama, returning home at 2 a.m. on Sunday morning. He slept in the car that night. That is the driver's story.

However that may be, one thing is quite clear that on Sunday morning he started off at about 7-30 a.m. in the direction which led to Mr. Catling's bungalow about a mile distant, and that

the accident happened while he was on the way. As already stated the driver was taking the car to Mr. Catling in accordance with his instructions. He ought to have gone to Mr. Dupan's bungalow on the previous night. But the circumstance that he had deviated from the strict order of his master will not relieve the appellants from liability for his negligence if, at the time of the negligent act, he was in the course of his employment.

The rule in such cases has been stated by BARON PARKE in *Joel v. Morison*(1) thus :

"If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. . . . The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

Again, in *Storey v. Ashton*(2) COCKBURN L.C.J. says :

"The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey."

In the same case, LUSH J. said :

"The question in all such cases as the present is whether the servant was doing that which the master employed him to do."

In the present case it is a fair inference that when the driver had left Mr. Catling's house he had decided to use the car for his own purpose.

STANES
MOTORS, LTD.
v.
PETER.
CORNISH J.

(1) (1834) 6 Car. & P. 501; 172 E.R. 1338. (2) (1869) L.R. 4 Q.B. 476.

STANES
MOTORS LTD.
v.
PETER.
CORNISH J.

The trip to the drama to which he says he treated himself had no relation to his master's business. And, if on the Sunday morning the accident had happened while he was returning in belated obedience to his orders to Mr. Dupan's bungalow, we think that it could not have been held to have occurred in the course of his employment. The expedition would have been from first to last solely for the driver's own purpose. And the case would have stood on the same footing as *Mitchell v. Crassweller*(1) and *Rayner v. Mitchell*(2). But we are satisfied that on Sunday morning the driver was taking the car to Mr. Catling in pursuance of his overnight instructions. And that was in the scope of his employment, because, Mr. Dupan has stated in his evidence that the driver had instructions to attend to Mr. Catling. It can make no difference that the driver, for his own convenience and in deviation from his orders, had started from his home instead of starting from Mr. Dupan's bungalow, because the errand that he was then on was connected with his master's business and accordingly within the scope of his employment.

For these reasons we are of opinion that the negligent act was committed by the driver in the course of his employment. It follows that the appellants are liable for their servant's act.

There remains the question of damages. Under the Act the suit is to be for the benefit of a wife, husband, parent and child. The learned Judge in the Court below has awarded Rs. 1,500 to the mother of the deceased and Rs. 3,000 each to the widow and child. The rule is that the damages must be fixed solely with reference to the pecuniary

STANES
MOTORS, LTD.
v.
PETER.
CORNISH J.

loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiff must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted; see *Barnett v. Cohen*(1). The mother has adduced no such evidence. There is no proof that she has suffered pecuniary loss in consequence of the death of the deceased. Consequently the award of compensation to her cannot stand.

With regard to the widow and child no sufficient reason has been shown why we should interfere with the amount awarded. There is evidence that the deceased was a skilled mechanic capable of earning Rs. 90 or Rs. 100 a month. In these circumstances it seems to us that the income which is likely to be obtained from the capital amount awarded by the Court below is not an unreasonable amount of compensation.

For these reasons the amount of total compensation awarded will be reduced to Rs. 6,000 payable to the widow and the child and the appeal in other respects will be dismissed with costs.

With regard to the memorandum of objections that interest at six per cent ought to have been allowed on the decree amount, we allow interest at the rate of six per cent per annum on the amount of compensation, namely, Rs. 6,000, from the date of the lower Court's decree. There will be no order as to costs on the memorandum of objections.

Solicitors for appellant : *King & Partridge.*

G.R.

(1) [1921] 2 K.B. 461.

(1) (1853) 13 C.B. 237.

(2) (1877) 2 C.P.D. 357.

APPELLATE CIVIL.

Before Mr. Justice Stone and Mr. Justice Pandrang Row.

1935,
September 10.

BASUDEVA DOSS (DEFENDANT), APPELLANT,

vs.

SREE SREE SREE CHANDRA CHUDAMANI RAJA
HARISCHAND JAGADDEVA GARU (DEAD)
AND ANOTHER (PLAINTIFF AND NIL), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 3 (11) (a)—Rent—
Fee over and above rent charged for cost of collecting rent—
Rent, if—Sec. 143—Effect of.*

A fee charged over and above the rent for the cost of collecting rent and not shown in the record of rights or in any patta either issued by the landlord or by the land Settlement Officer cannot be deemed to be "rent" within the extended meaning of that term as defined in section 3 of the Madras Estates Land Act and it cannot be recovered by reason of the provisions of section 143 of that Act.

APPEALS against the decrees of the District Court of Ganjam in Appeal Suits Nos. 277 of 1928 and 253 of 1928, preferred against the decrees of the Court of the Sub-Collector of Berhampore Division in Original Suits Nos. 352 of 1927 and 45 of 1927 respectively.

B. Jagannadha Das for appellant.

C. S. Venkatachari for second respondent.

Cur. adv. vult.

JUDGMENT.

STONE J.

STONE J.—These second appeals raise a point of some difficulty, viz., whether fees charged over and above the rent for the cost of collecting rent and not shown in the record of rights or in any

* Second Appeals Nos. 1181 of 1931 and 38 of 1932.

patta either issued by the landlord or by the land Settlement Officer can be deemed to be "rent" within the extended meaning of that term as defined in section 3 of the Madras Estates Land Act. If it is not, then such fee cannot be recovered, it being struck at by section 143 of the said Act.

The Sub-Collector has said that "there seems little doubt that this is a customary and established payment". The District Judge has adopted that statement. It is said that is a finding of fact that should not be disturbed in second appeal.

The Sub-Collector, relying on points of law derived from Chapter XI of the Estates Land Act, has disallowed this part of the claim. The District Judge has allowed it.

The principal question arises under section 3 (11) (a). Section 3 (11) defines "rent". Section 3 (11) (a) includes for the purpose of certain sections certain payments which apart from this statutory inclusion would not be "rent". The material words of section 3 (11) (a) are as follows :

"Any fee or sum payable by a ryot as such in addition to the rent due . . . according to law or usage having the force of law . . ."

The question of what these words include has been considered by the Courts in a number of cases. I put on one side cases under the Bengal Act, such as *Mahomed Fayez Chowdhry v. Jamoo Gazee*(1) and *Radha Charan Ray Chowdhry v. Golak Chandra Ghose*(2). Apart from the fact that these cases would appear to be in conflict with a later decision of the Privy Council in *Sri Rani Chattri Kumari Devi v. Broucke*(3), they are concerned with a different Act. I do not think it

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.
—
STONE J.

(1) (1882) I.L.R. 8 Cal. 730.

(2) (1904) I.L.R. 31 Cal. 834.

(3) (1927) 54 M.L.J. 293 (P.C.).

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.
—
STONE J.

could be seriously contended that a charge for collecting rent (as here) can be regarded as "actual rent". Nor can it be regarded as "rent" in the sense as defined in section 3 (11), i.e., apart from 3 (11) (a). If it were so regarded, then this claim would fail because the rent has been settled and does not include these charges. See sections 168 and 176.

There remain a number of cases that are concerned with charges similar to these. The nearest to this case are those concerned with the so-called "stationery charges".

That line of cases begins with an unreported decision of a Bench composed of the then Chief Justice, COLLINS C.J., and BENSON J. (Second Appeal No. 57 of 1896). The fee in question there was one called *sadalwar*. I quote from the judgment:

"The payment for *sadalwar* is a reasonable fee to cover the expenses of preparing the pattahs each year. It has been entered in the pattah and has been paid for at least thirty or forty years by the tenant along with the rent. The inclusion of such a fee in the pattah is contemplated by section 4 of the Rent Recovery Act, and the long continued payment of it raises a strong presumption of a contract between the parties that the fee should be paid."

In *Venkata Perumal Raja v. Ramudu*(1), the question (*inter alia*) was whether *sadalwar* (a charge for stationery) customarily paid along with the rent for a long number of years was to be treated as "rent". The only part of the judgment dealing with this point is to be found at page 90. It is as follows:

"I am prepared to follow the decision in Second Appeal No. 57 of 1896 and to hold that *sadalwar* . . . forms part of the rent of the lands and (is) not (an) additional illegal cess."

(1) (1914) I.L.R. 39 Mad. 84.

In *Sree Sankarachari Swamiar v. Varada Pillai*(1) a fee payable to the village accountant was allowed. The learned Judge (SUBRAMANIA AYYAR J.) observes:

"According to the immemorial custom of the country, these fees are generally payable out of the produce of the land, and, in the majority of cases, it is the landlord that has to collect and pay them over to the servants concerned. Though not rent in the sense in which he could appropriate them himself, yet, in so far as their recovery is concerned, that they are to be treated as part of the rent is clear from section 4 of the Act which provides for the mention in the patta of the amount and nature of the rent 'including any fees or charges payable with it according to established usage'."

This, it will be observed, is a decision under the old Rent Recovery Act. That Act is differently worded from the present Act. Section 4 deals with what the pattas may contain and by implication makes it clear that a fee customarily paid and which may be and is included in the patta may be recovered in addition to the rent. There is nothing requiring such fee to be payable by the ryot as such. *Lakshmanma v. Appa Rau*(2) is also under the old Act and decides merely that a patta is not inseparable by reason of its providing for the payment of fees to village artisans when such fees are customary and are included in the patta. It bases the obligation on contract. *Arunachallam Chettiar v. Mangalam*(3) is a case where the fee levied was a charge for supervising the harvest. It was held that it was a charge payable by the ryot as such and fell within section 3 (11) (a).

In *Karri Peddi Reddy v. Receiver, Nidadavole and Medur Estates*(4) it was held that fees collected for payment to the karnam in lieu of salary

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.
—
STONE J.

(1) (1903) I.L.R. 27 Mad. 332, 336.
(3) (1915) I.L.R. 40 Mad. 640.

(2) (1893) I.L.R. 17 Mad. 73.
(4) (1915) 18 M.L.T. 171.

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.

STONE J.

can be included in the patta under the power conferred by section 51 and when so included are fees to be included in the term rent for the purposes of section 148.

It is said that this line of authorities is conclusive of the point now in debate. It is also urged that such cases as *Sundaram Iyer v. Theetharappa Mudaliar*(1) and *Sri Mahant Prayaga Doss Jee v. Venkama Naidu*(2) show that a contract to pay should be implied from a long-continued practice of paying.

I propose to consider these contentions.

It will be noticed that three of the above decisions are decisions under the old Rent Recovery Act. Another purports simply to follow one of those decisions as though no change whatever had occurred in the law. This group includes all the cases that are similar to this case on the facts. Most of these cases turn on the fact that the fees in question were included in the patta and are payable with the rent. Not one, except *Arunachallam Chettiar v. Mangalam*(3), where the nature of the fee and the facts of the case were different from the facts here, considered the words "payable by the ryot as such" in section 3 (11)(a).

These words in our opinion are fundamental. As was pointed out in *Devanai v. Raghunatha Row*(4), even under the old Act the fee must be payable along with the rent. It must be one that has been made an incident of the tenure. Now, under the Act as it stood at all relevant times, it is clear that the fee must be payable not

(1) (1916) 40 I.C. 159.
(3) (1915) I.L.R. 40 Mad. 640.

(2) (1917) 7 L.W. 477.
(4) (1912) 18 I.C. 222

merely with the rent and by the ryot but by the ryot as such, i.e., it must be payable by him as an incident of his holding.

It further must be payable by him and payable by him to the landlord before the landlord can claim it. I have sought in vain to find here on what ground the alleged obligation is based. Counsel urged custom. There is no finding of a legally binding custom and I do not know how a custom could grow up even in sixty years between a landlord and his tenants which would legally bind the tenants to pay, say double rent, as a consequence of the binding force of the custom. I can understand its being said, as it has been said in several of the cases cited, that a contract can be implied from a long—continued usage when the term in question is included in the patta. But that is not found here and is not, as I understand it, argued here. It is not said the obligation to pay is based on a contract to be implied from long-continued usage and it would be difficult to imply such a contract in the circumstances here present. Many of the receipts given do not include this charge. The entries in the books relating to this fee are in a different ink and therefore presumably made at a different time from the entries relating to the rent. The fee is not entered in any patta. The patta as settled by the Settlement Officer does not include this fee.

That later point also raises a doubt as to whether these payments were to be made, or were made, at the same time as the rent, or were to be made to the landlord or merely to the landlord's servants for the benefit not of the landlord but of the servants.

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.
STONE J.

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.
—
STONE J.

It is also a most material fact that here there have been disputes as to the obligation to pay this fee or percentage and that at the time of the settlement of rents these fees were not entered, as they should have been entered were they to be included in the term "rent", as required by section 165. The last point has not in our opinion the great weight given to it by the Sub-Collector for the reasons given by the learned District Judge, but it goes a very long way to show that even the landlord did not regard this as a fee payable by the ryot as such.

It is, indeed, difficult for me to see how a charge for collecting rent can be regarded as a payment payable by the tenant as tenant. It was urged by Counsel that the Act imposes on the ryot the obligation to go to the landlord and pay him. A picture was drawn of a kindly landlord saving the tired legs of his ryots by sending his servant to collect, the landlord, of course in consideration of that service, making a charge for collection. Let it be so. What does this amount to? It amounts to a collateral contract that for the service of sending a collector to collect the rent the ryot will pay a sum of money. Apart from the fact that there is no finding that any such contract was made, and assuming it was made, the money payable under such a contract would not be payable by the ryot as ryot but by the ryot as being a party to that contract, which contract has nothing whatever to do with tenure.

In my opinion therefore these appeals succeed and the judgment arrived at by the Sub-Collector should be restored though for reasons other than

those given by him. The appellant is entitled to his costs throughout in each case.

PANDRANG ROW J.—I agree that the fee in question is not rent and that the appeals should be allowed.

A.S.V.

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

RAMAHARI PATRO, MINOR BY GUARDIAN SRIMATHI PATRANI
(SECOND COUNTER-PETITIONER), PETITIONER,

1935,
July 26.

v.

GOVINDA RONA (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 95—Applicability—Minor plaintiff—Case of—Improper arrest before judgment obtained by next friend—Damages against minor's estate in respect of—Award of—Power of Court.

Section 95 of the Code of Civil Procedure is not inapplicable to cases in which the plaintiff is a minor. The Court has therefore power under that section to award damages against the minor's estate in respect of an improper arrest before judgment obtained by his or her next friend.

In considering the provisions of the Code relating to costs (section 35) or to damages for improper arrest or attachment before judgment (section 95), it is not right to deal with the general law relating to the circumstances in which a minor's estate can be made liable in respect of the acts of a guardian.

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 Berhampur,

* Civil Revision Petition No. 1643 of 1933.

dated 29th April 1933 and made in Original Petition No. 13 of 1932.

B. Jagannadha Das for petitioner.
Respondent *ex parte*.

JUDGMENT.

This revision petition raises a question of some importance. In a money suit instituted on behalf of a minor plaintiff by his mother as next friend, an arrest before judgment was obtained on allegations which have been subsequently found by the Court not to have been justified. The defendant accordingly applied for an award of damages under section 95 (a) of the Civil Procedure Code and the lower Court has awarded a sum of Rs. 30 and directed it to be recovered from the family property of the minor.

In revision, Mr. Jagannadha Das contends that, taking the arrest to be improper, it was a tortious act of the next friend and the Court ought not to have awarded damages against the minor's estate in respect of such tortious act. The objection is plausible, and I am sorry to be obliged to decide it without the help of an argument on behalf of the respondent, as the respondent is *ex parte*.

I have however come to the conclusion that the view taken by the Court below is right. In considering the provisions of the Code relating to costs (section 35) or to damages for improper arrest or attachment before judgment (section 95), it does not seem to me right to deal with the general law relating to the circumstances in which a minor's estate can be made liable in respect of the acts of a guardian. Take the instance of a

suit instituted by a next friend on behalf of a minor. When such a suit fails, Courts have frequently given a decree for costs against the minor's estate. I do not think it is possible to bring such a case under any principle of the law of contract or the law of torts or the law relating to alienation by a guardian. I presume that the justification for such a course is that the language of section 35 is wide enough to authorize it and it is only in the special circumstances contemplated by Order XXXII, rule 14, Civil Procedure Code, namely, when the Court is satisfied that the institution of the suit was unreasonable or improper, that the next friend can be made personally liable for costs. In the same way, when section 95 of the Code is invoked, I do not think it is legitimate to canvass whether, if a suit for damages is brought by a defendant aggrieved by a wrongful arrest or attachment, he could obtain relief against the minor plaintiff or not. It may in a sense be true that section 95 provides a summary remedy for relief which can also be obtained by a suit. But I am not satisfied that the two remedies are co-extensive for all purposes and must be decided on the same considerations. For instance, sub-clause (b) of section 95 provides for compensation being payable to a defendant against whom an arrest or attachment before judgment was obtained, if the suit of the plaintiff ultimately fails and it appears to the Court that there was no reasonable or probable ground for instituting the same. I very much doubt if a claim like this could be made the subject of a separate suit.

I have, therefore, to consider whether there is any necessity or justification for excluding the

RAMAHARI
PATRO
v.
GOVINDA
RONA.

application of section 95 to cases in which the plaintiff happens to be a minor represented by a next friend. I am not satisfied that there is sufficient reason for doing so. It may ordinarily be presumed that, in such a suit, the next friend is taking steps to obtain an arrest or attachment before judgment only in the supposed interests of the minor. If ultimately damages should be awarded in respect of such action, it may well be made a matter of accountability by the guardian to the minor's estate, instead of denying all redress to the aggrieved defendant on the ground that the application was made not by the minor plaintiff but by his next friend. The section only says that the award of compensation is to be against the plaintiff and the plaintiff in the action is undoubtedly the minor and not the guardian. The award of compensation would therefore, just like the award of costs, be only against the minor, recoverable no doubt from his estate.

I do not feel that such a view will seriously jeopardise a minor's interests. After all, it is for the Court to consider whether or not compensation ought to be awarded and, if the Court is satisfied that in making the application the next friend was acting for his own ends and not in the belief that it was for the interests of the minor's estate, the Court may either refuse to exercise its discretion and refer the defendant to a suit for damages or, if the analogy of Order XXXII, rule 14, could be invoked (even during the plaintiff's minority), the Court may pass an order against the next friend himself. I am accordingly of opinion that the balance of convenience is in favour of the view that section 95 ought not to be held to

be inapplicable to cases in which the plaintiff happens to be a minor. The revision petition is therefore dismissed.

A.S.V.

RAMAHARI
PATRO
v.
GOVINDA
RONA.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Stodart.

NETTALIA SEQUERIA (PLAINTIFF), APPELLANT,

v.

CHOVVAKARAN ORKATTERI ABDUL KHADER,
MINOR, AND TWO OTHERS ALSO MINORS, BY GUARDIAN
KHAN SAHIB THAYILAKANDI MUKKATIL MOIDU
(RESPONDENTS), RESPONDENTS.*

1935,
July 29.

Malabar Tenancy Act (XIV of 1930), secs. 3 (o) and (p), 18, 20 (6), 22 and 40 (2)—Melchartdar—Ejectment suit by, against kuzhikanamdar from jenmi or original landlord—Application under sec. 22 by kuzhikanamdar in—Objection under S. 20 (6) by melchartdar to—Maintainability—Party to application—Jenmi or original landlord, if a necessary party.

The first plaintiff, the ultimate landlord or jenmi and the karnavan of a tarwad, granted to the mother of the plaintiffs 2 to 4 a melcharth. The melcharth document contained no provision for any payment of rent to the melchartdar during the continuance of the original tenant in possession, nor did it provide for any collection of rent by the melchartdar from the original tenant. It empowered the melchartdar to give notice to quit to the original tenant but it went on to add that any suit in ejectment should be instituted jointly with the karnavan but conducted at the expense of the melchartdar. After the grant of the melcharth, plaintiffs 1 to 4, the mother of the plaintiffs 2 to 4 having died in the meanwhile, filed a suit in ejectment against the defendant who was in possession

* Appeal Against Order No. 291 of 1933.

SEQUERIA
v.
ABDUL
KHADER.

from the jenmi as a kuzhikanamdar. In that suit the defendant filed an application claiming a renewal under section 22 of the Malabar Tenancy Act.

Held that the first plaintiff was a necessary party to that application as he was the landlord to whom notice should be given on such application and he was the person with reference to whose plea a claim under section 20 (6) of the Act must be decided.

Section 18 of the Act no doubt speaks of the "immediate landlord", but a person must satisfy the definition of "landlord" before he can be spoken of as the "immediate landlord", and, if the melchartdar is not really a landlord within the meaning of the definition in the Act, the first plaintiff must be taken to be the landlord for all purposes.

APPEAL against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal Suit No. 41 of 1932 preferred against the order of the Court of the Additional District Munsif of Tellicherry in Revised Interlocutory Application No. 86 of 1931 in Original Suit No. 502 of 1930.

B. Sitarama Rao for appellant.

B. Pocker for respondents.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal against an order of remand passed by the learned Subordinate Judge of Tellicherry in connection with an application made by a tenant who was a defendant in an ejectment suit. The application was made under section 22 of the Malabar Tenancy Act, and the case raises a point of some importance with reference to the construction of certain provisions of that Act. The first plaintiff is the ultimate landlord or jenmi. Also he is the karnavan of a tarwad and plaintiffs 2 to 4 are his sister's children. In 1928, the first plaintiff granted to his sister (the mother of the plaintiffs 2 to 4) what is described in the plaint as a "melcharth" but the

document itself has not been marked as an exhibit in the case. In 1930, the four plaintiffs (the sister having died in the meanwhile) filed a suit in ejectment against the present appellant who was in possession from the jenmi as a kuzhikanamdar. We are not now concerned with the merits of the ejectment suit but only with the application which the defendant filed in that suit, claiming a renewal under section 22 of the Tenancy Act. To that application he made only plaintiffs 2 to 4 parties and not the first plaintiff (who was the karnavan and the original landlord). That application was resisted on the ground that the paramba was required for *bona fide* building purposes as contemplated in section 20 (6) of the Act. The learned District Munsif dismissed the application holding that plaintiffs 2 to 4 were entitled to raise that question and that the paramba was in fact required for a purpose contemplated by section 20 (6).

The defendant (petitioner) appealed, contending that plaintiffs 2 to 4 were not entitled to avail themselves of the objection under section 20 (6) by reason of section 40 (2). The learned Subordinate Judge upheld this contention, but he was of opinion that the application for renewal should be made against the landlord, who according to him was the first plaintiff, and that it was bad for not making him a party. He accordingly set aside the order of the lower Court and remanded the application to be disposed of after making the first plaintiff a party to the application.

The tenant has appealed against this direction of the learned Subordinate Judge and on his behalf it has been contended before us by Mr. Sitarama Rao that the application should have been

SEQUERIA
v.
ABDUL
KHADER.
—
VARADACHARIAR J.

SEQUERIA
v.
ABDUL
KHADER.
—
VARADA-
CHARIAR J.

straightway granted, on the ground that plaintiffs 2 to 4 were precluded from relying upon section 20 (6) and that it was unnecessary to implead the first plaintiff, because after the grant of the melcharth he is really not the landlord at all. On behalf of the respondents a memorandum of cross-objections has been filed, contending that the Subordinate Judge should have affirmed the order of the District Munsif, that it is unnecessary to implead the first plaintiff as a party to the application and that the remand is therefore uncalled for.

As we stated at the outset, the melcharth document has not been filed as an exhibit in the case. But we have been shown a copy of it and, as its contents substantially correspond to the description given of it in paragraph seven of the plaint in the suit, it is not necessary for us to insist upon its being formally proved and marked. It contains no provision for any payment of rent to the melchartdar during the continuance of the original tenant in possession, nor does it provide for any collection of rent by the melchartdar from the original tenant. It no doubt empowers the melchartdar to give notice to quit to the original tenant but it goes on to add that any suit in ejectment should be instituted jointly with the karnavan but conducted at the expense of the melchartdar. In the light of these provisions, the question for consideration in this appeal is, who is the "landlord" for the purpose of the Act? Section 3 (o) defines a "landlord" as the person under whom a tenant holds and to whom he is liable to pay rent or michavaram and includes a jenmi. There can be no doubt that the first plaintiff as representing the tarwad is the jenmi in

this case and, as the melcharth contains no provision enabling the melchartdar to collect rent from the original tenant, the melchartdar cannot in any sense be regarded as a "landlord". Again in sub-clause (p) of the same section, a "melcharth" is defined as the transfer by the landlord of part of his interest in any land held by his tenant by which the transferee is entitled to evict such tenant. Here again, as we have pointed out already, the document seems to contemplate that the right to evict the original tenant lies not exclusively in the melchartdar but only in him jointly with the original landlord. The right to evict cannot therefore be said to be wholly vested in the melchartdar or transferred away from the first plaintiff. Taking this to be the correct legal position of the parties, we do not see how the appellant can contend that the first plaintiff is not the landlord to whom notice should be given on an application under section 22 or that he is not the person with reference to whose plea a claim under sub-clause 6 of section 20 must be decided. Section 18 no doubt speaks of the "immediate landlord", but a person must satisfy the definition of "landlord" before he can be spoken of as the "immediate landlord", and if the melchartdar is not really a landlord within the meaning of the definition in the Act the first plaintiff must be taken to be the landlord for all purposes. In this view, the order of the learned Judge is right. The appeal as well as the cross-objections must be dismissed. In the circumstances we make no order as to costs in this Court.

A.S.V.

SEQUERIA
v.
ABDUL
KHADER.
—
VARADA-
CHARIAR J.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

1935,
September 19.

THE PRESIDENT, UNION BOARD, PENTAPADU,
AND ANOTHER (DECREE-HOLDER AND NIL), APPELLANTS,

v.

SREEMATH THIRUMALA VENKATA SRINIVASA-
CHARYULU AYYAVARLU AND TWO OTHERS (JUDGMENT-
DEBTORS AND SURETY), RESPONDENTS.*

*Limitation Act (IX of 1908), art. 182 (5)—Step in aid of
execution—Decree-holder's application to record payment in
part satisfaction of decree, if a.*

An application made by a decree-holder asking the Court to record a payment of a certain sum in part satisfaction of the decree is not an application within the meaning of article 182 (5) of the Limitation Act to take a step in aid of execution.

Observations to the contrary in *Narayana Nair v. Kunhi Raman Nair*, (1924) 20 L.W. 190, and *E. Chathukutty v. E. Raman*, A.I.R. 1933 Mad. 674, dissented from.

The authority of *Tarani Doss Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya*, (1886) I.L.R. 12 Cal. 608, and *Sujan Singh v. Hira Singh*, (1889) I.L.R. 12 All. 399 (F.B.), held to be very seriously impaired by the decision in *Raja Shri Prakash Singh v. Allahabad Bank, Limited*, (1928) I.L.R. 3 Luck. 684 (P.C.).

APPEAL against the order of the Court of the Subordinate Judge of Ellore, dated 12th March 1934 in Execution Petition No. 98 of 1933 in Original Suit No. 81 of 1926.

K. Kameswara Rao, P. V. Rajamannar and K. Subba Rao for appellants.

V. Govindarajachari for third respondent.

Other respondents were unrepresented.

* Appeal Against Order No. 360 of 1934.

The JUDGMENT of the Court was delivered by BURN J.—We consider that the decision of the learned Subordinate Judge is undoubtedly correct. The facts are that the decree was passed on 21st February 1928. On 13th August 1930, Rs. 1,200 was paid to the decree-holder out of Court and another Rs. 1,300 on 24th March 1931. Up to that time no execution petition had been filed. The first execution petition filed in the case at all was Execution Petition No. 98 of 1933 filed on 25th September 1933. The objection taken by the respondents who were judgment-debtors and sureties for the judgment-debtors was that the execution petition was barred by limitation. The decree-holder relied upon Miscellaneous Petition No. 337 of 1930 which was a petition filed in the Sub-Court, Ellore, on 29th September 1930 and which runs as follows :—

“For the reasons stated in the accompanying affidavit the petitioner prays the Honourable Court may be pleased to record a payment of Rs. 1,200 in part satisfaction of the decree.”

The Court on 27th October 1930 passed the following order : “Allowed. Memo. would have been sufficient.” The only question is whether this petition, Miscellaneous Petition No. 337 of 1930, was an application within the meaning of article 182 (5) of the Limitation Act to take a step in aid of execution. The learned Subordinate Judge decided that it was not an application to take a step in aid of execution. Mr. Kameswara Rao for the appellant admits that there is no decision of any Bench of this Court to the contrary. He has referred us to the decisions of two single Judges reported as *Narayana Nair v.*

PRESIDENT,
UNION BOARD
PENTAPADU
v.
VENKATA
SRINIVASA-
CHARYULU.
BURN J.

PRESIDENT,
UNION BOARD,
PENTAPADU
v.
VENKATA
SRINIVASA-
CHARYULU.
BURN J.

Kunhi Raman Nair(1) and *E. Chathukutty v. E. Raman*(2). Those were cases which did not deal expressly with this point, but in which the Judges made remarks *obiter* indicating that they considered such applications to be applications to take a step in aid of execution. Mr. Kameswara Rao has also referred us to the cases reported as *Tarani Dass Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya*(3) and *Sujan Singh v. Hira Singh*(4) in which it was held that such applications are applications to take a step in aid of execution. It is clear, however, that those decisions have lost much of their force after the decision of the Privy Council reported as *Raja Shri Prakash Singh v. Allahabad Bank, Limited*(5). Their Lordships of the Privy Council have stated that they did not decide this point expressly, but from the whole tenor of their judgment it is apparent that the authority of the rulings in *Tarani Dass Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya*(3) and *Sujan Singh v. Hira Singh*(4) is very seriously impaired. Their Lordships have observed that under Order XXI, rule 2 (1), Civil Procedure Code, the decree-holder does not really make an application to the Court at all. What he does is to report that a payment towards the decree has been made out of Court. Thereupon, the Court, whether the decree-holder applies to the Court to do so or not, is obliged to record satisfaction, partial or complete as the case may be. It is not necessary for the decree-holder to ask the Court to do anything.

In the present case, as we have already observed, the petitioner prayed the Honourable Court to

(1) (1924) 20 L.W. 190.

(2) A.I.R. 1933 Mad. 674.

(3) (1886) I.L.R. 12 Cal. 608.

(4) (1889) I.L.R. 12 All. 399 (F.B.).

(5) (1928) I.L.R. 3 Luck. 684 (P.C.).

be pleased to record the payment. To that extent it may be said that he did make an application. But how can this be said to be an application to take a step in aid of execution? Mr. Kameswara Rao is not able to adduce any convincing argument on this point. The reasoning in the judgment⁵ reported as *Tarani Dass Bandyopadhyaya v. Bishtoo Lall Mukhopadhyaya*(1) and *Sujan Singh v. Hira Singh*(2) is, we say with all respect, not clear to us. The words "application to take a step in aid of execution" are extremely simple words and we find no difficulty in understanding them. If the Court is asked to take a step in aid of execution, it must, we think, be a step which will bring execution nearer by however so little it may be. In this case, all that the Court is asked to do is to record the payment of Rs. 1,200 in part satisfaction of the decree. It is clear that when the payment is recorded, the execution of the decree is not advanced in even the slightest degree. We agree therefore that this petition, Miscellaneous Petition No. 337 of 1930, was not an application to the Court to take a step in aid of execution and therefore the decision of the learned Subordinate Judge that the execution petition filed on 25th September 1933 was barred by limitation is correct.

This appeal is accordingly dismissed with costs.

A.S.V.

(1) (1886) I.L.R. 12 Cal. 608.

(2) (1889) I.L.R. 12 All. 399 (F.B.).

PRESIDENT
UNION BOARD,
PENTAPAI
v.
VENKAT.
SRINIVAS
CHARYULU
BURN J

APPELLATE CIVIL.

*Before Mr. Justice Cornish.*1935,
August 20.THE DEPUTY COMMISSIONER OF POLICE, MADRAS
(PETITIONER—APPLICANT), PETITIONER,

v.

S. VEDANTAM AND ANOTHER (PLAINTIFF AND DEFENDANT—
RESPONDENTS), RESPONDENTS.*

Madras Motor Vehicles Taxation Act (III of 1931)—Tax payable under, in respect of licence for motor-car—Arrears of—Crown debt, if—Sale proceeds of sale of motor-car of defaulter attached and sold in execution of money decree in deposit in Court—Crown's right to be paid arrears of tax out of, in priority to attaching decree-holder—Secs. 8 and 9 of Madras Motor Vehicles Taxation Act—Effect of—Attachment—Effect in India of.

In execution of a money decree a motor-car belonging to the judgment-debtor was attached and sold. The Crown, represented by the Deputy Commissioner of Police in charge of licences, applied to the Court claiming a portion of the sale proceeds paid into Court (and which had not been paid out to the decree-holder) as arrears of tax due by the judgment-debtor under the Madras Motor Vehicles Taxation Act, the tax being one made payable by the Act in respect of licences which owners of motor-cars were required to take out under the Act.

Held that the arrears of unpaid tax due by the judgment-debtor were clearly a debt due to the Crown, that is to say a Crown debt, that the debt being created by an Act was a specialty debt which had priority over all other debts, and that the Crown was entitled to receive payment of its debt out of the money in Court.

Even regarding the debt as a simple debt the Crown would have the prior right to payment over the decree-holder, because, whenever the right of the Crown and the right of the subject in respect of payment of a debt of equal degree compete, the Crown's right prevails.

* Civil Revision Petition No. 1546 of 1933.

In re Henley & Co., (1878) 2 Ch. D. 469, and *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179, relied upon.

The money, the sale proceeds paid into Court, did not become the decree-holder's money, because the effect of an attachment in India under the Code of Civil Procedure is not to create a charge or to convert the attaching creditor into a secured creditor.

Gayanoda Bala Dassee v. Butto Kristo Bairagee, (1906) I.L.R. 33 Cal. 1040, followed.

The provisions of sections 8 and 9 of the Madras Motor Vehicles Taxation Act do not exclude the Crown's power to enforce its prerogative right by other means.

PETITION under sections 115 of Act (V of 1908) and 107 of the Government of India Act praying the High Court to revise the judgment of the Full Bench of the Court of Small Causes, Madras, in New Trial Application No. 80 of 1932.

Government Pleader (K. S. Krishnaswami Ayyangar) for petitioner.

G. Rajagopalan for *S. Rajam Ayyangar* for first respondent.

Cur. adv. vult.

JUDGMENT.

This is a petition to revise the order of a Full Bench of the Small Cause Court disallowing a claim based on the prerogative right of the Crown to be paid its debt in priority to other creditors. The Full Bench took the view that the debt in question was not a Crown debt. This decision is so fundamentally wrong that I think a revision petition is justified.

The facts shortly stated are that the plaintiff-respondent had obtained a money decree on a debt, and in execution had attached and brought to sale a motor-car belonging to his judgment-debtor. The decree was made on 9th September

DEPUTY
COMMISSIONER
OF POLICE
v.
VEDANTAM.

DEPUTY
COMMISSIONER
OF POLICE
v.
VEDANTAM.

1931 and the attachment made absolute on that date. The motor-car was sold on 28th November 1931 for a sum of Rs. 53. On 4th December 1931 the Crown, represented by the Deputy Commissioner of Police in charge of licences, sent a written notice to the Court claiming Rs. 50 out of the money paid into Court (and which had not been paid out to the decree-holder) as arrears of tax due by the judgment-debtor under the Madras Motor Vehicles Taxation Act. This tax is made payable by the Act in respect of licences which owners of motor-cars are required to take out under the Act. The arrears of unpaid tax due by the judgment-debtor were clearly a debt due to the Crown, that is to say a Crown debt, and the learned Advocate for the plaintiff-respondent has quite properly not attempted to justify the Full Bench's decision to the contrary. The debt being created by Act was a specialty debt, and debts due to the Crown by record or specialty have priority over all other debts. Even regarding the debt as a simple debt, the Crown would have the prior right to payment over the plaintiff-respondent, because, whenever the right of the Crown and the right of the subject in respect of payment of a debt of equal degree compete, the Crown's right prevails; *In re Henley & Co.*(1) and *New South Wales Taxation Commissioners v. Palmer*(2).

It has been contended that the money paid into Court had become the decree-holder's money and was no longer available to the Crown for the satisfaction of its debt. No doubt under English law, if the subject has completely executed his distress by actual sale of his debtor's property

(1) (1878) 9 Ch. D. 469.

(2) [1907] A.C. 179.

DEPUTY
COMMISSIONER
OF POLICE
v.
VEDANTAM.

before distress proceedings are taken by the Crown, the Crown's right will be defeated; *Attorney General v. Leonard*(1). But this is because under the English law a creditor is, after seizure of his debtor's goods under a writ of *fi fa*, in the position of a secured creditor, with a legal right to have the goods sold and to be paid out of the sale proceeds; see *Clarke, In re*(2). But the effect of an attachment in India under the Civil Procedure Code is not to create a charge or to convert the attaching creditor into a secured creditor. The money, the sale proceeds, being in Court and unpaid to the decree-holder, I think that the Court on receiving notice of the Crown debt was bound to recognise the Crown's prerogative right to priority of payment of its debt out of that money. The question is covered by authority. In *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(3) the plaintiff in a pauper suit had obtained a decree for the conveyance of property to him by the defendants. Defendants were further ordered to pay the court-fee as certified. The plaintiff afterwards attached and sold other property of the defendants and the proceeds were paid into Court. The Government Solicitor, representing the Crown, applied to have the certified amount of court-fees paid out of this money. The application was allowed.

"It seems to me",
said SALE J.,

"that, inasmuch as the Crown represented by the Government Solicitor is entitled to precedence over all other creditors, no necessity exists for attachment of the fund before claiming payment. The Court is bound by section 284 of the Code (of

(1) (1888) 38 Ch. D. 622.

(2) [1898] 1 Ch. 336, 339.

(3) (1906) I.L.R. 33 Cal. 1040.

DEPUTY
COMMISSIONER
OF POLICE
v.
VEDANTAM.

1882) to pay the proceeds of the attached property to such parties as are entitled under the decree to recover the same, and, inasmuch as I must hold that the Crown is entitled to be paid the amount of the court-fees in precedence to the plaintiff by whom the amount in Court was realised, it follows that the Crown is entitled to an order for payment of its dues in priority out of that sum."

It was next contended that the Motor Vehicles Taxation Act provided the proper methods of recovering the debt in sections 8 and 9, and that the Crown should be left to take these remedies. Under section 8 the Crown might have seized the debtor's motor-car for non-payment of the tax; and section 9 gave the power to levy by a distraint of the debtor's property for the debt due. But I think that these particular provisions do not exclude the Crown's power to enforce its prerogative right by other means. In *In re Henley & Co.*(1) it was held that notwithstanding that the Income-tax Act gave the Crown the right to distrain upon a debtor's chattels for arrears of tax, this did not prevent the Crown from putting forward its claim in liquidation proceedings.

I hold therefore that the order of the lower Court must be reversed; that the proper order is that the Crown is entitled to receive payment of its debt for Rs. 50 out of the money in Court; and that this petition must be allowed with costs throughout.

Attorney for petitioner—*Government Solicitor.*
A.S.V.

(1) (1878) 9 Ch. D. 469.

APPELLATE CIVIL.

Before Mr. Justice Cornish and Mr. Justice Varadachariar.

THE REVENUE DIVISIONAL OFFICER, TRICHINOPOLY (REFERRING OFFICER), APPELLANT,

1935,
September 23.

v.

VENKATARAMA AYYAR AND ANOTHER (CLAIMANT
AND nil), RESPONDENTS.*

Interest—Land Acquisition Act (I of 1894)—Case not falling under sections 16 and 17 of Act—Government taking possession of land before payment of compensation money—Interest to the owner of the land on the compensation money for this period—Right to—Principle underlying the grant of.

Where Government took urgent possession of certain lands before the award under the Land Acquisition Act was made, interest on the amount awarded can be given to the person entitled, for the period between the date of taking possession by Government and the payment of compensation money, even in a case which does not exactly fall under sections 16 and 17 of the Land Acquisition Act, on the principle that the right to receive interest takes the place of the right to retain possession.

APPEALS against the decrees of the Court of the Subordinate Judge of Trichinopoly dated 6th March 1920 and made in Original Petitions Nos. 70, 82, 154, 155, 156, 157, 158, 159, 160, 162, 163, 164, 165, 169 and 186 of 1928 respectively.

Government Pleader (K. S. Krishnaswami Ayyangar) for appellant.

K. V. Sesha Ayyangar, S. T. Srinivasagopalachariar and M. Murugappa Chettiar for respondents.

* Appeals Nos. 494 to 508 of 1930.

REVENUE
DIVISIONAL
OFFICER,
TRICHINOPOLY
v.
VENKATARAMA
AYYAR.
CORNISH J.

The JUDGMENT of the Court was delivered by CORNISH J.—These appeals arise out of a batch of references made to the Court under section 18 of the Land Acquisition Act. The lands acquired, thirty-seven and odd acres in extent, form a block of territory between the South Indian Railway and the river Cauvery near Trichinopoly, and have been acquired for the purpose of making a new bund in the place of the old flood bank which was washed away by the serious flood in 1924. The lands are of the same quality throughout, that is to say, single crop land. The notification under the Act was made on 20th October 1925, and that is the date for determining the market value of the land. The claimants put the value at Rs. 17-8-0 for each cent of land. The Acquisition Officer awarded Rs. 12 for each cent and the Court has given Rs. 16 for each cent.

There is evidence of two sales of land within this block which occurred on 12th February 1919 and 7th April 1923 when plots of twenty and thirty-two cents were sold at Rs. 15 and Rs. 15-10-0 for each cent respectively. But these sales were prior to the flood and undoubtedly that disaster has diminished the market value of the land. The Court has therefore rightly set off this drawback against the rise in value of the lands indicated by the difference in rates as between the two sale deeds already referred to.

The Subordinate Judge has been principally guided by the Tahsildar's report made in 1925 with reference to the proposed acquisition of this land and of neighbouring land by the Municipal Council. The Tahsildar recommended a price of Rs. 17-8-0 for each cent. But it appears that the

REVENUE
DIVISIONAL
OFFICER,
TRICHINOPOLY
v.
VENKATARAMA
AYYAR.
CORNISH J.

Tahsildar regarded this as the extreme price, for, in paragraph 6 of his report he suggests that the owners might be willing to accept something between Rs. 15 and Rs. 17-8-0. The Revenue Inspector put the value at Rs. 15. We think that this figure may be taken as the market value. The lands which were selling in 1923 for Rs. 15-10-0 for each cent might have been expected to fetch something more in 1925, but allowance must be made for the depreciation in value by reason of the flood disaster. It is true that the Acquisition Officer in his award stated that the fertility of the acquired lands had not been much affected, but the evidence shows that the disaster had diminished the capacity of the people in the locality to purchase lands.

A further question is raised with regard to six per cent interest given by the Subordinate Judge as compensation for the period of occupation by the Public Works Department Officers prior to the award, that is from 16th January 1925 to 31st December 1927. Urgent possession was required, and the consent of the owners obtained. The two sections of the Act which make provision for Government taking possession are : section 16, which says that the Collector may take possession of the land after the award is made ; and section 17, which says that in cases of urgency the Collector may take possession even before the award has been made. Sub-section (3) of section 17 makes provision for compensation to be paid when such urgent possession is taken. It requires that compensation for the standing crops and trees (if any) on the land and for any other damage sustained by sudden dispossession shall

REVENUE
DIVISIONAL
OFFICER,
TRICHINOPOLY
v.
VENKATARAMA
AYYAR.
—
CORNISH J.

be offered to the parties interested and, in case such offer is not accepted, the value of the crops and trees and the amount of such other damages shall be allowed for in awarding compensation for the land. But the facts of this case do not exactly fall under sections 16 and 17.

We have however been referred to *Vallabhdas Naranji v. Development Officer, Bandra*(1) which we think furnishes a precedent for the award of interest by way of compensation in circumstances which are very similar to the present. It was there said :

" Their Lordships agree that the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the lands by the officials before the notification of November 4, 1920, which, as before stated, was awarded in the form of interest on the value of the land computed from the date when the Government took possession."

As pointed out in *Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission*(2), the right to receive interest takes the place of the right to retain possession. We think that the principle of those cases can be applied to the present ones.

Section 34 of the Act says that the amount of compensation, if not paid on or before taking possession of the land, shall carry interest at the rate of six per cent per annum from the time of taking possession until the compensation money is paid. No doubt section 34 contemplates an award having been made. But the foundation of the section is that when compensation is payable and has not been paid, interest for non-payment must be given from the date of taking possession.

(1) (1929) I.L.R. 53 Bom. 589 (P.C.).

(2) [1928] A.C. 492.

We think that the lower Court was right in awarding six per cent interest, the rate fixed by section 34, from the date on which the Government Officers took possession.

The appeal is therefore allowed in part with regard to the rate of compensation awarded ; it will be reduced from Rs. 16 for each cent to Rs. 15 for each cent. The memoranda of objections are dismissed without costs. The Government will pay half the costs of the appeals in the cases where memoranda of objections have been filed, but in the other two cases they will pay full costs to the respondents.

G.R.

REVENUE
DIVISIONAL
OFFICER,
TRICHINOPOLY
v.
VENKATARAMA
AYYAR.
—
CORNISH J.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

1935,
September 20.

KARUMOORI NARASIMHAMURTHY (THIRD RESPONDENT),
APPELLANT,

v.

THE OFFICIAL RECEIVER, WEST GODAVARI, ELLORE,
AND TWO OTHERS (PETITIONER AND RESPONDENTS 1 AND 2),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 90, proviso—Execution sale—Items of property sold separately—Setting aside of sale as to one or some of items sold and confirming of sale as to other or others—Permissibility—Insolvency of judgment-debtor—Interim receiver—Notice to—Omission to give—Validity of execution sale in case of—Notice to executing Court under sec. 52 of Provincial Insolvency Act (V of 1920) not given.

Where in an execution sale a vacant site and a house were sold separately and there was material irregularity in the publication of the sale notice,

held that the Court could, on an application made to it under Order XXI, rule 90, of the Code of Civil Procedure, set aside the sale of the vacant site on finding that the price realised for it was inadequate and that substantial loss resulted from the irregularity while confirming the sale of the house on the ground that the price realised for it was not inadequate and that therefore no substantial loss resulted from the irregularity.

The proviso to Order XXI, rule 90, forbids the setting aside of the sale of the house in such a case.

Chhaterbijai Singh v. Damodar Das, (1932) I.L.R. 12 Pat. 181, dissented from.

Where no notice was given to the executing Court of the admission of an insolvency petition against the judgment-debtor,

held that the execution sale was not bad for want of notice to the Official Receiver who at the time the sale was held was only an interim receiver.

APPEALS against the order of the Court of the Subordinate Judge of Narsapur dated 12th April 1934 in Civil Miscellaneous Petition No. 365 of 1933 in Original Suit No. 33 of 1929.

M. Appa Rao for appellant.

V. Satyanarayana for *B. Satyanarayana* for first respondent.

S. Venugopal Rao for first and second respondents in Appeal Against Order No. 35 of 1935.

The JUDGMENT of the Court was delivered by BURN J.—These appeals arise out of an order of the learned Subordinate Judge of Narsapur passed in an application under Order XXI, rule 90, Civil Procedure Code, to set aside a sale held in execution. The sale was held on 18th April 1933. In the sale two items of property were sold, one being a vacant site and the other a house. The learned Subordinate Judge found that there was material irregularity in the publication of the sale notice. He also held that in consequence of this material irregularity the price realised for the vacant site was substantially less than it would have been but for the irregularity. He therefore set aside the sale of the vacant site.

With regard to the house, the learned Subordinate Judge found that the price realised was not inadequate and that therefore no substantial loss has been caused to the judgment-debtor. He accordingly refused to set aside the sale of the house. The purchaser of the vacant site has preferred Civil Miscellaneous Appeal No. 376 of 1934, and the Official Receiver of West Godavari

NARASIMHA-
MURTHY
v.
OFFICIAL
RECEIVER,
WEST
GODAVARI.

BURN J.

* Appeals Against Orders Nos. 376 of 1934 and 35 of 1935.

NARASIMHA-
MURTHY
v.
OFFICIAL
RECEIVER,
WEST
GODAVARI.
—
BURN J.

has preferred Civil Miscellaneous Appeal No. 35 of 1935.

[Their Lordships then considered Civil Miscellaneous Appeal No. 376 of 1934 and, concurring in the Subordinate Judge's conclusions that there had been an irregularity in the publication of the sale notice and that substantial loss had been caused to the judgment-debtor by reason of that irregularity, dismissed the appeal with costs.]

Civil Miscellaneous Appeal No. 35 of 1935 is preferred by the Official Receiver of West Godavari. Before us it is contended that the learned Subordinate Judge was wrong in setting aside the sale in part and confirming it in part. He relies upon the ruling in *Chhaterbijai Singh v. Damodar Das*(1) where it was held that, unless both the irregularity and the injury to the objector can be satisfactorily laid to one part only of the sale, the whole sale should be set aside and not the sale of particular plots only. There is no reasoning in support of this conclusion and we regret that we are not able to follow it. Order XXI, rule 90, proviso, appears to be quite clear. It is provided that

"no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

In the present case, the learned Subordinate Judge has found that the price realised by the sale of the house was adequate and that there was no substantial loss occasioned to the Official Receiver who represented the judgment-debtor. If that be so, we think it clear that the proviso to Order XXI,

(1) (1932) I.L.R. 12 Pat. 181.

NARASIMHA-
MURTHY
v.
OFFICIAL
RECEIVER,
WEST
GODAVARI.
—
BURN J.

rule 90, forbids the setting aside of the sale. Lots were sold separately and we see no reason why the sale of the house should be set aside when it is established that it was sold for an adequate price. The learned Subordinate Judge's finding that the price realised for the house was adequate has not been criticised before us.

Another objection taken on behalf of the appellant is that the sale was void as against the Official Receiver because no notice was given to him of the sale of the house. It appears that an insolvency petition, No. 9 of 1928, was filed against the judgment-debtors and that an interim receiver was appointed on 27th October 1928. According to the statement of the facts given in the order of the learned Subordinate Judge, the petition was dismissed on 29th September 1931 but it was restored on 25th September 1932. The execution petition in pursuance of which this property was sold was filed on 26th October 1932. The sale was held on 18th April 1933. The insolvent was not adjudicated until 26th August 1933 which was long after the sale. No authority is quoted for the proposition that the sale was bad for want of notice to the Official Receiver who at the time the sale was held was only an interim receiver. As the learned Subordinate Judge has pointed out, the property did not vest in the interim receiver before adjudication. It is of course the case that, under section 52 of the Provincial Insolvency Act, if notice had been given to the Court that an insolvency petition against the judgment-debtor had been admitted, the Court would have been obliged to hand over the property to the Receiver. But it is not alleged that any notice was in fact

NARASIMHA-
MURTHY
v.
OFFICIAL
RECEIVER,
WEST
GODAVARI.

given to the executing Court of the admission of the insolvency petition and, since it is also not alleged that the property ever vested in the interim receiver, we are unable to agree that the sale was bad for want of notice to him. No other point arises in this appeal which is dismissed with costs of the contesting respondents separately to be paid by the Official Receiver out of the estate.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice King.

1936,
January 16.

IN RE RAJARATNAM PILLAI (ACCUSED), PETITIONER*.

Criminal Procedure Code (Act V of 1898), sec. 246—Summons case—Magistrate taking cognisance of—Charge in, of offence triable as a warrant case—Framing of—Legality of—Sec. 190 (1) (c)—Magistrate taking cognisance of offence under, upon his own knowledge—Opportunity to accused of saying if he wishes to be tried by him or not—Necessity of.

Where a Magistrate took cognisance of a case under section 121 of the Indian Railways Act (IX of 1890), and recorded evidence according to the procedure applicable to summons cases, but framed a charge both under section 323, Indian Penal Code (Act XLV of 1860), and under section 121 of the Railways Act, thereby converting the proceedings before him from a summons case to a warrant case,

held, that the Magistrate was precluded under section 246, Criminal Procedure Code (Act V of 1898), from framing a charge under section 323, Indian Penal Code.

Under section 246, Criminal Procedure Code, once a Magistrate has taken cognisance of a summons case, he cannot convict the accused for anything but an offence triable as a summons case.

* Criminal Revision Case No. 638 of 1935.

Where a Magistrate takes cognisance of an offence under section 190 (1) (c), Criminal Procedure Code, upon his own knowledge gained by the evidence to which he has listened, he is bound to afford the accused an opportunity of saying whether he wishes to be tried or not by him.

RAJARATNAM
PILLAI,
In re.

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 Thiruvadammarudur in Calendar Case No. 179 of 1935.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioner.

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

ORDER.

The petitioner in this case has been prosecuted by the police on a charge sheet in which it is alleged that he had interfered with a certain Station Master in the exercise of his duty, and in the course of that interference had slapped him on his cheek. The charge sheet specifically referred to his offence as falling simply within section 121 of the Railways Act (IX of 1890), the maximum punishment for which is a fine of Rs. 100. The Second-class Magistrate of Thiruvadammarudur, on receiving this charge sheet, took cognisance of the case as involving an offence under that section of the Railways Act, and, as he was bound to do, he proceeded with the trial of the case under the procedure laid down for the trial of summons cases. After he had taken the evidence of the prosecution in full, it occurred to him that the evidence also established an offence under section 323, Indian Penal Code, for which offence the maximum punishment awardable is imprisonment for one year. The trial for an offence under

RAJARATNAM
PILLAI,
In re.

section 323 must be held according to the procedure laid down for the trial of warrant cases, and what the Magistrate did was to convert the proceedings before him from a summons case into a warrant case and to frame a charge against the petitioner for both an offence under section 323, Indian Penal Code, and an offence under section 121 of the Railways Act.

It is argued in support of this petition that this procedure is illegal, that there is no provision in the Code which can justify it and that, once a Magistrate has taken cognisance of an offence which is triable only according to the procedure applicable to summons cases, he can in no circumstances proceed against an accused person for a more serious type of offence to be dealt with only under warrant cases. In support of this argument I have been referred to section 246 of the Criminal Procedure Code. That section runs as follows :—

“ A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons. ”

“ Triable under this Chapter ” means, of course, any offence triable under the procedure laid down for the trial of summons cases, and, although section 246 does not contain any explicit prohibition of the procedure now complained against, it is quite obvious that such prohibition is implied in it and that, once a Magistrate has taken cognisance of a summons case, he cannot convict an accused person for anything but an offence triable as a summons case. No doubt the Magistrate might, had he felt so inclined, have scrutinised

the charge sheet when he first received it and have come to the conclusion that an offence under section 323 was therein disclosed. He could then have commenced the whole proceedings according to the procedure laid down for warrant cases ; but not having done that, it seems to me that under section 246 he is precluded from convicting the present petitioner for any offence under section 323 and, therefore, of course precluded from framing any charge of an offence under that section against him.

It has also been pointed out that under section 190, Criminal Procedure Code, it is not upon a report in writing made by a police officer but upon the knowledge of the Magistrate himself gained by the evidence to which he has listened that the Magistrate has come to the conclusion that an offence under section 323 may have been committed and that, if the Magistrate takes cognisance of such an offence under section 190 (1) (c), it is his bounden duty to afford the accused person an opportunity of saying whether he wishes to be tried or not to be tried by that Magistrate. This procedure also has not been followed in the present case.

On these grounds this petition will be allowed and the order of the Magistrate complained against will be set aside. The case will be sent back to the Magistrate, who should proceed to dispose of it according to law on the understanding that the only offence with which he is concerned is the offence under section 123 of the Railways Act.

K.W.R.

RAJARATNAM
PILLAI,
In re.

PRIVY COUNCIL.

J.C.*
1935,
December 6.

TYAGARAJA MUDALIYAR AND ANOTHER,
APPELLANTS,

v.

VEDATHANNI, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Indian Evidence Act (I of 1872), ss. 91 and 92—Oral evidence that written agreement was not intended to be acted on—Whether admissible.

In a suit by V for maintenance, oral evidence was given to prove that a written agreement signed by her, providing, *inter alia*, for her maintenance, was not binding on her as she was induced to sign the document on the representation that it would not be acted upon, but was intended to be used solely as an admission of the joint status of the family.

Held, that the evidence was admissible.

Section 91 of the Indian Evidence Act only excludes oral evidence as to the terms of a written contract and does not preclude a party from giving oral evidence that the document was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence of some other matter. Section 92 only excludes oral evidence to vary the terms of a written contract and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document.

Pym v. Campbell, (1856) 6 EL. & BL. 370; 119 E.R. 903, *Mottayappan v. Palani Goundan*, (1913) I.L.R. 38 Mad. 226, and *Pertap Chunder Ghose v. Mohendranath Purkait*, (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291, referred to.

APPEAL (No. 13 of 1934) from a judgment of the High Court (March 17, 1932) which affirmed

* Present : Lord THANKERTON, Lord ALNESS and Sir JOHN WALLIS.

a judgment of the Subordinate Judge of Negapatam (February 14, 1929).

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.

The facts are stated in the judgment of the Judicial Committee.

The material terms of the deed in question were as follows :

“Deed of release executed on 28th December 1912 by Somasundara Mudaliyar, son of Vadapathimangalam Tyagaraja Mudaliyar, and Vedathanni, widow of the deceased Ramalinga Mudaliyar, younger brother of the aforesaid person, both residing in Kumara Kovil Street, Tiruvarur.

Ramalinga Mudaliyar, younger brother of Somasundara Mudaliyar and husband of Vedathanni of us, had been living as a member of one and the same undivided family and died without issue on 23rd December of the current year, and in these circumstances yourself and myself made an arrangement amicably to the effect that the gold jewels, silver jewels, silver vessels, bureau, etc., *samans* (articles) which are in the possession of Vedathanni of us, which are of the value of Rs. 17,000 (rupees seventeen thousand) and which are described in Schedule A annexed hereto shall be taken by her from this day onward with powers to alienate them according to her will and pleasure and that, at the time when it is inconvenient for Vedathanni of us to live along with Somasundara Mudaliyar as a member of one and the same family, Vedathanni shall during her lifetime enjoy the income of the lands, item 1 described in Schedule B annexed hereto, and shall during her lifetime live in house item 2 of Schedule B; and Vedathanni has agreed (to the

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.

terms) as stated by the said Somasundara Mudaliyar and accepted those terms; and so Vedathanni of us has hereby relinquished in favour of Somasundara Mudaliyar her right to maintenance as against Somasundara Mudaliyar. The arrangement relating to the enjoyment of the aforesaid properties and house in Schedule B shall take effect at the time when it is inconvenient for Vedathanni to live along with Somasundara Mudaliyar as a member of one and the same family and when she is willing to go (and live) separately. To this effect is the deed of release executed by us, viz., (i) Somasundara Mudaliyar, aged 42, Muthanmiar, Saivite, miras, and (ii) Vedathanni, aged 25, of the said caste and sect, housewife, with consent."

De Gruyther K.C. and *Subba Row* for appellants.—Unless the evidence can be brought within the terms of the Indian Evidence Act, it is inadmissible. Resort may not be had to the English law, *Balkishen Das v. W. F. Legge*(1). The evidence does contradict, vary, add to and subtract from the deed. The case does not fall within either proviso 1 or 3 of section 92. The deed cannot be treated as non-existent. There is no real resemblance between *Pertap Chunder Ghose v. Mohendranath Purkait*(2) and the present case. Here the widow consented to sign the document knowing what the terms were. It was held in *Pertap Chunder Ghose v. Mohendranath Purkait*(2) that oral evidence cannot be given to show the document was not intended to be a mortgage. Direct evidence cannot be given to show the intention of the parties in regard to the terms of a document. *Baijnath Singh v. Hajee Vally Mahammed Hajee Abba*(3) does not support the contention that oral evidence as in the present case is admissible, for there was no question of oral evidence but correspondence relating to the document. *G. Ruthna v. K. Arumuga*(4), which is against me, was decided before the Evidence Act came into force. *Lachman Das v. Ram*

(1) (1899) L.R. 27 I.A. 58; I.L.R. 22 All. 149.

(2) (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291.

(3) (1924) I.L.R. 3 Rang. 106 (P.C.). (4) (1872) 7 M.H.C.R. 189.

Prasad(1), in which Ashworth J. disapproved of the dictum in Amir Ali's Commentary on the Evidence Act, is in my favour. Benami transactions stand on a different footing.

[Reference was made to the following cases: *Navalbai v. Sivubai*(2), *Appa Dhond v. Babaji Krishnaji* (3), *Mottayappan v. Palani Goundan*(4), *Tsang Chuen v. Li Po Kwai*(5) and *Jibun Nissa v. Asgar Ali* (6).]

Dunne K.C. and *Sidney Smith* for respondent.—On the decision of the Courts below it was established that, if the contents of a document are not intended to be operative at all, there is no contract and the case does not come within the purview of section 92 of the Evidence Act. It is difficult to establish that what is written was never intended to come into force, but, if it is established, the case does not fall under section 92. Here there are concurrent findings that the lady's statement is true that the document was not intended to be operative. There was no claim by her for jewels or maintenance. The document was brought to her. The reference in the document to jewels and maintenance was padding for the admission of status

[In addition to the cases referred to by the appellant, reference was made to *Ranga Ayyar v. Srinivasa Ayyangar*(7).]

De Gruyther K.C. replied.

The JUDGMENT of their Lordships was delivered by SIR JOHN WALLIS.—The plaintiff Vedathanni, widow of the late Ramalinga Mudaliyar, who died without issue on 23rd December 1912, instituted this suit on 25th July 1925, in the Court of the Subordinate Judge of Negapatam, against the two widows of T. Somasundara Mudaliyar, her husband's brother, who had survived him, impleading also the minor third defendant who had been adopted by the junior widow on 1st July 1925, and defendants 4 and 5 who had been

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.

SIR JOHN
WALLIS.

(1) (1927) I.L.R. 49 All. 680.

(3) (1921) I.L.R. 46 Bom. 85.

(5) [1932] A.C. 715.

(2) (1906) 8 Bom. L.R. 761.

(4) (1913) I.L.R. 38 Mad. 226.

(6) (1890) I.L.R. 17 Cal. 937 (P.C.).

(7) (1897) I.L.R. 21 Mad. 56.

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

appointed receivers of the family properties in the suit instituted by the first defendant disputing the adoption. The plaintiff claimed to recover arrears of maintenance from 1st January 1914, when she began to live separately from her husband's family, at the rate of Rs. 10,000 a year. It was stated in the plaint that the ante-adoption deed executed on behalf of the minor third defendant by his natural father on 21st June 1925 in favour of the adopting widow had made a provision for the plaintiff's maintenance which would work out at Rs. 10,000 a year, and in the interests of peace she was willing to accept this sum although it was much below what would be legitimately due to her.

It was alleged in the plaint that the two brothers, Somasundara and Ramalinga Mudaliyar, were members of an undivided Hindu family and owned extensive movable and immovable properties in the Tanjore District of the approximate value of about 50 lakhs (Rs. 50,00,000), but had been living separately and enjoying the said lands in separate portions; and that in consequence, on Ramalinga's death, Somasundara, the surviving brother, feeling nervous as to the possibility of his widow, the plaintiff, setting up the case that the brothers had separated and that the plaintiff was accordingly entitled to a widow's estate in one half of the family properties, was anxious that a document should be executed evidencing the undivided status of the family. With this object, a document was executed on 28th December 1912 by the plaintiff and by Somasundara affirming the undivided status of the family and purporting to make provision for the plaintiff's

maintenance. It was, however, distinctly understood that this document was not to be the final contract for the plaintiff's maintenance but was solely intended as a voucher establishing the joint undivided nature of the family, it being agreed that the plaintiff's claim for maintenance on a scale commensurate with the position and status of the family was to be left over for future settlement at leisure. Consequently the provision for maintenance in the deed was never given effect to or acted on by the parties, and Somasundara continued in possession and enjoyment of all the family properties until his death on 17th January 1925. The plaintiff had lived separately from her husband's family from the beginning of 1914 (being maintained, as appeared from the evidence, by her own family) and had repeatedly asked Somasundara to make due provision for her maintenance. He had repeatedly promised to do so but died without having made any such provision or paid her anything for her maintenance.

The first defendant did not file any written statement, and the second defendant, in a joint written statement filed on behalf of herself and the minor third defendant, put the plaintiff to the proof of the allegations in the plaint. She stated that she was informed and believed that for several years past the plaintiff had not received any income from the lands set apart for her maintenance, and was therefore entitled to the mesne profits in respect of past maintenance. As regards the future, she admitted the execution of the ante-adoption deed making provision for the plaintiff, and, as the matter concerned the estate

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

of the minor third defendant, she left the Court to fix such maintenance as might be deemed reasonable.

The family admittedly owned 1,500 velis of wet and dry land of the approximate value of no less than fifty lakhs of rupees which they had apparently acquired in the course of their money-lending business by buying up the holdings of ryots with whom the land revenue had been temporarily settled under the ryotwari system prevailing in Tanjore. They also owned several lakhs of rupees invested in the money-lending business.

Some time before the death of the plaintiff's husband, the two brothers had divided their lands and begun to live separately, and according to the evidence the income from the lands in the husband's possession amounted to Rs. 70,000, all of which he spent. These facts were sufficient to raise a *prima facie* case of separation in which case his widow would be entitled for life to one-half of the family properties.

On his death in December 1912, his elder brother, Somasundara, took control, had the body removed to his own house for funeral rites, and locked up the other house in which there was a box containing jewels of which the widow had the key. The widow, who went to live with him, disclaimed any intention of setting up a case of separation; but there was always the possibility that her relations might persuade her to change her mind; and at his request she agreed to sign a document evidencing the undivided status of the family. He proceeded at once to have a deed of

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

settlement drawn up by which from that day onwards she was to have the jewels in her possession as set out in the schedule A with full powers of alienation; and as soon as she decided to live apart from him, she was to enjoy for her life the income of the lands and to live in the house mentioned in schedule B. In consideration of this provision she relinquished her claims for maintenance. The annual income of the lands set apart for her was between Rs. 2,000 and Rs. 2,500 only, Rs. 200 a month; and, as regards the house in Bazaar Street, Tiruvarur, the plaintiff stated in her evidence that people of her status and condition of life could not live there at all.

There are concurrent findings of the Courts below that when this document was presented to her three days after her husband's death, she refused to sign it, and was only induced to do so two days later by representations that it would not be acted on, and was only intended to provide evidence of the undivided status of the family. It was held by both Courts on these facts that there was no agreement and therefore no contract.

There can be little doubt that if a suit had been brought in time, this agreement might have been set aside on the ground of fraud or undue influence. What happened, however, was that the plaintiff retained the jewels which had all along been in her possession and that no effect was given to the provision for her maintenance. A year after her husband's death she went to live with her own people and has since been maintained by them. Somasundara died on 17th January 1925; and his junior widow, the second defendant,

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

executed the ante-adoption deed in which provision was made for the plaintiff's maintenance on the following 6th June and adopted the minor third defendant on 7th July; and on 21st December the plaintiff filed the present suit to recover arrears of maintenance at the rate already mentioned from 1st January 1914, when she ceased to live with her husband's family. As the arrears were claimed for less than twelve years the suit was in time.

The main question arising in this appeal is whether, as contended by the appellants, under the provisions of sections 91 and 92 of the Indian Evidence Act, oral evidence was inadmissible to establish that it had been agreed that the provisions for the plaintiff's maintenance were not to be acted on, as the document was only intended to create evidence of the undivided status of the family. The Madras High Court, from which this appeal comes, has repeatedly held such evidence to be admissible, and decisions to the same effect of the High Courts at Calcutta, Patna and Rangoon have been cited. There is, however, one decision of the Allahabad High Court the other way. In support of the admissibility of this evidence, the respondents have also cited the decision of this Board in *Pertap Chunder Ghose v. Mohendra-nath Purkait*(1) which came before Lord WATSON, Sir BARNES PEACOCK and Sir RICHARD COUCH. That was a suit by a zamindar to eject tenants under a kabuliyat which they had executed; and their Lordships, in a judgment dismissing the appeal which was delivered by Sir RICHARD COUCH, observed that

"if there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it."

There was a finding that, when the defendants objected to signing the kabuliyat on account of the stipulation entitling the zamindar to take *khas* possession at any time, they were told that it would not be acted on; and, as the experienced Counsel for the appellants, who contended that the learned Judges of the High Court were not justified in holding on that finding that the contracting parties were not of one mind as to the agreement, had not submitted that the oral evidence on which the finding was based was inadmissible to show that there was no agreement between the parties, it was unnecessary to deal with this question in the judgment of the Board. It may, however, in their Lordships' opinion, be safely inferred that Sir RICHARD COUCH and Sir BARNES PEACOCK were well acquainted with the provisions of the Indian Evidence Act and saw no objection to the reception of oral evidence to show that there was no agreement and therefore no contract.

The two relevant sections are as follows, the exceptions and explanation in section 91 being omitted as having no bearing on the question:

"S. 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

(1) (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291.

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

"S. 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts."

There being no proviso in either section making oral evidence to show that there was no

agreement and therefore no contract inadmissible, their Lordships will consider, in the first place, whether there is anything in the sections themselves to render it inadmissible, and, secondly, whether the terms of proviso 1 to section 92 are not wide enough to make it admissible under that proviso.

When a contract has been reduced to the form of a document, section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on section 91 which only excludes oral evidence as to the *terms* of a written contract. Clearly under that section, a defendant, sued, as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement that, as in *Pym v. Campbell*(1), the signed document was not to operate as an agreement until a specified condition was fulfilled, or that, as in the present case, the document was never intended to operate as an agreement but was brought into existence solely

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

for the purpose of creating evidence of some other matter, stands exactly on the same footing as evidence that the defendant's signature was forged.

In *Pym v. Campbell*(1) the defendants were sued upon a written contract to purchase an invention, and Lord CAMPBELL had ruled at the trial that on the plea denying the agreement, oral evidence was admissible that it had been agreed between the parties before they signed that there was to be no agreement until the invention was approved by A. In his judgment discharging the rule *nisi* for a new trial, Lord CAMPBELL said :

"It was proved in the most satisfactory manner that before the paper was signed, it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till A had been consulted and found to approve of the invention ; and that the paper was signed before he was seen only because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement."

ERLE J., who gave judgment first, had dealt more fully with this question.

"The point made is that there is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence . . . but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.

an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

The Indian Legislature has thought well to give statutory effect to the decision in *Pym v. Campbell*(1) in proviso 3 to section 92 :

"The existence of any separate oral agreement (constituting a condition precedent to the attaching of any obligation under any such contract) . . . may be proved"; and in *Mottayappan v. Palani Goundan*(2) BENSON and SUNDARA AYYAR JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter is admissible under proviso 1 to section 92, "any fact may be proved which would invalidate any document". This may well be so, but in their Lordships' opinion, even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract.

It was also contended that the case came within section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in

(1) (1856) 6 EL. & BL. 370; 119 E.R. 903.

(2) (1913) I.L.R. 38 Mad. 226.

TYAGARAJA
MUDALIYAR
v.
VEDATHANNI.
—
SIR JOHN
WALLIS.

TYAGARAJA
MUDALIYAR
v
VEDATHANNI.
—
SIR JOHN
WALLIS.

Pertap Chunder Ghose v. Mohendranath Purkait(1)
that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it.

In their Lordships' opinion both the lower Courts were right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitor for appellants.—*Harold Shephard.*

Solicitors for respondent.—*Hy. S. L. Polak & Co.*

C.S.S.

(1) (1889) L.R. 16 I.A. 233; I.L.R. 17 Cal. 291.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Cornish, Mr. Justice Varadachariar,
Mr. Justice Wadsworth, Mr. Justice Venkataramana Rao and
Mr. Justice Lakshmana Rao.*

KANCHAMALAI PATHAR (SECOND RESPONDENT—AUCTION
PURCHASER), APPELLANT,

1935,
October 2.

v.

RY. SHAHAJI RAJAH SAHIB (DECEASED) AND FIVE
OTHERS (PETITIONERS AND FIRST RESPONDENT—DECREE-HOLDER),
RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 50 ; O. XXI, r.
22—Execution of money decree—Sale of property in—
Void or Voidable—Death of judgment-debtor after pro-
clamation of sale and order for sale but before sale—Sale
held without bringing his legal representative on record.*

In execution of a money decree certain immovable property of the judgment-debtor was attached. After the proclamation of sale was settled and the order for sale was passed, the judgment-debtor died. The decree-holder and his Vakil were aware of the death of the judgment-debtor but no application was made under section 50 of the Civil Procedure Code for leave to execute the decree against the legal representatives of the deceased judgment-debtor and no notice was served on the legal representatives in accordance with Order XXI, rule 22 (1), of the Code. The sale was held and at the sale the property was purchased by a stranger.

Held by the Full Bench, that the sale was void and not merely voidable.

If execution of the decree is necessary against the legal representative of the deceased judgment-debtor, the decree-holder has no option but to proceed under section 50 of the Code. He must apply to the Court to execute the decree against the legal representative and notice must issue to the legal representative as required by Order XXI, rule 22, of the Code. The application under section 50 and the notice under Order XXI, rule 22, are the foundation of the Court's jurisdiction to execute a decree against the legal representative and a

* Appeal Against Order No. 225 of 1928.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

sale in execution held without those formalities would be void. The effect of sub-rule 2 of Order XXI, rule 22, is not to make the issue of a notice a matter which does not pertain to the jurisdiction but is by way of giving to the Court a special power to dispense with the issue of a notice in the exceptional cases specified.

The theory that, on the death of a person, proceedings for the recovery of a debt due by him are taken only against his "estate" and not against his "legal representative" is not justified either by legal history or by the language of the Civil Procedure Code. The liability is that of the *taker* and not of the estate (as an entity) though the "estate" furnishes the measure of liability.

Doraswami v. Chidambaram Pillai, (1923) I.L.R. 47 Mad. 63, overruled.

Raghunathaswamy Iyengar v. Gopal Rao, (1921) 41 M.L.J. 547; A.I.R. 1922 Mad. 206, *Rajayya v. Annapurnamma*, (1925) 50 M.L.J. 662, and *Rajagopala Ayyar v. Ramanujachariar*, (1923) I.L.R. 47 Mad. 288 (F.B.), approved.

In re Shephard. Atkins v. Shephard, (1889) 43 Ch. D. 131; *Erava v. Sidramappa*, (1895) I.L.R. 21 Bom. 424, 453; *Gopal Chunder Chatterjee v. Gunamoni Dasi*, (1892) I.L.R. 20 Cal. 370; *Malkarjun v. Narhari*, (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337; *Raghunath Das v. Sundar Das Khatri*, (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 and *Ramanathan Chettiar v. Ramanathan Chettiar*, (1928) 30 L.W. 995; referred to.

APPEAL against the order of the Court of the Subordinate Judge of Kumbakonam, dated 6th January 1928 and made in Execution Application No. 457 of 1927 in Execution Petition No. 25 of 1927 in Original Suit No. 63 of 1926.

V. V. Srinivasa Ayyangar (with him, *M. Krishna Bharathi*) for appellant.—After the proclamation of sale is settled and issued, there is, under the Code, no further judicial act to be done by the Court. The issue of the proclamation of sale is the last judicial act contemplated to be done by the Court. The actual carrying out of the order for sale is a mere ministerial act. The application of the principle of *audi alteram partem* is confined to judicial acts and is inapplicable to

ministerial acts. Order XXII, rule 6, of the Code of Civil Procedure shows that a deceased defendant need not always be represented in a suit. This rule is based on the principle that a party's presence is not necessary when nothing has to be done by the Court.

[The real principle is that the act of the Court ought not to prejudice a party, the act in the particular case being the delay of the Court in pronouncing judgment.—VARADACHARIAR J.]

The principle that I have stated is also comprehended in the provision because, if there was anything to be done by the Court in the interval, the presence of the party would have been held to be necessary. Further, a decree for money is really an order for payment and execution of the decree in default of payment is in the nature of contempt. Attachment of immovable property in default of payment is the method prescribed by the Code. Under section 50 of the Code it is the estate of the judgment-debtor that is really concerned. The definition of "legal representative" in section 2 (11) of the Code regards the estate of the judgment-debtor itself as an entity and the heir-at-law as the representative of that estate.

[Section 50 (1) of the Code uses the expression "legal representative" and not the estate of the judgment-debtor.—VENKATARAMANA RAO J.]

But the expression "legal representative" has to be understood in the sense of section 2 (11). The legal as well as the beneficial interest in the property of the judgment-debtor no doubt vests in the heir-at-law but the character of the estate as an entity continues. [Sections 50 (2), 52 and 53 of the Code referred to.] The heir-at-law is called the legal representative of the estate. It is a statutory declaration of the estate of the deceased being a legal entity. The sections contemplate the possibility of the estate of the deceased becoming vested in the heir-at-law and at the same time speak of the property of the deceased. These two positions must be reconciled.

[Section 50 (2) speaks of the property of the deceased which has come to the hands of the legal representative.—VARADACHARIAR J.]

The heir-at-law is, for purposes of execution, in the nature exactly of an executor or an administrator with probate. It is

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

altogether immaterial what the extent of the beneficial interest of the heir-at-law is. He is called the legal representative for purposes of execution and for such purposes he is in the eye of the law in exactly the same position as the deceased.

[Suppose the legal representative alienates the property and does not personally account. Would the alienation be valid? —LAKSHMANA RAO J.]

The alienation would be invalid. The very fact that the legal representative is made personally liable in the event of his failure to account shows that he is in the position only of a trustee. Section 50 has reference only to the stage when it becomes necessary to apply for execution against the legal representative. It does not apply to a case where the judgment-debtor himself is alive when the attachment is made. Once attachment is made, the property attached must be deemed to be in *custodia legis*. The liability under the section is the liability of the property and not the liability of the person. There is no provision for bringing legal representatives in their individual capacities on record in execution proceedings. The scheme of the execution provisions of the Code is that the primary liability is the liability of the property of the deceased. The legal representative is for purposes of execution really the deceased person himself. The expression legal representative is a generic expression including executors, trustees and also heirs-at-law. No distinction was intended to be made between the different classes of legal representatives and they are all treated as if each one of them was the deceased himself for purposes of execution. The person liable to be proceeded against is described by the Legislature as legal representative, a comprehensive term, and not as heir-at-law. Section 50 really applies therefore only to the case where the decree is not fully satisfied and the decree-holder has to see against whom he has to apply for execution after the death of the judgment-debtor. The legal representative is the deceased person himself for the purposes of execution and it is therefore there is no provision for bringing on record the heir-at-law as legal representative for purposes of execution.

[The whole of section 50 contemplates that the property sought to be proceeded against is not the property of the deceased but the property of the legal representative, though the quantum of his liability is limited to the extent of the property.—VENKATARAMANA RAO J.]

KANCHAMALA
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

The estate undoubtedly vests in the legal representative but it does so only for purposes of administration. For the purpose of satisfying the decree he is fixed with a representative character. The liability attaches to the estate and, as the estate vests in the heir-at-law, the liability also vests in him. The quantum of his beneficial interest in the property is immaterial. [Section 52 referred to.]

[The decree is against the legal representative in his individual capacity but the extent of his liability is limited to the extent of the property which he got.—VARADACHARIAR J.]

The decree is not against the legal representative individually but against him in his character of legal representative.

[The decree amount can be recovered in execution from the other property of the legal representative on his failure to account. How can that be done if the decree is not regarded as being against him personally?—VARADACHARIAR J.]

Property of the judgment-debtor in the hands of third parties or strangers can be proceeded against in execution. This can only be on the principle that a decree against the legal representative is a decree against the estate of the deceased. The decree is said to be executable, both by section 50 and by section 52, against the property which has come into the hands of the legal representative. The legal representative is proceeded against only in his legal character of legal representative of the deceased. Proceedings in execution after the death of a judgment-debtor being only against his estate, the absence of the legal representative as a party to such proceedings cannot affect the jurisdiction of the Court executing the decree, and the notice prescribed by Order XXI, rule 22, of the Code is not therefore a condition precedent to the acquisition of jurisdiction by the executing Court. The power given to the Court by clause 2 of Order XXI, rule 22, to issue a process in execution in certain circumstances even without issuing the notice prescribed by the first clause is itself an indication that the service of such notice is not a condition precedent to the acquisition of jurisdiction by the executing Court. In any event, the omission to bring the legal representative on record is only an irregularity and the sale is only voidable under Order XXI, rule 90, of the Code subject to the conditions laid down therein.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

[The following cases were referred to:—*Doraswami v. Chidambaram Pillai*(1); *Sheo Prasad v. Hira Lal*(2); *Net Lal Sahoo v. Sheikh Kareem Bux*(3); *A'bu v. Dhondu Bai*(4); *Bepin Behary Bera v. Sasi Bhushan Datta*(5); *Jagadish v. Bamasundari*(6); *Tarangini Debi v. Raj Krishna Mondal*(7); *The General Electric Trading Co. v. Siemens (India), Ltd.*(8); *Erava v. Sidramappa*(9); *Malkarjun v. Narhari*(10); *Raghunath Das v. Sundar Das Khetri*(11); *Krishna Pershad Singh v. Moti Chand*(12); *Rewa Mahton v. Ram Kishen Singh*(13); *Kuppusami Ayyangar v. Bavaswami Rao*(14); *Gopal Chunder Chatterjee v. Gunamoni Dasi*(15); *Rajagopala Aiyar v. Ramanujachariar*(16); *Raghunathaswamy Aiyangar v. Gopal Rao*(17); *Rajayya v. Annapurnamma*(18); *Ramanathan Chettiar v. Ramanathan Chettiar*(19) and *Suraj Bunsu Koer v. Sheo Persad Singh*(20).]

A. V. Viswanatha Sastri for respondents.—The Court has no jurisdiction to sell the property of a person who is not himself a party to the execution proceedings or who is not represented in such proceedings. If a person is not represented in the execution proceedings, the sale is absolutely null and void. The estate of a deceased person is not an entity which is a party to a suit and which can be affected in execution proceedings without a person to represent it. The true legal position is that the heir-at-law is the owner of the property. He has plenary powers of disposition subject to his satisfying the decree-holder's claim. All that the heir-at-law is bound to do is to apply the value of the property for the discharge of debts binding on the estate. The character in which the legal

- (1) (1923) I.L.R. 47 Mad. 63, 65.
(2) (1889) I.L.R. 12 All. 440, 441, 447 (F.B.).
(3) (1896) I.L.R. 23 Cal. 686. (4) (1894) I.L.R. 19 Bom. 276.
(5) (1913) 18 C.W.N. 766. (6) (1919) 29 C.L.J. 411, 413.
(7) (1927) 32 C.W.N. 418. (8) (1928) 33 C.W.N. 418.
(9) (1895) I.L.R. 21 Bom. 424.
(10) (1900) I.L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.
(11) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72.
(12) (1913) I.L.R. 40 Cal. 635 (P.C.).
(13) (1886) L.R. 13 I.A. 106; I.L.R. 14 Cal. 18, 24.
(14) (1926) I.L.R. 50 Mad. 357.
(15) (1892) I.L.R. 20 Cal. 370. (16) (1923) I.L.R. 47 Mad. 288 (F.B.).
(17) (1921) 41 M.L.J. 547; A.I.R. 1922 Mad 206.
(18) (1925) 50 M.L.J. 662. (19) (1928) 30 L.W. 995.
(20) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148, 150, 166.

KANCHAMALA
PATHAR
v.
SHAHAJI
RAJAH SAHIB

representative takes the property of the deceased judgment-debtor is as a person entitled to deal with it as an owner. The legal representative being the owner of the property, the sale held without making him a party to the execution proceedings is absolutely invalid. The crucial date is the date of the auction sale and the legal owner being the owner at that time he ought to have been impleaded. Attachment merely prevents alienation and has no greater effect. The judgment-debtor has very substantial rights after attachment which have to be protected and to safeguard those rights the initiative has sometimes to be taken by him. It is therefore necessary that his representative should be on record; see Order XXI, rules 66, 69, 72, 73, 74, 83, etc. Under section 234 of the Code of 1882, there was a conflict of view as to whether execution of a decree was complete with attachment. The Allahabad, Bombay and Calcutta High Courts held that execution was complete with attachment and that therefore the omission to bring the legal representative on record was a mere irregularity. This Court held the contrary view; see *Ramasami v. Bagirathi*(1); *Krishnayya v. Unnissa Begam*(2) and *Groves v. Administrator-General*(3). The present Code has adopted the view of this High Court in section 50. The language of section 234 of the Code of 1882 was: "before the decree has been fully executed". The language of section 50 of the present Code is: "before the decree has been fully satisfied". The language of the present Code is a legislative recognition of the soundness of the view of this Court. *Raghunath Das v. Sundar Das Khetri*(4) is conclusive of the present case in favour of the respondents. The fact that *Raghunath Das v. Sundar Das Khetri*(4) was a case of insolvency is immaterial. The Official Assignee was under the old Code, which contained no definition of legal representative, held to be a legal representative. *Raghunath Das v. Sundar Das Khetri*(4) is also authority for the view that Order XXI, rule 22, is not confined to cases where the execution proceeding is initiated against the legal representative. The rule applies also to cases of pending execution petitions. *Ramanathan Chettiar v. Ramanathan Chettiar*(5) is inconsistent with this case and is

- (1) (1883) I.L.R. 6 Mad. 180. (2) (1891) I.L.R. 15 Mad. 399.
(3) (1898) I.L.R. 22 Mad. 119, 123.
(4) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72.
(5) (1928) 30 L.W. 995.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

not therefore good law. Further, *Ramanathan Chettiar v. Ramanathan Chettiar*(1) is distinguishable because that was not a case of non-representation but was merely one of irregular representation. Section 50 of the present Code applies to cases of the death of the judgment-debtor at any stage before satisfaction of the decree. [*Rayarappan Nambiar v. Malikandi Aket Mayan*(2), *Raghunathaswamy Aiyngar v. Gopal Rao*(3), *Subbai Goundan v. Palani Goundan*(4), *Shankar Daji v. Duttatraya Vinayak*(5) considering *Malkarjun v. Narhari*(6), *Kuppusamy Ayyangar v. Bavaswami Rao*(7) considering *Krishna Pershad Singh v. Moti Chand*(8) and *Manmatha Nath Ghose v. Lachmi Debi*(9) referred to.] The proviso to Order XXI, rule 22, does not detract from the authority of the decision in *Raghunath Das v. Sundar Das Khetri*(10).

[The very fact that the Court can dispense with notice even on certain conditions shows that the Court has jurisdiction to deal with the matter.—VARADACHARIAR J.]

Even if the proviso be held to have the effect of taking away the authority of the decision in *Raghunath Das v. Sundar Das Khetri*(10) as regards the judgment-debtor, the case of the legal representative is not affected. [*Smith v. Kailash Chandra Chakraverty*(11) referred to.] *Sankaralinga Mudaliar v. Official Receiver of Tinnevely*(12) explains *Suraj Bansi Koer v. Sheo Persad Singh*(13). Attachment does not put an end to the right of survivorship for all purposes. To the extent to which the attaching creditor can proceed to sell the property attached even after the death of the judgment-debtor, the right of survivorship does not prevail. Otherwise the right of survivorship prevails.

V. V. Srinivasa Ayyangar replied.

Cur. adv. vult.

JUDGMENT.

CORNISH J.

CORNISH J.—The facts out of which this reference arises can be briefly stated. In execution

- | | |
|--|---------------------------------------|
| (1) (1928) 30 L.W. 995. | (2) (1914) 26 M.L.J. 267. |
| (3) (1921) 41 M.L.J. 547; A.I.R. 1922 Mad. 206. | |
| (4) (1916) 30 M.L.J. 607. | (5) (1921) I.L.R. 45 Bom. 1186. |
| (6) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337. | |
| (7) (1926) I.L.R. 50 Mad. 357. | (8) (1913) I.L.R. 40 Cal. 635 (P.C.). |
| (9) (1927) I.L.R. 55 Cal. 96. | |
| (10) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72. | |
| (11) (1931) I.L.R. 11 Pat. 241. | (12) (1925) 49 M.L.J. 616. |
| (13) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148. | |

of a decree against the sole defendant in a suit the decree-holder attached certain lands of the judgment-debtor and brought them to sale.

The sale was fixed for 15th September 1927 and took place on 16th September 1927, and the property was knocked down to the bid of the present appellant. But in the meantime the judgment-debtor had died on 8th September 1927. His sons, the respondents to this appeal, put in a petition under section 47 and Order XXI, rule 90, to have the sale set aside. In the affidavit supporting this petition it is alleged that the decree-holder, notwithstanding that he and his Vakil were aware of the judgment-debtor's death before the date of the sale, took no steps to bring on record the legal representatives of the deceased judgment-debtor. It is true that no application was made under section 50, Civil Procedure Code, for leave to execute the decree against the legal representatives and that no notice was served on the legal representatives in accordance with Order XXI, rule 22 (1).

The Subordinate Judge confronted with some divergent rulings of this High Court felt bound to follow the decision of PHILLIPS J. in *Rajayya v. Annapurnamma*(1) and held that the sale was void against the legal representatives of the deceased. The auction purchaser has appealed against this decision.

The question narrows itself down to this : Can a decree-holder whose decree is unsatisfied when the sole judgment-debtor dies execute that decree without having recourse to section 50 ?

(1) (1925) 50 M.L.J. 662.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
CORNISH J

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
CORNISH J.

The section says (sub-section 1):

“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.”

Sub-section 2 limits the liability of the legal representative when the decree is executed against him

“to the extent of the property of the deceased which has come to his hands and has not been duly disposed of”.

It is provided by section 53 that, for the purpose of section 50, property which is liable in the hands of the Hindu son for the decree-debt of his deceased father shall be deemed to be the property of the deceased which has come to the hands of the son as his legal representative.

The language of section 50 is permissive. But this, as RAMESAM J. has pointed out in *Raghu-nathaswamy Iyengar v. Gopal Rao*(1), does not mean that recourse to the section may not be obligatory. If a decree-holder does not desire to proceed with the execution after the judgment-debtor's death or if there are other parties on record against whom the decree can be executed, there will be no occasion to have recourse to section 50. But if execution of the decree is necessary against the legal representative of the deceased judgment-debtor, the decree-holder has no option but to proceed under section 50. He must apply to the Court to execute the decree against the legal representative and notice must issue to the legal representative as required by Order XXI, rule 22.

(1) (1921) 41 M.L.J. 547 ; A.I.R. 1922 Mad. 206.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB
—
CORNISH J

On the death of a judgment-debtor the decree cannot be executed against him, for there is no such thing as execution against a dead man. His property remains subject to the decree and to an attachment upon it, notwithstanding that it has passed to his heir or to a surviving coparcener, or, if there is an executor, has vested in his executor. But his death effects a change in the parties liable to execution. The legal representative has stepped into the place of the deceased judgment-debtor, with the liability under the decree, though his liability is limited to the extent of the deceased's assets which have come into his hands and have not been duly administered by him. In these well-known principles lies the reason for the provision in section 50 enabling the decree-holder whose decree has not been fully satisfied prior to the death of the judgment-debtor to apply to the Court to execute the decree against the legal representative. They also explain the notice required by Order XXI, rule 22.

“It is quite new to me”,

said COTTON L.J. in *In re Shephard. Atkins v. Shephard*(1),

“to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually.”

Those observations appear to me to be very pertinent to the case where the Court proceeds in execution of a decree made against A to sell property which on A's death has devolved on B

(1) (1889) 43 Ch. D. 131.

KANCHAMALAI
PATHAR
"
SHAHJI
RAJAH SAHIB. without an opportunity to B of coming before the
Court to shew cause why execution should not
proceed against him.

CORNISH J.

But the question on which judicial opinion in this country has been so acutely divided is whether the application under section 50 and the notice under Order XXI, rule 22, are the foundation of the Court's jurisdiction, so that a sale in execution without these formalities will be void, or whether the absence of these formalities amounts to nothing worse than an irregularity which may or may not serve to avoid the sale. But it seems to me that, since the Privy Council ruling in *Raghunath Das v. Sundar Das Khetri*(1), the subject is no longer open to controversy.

Their Lordships in *Malkarjun v. Narhari*(2) had previously to consider the effect of an application under section 50. It was held that, it being within the jurisdiction of the Court to receive an application under section 50, the Court's mistake in issuing notice to a person whom it wrongly decided was the legal representative of the deceased judgment-debtor did not render the Court's exercise of its jurisdiction ineffectual. This ruling suggests that an application under section 50 and the issue of a notice in accordance with Order XXI, rule 22, were necessary to give the Court jurisdiction to issue process against the legal representative. But the matter was made clear by their Lordships' judgment in *Raghunath Das v. Sundar Das Khetri*(1). That was a case where there had been a devolution of property by reason of

insolvency, and it was held that the Official Assignee being the legal representative of the bankrupt the issue of a notice to him under section 248 of the Civil Procedure Code of 1882 [corresponding to Order XXI, rule 22 (1), of the present Code] was a condition to the Court's having jurisdiction to execute the decree against the legal representative. It was not a case of execution of a decree against the legal representative of a deceased judgment-debtor, and at the time the definition of "legal representative" as a person who in law represents the estate of a deceased person had not been introduced into the Code. But their Lordships expressly approved *Gopal Chunder Chatterjee v. Gunamoni Dasi*(1), where it was held that the issue of a notice was necessary to give the Court jurisdiction to sell property by way of execution against the legal representative of a deceased judgment-debtor. On this authority, I think, there can be no doubt that, where there has been no application under section 50, and consequently no issue of notice under Order XXI, rule 22 (1), the foundations of the Court's jurisdiction to execute a decree against the legal representative are entirely wanting. And a sale held without this jurisdiction would be void.

Since these rulings, an addition has been made to Order XXI, rule 22. It is sub-rule 2, which says that nothing in sub-rule 1 shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
CORNISH J.

(1) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal 72 (P.C.).

(2) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(1) (1892) I.L.R. 20 Cal. 370.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
CORNISH J.

would cause unreasonable delay or would defeat the ends of justice. It has been held by a Full Bench of this Court in *Rajagopala Ayyar v. Ramanujachariar*(1) that the effect of this sub-rule is not to make the issue of a notice a matter which does not pertain to the jurisdiction, but is by way of giving to the Court a special power to dispense with the issue of a notice in the exceptional cases specified. I agree with that interpretation, and it is supported by the views of other High Courts in *Manmatha Nath Ghose v. Lachmi Debi*(2) and *Smith v. Kailash Chandra Chakraverty*(3). On the facts of the present case too, even if the Court had been moved under section 50, I think there is nothing which would have justified the Court in exercising its power under sub-rule 2. For these reasons I am of opinion that the sale is void, and that this appeal should be dismissed with costs.

VARADACHARIAR J.

VARADACHARIAR J.—I agree. On behalf of the appellant it has been contended by Mr. Srinivasa Ayyangar that, as the judgment-debtor died only a week before the sale and no *judicial* act remained to be performed during the interval, the omission to bring the legal representative on record before the sale can at best only amount to an irregularity and the sale ought not to be set aside except on proof of substantial injury resulting from such omission. He laid great stress on the necessity of protecting *bona fide* purchasers in Court sales and insisted that the lower Court should have followed the decision of a Division

Bench of this Court in *Doraswami v. Chidambaram Pillai*(1) in preference to that of PHILLIPS J. in *Rajayya v. Annapurnamma*(2), as the former is supported by a course of decisions in Allahabad and Calcutta. Incidentally he argued that the Full Bench decision in *Rajagopala Ayyar v. Ramanujachariar*(3) on the strength of which PHILLIPS J. dissented from *Doraswami v. Chidambaram Pillai*(1) required reconsideration.

On principle and on the true construction of sections 50 and 52 of the Code, he maintained that, when a decree has been passed against a person as legal representative or a decree passed against a person is after his death sought to be executed against the legal representative, all further proceedings are taken only against the "estate" of the deceased person, that the presence or absence of the legal representative as a party to such proceedings is not really a factor affecting the *jurisdiction* of the Court executing the decree, that the notice prescribed by Order XXI, rule 22, Civil Procedure Code, cannot therefore be taken to be a condition precedent to the acquisition of jurisdiction by the executing Court, that the presence of the legal representative will be deemed essential only on the principle of *audi alteram partem* and if no judicial act has been done in his absence he would have nothing to complain of. He pointed out that the power given to the Court by clause 2 of Order XXI, rule 22, Civil Procedure Code, to issue a process in execution in certain circumstances even without issuing the notice

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
VARADACHARIAR J.

(1) (1923) I.L.R. 47 Mad. 288 (F.B.).
(2) (1927) I.L.R. 55 Cal. 96.
(3) (1931) I.L.R. 11 Pat. 241.

(1) (1923) I.L.R. 47 Mad. 63.
(2) (1925) 50 M.L.J. 662.
(3) (1923) I.L.R. 47 Mad. 288 (F.B.).

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

prescribed by the first clause was itself an indication that the service of such notice cannot be a pre-requisite to the acquisition of jurisdiction by the executing Court. Alternatively, he contended that, whatever may be the position when a *fresh* application for execution has to be filed after the death of a judgment-debtor, the notice under Order XXI, rule 22, is not obligatory when it is merely sought to *continue* against the legal representative proceedings in execution started against the deceased judgment-debtor and pending at his death. Finally, he relied on the principle that an attachment brings the property attached into "*custodia legis*" and argued that thereafter it is the power and duty of the Court to carry out the purposes for which the attachment had been effected and the violation of any provision of the processual law at subsequent stages cannot affect the "jurisdiction" of the executing Court but can at best only amount to an irregularity to be dealt with under Order XXI, rule 90, Civil Procedure Code.

The theory that, on the death of a person, proceedings for recovery of a debt due by him are taken only against his "estate" and not against his "legal representative" does not seem to be justified either by legal history or by the language of the Procedure Code. In discussing the development of the law relating to the heir's liability for debts due by the ancestor, Mr. Justice Holmes (Common Law, Ch. X) refers to the rule of the Roman law making the heir (if he enters on the inheritance) liable for *all* the debts of the ancestor (whatever may be the extent of assets received by him), and states that this rule was adopted even

in England at the time of Glanville but modified by the time of Bracton. The rule was to some extent the same even under the Hindu Law (*See* Mayne's Hindu Law, paragraph 304) and Bombay Act VII of 1866 was passed to limit the liability to the assets received by the heir. Subject to this limitation, the position (as stated by Mr. Holmes) is that the "heir" is identified with the ancestor or continues or represents the "persona" of the ancestor. A comparison with the position of a "universal donee" will be instructive in this connection; he is declared to be "personally" liable for the debts and liabilities of the donor (as at the time of the gift) to the extent of the property comprised in the gift (Transfer of Property Act, section 128). It is thus clear that the liability is that of the *taker* and not of the estate (as an entity) though the "estate" furnishes the *measure* of liability. The position is, if I may say so, correctly stated by RANADE J. in *Erava v. Sidramappa*(1) and there is nothing inconsistent with it in the judgment of the Privy Council in *Malakarjun v. Narhari*(2).

Some observations in *In re Shephard. Atkins v. Shephard*(3) are apposite in this connection. Shortly before the death of the judgment-debtor, the decree-holder applied for a receiver by way of equitable execution; the application was being adjourned from time to time and in the meantime the judgment-debtor died. Two days after his death, an order for a receiver was made without reviving the action or bringing the heir-at-law

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

(1) (1895) I.L.R. 21 Bom. 424, 453.

(2) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(3) (1889) 43 Ch. D. 131.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

before the Court. In discussing the validity of that order, the question was incidentally discussed whether *at law* execution can issue against the estate of a deceased person without leave of the Court (under Order XLII, rule 23, of the Rules of the Supreme Court) and all the LORDS JUSTICES (COTTON, BOWEN and FRY) refused to assent to the proposition that it can. Referring to Order XVII R. S. C. (corresponding to Order XXII, Civil Procedure Code), they observed in the course of the argument as well as in their judgment that, though by reason of the death of a party, the action "may not be gone", it is gone as against the dead person until he is represented and that rule 1 of that Order can apply only when the title has devolved on someone who is before the Court. The same principle ought to apply to an execution proceeding, though Order XXII of the Civil Procedure Code does not in terms apply to execution proceedings. On page 137, COTTON L.J. observed:

"It is quite new to me to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually."

In *Stewart v. Rhodes*(1) STIRLING J. points out that the effect of the order granting leave to issue execution against the representative is to make the representative the judgment-debtor. On page 402, LINDLEY M.R. preferred the view that the order granting leave "dispenses with the necessity of a judgment", but neither of them contemplates the possibility of execution against the

(1) [1900] 1 Ch. 386, 393.

"estate" of the deceased without leave under Order XLII, rule 23, R.S.C. In *Rajagopala Ayyar v. Ramanujachariar*(1) SCHWABE C.J., referring to *Blanchenay v. Burt*(2) and *Goodtitle v. Badtitle*(3), observed that, though under the English Common Law a writ of *scire facias* was necessary before execution could be had on a judgment, if more than a year had elapsed from its date, an execution sale held without a *scire facias* was only voidable and not void. It must be pointed out that in this respect a distinction was made between two classes of "dormant" judgments, i.e., those where the *scire facias* had to be sued out between the original parties to the judgment and those where a new party was to be charged or benefited. In the latter case,

"the issue of a writ without the revivor of the judgment by *scire facias* or by motion or other statutory proceeding is a more serious matter than its issue on a dormant judgment. If an execution is issued and *tested* after the death of a sole plaintiff, the authorities are evenly divided upon the question whether it is void or irregular only. But if it issues and bears *teste* after the death of a sole defendant the authorities almost (but not quite) unanimously adjudge it void."

(FREEMAN on Void Judicial Sales, paragraph 24). This distinction is also reflected in the decisions which discussed the difference between the two classes of cases in respect of the effect of a revivor or *scire facias*; see *Farran v. Beresford*(4), *Farrel v. Gleeson*(5), *Ashootosh Dutt v. Doorga Churn Chatterjee*(6) and *Jogendra Chandra Roy v. Shyam Das*(7).

(1) (1923) I.L.R. 47 Mad. 288, 300 (F.B.).

(2) (1843) 4 Q.B. 707; 114 E.R. 1064. (3) 9 Dow. Pr. Cases 1009.

(4) (1843) 10 Cl. & F. 319; 8 E.R. 764.

(5) (1844) 11 Cl. & F. 702; 8 E.R. 1269.

(6) (1880) I.L.R. 6 Cal. 504.

(7) (1909) I.L.R. 36 Cal. 543, 553.

480 THE INDIAN LAW REPORTS [VOL. LIX

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

In *Ranken v. Harwood*(1), where a judgment-creditor had sued out a writ of *fi fa* in the lifetime of his debtor but the writ was placed in the hands of the Sheriff only the day after the debtor's death, the VICE-CHANCELLOR observed that

"the creditor had an option to sue out a *scire facias* against the executor or (passing by the executor altogether and by force of the proceedings had in the testator's lifetime) to take in execution Harwood's goods in whosoever hands they might be".

This must be understood in the light of a peculiar rule of the Common Law and of the other observations in the case which differentiate between proceedings at law in respect of the goods seized and proceedings by way of administration in respect of goods that vested in the executor. Under the Common Law, if a testator, sole defendant, died after judgment, the plaintiff could issue execution against the goods of the testator without any order, if the judgment were recovered within a year before his death; see William's Executors, Part IV, Book II, Ch. 1, section 2, 11th Edition, page 1353. The author adds:

"But now by Order XLII, rule 23, if any change has taken place by death in the parties liable to execution, leave must be obtained to issue execution against the goods of the testator. This order must, it would seem, be obtained on notice to the executor."

It was another rule of the English Law that a writ, though put into the hands of the Sheriff after the judgment-debtor's death, took effect from the *teste* of the writ. [For the history of this rule, see the judgment of FLETCHER MOULTON L.J. in *Johnson v. Pickering*(2)]. To avoid misapprehension arising from observations in some of the

English cases, reference may also be made to another principle of the English law that *judicial* acts are to be considered as having taken place at the earliest possible period of the day on which they are done. In *Wright v. Mills*(1) judgment was signed and execution issued at 11 a.m. on the day on which the judgment-debtor died at 9-30 a.m. The Court of Exchequer held that, by reason of the above principle, the judgment and execution were regular; cf. *Clarke v. Bradlaugh* (2). Order XX, rule 6, of the Indian Code embodies another special principle which cannot be extended by analogy.

As regards the general principle, it was declared by Lord HARDWICKE so long ago in *Nugent v. Gifford*(3) that

"the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands but there is no lien on the assets."

It is on this that the principle is founded that the representative can alienate the ancestor's property and the creditors of the ancestor have their remedy only against the representative and not against the alienee; cf. *Jamiyatram Ramchandra v. Parbhudas Hathi* (4), *Bazayet Hossein v. Dooli Chund*(5) and *Ram Dhun Dhur v. Mohesh Chunder Chowdhry* (6). In respect of involuntary sales, however, there is a difference between an heir and an administrator, in that it is only in the former case that the assets derived from the deceased can be sold for the personal debts of the heir; see *Mussamat Wahidunnissa v. Mussamat*

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

(1) (1859) 4 H. & N. 488; 157 E.R. 931.

(2) (1881) 8 Q.B.D. 63. (3) (1738) 1 Atk. 463; 26 E.R. 294.

(4) (1872) 9 B.H.C.R. 116.

(5) (1878) L.R. 5 I.A. 211; 1 L.R. 4 Cal. 402.

(6) (1882) I.L.R. 9 Cal. 406.

(1) (1846) 5 Hare. 215; 67 E.R. 892.

(2) [1908] 1 K.R. 17.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

Shubrattun (1) and *Bazayet Hossein v. Dooli Chund*(2). That the creditor's right is against the representative and not against the debtor's property in *specie* is also shown by the cases which recognize that, even when the heir retains property of the ancestor, a creditor of the deceased cannot seek to hold such property liable if the heir has by any means discharged debts of the ancestor to the value of the assets; see *Ram Golam Dobey v. Ayma Begum*(3) and *Veerasokkaraju v. Papiiah*(4).

In the Civil Procedure Code of 1859, section 210 provided that on the death of a judgment-debtor application for execution of the decree may be made "against the legal representative or the estate of the person so dying", and in *Dunput Sing Bahadoor v. Rane Rajessuree*(5) stress was laid on this alternative form of the provision; but this was modified in 1877, and since then execution is to be had only against the "legal representative"; see observations in *Dunput Sing Bahadoor v. Rane Rajessuree*(5) and in *Chathakelan v. Govinda Karumiar*(6). Even while Act VIII of 1859 was in force, it was observed by PHEAR J. in *Shurfun Bebee v. The Collector of Sarun*(7):

"By the fact of the debtor's death, his property passes from him. It may be that it will, in the hands of the transferee, remain still liable to satisfy the deceased's debts; but if so, the transferee, for the same reason, becomes the representative of the deceased for the payment of those debts and the proper mode of getting at such property of the deceased as he holds is to put him on the record in the place of the deceased in the ordinary mode which would necessitate the establishment of his representative character, or else to bring a regular suit

(1) (1870) 6 Beng. L.R. 54.
(2) (1878) L.R. 5 I.A. 211; I.L.R. 4 Cal. 402, 406, 407.

(3) (1869) 12 W.R. 177.
(4) (1902) I.L.R. 26 Mad. 792.
(5) (1871) 15 W.R. 476.
(6) (1893) I.L.R. 17 Mad. 186.
(7) (1868) 10 W.R. 199, 201.

against him. There is no ground for treating him as if he were holding benami for the dead man."

In *Madho Prasad v. Kesho Prasad* (1) Sir JOHN EDGE [whose judgment in *Sheo Prasad v. Hira Lal* (2) was much relied on by the appellant's learned Counsel in another connection] described as "novel" the possibility of executing a decree

"against the estate of a deceased judgment-debtor without any notice to his representative and without any one to protect the property being brought upon the record".

The circumstance that some decisions have differed from this ruling to the extent of holding that an application for execution *bona fide* made against a deceased defendant may help to save the bar of limitation as a "step in aid" of execution, does not affect the present question. The ground on which Sir JOHN EDGE distinguished his previous decision [in *Sheo Prasad v. Hira Lal* (2)] will be presently dealt with.

An extract from Black on Judgments quoted in *Goda Coopooramier v. Soondarammall* (3) suggests that in America the death of a defendant even during the pendency of an action may not be regarded as depriving the Court of jurisdiction to deal with the case in the absence of the legal representative and a judgment pronounced against a dead man is not void or open to collateral attack. This certainly is not the law in England nor the law in India [see some of the cases referred to in *Muthuraman Chettiar v. Adaikappa Chetty* (4)]. While insisting on representation of a deceased person's estate, the High Courts in India and the Judicial Committee have taken a very liberal attitude in the matter of condoning defective

(1) (1897) I.L.R. 19 All. 337. (2) (1889) I.L.R. 12 All. 440 (F.B.).
(3) (1909) I.L.R. 33 Mad. 167, 169. (4) (1934) I.L.R. 58 Mad. 407.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J

representation—even in the event of death before the institution of or during the pendency of an action and much more so in the event of death after decree; see *Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali* (1) and the other cases referred to in *Muthuraman Chettiar v. Adaikappa Chetty*(2) and in the report of the arguments in *Ramaswami Chettiar v. Oppilamani Chetti*(3). To refer to two extreme instances: *Malkarjun v. Narhari* (4) held that a person even though he is not an heir may represent the estate if by an order of Court he has been held to be the representative and *Ramaswami Chettiar v. Oppilamani Chetti* (3) held that, even in the absence of a decision of the Court to that effect, a person may sufficiently represent the estate of a deceased person if from among several rival claimants thereto the decree-holder *bona fide* chose him as being in possession of, or having the best *prima facie* title to, the estate.

Is the application of the above principles affected by the fact that the property of a judgment-debtor has been attached in execution before his death? The observations of the Judicial Committee in *Suraj Bunsî Koer's* case [*Suraj Bunsî Koer v. Sheo Persad Singh*(5)] do not suggest that there will be no devolution of the attached property on the successor but only that he would take it subject to the liability of discharging the particular decree debt. Though their Lordships speak of the proceedings having constituted in favour of the decree-holder “a valid charge upon

(1) (1930) I.L.R. 54 Mad. 212.

(2) (1934) I.L.R. 58 Mad. 407.

(3) (1909) I.L.R. 33 Mad. 6; 19 M.L.J. 671.

(4) (1900) I.L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(5) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148, 174.

the land”, Courts in India and even the Judicial Committee in later cases have hitherto held that an attachment does not according to the Indian law create any interest in the land or convert the attaching decree-holder into a “secured” creditor. In a very recent case, *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1), Lord THANKERTON has used language which is calculated to revive this controversy; but, even taking the attaching decree-holder to stand in the position of a secured creditor, the question will still remain as to the further procedure to be followed by him. The observations in *Suraj Bunsî Koer's* case must be taken along with the fact noted in the judgment (on page 161) that on Adit Sahai's death on 19th May 1873, i.e., four days before the date fixed for the sale, the proceedings were “revived in the usual way against his two sons as his heirs”, and it was only after the Court had disposed of the objections raised by the mother on behalf of the sons by petition, dated 14th July, that the sale was held on 28th July. The case is therefore no authority for the contention that, if the judgment-debtor dies after attachment and very shortly before the date fixed for the sale, the sale could take place without bringing the legal representative on record.

In *Sheo Prasad v. Hira Lal*(2) Sir JOHN EDGE and three other learned Judges held that, when a judgment-debtor died after his property had been attached, the sale of such property was not rendered invalid by reason of the omission to make the legal representative a party to the sale

(1) (1933) L.R. 60 I.A. 167; I.L.R. 56 Mad. 405.

(2) (1889) I.L.R. 12 All. 440 (F.B.).

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

proceedings. MAHMOOD J. was of opinion that a sale under such circumstances would be irregular but that the remedy of the legal representative was by way of proceedings under section 311 of the old Code (now Order XXI, rule 90). One need not quarrel with the statement that property under attachment must be considered as in the custody of the law and that an attachment would not abate on the death of the judgment-debtor. A doubt was recently raised in this Court whether, on the death of a judgment-debtor before an application for execution had been finally disposed of, the proper course for the decree-holder was to present a *fresh* application for execution against the legal representative or to continue the existing execution petition by making the legal representative a party to it. We may now take it as settled that both courses are open to the decree-holder; see *Venkatachalam Chetti v. Ramaswamy Servai*(1); cf. *Purushottam v. Rajbai*(2) and *Bhagwan Das v. Jugul Kishore*(3). But what are the steps to be taken by the decree-holder, if he wishes to *continue* the pending execution proceedings. In *Abdur Rahman v. Shankar Dat Dube*(4) a Division Bench interpreted the Full Bench judgment in *Sheo Prasad v. Hira Lal*(5) as depriving the Court of the *power* to add the legal representative in such proceedings. A course of decisions in this Presidency beginning from *Ramasami v. Bagirathi*(6) have held that, notwithstanding attachment during the judgment debtor's lifetime, the property could not be validly sold after his death unless his representative was brought on

(1) (1931) I.L.R. 55 Mad. 352 (F.B.). (2) (1909) I.L.R. 34 Bom. 142, 151.
(3) (1920) I.L.R. 42 All. 570. (4) 1895) I.L.R. 17 All. 162.
(5) (1889) I.L.R. 12 All. 440 (F.B.). (6) (1883) I.L.R. 6 Mad. 180.

the record; see *Krishnayya v. Unnissa Begam*(1), *Narayana Kothan v. Kalianasundaram Pillai*(2), *Groves v. Administrator-General*(3), *Rayarappan Nambiar v. Malikandi Aket Mayan*(4), *Raghunathaswamy Iyengar v. Gopal Rao*(5), *Rajayya v. Annapurnamma*(6) and *Kanakasabapathy Chetty v. Venkatarama Aiyar*(7). The learned Judges of the Allahabad High Court dissent from this view because (i) in their opinion section 234 of the Code of 1882 could have no application to a case where by reason of the subsisting attachment the legal representative could not have disposed of the property and (ii) there is no provision in the Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. They did not approach the question from the point of view of general principles as to the effect of the death of a party on the jurisdiction of the Court. MAHMOOD J. was of opinion that the objection of the legal representative could rest only on the principle of *audi alteram partem*. I am not persuaded that [as suggested in *Tarangini Debi v. Raj Krishna Mondal*(8) and by some of the annotators on the Code] the reasoning in *Sheo Prasad v. Hira Lal*(9) is necessarily precluded by the substitution of the word "satisfied" in section 50 of the new Code for the word "executed" in the old Code.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

(1) (1891) I.L.R. 15 Mad. 399. (2) (1895) I.L.R. 19 Mad. 219.
(3) (1898) I.L.R. 22 Mad. 119. (4) (1914) 26 M.L.J. 267.
(5) (1921) 41 M.L.J. 547; A.I.R. 192 Mad. 206.
(6) (1925) 50 M.L.J. 662. (7) (1909) 5 I.C. 339.
(8) (1927) 32 C.W.N. 418. (9) (1889) I.L.R. 12 All. 440 (F.B.).

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
VARADA-
CHARIAR J.

It seems to me the better course is to say, with all respect, that the construction placed by the learned Judges on section 234 was not warranted by the language of that section. I would respectfully adopt the observations made by BODDAM J. in *Groves v. Administrator-General*(1). The first clause of section 234 (now section 50) is absolute in the declaration about execution of the decree against the legal representative; the second clause, for reasons already explained, only defines the extent of liability. This way of reading the two clauses is supported by the introduction of the words "where the decree is executed against such legal representative" at the commencement of the second clause in section 50 of the Code of 1908. Even in Allahabad, the authority of the ruling in *Sheo Prasad v. Hira Lal*(2) has been greatly restricted (if not questioned) in the recent decision in *Chandi Prasad v. Jamna*(3).

In Calcutta, the learned Judges have not dissented from the Madras cases but point out that while holding the sale to be void "they nevertheless proceed to set aside the sale"; see *Bepin Behary Bera v. Sasi Bhusan Dhatta*(4). It is true that in some of the Madras cases a sale in such circumstances has been spoken of as "voidable" but the context makes it fairly clear that the learned Judges did not there contemplate an application under section 311 of the Code of 1882 requiring independent proof of substantial injury. The later cases in Calcutta have merely followed the decision in *Bepin Behary Bera v. Sasi Bhusan*

(1) (1898) I.L.R. 22 Mad. 119.

(2) (1889) I.L.R. 12 All. 440 (F.B.).

(3) (1927) I.L.R. 49 All. 830.

(4) (1913) 18 C.W.N. 766, 768.

Dhatta(1). The very fact that in several judgments of the Calcutta High Court [as also in the judgment of the Privy Council in *Malkarjun v. Narhari*(2)] a suit governed by article 12 of the Limitation Act is contemplated will show that the mere use of the word "voidable" or the expression "set aside" will not necessarily involve the conditions imposed by section 311 of the old Code (Order XXI, rule 90) [cf. *Erava v. Sidramappa*(3) and the cases prior to the Code of 1908 setting aside a sale on the ground of fraud]. It may be noted in passing that, in the present case, the application was made within thirty days of the sale and before its confirmation, and it can make no difference whether the sale is held to be "void" or "voidable" so long as the conditions of Order XXI, rule 90, are not insisted on. So far as this High Court is concerned, the decision in *Ramasami v. Bagirathi*(4) has been uniformly followed and it is not clear whether even in *Doraiswami v. Chidambaram Pillai*(5) the learned Judges meant to dissent from it.

Without repeating the reasons given by PHILLIPS J. in *Rajayya v. Annapurnamma*(6) for not following the decision in *Doraiswami v. Chidambaram Pillai*(5), I may respectfully say that the judgment of SPENCER and KRISHNAN JJ. is almost wholly based on a misreading of the judgment in *Malkarjun v. Narhari*(2) and an erroneous assumption that the earlier Madras rulings rest not on any principle of jurisdiction but merely on the

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
VARADA-
CHARIAR J.

(1) (1913) 18 C.W.N. 766.

(2) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(3) (1895) I.L.R. 21 Bom. 424.

(4) (1883) I.L.R. 6 Mad. 180.

(5) (1913) I.L.R. 47 Mad. 63.

(6) (1925) 50 M.L.J. 662.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

principle of *audi alteram partem*. It is begging the question to assume (as SPENCER J. does on page 67) that when proceeding to sale without bringing the legal representative on record "the decree-holder has done all that the law requires him to do." The argument based on the reference in sections 50 and 53 of the Code to "the property of the deceased" has already been dealt with.

As the argument based on the introduction in the new Code of clause 2 to Order XXI, rule 22, has been pressed before us, it requires more than a passing notice. It is undoubtedly a matter for comment [as felt by the learned Judges who decided *Rajagopala Ayyar v. Ramanujachariar* (1)] that the Legislature should have dealt with the two classes of cases referred to in the first clause of Order XXI, rule 22, as if they stood on the same footing for *all* purposes. In adopting that arrangement, it seems to have followed the English rules (Order XLII, rule 23, R.S.C.) and the provisions in force in India (under the old Regulations) even before section 216 of the Code of 1859 was enacted. Out of deference to the observations of the Privy Council in *Raghunath Das v. Sundar Das Khetri*(2), Courts in India have held even under the new Code that compliance with the provisions of Order XXI, rule 22, is a condition precedent to the acquisition of jurisdiction by the executing Court [see *Rajagopala Ayyar v. Ramanujachariar*(1), *Manmatha Nath Ghose v. Lachmi Debi*(3) and *Srishchandra Nandi v. Rahatannessa Bibi*(4)] but it must be

(1) (1923) I.L.R. 47 Mad. 288 (F.B.).

(2) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72.

(3) (1927) I.L.R. 55 Cal. 96.

(4) (1930) I.L.R. 58 Cal. 825, 827.

admitted that their way of dealing with clause 2 of that rule is not above criticism. If, as held in *Rajanikanta Saha v. Emperor*(1) and in *Yakub v. Mahadev*(2), the omission to record reasons for taking action under that clause is only an "irregularity", the description of the first clause as "mandatory" may sometimes lead to an illogical position. I may in this connection refer to the observations of CHITTY J. in *Richerson In re Scales v. Heyhoe*(3) on the construction of Order XVI, rule 46, R.S.C., which empowered the Court in certain circumstances to dispense with service on the representative of a deceased person. The learned Judge said :

"There must be a *constat* on the face of the order that the attention of the Judge was called to the point and that he decided to proceed."

It is however sufficient for the present purpose to point out that clause 2 is only *negative* in form, in that it does not *preclude* the Court from issuing execution without issuing a notice under clause 1 and that if, on general principles or on a proper construction of section 50, the Court has no jurisdiction to sell a dead man's estate, clause 2 of Order XXI, rule 22, will not operate to *confer* such jurisdiction on the Court.

In this connection, a distinction has been suggested between cases where execution is sought by a fresh application filed after the death of a judgment-debtor and those where it is only sought to *continue* a pending execution application; *Ramanathan Chettiar v. Ramanathan Chettiar*(4). It is open to argument that this distinction is not

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VARADA-
CHARIAR J.

(1) (1930) I.L.R. 58 Cal. 940.

(3) [1893] 3 Ch. 146, 150.

(2) (1932) 34 Bom. L.R. 987.

(4) (1928) 30 L.W. 995, 1002.

492 THE INDIAN LAW REPORTS [VOL. LIX

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB
—
VARADA-
CHARIAR J.

reconcilable with the decision of the Judicial Committee in *Raghunath Das v. Sundar Das Khetri*(1). [See also *Smith v. Kailash Chandra Chakraverty*(2)]. But, even in *Ramanathan Chettiar v. Ramanathan Chettiar*(3), the learned Judges recognize the necessity for notice to the legal representative when by the death of a sole judgment-debtor pending the execution petition his estate will otherwise be left unrepresented (see pages 998, 1004 and 1007). The case of *Krishna Pershad Singh v. Moti Chand*(4) was not a case of non-representation of the estate of the deceased judgment-debtor. The minor sons had been impleaded in the suit itself, but they were represented by a Court guardian and not by the father. On the transfer of the decree for execution to another Court, the former Court guardian could not take steps to protect their interests; this is apparently why their Lordships say on page 646 :

“There was no effective representation of the infant heir”;

see also *Fani v. Surendra*(5) and *Kuppuswamy Ayyangar v. Bavaswami Rao*(6). I may also point out that in that case the application itself had been filed under section 311 of the Code of 1882 and, as their Lordships were satisfied as to the proof of “substantial injury”, it was unnecessary for them to consider whether the minor would have been entitled to relief independently of section 311.

It only remains to deal with the argument based on the observations in *Malkarjun v.*

Narhari(1) and *Sheo Prasad v. Hira Lal*(2) and elsewhere as to the necessity of protecting *bona fide* auction purchasers and considerations of convenience. In answer to the first, it is sufficient to point out that all observations about the right of purchasers have expressly or impliedly been made subject to conditions relating to the jurisdiction of the Court in respect of the decree or sale as the case may be. For instance, in *Gopal Chundar Chatterjee v. Gunamoni Dasi*(3), which the Judicial Committee approve of in *Raghunath Das v. Sundar Das Khetri*(4), the finding of the lower appellate Court was that the auction purchaser had acted *bona fide* but the High Court nevertheless held the sale void. In the period anterior to the confirmation of the sale, this argument has even less force, because it is not the principle of the law that during this period an auction purchaser has anything like an “absolute” right to insist on the sale being confirmed; cf. *Raja of Kalahasti v. Maharaja of Venkatagiri*(5) and *Tanguturi Jaganadham v. Seshagiri Rao*(6). In cases falling under Order XXI, rule 90, the fact that the auction purchaser may have acted perfectly *bona fide* is no bar to the setting aside of the sale.

Coming next to considerations of convenience, it is by no means clear that they point necessarily or even predominantly in favour of the course contended for on behalf of the appellant. If it may seem a hardship that a decree-holder or auction purchaser should be frustrated or defeated

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB
—
VARADA-
CHARIAR J.

(1) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337, 347.

(2) (1889) I.L.R. 12 All. 440, 446 (F.B.).

(3) (1892) I.L.R. 20 Cal. 370.

(4) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 (P.C.).

(5) (1913) I.L.R. 38 Mad. 387, 395. (6) (1916) 20 M.L.T. 479.

(1) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 (P.C.).
(2) (1931) I.L.R. 11 Pat. 241. (3) (1928) 30 L.W. 995, 1002.
(4) (1913) I.L.R. 40 Cal. 635 (P.C.).
(5) (1921) 35 C.L.J. 9. (6) (1926) I.L.R. 50 Mad. 357.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
VARADA-
CHARIAR J.

by the death of the judgment-debtor, of which they may not sometimes be even aware, it is equally possible to conceive of cases where the legal representative may not be aware of the pending execution proceedings, and it will certainly be a serious hardship to deny to him the opportunity of taking steps under Order XXI, rules 89 and 90, if, as is not unlikely, he should not become aware of the sale before the expiry of thirty days from the sale. Again, it is not justifiable to assume that, once the proclamation of sale has been settled after notice to the judgment-debtor, everything necessary to safeguard his interests has been done. There are provisions in the Code which secure very considerable practical advantages to the judgment-debtor right down to the moment of sale and, under some of these, it is for him to take the initiative and not merely to oppose an application by the decree-holder, e.g., Order XXI, rules 69 and 83 ; and, if the sale is to take place without any legal representative on record, these advantages will be denied to him. Where, as in the present case, the judgment-debtor is a father who dies undivided from his sons, there is an even more serious objection to the sale going on without bringing the sons on record. The sons may wish to raise a contention that the property sought to be sold is "joint family property" and that the decree against the father was passed in respect of an illegal or immoral debt. In view of section 53, Civil Procedure Code, these questions must be decided by the executing Court and they cannot be said to fall under Order XXI, rule 90. Nor, in view of the very wide terms of

section 47, Civil Procedure Code, could it be maintained that they can be raised and decided in a separate suit.

I am therefore of opinion that the Court below was right in holding the sale to be void.

WADSWORTH J.—I agree with my learned brothers, CORNISH and VARADACHARIAR JJ., and have nothing to add.

VENKATARAMANA RAO J.—I agree. The plaintiff, the sixth respondent herein, obtained a money decree against the first defendant, since deceased, and in execution thereof attached certain immovable property of his. After the proclamation of sale was settled and the order for sale was passed, the first defendant died and without impleading his legal representatives or notice to them the sale was held and the property was purchased by the appellant. Is the sale void or voidable? If the Court has no jurisdiction to sell the property under such circumstances, it is certainly void. If it has, then it is only voidable, and the further question arises, is the omission to implead the legal representatives or to issue a notice to them a material irregularity sufficient by itself to have the sale set aside or must substantial injury be shown? Therefore the main question for decision is, had the Court jurisdiction to sell?

"Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, viz., (i) with reference to the subject-matter, (ii) the parties and (iii) the particular question, which calls for decision. A Court cannot adjudicate upon a subject-matter which does not fall within its province as defined or limited by law. As regards jurisdiction in relation to persons, a Court cannot act upon persons who are not

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.

VENKATA-
RAMANA
RAO J.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

legally before it, upon one who is not a party to the litigation. As regards jurisdiction in regard to the particular question which a Court assumes jurisdiction to decide, it can pass judgment only upon a matter which has been submitted to its determination and which under the statute it has authority to decide"; *per* MOOKERJEE J. in *Sukh Lal Sheikh v. Tara Chand Ta(1)*.

In this case, the Court has jurisdiction over the subject-matter, viz., the execution of its own decree, but has it jurisdiction in relation to the parties? In order to have it, the proper parties must be before it, otherwise the Court would have no jurisdiction to sell the property of persons who were not parties to the proceedings. It is contended by Mr. V. V. Srinivasa Ayyangar that the decree was properly passed against the deceased first defendant and, while he was alive, the Court had attached the property and taken it under its custody and nothing further was required to be done and everything essential for the Court to have jurisdiction had been complied with, in relation to the subject-matter and the parties and the question to be decided. According to him, the decree has established the liability of the deceased and the estate of the first defendant after his death is virtually the judgment-debtor and the party before the Court and the addition of the legal representative is not necessary. He relies strongly on the Full Bench decision in *Sheo Prasad v. Hira Lal(2)*, on *Doraswami v. Chidambaram Pillai(3)* and on *Malakarjun v. Narhari(4)*. Before examining the soundness of the Allahabad view, which is based on the

theory of attachment, it is necessary to define exactly the legal effect of the death of a defendant in relation to his property. One of the recognized modes known to law by which property is lost is the death of its owner. As Salmond observes in his "Jurisprudence":

"Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as they are free from liabilities. . . . They do not even remain owners of their property until their successors enter upon the inheritance."

As explained by RANADE J. in *Erava v Sidramappa(1)*:

"The so-called estate of a deceased person is a very convenient legal fiction, but, as a matter of fact, there is in Hindu law at least no such objective reality as the estate of a deceased person. At the moment of Nagappa's death, the property owned by him ceased to be his, and became the property of his heirs subject, of course, to the liabilities and obligations created by him."

The expression "the estate of the judgment-debtor" is used in the several sections of the Civil Procedure Code to indicate the quantum of liability and to signify that the legal representative is to pay from and out of the estate which was of the deceased and devolved on him in contrast to what was already owned by him. That it is the legal representative that becomes in fact liable will be clear if the theory on which this liability is fastened is understood. The notion of the continuance of the existence of the ancestor in the heir is largely involved in the conception of succession and by the resort to this fiction the rights and obligations which were attached to his person were deemed to continue,

(1) (1905) I.L.R. 33 Cal. 68, 71 (F.B.).

(2) (1889) I.L.R. 12 All. 440 (F.B.). (3) (1923) I.L.R. 47 Mad. 63.

(4) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(1) (1895) I.L.R. 21 Bom. 424, 453.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

so much so that the heir was even held liable personally for the debts of the deceased, but now the law has modified it and limited the liability to the extent of the estate which he has inherited and he is rendered liable personally only if he is unable to prove that he has duly applied the property he got. As Salmond says :

“The rights which a dead man thus leaves behind him vest in his representative. They pass to some persons whom the dead man or the law on his behalf has appointed to represent him in the world of the living. The representative bears the *persona* of the deceased and therefore has vested in him all the inheritable rights and has imposed upon him all the inheritable liabilities of the deceased. Inheritance in some sort is a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with the persons whom he represents.”

Therefore, as soon as a man dies, he disappears from the record and there is no party over whom the Court can exercise jurisdiction and it loses jurisdiction in one of its essentials ; vide *In re Shephard. Atkins v. Shephard*(1). No decree can be passed without bringing his representative on the record. After he is so brought, he becomes the defendant. Similarly, after the decree he becomes the judgment-debtor. If there is no attachment of his property, even Sir JOHN EDGE in *Madho Prasad v. Kesho Prasad*(2) concedes that any execution had without the legal representative on record is ineffectual. Indeed, he observes :

“There is quite sufficient irregularity in the execution of decrees in this country without our introducing the novel system that a decree can be executed against the estate of a deceased judgment-debtor without any notice to the

(1) (1889) 43 Ch. D. 131, 136, 137. (2) (1897) I.L.R. 19 All. 337.

representative and without any one to protect the property being brought upon the record.”

It is not possible to understand how the attachment could make any difference and how the property can be protected without the representative being on the record if there is an attachment. As observed by BODDAM J. in *Groves v. Administrator-General*(1):

“The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal devolution of the property ; it only gives at the best the custody of the property, without affecting the right to the property, to the Court.”

If the correct juristic principle is that the dead man is no person in the eye of the law and, on the death of a judgment-debtor, the liability of paying his debts devolves on his legal representative, whether on decree or otherwise, the Court cannot regain the jurisdiction which it has lost till the representative is impleaded and made the judgment-debtor and the property which became his cannot be sold and no right thereto would pass to the execution purchaser.

That it is obligatory to implead the legal representative is clear from the various enactments relating to civil procedure passed from time to time by the Legislature. The provisions of Act VIII of 1859 relating to this were sections 210, 211 and 203. Section 210 corresponded to section 234 of Act XIV of 1882 and section 50 of Act V of 1908 and sections 211 and 203 to section 51 of Act V of 1908. Section 210 is in these terms :

“If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be made against the legal representative or the estate of the person so dying as aforesaid

(1) (1898) I.L.R. 22 Mad. 119.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA
RAMANA
RAO J.

and if the Court shall think proper to grant such application the decree may be executed accordingly."

This section was interpreted to mean that the property of the deceased in the hands of a person other than the legal representative can be proceeded against, making him a party and to that extent a representative of the estate. But no execution can issue against the estate without somebody being on the record representing the estate. In *Lekraj Roy v. Becharam Misser*(1) MACPHERSON J. observes as follows :

" The present application is defective and wholly bad . . . It is made generally against the estate of the deceased *Becharam Misser* . . . We are quite clear that no execution can issue till some one is placed on the record, as representing the estate. Section 210 of Act VIII speaks of execution against the estate; but that does not in our opinion mean the estate independent of some person who is, for some reason or another, legally liable to a greater or less extent as representing the deceased person under the decree. We know of no precedent for the issue of execution against the estate of a dead man, when there is no one on record who represents him."

To a similar effect is the case reported as *Ameerunnissa Khatoon v. Meer Mozuffer Hossein Chowdhry*(2).

Section 234 of Act X of 1877 and Act XVI of 1882 replaced section 210 of Act XIV of 1859. Section 234 was in these terms :

" If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

FARRAN C.J. described the effect of sections 234 and 248 thus in *Erava v. Sidramappa*(3) :

" Section 248 of the Code places a decree where a year had elapsed since the last proceeding in execution and a decree

in cases where the judgment-debtor has died upon the same footing. A duty is imposed on the Court to give the requisite notice before execution issues in either case. The procedure to be adopted in the case of the death of the judgment-debtor where execution is sought against his property is laid down in section 234 of the Code. *To my mind it appears to be the only way in which the decree can be enforced.* The Code of 1859 provided (section 210) that an application for execution could be made against the 'estate' of a person dying after decree against him, but no such provision is to be found in the present Code."

The position is made perfectly clear by their Lordships of the Privy Council in *Raghunath Das v. Sundar Das Khetri*(1) where, after an order for sale, the judgment-debtor became insolvent. Their Lordships assume that notice under section 248 of the old Code should go to the Official Assignee and on that basis make the following observations :

" As laid down in *Gopal Chunder Chatterjee v. Gunamoni Dasi*(2) a notice under section 248 of the Code is necessary in order that the Court *should obtain jurisdiction* to sell property by way of execution against the legal representative of a judgment-debtor." (The italics are mine).

This case is an authority for two propositions:

(i) whatever the stage of execution, whenever a judgment-debtor dies, the presence of a legal representative is necessary before further proceedings can be had; (ii) it is a case of jurisdiction and not a case of mere irregularity because there would be no party on the record until the legal representative is impleaded.

The Madras High Court, before the passing of Act V of 1908, has consistently taken the view, differing from the Allahabad decision, that, if the judgment-debtor dies before the decree

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

(1) (1867) 7 W.R. 52.

(2) (1873) 12 Beng. L.R. 65, 68 and foot-note on page 69.

(3) (1895) I.L.R. 21 Bom. 424.

(1) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 (P.C.).

(2) (1892) I.L.R. 20 Cal. 370.

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

has been fully executed, it is obligatory on the executing creditor to apply for execution against the legal representative; see *Groves v. Administrator-General*(1). The Legislature has accepted the Madras view and amended the section by substituting “fully satisfied” for “fully executed”.

The Code contemplates the necessity of a judgment-debtor being a party to sale proceedings. The provisions of the Code show that even after decree the law gives the debtor many reasonable facilities for saving the property from sale and, if a sale has become inevitable, the law further enables him under proper restrictions to complain of irregularity in connection with it. How could the interest of a judgment-debtor, if he be dead, be effectively protected in execution if it is to go on without his being represented therein?

Mr. V. V. Srinivasa Ayyangar contended that, under section 50, if it is only necessary for him to apply for execution, the decree-holder should do so and after the order for sale there would be no necessity for him to apply for execution and Order XXI, rule 22, applies only when the execution proceedings are initiated; *Doraswami v. Chidambaram Pillai*(2). This contention gives the go by to the words “fully satisfied”. When the judgment-debtor dies, there is no one who could be said to be a party. Hence the necessity for the application and, after application is made, the Court is bound to issue notice under Order XXI, rule 22. In a pending execution proceeding, there is no necessity to make a fresh execution application but the execution will be continued from the

(1) (1898) I.L.R. 22 Mad. 119.

(2) (1923) I.L.R. 47 Mad. 63.

stage where it was when the judgment-debtor died. Mr. V. V. Srinivasa Ayyangar strongly relied on *Malkarjun v. Narhari*(1) for the position that the omission to bring on record the legal representative is only an irregularity and does not affect the jurisdiction of the Court and that this is the correct position is strengthened, according to him, by the Legislature enacting clause 2 of Order XXI, rule 22. As the Privy Council have themselves explained the scope of this decision in *Raghunath Das v. Sundar Das Khetri*(2), it is not a case of no representation but it is a case of a wrong representation. If there is a wrong representation or a defective representation as in *Krishna Pershad Singh v. Moti Chand*(3) or *Ramanathan Chettiar v. Ramanathan Chettiar*(4), the legal representatives on the record being minors or insane [cf. *Narayana Kothan v. Kalianasundaram Pillai*(5)] and not represented by a proper guardian or any guardian, there is no want of jurisdiction in such cases but it will be a case of irregularity or even “material irregularity” sufficient in itself to invalidate the sale. The argument based on Order XXI, rule 22, may be briefly dealt with. It may be legitimate to contend that, if there is a judgment-debtor on the record, there is always jurisdiction to sell and omission to issue a notice would not take away jurisdiction and Order XXI, rule 22, clause 2, is intended to apply to cases coming under clause (a), but the Legislature has clubbed both (a) and (b) of clause 1 together and the issue of a notice is

KANCHAMALAI
PATHAR
v.
SHAHAJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

(1) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(2) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 (P.C.).

(3) (1913) I.L.R. 40 Cal. 635 (P.C.).

(4) (1928) 30 L.W. 995.

(5) (1895) I.L.R. 19 Mad. 219.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

made mandatory. What the Legislature contemplates is there must be an application under section 50 to execute the decree against the legal representative and, once that is made, both clauses (a) and (b) of Order XXI, rule 22, stand on the same footing and in both the cases, if the conditions mentioned in clause 2 are satisfied, the Court can dispense with the notice. As pointed out in *Rajagopala Ayyar v. Ramanujachariar*(1):

“The only effect of the sub-section is to give the Court jurisdiction in certain cases in which without it the Court would have none.”

The true legal position is correctly summed up in *Ramanathan Chettiar v. Ramanathan Chettiar* (2) at page 1004 :

“An initial notice under rule 22 when issued does sufficiently, for the purposes of the law, bring into Court the estate against which execution is being enforced and sufficiently retains it there, unless the result of the death of the party to whom notice was originally issued is to leave no one at all on the record to represent the estate and thus to effect the disappearance of the estate from the jurisdiction of the Court.”

So

“the only thing sold was the right of a dead man which passes no property . . . the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.” *Groves v. Administrator-General* (3).

The sale in this case is therefore void. Even if it is not void, the omission to implead the legal representatives is a material irregularity sufficient by itself to invalidate the sale without any further

(1) (1923) I.L.R. 47 Mad. 288, 302 (F.B.).
(2) (1928) 30 L.W. 995. (3) (1898) I.L.R. 22 Mad. 119, 125.

proof of substantial injury ; see *Malkarjun v. Narhari*(1).

Mr. Srinivasa Ayyangar next contended that a bona fide purchaser at an execution sale ought not to be affected by the irregularities in the Court proceedings and relied on the Privy Council decision in *Rewa Mahton v. Ram Kishen Singh*(2). Their Lordships therein observe :

“If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution.” Therefore the question is one of jurisdiction and not bona fides. If there is no jurisdiction, no amount of bona fides can confer title on an execution purchaser.

The decision in *Doraswami v. Chidambaram Pillai*(3) is vitiated by certain wrong assumptions. The learned Judges observe :

“It may not be accurate to speak of a dead man as owning property ; it is well understood that in law there are estates of deceased persons.”

It has been already shown that this conception is wrong and why the expression “the estate of a deceased person” is used by the Legislature. Another assumption is :

“When the law only prescribes the issue of a notice to them at the commencement of the execution proceedings, they cannot claim, as a matter of right, to have a fresh notice if their representation of the deceased’s estate commences during the progress of the carrying out of the processes of the Court.” This is again based on a misreading of section 50 and Order XXI, rule 22. Their Lordships again proceed on a misunderstanding of the scope of the decisions in *Malkarjun v. Narhari*(1) and *Gopal Chunder Chatterjee v. Gunamoni Dasi*(4).

(1) (1900) L.R. 27 I. A. 216 ; I.L.R. 25 Bom. 337, 348.
(2) (1886) L.R. 13 I.A. 106 ; I.L.R. 14 Cal. 18, 24, 25.
(3) (1923) I.L.R. 47 Mad. 63. (4) (1892) I.L.R. 20 Cal. 370.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
VENKATA-
RAMANA
RAO J.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.

I am therefore of opinion that *Raghunathaswamy Iyengar v. Gopal Rao*(1) and *Rajayya v. Annapurnamma*(2) have been correctly decided and the sale in this case is void and the appeal fails and should be dismissed with costs.

LAKSHMANA
RAO J.

LAKSHMANA RAO J.—This is an appeal by the auction purchaser and the question for determination is whether the lower Court was right in holding that the sale was void.

The sale was held in execution of a simple money decree obtained by the sixth respondent against the undivided father of respondents 1 to 5 and it is common ground that the judgment-debtor against whom the decree was being executed died after the order for sale but before the actual sale. The legal representatives were not impleaded though the demise of the judgment-debtor was brought to the notice of the decree-holder and the Court, and the sale was held with none on record to represent the estate. The appellant became the purchaser and the application out of which this appeal arises was filed by respondents 1 to 5 to avoid the sale on, among other grounds, that it was void. The lower Court upheld their contention that the sale was void and hence this appeal.

There was, under the previous Code of Civil Procedure, a conflict as to whether the legal representative should be impleaded if the judgment-debtor dies after attachment of his properties, but the conflict was set at rest by the present Code by substituting the word "satisfied" for the word "executed" in section 50 and legislative sanction was accorded to the Madras view that until the

sale is actually held the decree cannot be said to be fully executed, and, if the judgment-debtor dies before sale and further execution is needed, his legal representative ought to be brought on record. It is therefore futile to contend that, once the order for sale is passed, the legal representative need not be impleaded, and the real question is whether the failure to implead the legal representative renders the sale void or voidable. It is well settled that attachment does not create any interest in or charge over the property, nor do sections 50, 52 and 53, which relate to execution against the legal representative and liability of ancestral property, prevent or postpone the vesting of the property in the legal representative. They merely define the liability of the legal representative and the property in his hands, and, in spite of the order for sale, the legal representative can in certain cases challenge the right of the decree-holder to proceed against the property. A separate suit in respect of that matter will be barred under section 47 and it would be wrong to allow the sale to proceed until proper steps are taken to bring the legal representative before the Court and obtain an order binding on him. The property vests in him on the death of the judgment-debtor and, unless further proceedings are to be dropped, there is no option left to the decree-holder but to follow the procedure laid down in section 50, viz., to execute the decree against the legal representative. This can be done either by an independent application or by impleading the legal representative in the pending execution petition, but, as pointed out in *Gopal Chunder*

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
LAKSHMANA
RAO J.

(1) (1921) 41 M.L.J. 547; A.I.R. 1922 Mad. 206.

(2) (1925) 50 M.L.J. 662.

KANCHAMALAI
PATHAR
v.
SHAHJI
RAJAH SAHIB.
—
LAKSHMANA
RAO J.

Chatterjee v. Gunamoni Dasi(1) which was approved by the Privy Council in *Raghunath Das v. Sundar Das Khetri*(2), a notice under section 248 of the old Code corresponding to Order XXI, rule 22, of the present Code, is necessary in order that the Court may obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. Clause 2 of Order XXI, rule 22, which under certain circumstances empowers the Court to issue any process in execution without issuing the prescribed notice, assumes the presence on record of some person against whom the process is to be issued and, as observed in *Rajagopala Ayyar v. Ramanujachariar*(3), the only effect of this clause is to give the Court jurisdiction in certain cases in which without it the Court would have none. The decision in *Malkarjun v. Narhari*(4), wherein a wrong person was impleaded but was held to be the true heir, has no bearing, and the sale in this case must be held to be void. That was the view of this Court from the earliest times and the decision in *Doraiswami v. Chidambaram Pillai*(5) which took the opposite view was disapproved by the Full Bench soon after in *Rajagopala Ayyar v. Ramanujachariar*(3). The decision of the lower Court is therefore right and the appeal must be dismissed with costs.

A.S.V.

(1) (1892) I.L.R. 20 Cal. 370.

(2) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72.

(3) (1923) I.L.R. 47 Mad. 288, 302 (F.B.).

(4) (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337.

(5) (1923) I.L.R. 47 Mad. 63.

ORIGINAL MATRIMONIAL.

Before Mr. Justice Mockett.

AGNES SUMATHI AMMAL, PETITIONER,

v.

D. PAUL, RESPONDENT.*

Indian Divorce Act (IV of 1869) sec. 2—Marriage in Mysore State—Parties, domiciled subjects of Mysore State—Nullity of marriage—Petition by wife in Madras—Petitioner, bona fide resident of Madras—Jurisdiction.

A petition was presented by a wife against her husband under the Indian Divorce Act to the Madras High Court in its Original Matrimonial Jurisdiction praying for a decree for nullity of her marriage. The petitioner and the respondent were married in Mysore State and they were domiciled subjects of the same but the petitioner was a *bona fide* resident of Madras at the time of the petition. On an objection taken to the jurisdiction of the Court,

held, that the Madras High Court had jurisdiction in respect of the same.

M. A. T. Coelho and *T. Krishnarajan* for petitioner.

K. Varadachari and *P. V. Srinivasachari* for respondent.

Cur. adv. vult.

JUDGMENT.

This is a petition under the Indian Divorce Act by a wife against her husband. She prays for a decree for nullity of her marriage. It is conceded that the husband is a domiciled subject of H.H. The Maharaja of Mysore; that is to say, he is what is known as a Mysorean. The marriage was in Mysore State, and the parties

* Original Matrimonial Suit No. 2 of 1935.

SUMATHI
AMMAL
v.
PAUL.

lived together in Mysore State. It is axiomatic that the domicile of the wife is the domicile of the husband, and that the nationality of the wife is the nationality of the husband. Therefore the petitioner must be regarded as a domiciled subject of Mysore State. Apart from the facts, the defence to this case is one of jurisdiction. The respondent says that this Court has no jurisdiction under the Indian Divorce Act to grant the decree.

With regard to the facts, I have no difficulty whatever. The respondent has not gone into the witness-box. The wife has gone into the box. I shall first deal with the medical aspect. She has told me—and I accept her story—that from the very beginning of her marriage the respondent had some sort of physical aversion to any marriage relations with her and that in fact no marriage relations with her took place although she apparently at least made some sort of advances to her husband. That evidence is not contested. I did not think it right, although I could have accepted it uncorroborated, had I thought fit, to allow this case to be proved on the evidence of the wife alone [*Wilson v. Wilson*(1) and cases cited therein], and so Mr. Coelho who appears for the petitioner, at my suggestion, has called a lady of high qualifications and she has told me that she has examined the petitioner, and that, as far as it is possible to say, the petitioner is a virgin. I did not appoint a special board in this case as I thought it sufficient for the petitioner to call a doctor of whom I approved and it is quite obvious that the evidence of Dr. Satur was such evidence as I could accept

(1) A.I.R. 1931 Lah. 245.

SUMATHI
AMMAL
v.
PAUL.

without any question. Therefore, on the question as to whether this marriage was consummated, I am definitely of opinion that it was not, and I am definitely of opinion that there was nothing on the part of the petitioner which led to that state of affairs. I am entitled to infer and I find that the respondent is impotent *quoad* the petitioner.

The only other question of fact is whether the petitioner was resident in Madras. "Residence" means not residence for the purpose of invoking the divorce law but *bona fide* residence. There is ample authority for that proposition and it only requires stating. Now what are the facts? The wife, the petitioner, lived with her husband for a short time only, and afterwards with her mother and father. The father died on 17th February 1934, and from the time of his death until November 1934 the petitioner continued to live with her mother at a place called Doddaballapur, about twenty-four miles from Bangalore. In November 1934 she came to Madras with her mother. Her action in coming here has been strongly criticised by the learned Counsel for the respondent, which he is quite entitled to do. He suggests that it was a move in order to get the advantage of suing in this Court. But the petitioner's mother has told me—and I accept her evidence—that she herself was a Madrasce, and, that being so what is more natural than that after the death of her husband, and after his properties, as she has told me, had been disposed of in Mysore State, she should come back to Madras? There is a special reason for that because it appears that Mr. Asirvadam Pillai, an Honorary Magistrate in this city, who

SUMATHI
AMMAL
v.
PAUL.

has given evidence and who lives at "Gifford House", Kilpauk, had apparently offered them a home here, and there was very good reason to do so because his son had married the petitioner's sister. A combination of the above circumstances seems to me to lead to the most natural conclusion that these two women left alone, deliberately by the petitioner's husband and adventitiously by the death of her father, should go back to the place where apparently the mother had been before and where she had kind friends. And I think it right to say that I can see no reason for criticising Mr. Asirvadam Pillai's behaviour at all; on the contrary, he seems to have taken a most commendable attitude in coming to the rescue of these two women who, in the manner I have described, had found themselves without the assistance of any of their men-folk. He seems to have given them a home in his house and generally has behaved as one would hope that most men would behave to women in some degree of distress. I therefore find that so far as the residence is concerned the petitioner is genuinely a resident in Madras and that from that point of view is entitled to invoke the jurisdiction of this Court.

So much for the facts. With regard to the law, I am proposing to take time to consider the matter as a point of very great importance is raised. At this stage I only desire to say this. The respondent's attitude is: you cannot get this marriage annulled in Mysore State because there is no legislation there for that purpose; you cannot get this marriage annulled in the Madras Presidency (or anywhere else) because the Madras High Court has no jurisdiction; and so, by inference, he says, you will remain married to me and

SUMATHI
AMMAL
v.
PAUL.

unable to marry anybody else just as long as I live although I am not prepared to live with you on the terms that are usual between husband and wife. That is an attitude that he is entitled to take up if it is the law. What I have to consider is whether it is the law, and, as I have already said, that is a point that I propose to consider and will deal with it at a later date.

The respondent's Counsel contends that this Court has no jurisdiction inasmuch as (i) the respondent was and is domiciled in Mysore State, (ii) the marriage was in Mysore State, and (iii) the petitioner and respondent have never resided in British India together. It is necessary therefore to consider the provisions of the Divorce Act IV of 1869 as amended by Acts XX of 1926 and XXX of 1927. The object of these last two Acts was to clarify the position in India owing to the uncertainty which had arisen with regard to the power of Indian Courts to dissolve marriages of persons not domiciled in India, a doubt which was brought to a head by the decision of the President of the Probate, Divorce and Admiralty Division in *Keyes v. Keyes and Gray*(1), and it will be seen that since the amending Statute of 1926 this Court has power only to dissolve marriages of persons domiciled in India at the time when the petition was presented. The Act followed on a conflict of judicial decisions in this country, of which *Wilkinson v. Wilkinson*(2), *Lee v. Lee*(3) and *Miller v. Miller*(4) are examples. The result now is that, so far as the statute law in India relating to dissolution is concerned, it is in accord with the established

(1) [1921] P. 204.

(2) (1923) I.L.R. 47 Bom. 843.

(3) (1924) I.L.R. 5 Lah. 147 (F.B.).

(4) (1924) I.L.R. 52 Cal. 566.

rule of Private International Law, but so far as decrees for nullity are concerned the Indian Statute still confers upon the Indian Courts jurisdiction under certain circumstances. This would appear also to be according to the rules of Private International Law as enunciated by JEUNE P. in *Roberts v. Brennan*(1) with this variation that under the Indian Divorce Act it is the petitioner's residence which is material. I am however bound to point out that, since the decision in *Salvesen or von Lorang v. Administrator of Austrian Property*(2)—a decision of the House of Lords—and *Inverclyde v. Inverclyde*(3), it is open to argument whether according to Private International Law domicile is not essential to give a Court jurisdiction in suits for nullity based on grounds of impotence, as distinct from other grounds. In other words, it would appear that the rule, as recognized at least in England, is that suits for nullity on grounds of impotence and suits for dissolution of marriage are, so far as jurisdiction is concerned, identical, i.e., that only a decree of the *forum domicilii* will be recognized. This of course is only relevant if and when the recognition of this Court's decree of nullity by a Foreign State arises. It is clear that under the Indian Divorce Act as amended I have express jurisdiction conferred upon me to grant a decree for nullity which is unquestionably binding in British India even though the parties are domiciled elsewhere. Whether Foreign Courts will recognise such a decree is of course another matter and will depend on whether the decision in *Salvesen's* case and

(1) [1902] P. 143.

(3) [1931] P. 29.

(2) [1927] A.C. 641.

Inverclyde v. Inverclyde(1) is adopted as stating the rules of Private International Law.

It is however contended on behalf of the respondent that the Divorce Act expressly or by implication excludes the petitioner from its operation. Section 2 of the Act reads as follows :

“ This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except where the petitioner (or respondent) professes the Christian religion,

or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

or to make decrees of nullity of marriage except where the marriage has been solemnised in India, and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.”

It should be noted that residence must be “ in India ” not “ in British India ”. It is conceded that the petitioner's husband is not a British subject but a subject of Mysore State. The petitioner however relies on that part of section 2 which confers jurisdiction in suits for nullity when the marriage has been solemnised in India and the petitioner is resident in India at the time of presenting the petition. Both those conditions are satisfied in this case. The respondent still contends that those words only apply to parties governed by the Act, which he contends does not apply to Indian subjects of Mysore State. I agree

(1) [1931] P. 29.

that the wording of the Act is at the least difficult to interpret; but the principal statute has by amendment deliberately introduced into it the words "and the petitioner is resident in India". It must be noted also that the marriage need not be solemnised in British India but simply "in India". Section 2 seems to mean this, that so far as a suit for dissolution is concerned a domiciled British subject but resident in Mysore State can invoke this Court's jurisdiction, but that so far as a suit for nullity is concerned any person resident in India who has been married in India can bring a suit for nullity. In *Roberts v. Brennan*(1) the President held that it (the Court) had power to annul the marriage of a domiciled Irishman; and I imagine that the object of the Indian Divorce Act was to enact rules of Private International Law as then generally recognized. I am told that there is no Court in Mysore which can dissolve or annul the marriage of an Indian Christian. It is difficult to suppose that the intention of the Legislature was to leave the Indian Christians resident in India who are subjects of a Foreign State without any remedy whatsoever. The whole object of the Act, as stated in the preamble, is "to amend the law relating to the divorce of persons professing the Christian religion". In two cases in England, *Stathatos v. Stathatos*(2) and *DeMontaigne v. DeMontaigne*(3), where the party before the Court had no apparent remedy, Judges of the Probate, Divorce and Admiralty Division assumed for themselves jurisdiction, the petitioner's position being, as stated in one of the cases, "intolerable."

(1) [1902] P. 143.

(3) [1913] P. 154.

(2) [1913] P. 46.

I do not think it is necessary for me to do that as I think that jurisdiction is expressly given me by the Act—and I am governed by the Act—not by rules of Private International Law.

I have only to add that I think it is clear from section 3 of the Indian Divorce Act and sections 3 and 4 of the Criminal Procedure Code that this High Court is the proper tribunal for petitions emanating from Mysore State.

The result therefore will be, there will be a decree for nullity with costs.

A question has arisen as to whether this decree should be *nisi* or absolute. It is unquestionably the practice in this High Court to make decrees of nullity *nisi*. This however appears contrary to the practice in the other High Courts and to the Act, and I think this is a matter of importance which should be finally determined. I therefore refer this point to a Bench for decision. I may say that I am not at all satisfied with my own judgment in Original Matrimonial Suit No. 5 of 1934 on this point. The point I wish to refer is whether a decree under the Indian Divorce Act for nullity should be a decree *nisi* or a decree absolute.

I direct that the papers be placed before the Chief Justice.

[The Judgment of the Full Bench on this point is reported at page 518 *et seq.*]

G.R.

ORIGINAL MATRIMONIAL—FULL BENCH.

Before Mr. Justice Stone, Mr. Justice Mockett and
Mr. Justice Wadsworth.

AGNES SUMATHI AMMAL, PETITIONER,

v.

D. PAUL, RESPONDENT.*

*Indian Divorce Act (IV of 1869), ss. 7, 16, 17, cls. 1 to 4,
17-A, 18 and 19—Nullity of marriage—Petition for—
Decree to be passed in the first instance—Decree nisi and not
decree absolute.*

Held by the Full Bench (WADSWORTH J. *contra*), that the decree that should be passed by the High Court in its Original Matrimonial Jurisdiction in a petition for nullity of marriage should in the first instance be a decree *nisi* and not a decree absolute.

THE facts of the case and the question referred to the Full Bench are stated in the judgment of MOCKETT J. at page 509 *et seq.*

ON THE REFERENCE :

M. A. T. Coelho and *T. Krishnarajan* for petitioner.

K. Varadachari and *P. V. Srinivasachari* for respondent.

Cur. adv. vult.

JUDGMENT.

STONE J.

STONE J.—The question that has been referred is whether a decree passed by the Court sitting for the disposal of matrimonial work of this High Court in a petition for nullity of marriage should be a decree *nisi* or a decree absolute. It has been

the practice in this High Court hitherto to make the decree in the first place a decree *nisi*. It would appear that the practice in the other High Courts and in particular Bombay has been different, those High Courts having in nullity suits made the decree absolute in the first place.

Section 16 of the Indian Divorce Act provides that a decree for a dissolution of marriage made by a High Court *inter alia* shall, in the first instance, be a decree *nisi* and shall not be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

Provision is made for the intervention, originally of any person, now, since the passing of section 17-A, an officer exercising power similar to those of the King's Proctor. On the other hand, section 18 enables a husband or wife to present a petition praying that the marriage might be declared null and void. Section 19 states the grounds upon which a decree of nullity may be granted, and section 20 makes it necessary in the case where a decree is passed by a District Judge for it to be subject to confirmation by the High Court and applies the provisions of section 17, clauses 1, 2, 3 and 4, to such decrees. Section 17, clauses 1, 2, 3 and 4 are concerned with the confirmation of a decree for dissolution of marriage by a District Judge, and it has been a matter of debate in other High Courts as to what clauses 1, 2, 3 and 4 include. The clauses are not numbered and there are in the section six paragraphs. The doubt has been as to paragraphs 4 and 5, whether those are two clauses or one clause *plus* a proviso. A (*Wife*)

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

1935,
October 11.

* Original Matrimonial Suit No. 2 of 1935.

520 THE INDIAN LAW REPORTS [VOL. LIX

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

v. *B (Husband)*(1) decides that the proviso is attached to the fourth clause and consequently the fourth clause includes the fourth paragraph and the fifth paragraph. *Edward Caston v. L. H. Caston*(2) and *Samuel v. Samuel*(3) decide that the fourth paragraph is one clause and the fifth paragraph, that is, the proviso is another clause. In my opinion, as a matter of construction it is not possible to regard a proviso as a clause, and I prefer to follow *A (Wife) v. B (Husband)*(1). If that be so, then in the case of decrees for nullity of marriage as in the case of decrees for dissolution of marriage, where those decrees are passed by a District Judge, six months must elapse between the passing of the decree and confirmation. On the other hand, if in the case of a petition for nullity the proper decree to pass is an absolute decree in the first instance, then there is a difference where the suits are brought in this High Court, between the case where the suit is for dissolution of marriage and the case where the suit is for a declaration that the marriage is null and void. In the first case, there is the decree *nisi* in the first instance; in the other case, the decree must be absolute in the first instance.

At the time the Indian Divorce Act was passed, the state of the law in England was as follows: In the case of dissolution, by the Act of 1860, section 7, the decree was *nisi* and the period that had to elapse before it could be made absolute was three months. That period, by section 3 of the Act of 1866, was extended to six months. But

this gap between the passing of the decree and the making absolute of the decree did not exist in the case of a nullity suit; that is to say, where the petition was for a declaration that the marriage was null and void, a simple decree making that declaration was passed and a decree *nisi* was not required. By the Act of 1873 for the first time, section 7 of the Act of 1860 and section 3 of the Act of 1866 were extended to decrees in suits for nullity of marriage, in like manner as they applied in suits for divorce. It will thus be seen that the Indian Divorce Act was passed at a time when the practice in England was to pass a decree *nisi* in the case of a suit for dissolution of marriage and a plain decree in the case of a suit for nullity of marriage. It will also be seen that, after the passing of the Indian Divorce Act, by statute in England that position was altered so as to put the two classes of cases, as regards this point, on a parity.

It is necessary now to refer to another section, and a very important one, of the Indian Divorce Act. Section 7 provides as follows:

“Subject to the provisions contained in this Act, the High Courts . . . shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.”

Then follows a proviso. In *Iswarayya v. Iswarayya*(1) REILLY J. made some remarks upon the meaning of the words “principles and rules” in this section. His observations

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

(1) (1898) I.L.R. 23 Bom. 460.

(2) (1899) I.L.R. 22 All. 270 (F.B.).

(3) (1934) I.L.R. 15 Lah. 846 (S.B.).

(1) (1929) 58 M.L.J. 29.

SUMATHI
AMMAL
v.
PAUL.
STONE J.

are at page 31. I would observe that these observations are *obiter*. He says :

"The words 'principles and rules' in section 7 of the Indian Divorce Act mean principles and rules of law, of evidence, of interpretation, of practice, and of procedure but not statutory provisions nor statutory rules."

That case went to the Privy Council and I shall return to it later when considering what the Privy Council has had to say on this. At the moment I content myself with observing that those words "principles and rules" are to be found in the English Divorce Act of 1857, section 22, which provides as follows :

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

I think it is a little unfortunate that a term which is apposite when dealing with the principles and rules applied by the Ecclesiastical Courts has been imported into a section which directs this High Court to act on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. But I am satisfied that the Court for Divorce and Matrimonial Causes in England acts upon principles and rules which include statutory provisions. I myself find it difficult to see why a distinction should be drawn between those "principles and rules" (which presumably mean principles and rules of law) which are derived from statute and those which are derived from any other source. Such source clearly cannot be the principles and rules applied by the old

SUMATHI
AMMAL
v.
PAUL.
STONE J.

Ecclesiastical Courts, because such principles and rules would have become a closed body of principles and rules at the time when the old Ecclesiastical Courts were replaced by the Court for Divorce and Matrimonial Causes and could not thereafter, as principles and rules of the Ecclesiastical Courts, be extended, and, with respect, I find myself unable to agree with the last seven words of the citation above made from REILLY J.'s judgment in *Iswarayya v. Iswarayya*(1). But, subject to the deletion of the last seven words, I respectfully agree with his observations in that case. When the case came before the Privy Council reported as *Iswarayya v. Swarnam Iswarayya*(2), the Judicial Committee at page 375 made the following observations :

"Their Lordships fully realise that an Indian Act does not fall to be construed in the light of statutes enacted by another Legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms."

In that case the question was whether in the case of a decree for judicial separation the Courts in India had the power to increase permanent alimony or whether once the order directing permanent alimony had been passed that exhausted

(1) (1929):58 M.L.J. 29.

(2) (1931) I.L.R. 54 Mad. 774 (P.C.).

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

the power of the Court. In other words, whether the expression "an order" excluded the idea of a series of orders. In the present case, the question is whether the words, "a decree", exclude the possibility of a decree reached in two stages or including two stages, one a decree *nisi*, the other, a decree absolute. Lord RUSSELL who delivered the judgment of the Board follows out the history of the law in England, but he only refers to this history after he had considered as a matter of construction the relevant section in the Indian Divorce Act; that is to say, their Lordships first of all consider as a matter of construction what the true meaning of the relevant section of the Act is and then they consider the history of the matter as it was in England in order to see whether that in any way throws doubt on the correctness of the reading that they have given to the relevant section. They do this because they observe at page 372 that

"section 7 of the Act makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Courts in England acted and gave relief."

Their Lordships add :

"It is therefore not irrelevant to enquire how matters stood and stand in England in relation to this question."

Under the Act of 1857 provision was made for the maintenance of the wife after the dissolution of the marriage. That was a new provision. It gave the Court power to order the husband to secure by deed a gross sum to the wife and to suspend pronouncing of its decree until the deed had been executed. That provision is permanent maintenance. Under that section no power was conferred on the Court to make a subsequent

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

order. It is only effective against the husband who had property to secure. To remedy that defect the Act of 1866 was passed, which empowered the Court to make an order directing the husband to pay periodically a sum to the wife for maintenance and support. Thus at the time of the passing of the Indian Divorce Act, in the case of a decree for dissolution of marriage the Court had power to direct the securing of a gross sum or an annual sum and had a further power to order periodical payments and to modify in favour of the husband such order for periodical payments, but no power enabling the wife to apply to have the periodical payments increased.

The wife had not that power to apply for an increase until 1907 so far as regards maintenance in the case of dissolution. Now as regards permanent alimony. In the case of maintenance the old Ecclesiastical Courts had no power to grant it at all. In the case of permanent alimony the Ecclesiastical Courts had the power and could order variations from time to time for increasing or reducing it. The Act of 1857 dealing with restitution of conjugal rights or judicial separation provided that the Court might make "any order" for alimony which shall be deemed just. It did not provide for "orders" but "any order". Notwithstanding that on the face of it it looked as though only one order could be made, the power of the Court to make orders from time to time varying the alimony was not doubted and was the practice of the Courts. This was not in virtue of section 22 which applied the principles and rules of the Ecclesiastical Courts, because, if on a true construction of section 17 "any order"

had meant one order and one only, then the Ecclesiastical Courts' power of making orders from time to time could not have been imported without going contrary to the express provisions of the Act of 1857. When the Indian Divorce Act was passed this question of maintenance and alimony were put together in one section and that section, section 37, provides as follows :

"The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife . . . order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable :

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court seems fit."

That is to say, the section is dealing both with decrees for dissolution, where permanent maintenance is the normal order, and with decrees for judicial separation, where permanent alimony is granted, under the same section. And it enables the Court (i) to make an order on the husband to secure and (ii) to make an order on the husband to pay. Now, if there is power in the Court to increase a permanent alimony, it would appear at any rate to be arguable that there is a power to

increase the amount of permanent maintenance. If this were so, then the section gives the Courts in India in 1869 a power which the Court in England only obtained in 1907. That question was left expressly open by the Judicial Committee who decided that upon the true construction of section 37 a Court which has made an order on a husband for payment to his wife of monthly or weekly sums for maintenance and support has power to make subsequent orders on the husband for payment of increased amounts. The importance of that case from the present point of view is in my opinion as follows : Since in 1869 the Courts in England had power to vary orders for permanent alimony, and as section 7 in their Lordships' opinion makes it apparent that the Indian Legislature desired matrimonial causes in this country to follow the English practice so far as that practice did not conflict with the provisions of the Act, had the Legislature had it in mind to stop Indian Courts following this particular kind of English practice then existing in 1869, they would have put words in section 37 which would have made it impossible without violating the provisions of the Indian Divorce Act to follow the English practice on this point. In the present case at the time of the passing of the Indian Divorce Act there was no practice or procedure in England in the case of nullity suits where a decree *nisi* was first pronounced and then a decree absolute and the Indian Divorce Act is entirely silent on the point. It does not provide that the decree that shall be passed in a nullity suit shall be a decree absolute. Indeed in my opinion the term "decree absolute" has only a relative

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

meaning. It is a term that is used in contradistinction to a decree *nisi*. Ordinary decrees passed by Courts, which are called decrees *simpliciter*, are decrees absolute. But there is no need to use the word "absolute" unless you are distinguishing that decree from another kind of decree. One has the same sort of decrees in this Court in the case of mortgage suits where one has a preliminary decree and a final decree. But in such suits I do not think there can be any doubt that the final decree is "the decree". When therefore the Indian Divorce Act in section 19 speaks of "such decree", it is not defining the nature of the decree, it is not stating in what form the decree shall first of all be drafted, it is empowering the Court to pass a decree. If the decree in question must be in all cases an unconditional absolute decree, then it would be proper to construe section 19 somewhat as follows: "Such decree, which shall be a decree absolute in all cases, may be made on any of the following grounds". But in fact the section leaves out the words "which shall be a decree absolute in all cases". It doubtless leaves out those words because it is following the English practice which as regards nullity suits makes no distinction between decrees *nisi* and absolute. But in England, thereafter, owing to statutory changes this distinction between decrees *nisi* and absolute is made. In my opinion, that statutory change imports a new principle or rule which the Matrimonial Courts in England must follow, and owing to section 7, as a consequence, the Matrimonial Courts in this country must follow the change also unless there is a provision in the Indian Divorce Act to

the contrary. In my opinion, there is no provision to the contrary; there is no provision on the point at all. All that is said is that such decree may be made, leaving it at large as to the nature of the decree. That in my opinion is not a provision which forbids the Court to make a decree conditional if it thinks fit. It is a direction directing the Court to pass the proper kind of decree. The Court is further directed by section 7 in considering what is the proper kind of decree to look at the kinds of decrees that are passed in Courts in England according to the principles and rules which they from time to time apply. If the Court looked at the decree that the Courts in England were passing in nullity suits in 1867, they would have seen a decree that was not a decree *nisi*. If they had looked at the kinds of decrees that the English Courts were passing in 1874, they would have seen that the decree was a decree *nisi*. Immediately they see the change, in my opinion, owing to the section and owing to the fact that there is no provision to the contrary, they must follow the change.

Quite different considerations apply of course where there is a provision to the contrary. For instance, in England the law and the practice of the Courts, as a consequence of the change in the law, has been changed as regards the question of cruelty. We in India cannot follow that change because there is an express provision in the Indian Divorce Act requiring, as one of the grounds on which a dissolution of marriage may be decreed, the need to prove cruelty. We therefore cannot follow the English change because there is a provision to the contrary. Had there

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

SUMATHI
AMMAL
v.
PAUL.
—
STONE J.

not been a provision to the contrary, we could have followed even that important change. In my opinion therefore the decree that should be passed in nullity as well as in divorce cases should be in the first place a decree *nisi*. I have arrived at this conclusion without in the least considering the question of what is desirable from the point of view of the parties and the children of those or of later marriages. But I do on that point very strongly stress the observations of RANADE J. in *A. (Wife) v. B. (Husband)*(1) starting from the words :

“Quite apart from the requirements of strict legal construction . . .”

I also think that it is desirable to lean, if at all, in such matters on the side of caution. It would be lamentable if the High Court by passing decrees absolute should be the cause, the very indirect cause, of parties getting married before they were lawfully entitled to and in my humble opinion it is desirable that the Legislature should place beyond conjecture what the position on this point is by either making provision that will exclude the English practice or by making provision that shall adopt the English practice on the question of granting decrees *nisi* in suits for nullity of marriage. It may be that large numbers of people are not involved. It may be that the actual litigants are not worthy of much consideration. But in these matrimonial cases it is the children of the disrupted or of future marriages whose interests should be very carefully guarded, and it is in my opinion undesirable that there should be any doubt about the kind of decree that

(1) (1898) I.L.R. 23 Bom. 460, 463.

should be passed or the period that should expire before the parties are free to contract a lawful marriage.

MOCKETT J.—I have had the advantage of reading the judgment of my learned brother STONE J. and I am in agreement with him as to the answer we should give to this reference. I also agree with the reasons which are contained in his judgment and I would be content to express my concurrence if it were not for the fact that my learned brother WADSWORTH J. takes a different view.

It seems to me clear that the intention of section 7 of the Indian Divorce Act was to prevent the principles and rules on which the Indian Courts were to give relief from being rigidly fixed and that, as has been stated by my learned brother, STONE J., the “principles and rules” must include principles of law. The decision of the Privy Council in *Iswarayya v. Swarnam Iswarayya*(1) supports this view. I observe that in the case of *Wilkinson v. Wilkinson*(2) this is the view of MARTIN J. Section 7 is an unusual provision in a statute and requires careful examination. It is to be operated “subject to the provisions contained in the Act” and the meaning of those words has often been discussed. One meaning must be beyond doubt, and that is that the Court cannot give any relief which is contrary to the provisions in the Act. As an example, this Court cannot follow the English Courts in giving the very much more extended relief which they have within the last ten years been enabled to give by statute. I refer especially to the powers of the English

SUMATHI
AMMAL
v.
PAUL.

MOCKETT J.

(1) (1931) I.L.R. 54 Mad. 774 (P.C.). (2) (1923) I.L.R. 47 Bom. 843.

SUMATHI
AMMAL
v.
PAUL.
—
MOCKETT J.

Courts to grant dissolution of marriage to a wife on proof of adultery alone. It would be impossible by any process of reasoning to hold that an Indian Court could give such relief, because section 10 specifically states the grounds on which a wife can present a petition for dissolution and it is therein stated that adultery must be coupled with cruelty or with desertion. Mr. Coelho's argument really amounts to very much the same thing with regard to the powers of this Court to grant a decree *nisi* in the case of a decree for nullity. But section 16 states that a decree for a dissolution of marriage made by a High Court shall, in the first instance, be a decree *nisi*. It is silent with regard to decrees for nullity. I think that the effect of section 17 is as held in *A. (Wife) v. B. (Husband)*(1), namely, that a decree of nullity passed by a District Judge cannot be confirmed before the expiration of six months from the pronouncing thereof. I share STONE J.'s preference for this decision to that of the High Court of Allahabad in *Edward Caston v. L.H. Caston*(2) and of Lahore in *Samuel v. Samuel*(3). We therefore have the position that a decree for nullity is in a sense *nisi* if passed by a District Judge, i.e., it must be confirmed, but absolute if passed by the High Court, that is to say, if Mr. Coelho's argument is correct. I will not reiterate the history of legislation in this matter: it is sufficient only to say that in 1869, when the Indian Divorce Act was passed, decrees for nullity in England were decrees absolute. The Matrimonial Causes Act of 1873 enacted that decrees for nullity

(1) (1898) I.L.R. 23 Bom. 460.

(2) (1899) I.L.R. 22 All. 270 (F.B.).

(3) (1934) I.L.R. 15 Lah. 846 (S.B.).

SUMATHI
AMMAL
v.
PAUL.
—
MOCKETT J.

should be *nisi*, as before had been decrees for dissolution. Section 7 obviously contemplates that the principles and rules of the Indian Divorce Act should be subject to change and development because the words "principles and rules on which the Court . . . acts" are qualified by the words "for the time being". This must surely contemplate statutory rules. It seems to me that the whole object of section 7 is to keep the practice of the Indian Divorce Court as nearly as possible in line with that of the English Court; otherwise, this exceptional, but most useful, provision loses much of its force. I personally would give the widest possible interpretation to it but always having in mind that it must be subject to the provisions of the Act. There is no provision in the Act that a decree for nullity should be *nisi* or absolute; the Act is silent. It does not seem to me that the suspension of a decree for a period of months by the Court passing it is in conflict with the Act. There is nothing repugnant to me about this notion as there would be, for instance, if an Indian Court granted a decree for dissolution of marriage to a wife on proof of adultery alone which would be in direct conflict with the Act. That there are two sorts of decrees in matrimonial suits—decrees *nisi* and decrees absolute—is almost, but not wholly, peculiar to the matrimonial practice. STONE J. has referred to decrees in mortgage suits. My view is that the express object of section 7 was to enable this Court to keep pace with the practice in England. That it is desirable I have not the least doubt, and I too respectfully agree with the views of RANADE J. in

SUMATHI
AMMAL
v.
PAUL.

MOCKETT J.

A (Wife) v. B. (Husband) (1). I would add that we have not got elaborate machinery here for the provision of medical boards and I think the possibility of collusion in nullity cases must be kept in mind.

With regard to the decision of the Judicial Committee in *Iswarayya v. Swarnam Iswarayya* (2), I would add this. It would appear that, although section 37 of the Indian Divorce Act is silent with regard to the power of the Court to vary alimony, nevertheless their Lordships held that, because in England Courts had power to do so, so also had the Indian Courts. It is in connection with this decision that I stress the words "for the time being" in section 7 which, as I have already indicated, seem to contemplate that the Indian Courts should as far as possible follow the English Courts.

For the above reasons I would answer the reference by saying that a decree for nullity passed by this High Court should in the first instance be a decree *nisi*.

WADSWORTH J. WADSWORTH J.—The question referred to this Bench is whether the proper form of decree in a suit for a declaration of nullity of marriage, filed on the Original Side of the High Court, should be that of a decree *nisi* or a decree absolute. We are informed that the practice of this Court in the past has been to treat a decree under section 19 of the Indian Divorce Act as a decree *nisi*. But naturally the number of cases would be very small, and actual cases of this Court have not been cited before us. The present English rule is that a

decree in a nullity suit should be a decree *nisi*, just like the decree in a divorce suit. But this has not always been the case. Until 1873 the English law provided for a decree absolute in nullity cases. It is suggested that the practical arguments in favour of making the decree in divorce cases a decree *nisi* apply with equal force to decrees in nullity cases. But I am not quite sure that this is correct. It must be remembered that the petitioner's own misconduct would not be a ground for refusing or rescinding a decree for nullity in a proper case, for instance, a case in which the respondent was already married at the time of his marriage to the petitioner, so that in such cases questions of collusion are much less likely to arise, and it does seem that in the vast majority of cases, the grounds on which a nullity decree is granted are not such as are likely to be affected by facts coming to light after the decree. I am therefore inclined to think that there is no very strong case based on practical considerations for introducing the decree *nisi* into the nullity procedure.

It seems to me clear that the Indian Divorce Act as drafted contemplated that the decree for nullity should be a decree absolute. A decree absolute is the ordinary form of decree in civil proceedings unless the law for some special reason prescribes a preliminary decree or a decree *nisi*. The Indian Divorce Act was modelled upon the existing English law and practice, and it is significant that in 1869, when the Indian Act came into force, the English law prescribed an absolute decree in nullity cases and a decree *nisi* in divorce cases. This fact strengthens the inference which

SUMATHI
AMMAL
v.
PAUL.
—
WADSWORTH.

(1) (1898) I.L.R. 23 Bom. 460 463. (2) (1931) I.L.R. 54 Mad. 774 (P.C.)

SUMATHI
AMMAL
v.
PAUL.
—
WADSWORTH J.

would naturally be drawn from the terms of section 19 that the Legislature intended a similar procedure to be followed in India. Chapter III of the Indian Divorce Act which deals with decrees for dissolution of marriage makes express provision that the decree in such cases shall be a decree *nisi* which is ordinarily not to be confirmed until six months after its pronouncement. The absence of a similar provision from Chapter IV relating to nullity decrees is to my mind a clear indication that in the latter class of cases, the ordinary form of decree, that is to say, a decree absolute, was contemplated.

An argument in favour of the decree *nisi* procedure might be based on section 20 of the Act which provides that a decree for nullity passed by the District Judge shall be subject to confirmation by the High Court, and that the provisions of section 17, clauses 1 to 3 and 4, shall, *mutatis mutandis*, apply to such decrees. There is a difference of judicial opinion on the question whether this section makes the proviso to section 17 prescribing a six months' period for confirmation of decrees of District Judges for nullity applicable. Even assuming that it does, I do not think that the mere fact that the Legislature prescribes confirmation after a period of six months for a District Judge's decree for nullity is sufficient reason for holding that a similar rule should be applied to decrees passed on the Original Side of the High Court with reference to which no such provision has been enacted. I am therefore definitely of opinion that Chapter IV of the Indian Divorce Act does not provide for nor contemplate a decree *nisi* in a nullity suit.

SUMATHI
AMMAL
v.
PAUL.
—
WADSWORTH J.

It remains to be considered whether, by virtue of section 7 of the Indian Divorce Act, the English procedure for a decree *nisi* in nullity suits can be made applicable in India. Section 7 says that, subject to the provisions contained in this Act, the Courts shall give relief on principles and rules which are as nearly as may be conformable to the principles and rules observed in England. In the case of *Iswarayya v. Iswarayya*(1) it was held that the term "principles and rules" in section 7 does not refer to or include statutory provisions or statutory rules. And a similar view was taken in the case of *Isharani Nirupoma Devi v. Victor Nitendra Narain*(2). The authority of the dictum in the former case may be taken to have been somewhat shaken by the observations of the Privy Council in the appeal from that decision reported as *Iswarayya v. Swarnam Iswarayya*(3). The passage at page 375 containing Lord RUSSELL'S observations on this subject is quoted in my learned brother STONE J.'s judgment and I will not repeat it. But I do not think that these observations can be taken as a warrant for the view that the English Law as laid down by statute can, by virtue of section 7, be imported into India so as to confer powers or impose restrictions on the Court, which powers or restrictions would, if the Legislature had intended them to be in force, necessarily have been embodied in the Indian Statute. It is to be remarked that section 7 is always "subject to the provisions contained in this Act", and if it was the intention of the Legislature, as according to my reading of

(1) (1929) 58 M.L.J. 29.

(2) (1925) I.L.R. 53 Cal. 282, 290.

(3) (1931) I.L.R. 54 Mad. 774 (P.C.).

SUMATHI
AMMAL
v.
PAUL.
WADSWORTH J.

the Act it must have been, to prescribe in this Act one form of procedure for decrees for dissolution of marriage, and another form for decrees for nullity, it is, in my opinion and with all respect to my learned brothers who have taken a different view, an error to use section 7 as authority for doing away with this distinction which is embodied in the Indian statute, in order to make the Indian procedure conform to that laid down by statute in England. I may point out that both the Allahabad and the Bombay High Courts have held that decrees of the High Court for nullity under section 19 of the Indian Divorce Act are decrees absolute; vide *Edward Caston v. L. H. Caston* (1) and *A. (Wife) v. B. (Husband)* (2). I would therefore decide this reference by holding that the terms of the Indian Divorce Act contemplate a decree absolute in cases of nullity and that to introduce the practice prescribed by the English Law whereby a decree *nisi* is pronounced in such cases would be to introduce a provision which is contrary to the provisions of the Indian Act and therefore not admissible with reference to the terms of section 7.

[The matter coming on for final hearing before MOCKETT J. on 14th October 1935, his Lordship ordered the decree of nullity in the case to be decree *nisi*.]

G.R.

(1) (1899) I.L.R. 22 All. 270, 278 (F.B.). (2) (1898) I.L.R. 23 Bom. 460

PRIVY COUNCIL.

INUGANTI VENKATARAMA RAO, APPELLANT,

J.C.*
1936,
January 13.

v

SOBHANADRI APPA RAO AND OTHERS, RESPONDENTS.
[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Registration—Place of registration—Indian Registration Act (XVI of 1908), sec. 28—Device to evade Act—Sale—Inclusion of land not intended to be conveyed—Validity of sale.

In a sale of land situated in one registration district there was included a yard of land situated in another registration district in which the purchaser neither resided nor owned property. There was no explanation of the use to which he could put it. The title of the vendor to it was doubtful, the purchaser made no attempt to take possession of it and it was built over by the owner of adjacent property.

Held that there was no intention to convey the square yard of land and the registration of the sale deed in the district in which the yard of land was situated was a device to evade the law of registration. There was, therefore, no effective registration and the deed was invalid.

Harendra Lal Roy Chowdhuri v. Haridasi Debi, (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972, *Biswanath Prasad v. Chandra Narayan Chowdhury*, (1921) L.R. 48 I.A. 127; I.L.R. 48 Cal. 509, and *Collector of Gorakhpur v. Ram Sundar Mal*, (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468, referred to.

APPEAL (No. 110 of 1932) from a decree of the High Court (August 20, 1930) which reversed a decree of the Additional Subordinate Judge of Bezwada (September 20, 1924).

On 14th October 1910, the plaintiff's father, acting as the plaintiff's guardian, sold the plaintiff's share in the village of Somavaram in the Kistna district to the Zamindar of Mirzapuram

* Present: Lord MACMILLAN, Sir JOHN WALLIS and Sir GEORGE LOWNDES.

VENKATARAMA
RAO
v.
APPA RAO.

for Rs. 27,302. A vacant site one square yard in extent in the village of Vundoor in the Godavari district was included in the sale and on the 14th February 1911 the sale deed was registered by the Sub-Registrar of Samarlakota in the Godavari district.

On 4th December 1921, the plaintiff instituted the present suit to recover possession of the Somavaram lands sold, alleging, *inter alia*, that the yard of vacant land included in the sale was not in existence, was not owned by him or his father at the time of the sale and was included to avoid registration in the Kistna district and that its inclusion was a fraud on the law of registration and rendered the sale void.

The Subordinate Judge upheld the contention that the yard included in the sale was not owned by the plaintiff or his father and was included merely to effect registration in the Godavari district and found that both parties were aware of this, that there was a fraud on the law of registration and the sale was void.

On appeal, the High Court, on this point, held that the yard of land in Vundoor actually existed, that the title to it was in the plaintiff's father, that it was not clear that there was no intention of passing possession of the item nor was it shown that the parties had any reason to practise a fraud on the law of registration and that the sale was valid.

De Gruyther K.C. and *Godfrey* for appellant.—Referred to section 28 of the Registration Act and *Hari Ram v. Sheodayal Mal*(1). Some portion does not mean a substantial portion,

(1) (1888) L.R. 16 I.A. 12; I.L.R. 11 All. 136.

but a portion however small. But there is a distinction between a genuine and a simulated transaction. Here the yard of land cannot be identified by boundaries. The description might be sufficient for a fictitious transaction. It would not be sufficient if the transaction was intended to be a genuine one. Assuming it can be identified, there is no evidence of the intention of anyone to take possession. There was, therefore, no intention to sell. Moreover, at the time the deed was drawn up, the square yard did not belong to either the plaintiff or his father. [Reference was made to the following decisions: *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1), *Biswanath Prasad v. Chandra Narayan Chowdhury*(2) and *Collector of Gorakhpur v. Ram Sundar Mal*(3).]

The effect of these decisions is that if there is no real intention to pass the title in the small portion, there is a fraud on the law of registration and the registration is bad.

The High Court had not the benefit of the decision in *Collector of Gorakhpur v. Ram Sundar Mal*(3). It applied *Biswanath Prasad v. Chandra Narayan Chowdhury*(2) and relied on *Venkata Lakshmikantaraju Garu v. Pedu Venkata Jagannatha Raju Garu*(4) and *Marina Ammayi v. Sundayya*(5), but the test applied was the wrong test.

Dunne K.C. and *Subba Row* for respondents.—If the word fictitious can be extended to land which is included in the deed, but in regard to which there is no intention to convey, then *Collector of Gorakhpur v. Ram Sundar Mal*(3) is a difficulty in my way. But here there is a real piece of land. The boundary on the south and west is a road. That identifies the land as in the corner of the plot. The case proceeded on the footing that the piece was a yard square, one yard each way. If it is included by the vendor intending to sell it merely to suit his convenience, he is entitled to sell it. There are effective purposes to which a square yard might be put. It might be used for erecting a lingam. The case is outside *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1) because the land is not fictitious. There can be no fraud on the law of registration by putting in existing land. The document has

(1) (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972.

(2) (1921) L.R. 48 I.A. 127; I.L.R. 48 Cal. 509.

(3) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(4) (1923) 46 M.L.J. 12.

(5) A.I.R. 1929 Mad. 432.

VENKATARAMA
RAO
v.
APPA RAO

VENKATARAMA
RAO
v.
APPA RAO. v. *Ram Sundar Mal*(1) conflicts with *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(2) by finding that "fictitious" includes existing land not intended to be sold.

De Gruythur K.C. was not called on to reply.

SIR GEORGE
LOWNDES.

The JUDGMENT of their Lordships was delivered by Sir GEORGE LOWNDES.—The issue between the parties to this appeal is as to the validity of a conveyance, made to the father of the first and second respondents, of a quarter share in the village of Somavaram, in the Kistna district, of which the appellant seeks to recover possession with mesne profits. The property in dispute had been the subject of a gift (the validity of which is not disputed) in July 1900, by the late Maharaja of Venkatagiri, to the appellant who was then a minor. It was sold by the appellant's father, purporting to act as his guardian, to the father of the respondents on 14th October 1910, and upon a partition after his death came to the first respondent, who alone appears before the Board to contest the appellant's claim. It is common ground between the parties that if the conveyance was effective the appellant's suit must fail; for if it were necessary for him to ask that the conveyance should be set aside as not binding on him, his suit was out of time; if, on the other hand, it could be regarded as a nullity, there would be no bar of limitation to his recovering possession, and he would be entitled to his decree.

The conveyance in question was duly executed, the consideration of Rs. 27,000 being paid to the

appellant's father. The only attack upon it is as to the validity of its registration. The Somavaram property was situated in the Kistna district, but registration was effected at Samarlakota in the Godavari district, and if the matter rested there the registration would be clearly invalid, the conveyance would be unregistered and ineffective, and the respondents could not resist the appellant's claim.

The deed was undoubtedly prepared as a conveyance of the Somavaram property only purporting to be sold by the father of the appellant as his natural guardian, and appears to have been executed and attested on 14th October 1910. I was not, however, presented for registration till 14th February 1911, and by that time an additional sheet had been inserted in the document purporting to include in the sale one yard of land in the village of Vundoor which was in the Godavari registration district. If the deed in truth "related" to a piece of land in Vundoor, the registration would, by the terms of section 28 of the Registration Act (XVI of 1908), be effective; if it did not, it would be ineffective, and no title to the Somavaram property passed under it. This is the question upon which their Lordships' judgment is sought.

The suit was tried by the Subordinate Judge of Bezwada. He accepted the contentions of the appellant and passed a decree in his favour dated 20th September 1924, assessing the mesne profits at Rs. 1,000 per annum. On appeal the High Court took the opposite view. They held the registration to be valid, and that, therefore the appellant could not recover possession of the

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(2) (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972.

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

property without setting aside the conveyance, and that this relief was time barred. The appellant's suit was accordingly dismissed by their decree of 20th August 1930.

The learned Judges of the High Court also held that the mesne profits to which the appellant would be entitled if he had succeeded in his suit, would be at the rate of only Rs. 600 a year instead of the Rs. 1,000 allowed by the Subordinate Judge. Their finding upon this point has not been contested before the Board.

Before their Lordships it is asserted on the one side that the deed was a real conveyance of one yard of land in Vundoor (as the High Court held), and that although the motive of its inclusion was no doubt to allow of registration in a place convenient to the vendor, this did not affect the validity of the transaction. It is, on the other hand, contended for the appellant that the Vundoor land was a fictitious item which was never intended by either party to the transaction to pass under the deed and (translating this into the language of the Act) that the document did not in reality "relate" to any land in the Godavari registration area.

Similar questions have come before the Board in three cases subsequent to the date of the transaction now impugned, the most recent decision being in June, 1934, after the judgment of the High Court in the present case.

In the first, *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1), there had been included in a mortgage deed of certain mofussil properties a plot of land described as No. 25 Guru

(1) (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972.

Das Street in Calcutta, where the deed was registered. This was found to be a non-existent property and the registration was, therefore, held to be invalid. Lord MOULTON in delivering the judgment of the Board said :

" Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the registration law, and no registration obtained by means thereof is valid."

In *Biswanath Prasad v. Chandra Narayan Chowdhury*(1) a mortgage deed had been registered in the Mozaffarpur district on the strength of the inclusion of a one-kauri share is the village of Kolhua situated in that district. It was not suggested in this case that the property was non-existent, but only that the mortgagor's title to it was imperfect. The appeal was heard by seven members of the Judicial Committee (including Lord MOULTON) and the judgment was delivered by Viscount FINLAY. He said :—

" The view which their Lordships take of the facts is that which is compendiously stated by the High Court in the judgment of COX J. : ' I agree. The circumstances of the case leave no doubt that the parties never intended that the share of Kolhua should really be sold to Udit Narayan or mortgaged to Polai Lal. The so-called sale was a mere device to evade the Registration Act.' "

The judgment then sets out the passage cited above from the judgment in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(2) and the Board

(1) (1921) L.R. 48 I.A. 127; I.L.R. 48 Cal. 509.

(2) (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972.

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

held that, in the view taken of the facts by the High Court and by their Lordships, the case fell within that decision.

In *Collector of Gorakhpur v. Ram Sundar Mal* (1) the question turned on the inclusion in a sale deed of a one-third share in a garden-room, which was the only property covered by the deed which was situated in the district where registration was effected. Here there was no doubt either as to the existence of the property or the vendor's title to it, but again a similar conclusion was reached. Lord BLANESBURGH, by whom the judgment of the Board was delivered, referring to the inclusion of this item, says :—

“ [Their Lordships] think that one of two inferences alone is possible: either that it was never intended by either party that the sitting room should for any purpose other than that of registration be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchasers. The word ‘fictitious’ used in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(2) is not confined to non-existing properties. It is satisfied if the deed does not ‘relate’ to a specified property for any effective purpose of enjoyment or use.”

Dealing with the question on these lines the Board held that the so-called sale was a mere device to evade the Registration Act and that the registration of the document was invalid.

Having regard to these pronouncements their Lordships can have no doubt that the criterion by which the question now before them must be decided is whether, upon the facts established by the evidence, the parties intended this one yard of land to pass under the deed. The motive may be

(1) (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468.

(2) (1914) L.R. 41 I.A. 110; I.L.R. 41 Cal. 972.

immaterial as the respondent contends, if the requirements of the law have been complied with; but of this the intention is critical. They are satisfied that in the present case no such intention existed.

It is clear that the document as originally prepared, and, indeed, as executed by the vendor, contained no reference to any land in Vundoor. When it was brought in, no value was placed upon it, and no part of the consideration was assigned to it. The purchaser neither lived in Vundoor nor did he own any property in Vundoor, and what possible use he could have had for a single yard of land in that village is unexplained. It is at least doubtful on the evidence whether this parcel, though forming part of a plot ostensibly purchased in the name of the vendor (the father of the present appellant), really belonged to him, or whether it was in fact identifiable. It is admitted that the purchaser never made any attempt to take possession of it in any shape or form: that when after his death his estate was partitioned between his sons, the first and second respondents, no account was taken of it, and no reference made to it, and the uncontradicted evidence is that it was shortly afterwards enclosed and built over by the owner of the immediately adjacent property, with whom the vendor was living, and for whom it is said that he was only a *benamidar*.

Their Lordships think that it is the inevitable conclusion from these facts that neither did the vendor intend to sell, nor did the purchaser intend to buy, this almost ridiculous fraction of land and that in the words of Lord BLANESBURGH in the case

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

VENKATARAMA
RAO
v.
APPA RAO.
—
SIR GEORGE
LOWNDES.

last cited, the so-called sale of it was a mere device to evade the Registration Act. The result, in their opinion, is that there was no effective registration of the conveyance upon which the respondent seeks to defeat the appellant's claim, and that it was, therefore, no obstacle to the appellant's suit for possession, which they think was rightly decreed in his favour by the Subordinate Judge.

There is one other matter to which their Lordships must refer. Mr. Dunne for the first respondent contended that if the conveyance was held to be ineffective, possession should only be given to the appellant upon the terms of his refunding the purchase money to the first respondent. If it had been established that the appellant had in fact received, or got the benefit of, the Rs. 27,000 which the father of respondents 1 and 2 undoubtedly paid, there might have been some basis for this claim. But unfortunately for the first respondent there was no proof of this, and both Courts in India have found against him on the point.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated 20th August 1930, should be set aside with costs, and the decree of the Subordinate Judge, dated 20th September 1924, restored, with the modification that the mesne profits should be calculated at the rate of Rs. 600 per annum instead of Rs. 1,000. The appellant must have his costs of the appeal.

Solicitors for appellant : *Douglas Grant and Dold.*
Solicitors for respondent : *Nehra & Co.*

C.S.S.

APPELLATE CIVIL.

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

KOYA ANKAMMA (APPELLANT), APPELLANT,

v.

KONAGANCHI KAMESWARAMMA AND THREE OTHERS
(RESPONDENTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 44—Applicability—Hindu joint family—Minor members of—Sale of property of, by their mothers acting as guardians—Suit by surviving minor to recover property subject of—Limitation for—No adult coparceners in existence at time of alienation.

During the minority of two undivided cousins their mothers acting as guardians alienated certain properties belonging to them. At the time of the alienation there were no adult coparceners. One of the minors died later on and the surviving minor sued to recover the properties from the alienee on the ground that the alienation was beyond the power of the guardians to make.

Held that article 44 of the Indian Limitation Act applied to the case and that the suit which was instituted more than three years after the plaintiff attained majority, though within twelve years of the alienation, was barred by that article.

The mothers who made the alienations were the *de jure* guardians of the minors.

Bindaji v. Mathurabai, (1905) I.L.R. 30 Bom. 152, *Arumugam Pillai v. Panayadian Ambalam*, (1920) 40 M.L.J. 475, *Purushotama v. Brundavana*, A.I.R. 1931 Mad. 597, and *Munugarra Satyalakshmi Narayana v. Munugarra Jagannadham*, (1917) 34 M.L.J. 229, referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J. in Second Appeal No. 1254 of 1930, dated 10th May 1934, preferred against the decree of the Court of

* Letters Patent Appeal No. 37 of 1934.

1935,
October 29.

ANKAMMA
v.
KAMES-
WARAMMA.

the Subordinate Judge of Bezwada in Appeal Suit No. 14 of 1929 preferred against that of the Court of the District Munsif of Bezwada in Original Suit No. 416 of 1925.

A. *Lakshmayya* for appellant.

B. V. *Ramanarasu* for V. *Govindarajachari* for respondents.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—The facts here are that there were two undivided cousins and at a time when both of them were minors their mothers acting as guardians alienated certain properties belonging to them. One of the minors died later on and the suit under appeal was brought by the surviving minor to recover the property from the alienee on the ground that the alienation was beyond the power of the guardians to make. The suit was instituted within twelve years of the alienation but more than three years after the plaintiff attained majority. The point is whether article 44 of the Limitation Act applies to this case. Both the lower Courts and the second appellate Court dismissed the suit as barred by article 44. The important facts in the case are that at the time of the alienations there were no adult coparceners and, in spite of the contention in the lower appellate Court which was not accepted there, that it is not correct to speak of the mothers who alienated the property as guardians in any legal sense, in my view, they were the *de jure* guardians of the minors. There is no authority for saying that, when the senior member of a coparcenary—a father—dies leaving only minor coparceners, the mother or mothers of the latter are not their *de jure* guardians; and I agree with VARADACHARIAR J.

that the cases relied upon to show that a minor's interest in an undivided Hindu family is not such an interest or property that a guardian can be appointed or predicated in respect of it can be distinguished on the ground that in those cases there were other adult coparceners and the legal guardianship of the minor coparcener therefore vested in the adult coparceners. That cannot be the case here; and this distinction was pointed out by JENKINS C.J. in *Bindaji v. Mathurabai*(1). The position is, therefore, that these were alienations made by the *de jure* guardians of the minors and the present plaintiff was entitled to avoid the transaction; and in such cases it has been held that article 44 is the correct article. In *Arumugam Pillai v. Panayadian Ambalam*(2) property inherited by a minor from his mother and belonging exclusively to him was sold by his father acting as his guardian, and it was held that a suit by the minor on his attaining majority to recover the property was covered by article 44 and not by article 126 of the Limitation Act. KRISHNAN J. on page 476 states:

“When a guardian acting in his capacity of guardian sells or otherwise transfers the property of his ward, there can be no question that article 44 will apply to the suit by the ward to recover that property subsequently for he must get the guardian's transfer set aside which is *prima facie* binding on him. A transfer by a guardian, however improper it may have been, is not a void transaction but only a voidable one and, when property cannot be recovered without avoiding it, it is now settled that article 44 will apply to the suit. No doubt it has been held that, where a Hindu father sells the joint ancestral property of himself and his minor son, article 44 will not apply even though he purported to act as his minor son's guardian in making the sale. Article 126 expressly provides

ANKAMMA
v.
KAMES-
WARAMMA.
BEASLEY C.J.

(1) (1905) I.L.R. 30 Bom. 152.

(2) (1920) 40 M.L.J. 475.

ANKAMMA
v.
KAMES-
WARAMMA.
—
BEASLEY C.J.

for setting aside such alienations of ancestral property and the Court therefore held in those cases that the mere fact that the father executed the deed also as guardian of his minor son made no difference to the validity of the sale as he could have passed his son's share also by executing the deed himself and therefore article 44 was not applicable. Those rulings however apply only to alienations of ancestral property and are clearly distinguishable from the present case as here the property has been found to be the minor's separate property."

The present case would not be excepted from the operation of article 44 for the reason that there were no other coparceners and this was the separate property of the minors and they alone were interested in the property. *Purushotama v. Brundavana*(1) decides that suits brought by persons to set aside alienations by their *de jure* guardians during their minority are governed by article 44, whereas article 44 does not apply to suits by minors to set aside alienations made by *de facto* guardians; [see also *Munugarra Satyalakshmi Narayana v. Munugarra Jagannadham*(2).] Moreover, on a comparison between the language used in the two articles, it is clear that, of the two, article 44 is the one more applicable. I agree with the conclusion reached by the second appellate Court and this Letters Patent Appeal must accordingly be dismissed with costs.

STODART J.—I entirely agree. On the point of limitation, the argument is that a man who wishes to set aside an alienation of immovable property made by his guardian during his minority can avail himself of one of two periods of limitation, whichever is longer, namely (a) three years after attaining his majority under article 44 and (b) twelve years from the date of alienation under

(1) A.I.R. 1931 Mad. 597.

(2) (1917) 34 M.L.J. 229.

article 144 extended of course by the operation of section 6. But article 144 applies to cases where the possession of the purchaser is adverse to the plaintiff and a purchaser from the guardian of a minor does not hold the land under a title adverse to the minor but on the contrary he derives his title from the minor and has a good title until it is shown that in selling the land to him the guardian exceeded his powers. The observations in the referring judgments in *Doraisami Serumadan v. Nondisami Saluvan*(1), which seem to support this part of the appellant's case, are based on the decision of the Privy Council in *Gnana-sambanda Pandara Sannadhi v. Velu Pandaram*(2) in which the alienations were bad from their inception, being sales of trust property which the minor's guardian acting on his behalf had no power to sell. The purchaser in that case did not obtain a good title but was in the position of a trespasser holding adversely to the trust.

A.S.V.

(1) (1912) I.L.R. 38 Mad. 118.

(2) (1899) I.L.R. 23 Mad. 271 (P.C.).

ANKAMMA
v.
KAMES-
WARAMMA.
—
STODART J

APPELLATE CIVIL.

Before Mr. Justice Mudhavan Nair and Mr. Justice Stone.

1935,
October 21.

T. S. KRISHNAMOORTHY AYYAR (SECOND PETITIONER),
APPELLANT,

v.

THE SPECIAL DEPUTY COLLECTOR OF LAND
ACQUISITION, KUMBAKONAM
(RESPONDENT), RESPONDENT.*

*Land Acquisition Act (I of 1894), sec. 3 (d)—Special Judicial
Officer appointed under—Decision of, under section 49 of
Act—Not an award—Non-appealability of such decision.*

The decision under section 49 of the Land Acquisition Act of a Special Judicial Officer appointed by the Local Government under the provisions of section 3 (d) of the said Act is not an award and no appeal lies from such a decision.

APPEAL against the order of the Court of the Subordinate Judge of Kumbakonam dated 18th August 1932 in Original Petition No. 63 of 1930.

K. Sankara Sastri for appellant.

Government Pleader (K. S. Krishnaswami Ayyangar) for respondent.

Cur. adv. vult.

JUDGMENT.

MADHAVAN
NAIR J.

MADHAVAN NAIR J.—I agree in upholding the preliminary objection raised by the Government Pleader on the short ground on which my learned brother has upheld it. But I should like to make a few remarks about the decisions in *Secretary of State for India v. Narayanaswamy Chettiar*(1), *Ramachandra Rao v. Ramachandra Rao*(2),

*Appeal No. 72 of 1933.

(1) (1931) I.L.R. 55 Mad. 391.

(2) (1922) I.L.R. 45 Mad. 320 (P.C.)

Rajagopala Chettiar v. H.R.E. Board, Madras(1) and *Maung Ba Thaw v. Ma Pin*(2), lest my silence should be misunderstood as meaning that I think that my remarks in the Full Bench decision in *Rajagopala Chettiar v. H.R.E. Board, Madras*(1) regarding *Secretary of State for India v. Narayanaswamy Chettiar*(3) and *Ramachandra Rao v. Ramachandra Rao*(4) require revision.

In *Secretary of State for India v. Narayanaswamy Chettiar*(3), the decision strongly relied on by the respondent, RAMESAM J. held that decisions other than awards passed by Courts in disputes under the Land Acquisition Act are decrees and as such appealable as though they were decrees. The learned Judge came to this conclusion because of the amendment of sections 26 and 54 of the Land Acquisition Act by Act X of 1921 and the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(4). The learned Counsel has not, before us, sought to justify the first ground for the conclusion. As regards the decision of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(4), I expressed the view that

“their Lordships in that case were dealing with the finality of the High Court's decree for the purposes of *res judicata* and were not directly concerned about the appealability of the order passed by the District Court”

and that that decision

“does not support the argument that an adjudication on an application stands on the same footing as an adjudication in a suit for the purposes of the definition of a decree under the Code.”

(1) (1933) I.L.R. 57 Mad. 271 (F.B.).

(2) (1934) I.L.R. 12 Rang. 194 (P.C.).

(3) (1931) I.L.R. 55 Mad. 391.

(4) (1922) I.L.R. 45 Mad. 320 (P.C.).

KRISHNA-
MOORTHY
Ayyar
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.
—
MADHAVAN
NAIR J.

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBakonam.
—
MADHAVAN.
NAIR J.

I am still of the same opinion. I also think that the decision in *Maung Ba Thaw v. Ma Pin*(1) does not affect the opinion that I have expressed in the Full Bench, for, in the case first mentioned their Lordships of the Privy Council were concerned not with the question of the appealability of an order to the High Court, for the order in that case which was one under the Insolvency Act was appealable to the High Court, but with the question whether an appeal lay to the Privy Council, and their Lordships held that an appeal from a decision of the High Court lies to the Privy Council under and subject to the Code of Civil Procedure (obviously meaning sections 109 and 110, Civil Procedure Code); and in holding so, their Lordships followed *Secretary of State for India v. Chellikani Rama Rao*(2) in which, as stated by them,

“when such a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil Procedure Code.”

(The reference here is obviously to sections 109 and 110, Civil Procedure Code.) The remarks in *Secretary of State for India v. Chellikani Rama Rao*(2) clearly relate to the appealability to the High Court of an order passed by the District Court, the latter order being appealable to the High Court under the ordinary rules of the Civil Procedure Code. (The Code applicable in that case was Act XIV of 1882). This appears to be clear from the fact that their Lordships in *Secretary of State for India v. Chellikani Rama Rao*(2) accept as correct the Full Bench decision,

(1) (1934) I.L.R. 12 Rang. 194 (P.C.). (2) (1916) I.L.R. 39 Mad. 617 (P.C.).

Kamaraju v. The Secretary of State for India(1). Similarly, with reference to the order of the High Court sought to be appealed against to the Privy Council, their Lordships say in *Maung Ba Thaw v. Ma Pin*(2) that that order will also be subject to the rules of the Civil Procedure Code, obviously meaning sections 109 and 110, Civil Procedure Code. I do not think that on the point under consideration the decision in *Maung Ba Thaw v. Ma Pin*(2) affects my interpretation of the Privy Council decision in *Ramachandra Rao v. Ramachandra Rao*(3). The appeal is dismissed with costs.

STONE J.—This is an appeal from the Land Acquisition Court presided over by the Special Judicial Officer appointed by the Local Government under the provisions of section 3 (d) of the Land Acquisition Act. The Special Judicial Officer in question is the Subordinate Judge of Kumbakonam. The nature of the dispute is as to whether the acquisition should be of the whole or only part of certain houses and grounds. It was raised by the person from whom the land was sought to be acquired, under the provisions of section 49, second proviso, of the Land Acquisition Act. It should be noted that under that proviso the reference by the Collector is to “the Court”, and “the Court” in question means the Court appointed under the Land Acquisition Act and can conveniently be referred to as the Land Acquisition Court. The proceedings in question therefore took place in the Land Acquisition Court. The objections are headed “In the Court of the Subordinate Judge of Kumbakonam”.

(1) (1888) I.L.R. 11 Mad. 309 (F.B.). (2) (1934) I.L.R. 12 Rang. 194 (P.C.).
(3) (1922) I.L.R. 45 Mad. 320 (P.C.).

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBakonam.
—
MADHAVAN
NAIR J.

STONE J.

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.
—
STONE J.

The learned Government Pleader took a preliminary objection to the maintainability of this appeal on the ground that the decision arrived at was not an award and that the section of the Act under which the appeal was brought, that is to say section 54, only gives a right of appeal in the case of awards; and he cited *Giles Seddon v. Deputy Collector of Madras*(1), *Sarat Chandra Ghose v. The Secretary of State for India*(2) and *Mulraj Khata v. The Collector of Poona*(3), which decide that, where the decision is not an award, the resulting decision, and in particular a decision under section 49, is not appealable. That line of cases proceeds according to the rule that in the absence of special statutory authority there is no right of appeal, that under the Land Acquisition Act the special statutory authority permitting appeals is limited to awards, and that decisions under section 49 are not awards.

On the other hand, a considerable number of cases were cited, of which *Secretary of State for India v. Narayanaswamy Chettiar*(4) is the most stressed, the others being *Raghunathdas Harjivandas v. The District Superintendent of Police, Nasik*(5), *Venkatareddi v. Adinarayana Rao*(6) followed in 40 Law Weekly, page 37 (Short Notes), *Mahalinga Kudumban v. Theetharappa Mudaliar*(7) and *Paramaswami Ayyangar v. Alamelu Nachiyar*(8), which, it is urged, suggest that, as a consequence of the Privy Council decision in *Ramachandra Rao v. Ramachandra Rao*(9), which

(1) (1912) 17 I.C. 117.

(3) (1913) 15 Bom. L.R. 802.

(5) (1932) I.L.R. 57 Bom. 314.

(7) (1928) 56 M.L.J. 387.

(2) (1919) I.L.R. 46 Cal. 861.

(4) (1931) I.L.P. 55 Mad. 391.

(6) (1928) I.L.R. 52 Mad. 142.

(8) (1926) I.L.R. 49 Mad. 954.

(9) (1922) I.L.R. 45 Mad. 320 (P.C.).

was relied upon in another Privy Council decision, *Maung Ba Thaw v. Ma Pin*(1), and the Privy Council decision in *Secretary of State for India v. Chellikani Rama Rao*(2) which approved of the Full Bench decision in *Kamaraju v. The Secretary of State for India*(3), decisions other than awards passed by Courts in disputes under the Land Acquisition Act are decrees and as such appealable as though they were decrees of ordinary Courts.

On the other hand, the recent Full Bench decision in *Rajagopala Chettiar v. H. R. E. Board, Madras*(4), which was directly concerned with the right of appeal, if any, under the Hindu Religious Endowments Act, has doubted the decision in *Secretary of State for India v. Narayanaswamy Chettiar*(5), and has explained the apparent change introduced by *Ramachandra Rao v. Ramachandra Rao*(6) in a way that suggests that that change is only apparent and not real, turning, as it does, upon the fact that what was there held to operate as *res judicata* was a disposal in appeal, and a decision in appeal was, as the Civil Procedure Code then stood, a decree as defined by the Civil Procedure Code whether in a suit or not.

The discussion of the above cases has resulted in a number of very nice points being argued and we are much obliged to the learned Counsel for the help they have given us in the consideration of those cases, which we should have deemed it our duty very carefully to have analysed, had it

(1) (1934) I.L.R. 12 Rang. 194 (P.C.).

(2) (1916) I.L.R. 39 Mad. 617 (P.C.).

(3) (1888) I.L.R. 11 Mad. 309 (F.B.).

(4) (1933) I.L.R. 57 Mad. 271 (F.B.). (5) (1931) I.L.R. 55 Mad. 391.

(6) (1922) I.L.R. 45 Mad. 320 (P.C.).

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.
—
STONE J.

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.
—
STONE J.

not appeared that this preliminary objection can be upheld on a much shorter and simpler point.

In *Mahant Bagavathi Doss v. Sarangaraja Iyengar*(1) it was decided by a Bench of this High Court that the Court, at least where it was constituted by the appointment of a Special Judicial Officer under the provisions of section 3(d), was a special Court, that is to say, it was not an ordinary Civil Court but a Court established under the provisions of the Act. From which it follows, and it was there so decided, that no appeal lies from such a Court unless by statute the right to appeal is given. In this statute a right of appeal is given in one class of cases and in one class of cases only, that is to say, where the Court arrives at a decision that amounts to an award. As was pointed out by the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(2) at page 329 :

"There are two perfectly separate and distinct forms of procedure contemplated by the Land Acquisition Act. The first is that necessary for fixing the amount of the compensation and this is described as being an award."

The present decision is clearly not an award and it appears to us that, whatever you call it, it is a decision of a Court specially constituted under statutory authority, and unless from that decision the right to appeal is given no right to appeal lies. It might well be that it would be otherwise if the Court in question were an ordinary Civil Court to which this matter—the matter in dispute—had been, under powers conferred by the statute, referred for decision by the proper authority. That, however, is not the scheme of the Act. The scheme of the Act contemplates that sometimes the Court

(1) (1931) 33 L.W. 528.

(2) (1922) I.L.R. 45 Mad. 320 (P.C.).

shall be an ordinary Civil Court and sometimes a special Court, specially constituted. In the latter case, except where that Court makes an award, the Act does not make any statutory provision for appeals from that Court. And on this short ground we are of the opinion that the objection succeeds.

We desire however to observe that the result is unsatisfactory in our opinion. Although it might well be in the contemplation of the Legislature that preliminary points such as those falling under section 49, that is to say, those that are the subject-matter of this present appeal, should not be appealable, it is difficult to believe that it was the intention of the Legislature to prevent persons disputing as to title of the property, as might well be the case where an award having been made, and money due under that award paid into Court, various claimants come forward claiming that money as theirs and endeavouring to establish in support of that claim title to the subject-matter, in respect of which the compensation was paid into Court. It is difficult to imagine that it was intended to shut out all such claimants from all rights of appeal, where the Court in question was a Court specially constituted, and not an ordinary Court, though this result appears to follow when the Court is a special Court from which no appeal lies unless there be a statutory provision to that effect. This however, as was pointed out in *Mahant Bagavathi Doss v. Sarangaraja Iyengar*(1), may result in an anomaly, but one that can only be put right by the Legislature, if the Legislature thinks fit so to do.

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.
—
STONE J.

(1) (1931) 33 L.W. 528.

KRISHNA-
MOORTHY
AYYAR
v.
SPECIAL
DEPUTY
COLLECTOR OF
LAND
ACQUISITION,
KUMBAKONAM.

On this short point, therefore, we are of the opinion that the preliminary objection succeeds and the appeal is accordingly dismissed with costs.

G. R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Cornish, Mr. Justice Varadachariar,
Mr. Justice Wadsworth, Mr. Justice Venkataramana Rao
and Mr. Justice Lakshmana Rao.

SESHA AYYAR (THIRD DEFENDANT), PETITIONER,

v.

KRISHNA AYYAR AND SIX OTHERS (PLAINTIFFS AND
DEFENDANTS 1, 2, 4 AND 5), RESPONDENTS.*

Lottery—Chit fund, if and when a—Persons participating in a lottery—Guilty under sec. 294-A, Indian Penal Code (Act XLV of 1860), if and when—Persons subscribing to or purchasing tickets in a lottery—Guilty of offence under, or of abetment of offence under, sec. 294-A, Penal Code, if and when—Subscriber to a lottery—Refund of subscriptions paid—Right of—Indian Trusts Act (II of 1882), sec. 84—Applicability of—Maxim “pari delicto”—Applicability.

A kuri or prize chit was started with the object of creating a fund for a temple. It consisted of 625 subscribers, the monthly subscription being Rupees three. The number of months for which subscriptions were to be paid was fifty. The arrangement was that a drawing was to take place every month, one ticket was to be drawn out of the 625 tickets and the subscriber who drew the ticket was to be paid Rs. 150 without any liability to pay for future instalments. That process was to be repeated month after month till the fiftieth

month. After the fiftieth month the remaining 575 subscribers were to be each paid in a particular order Rs. 150, i.e., the amount actually paid by them, and the chit fund was to be then closed. The subscription money was to be deposited for interest with banks and merchants or to be lent to subscribers and, on the termination of the chit fund, the entire profits accruing from the kuri were to be utilised for purposes connected with the temple for whose benefit the kuri was started. The kuri regulations which contained the proposals relative to the scheme were printed and duly published. According to one of the provisions therein, the drawings were to be held every month at the temple (which according to the evidence was understood to mean the portico in front of the temple), and the evidence was that the drawings were held in the portico of the temple till the discontinuance of the kuri after forty-five drawings. The plaintiff was a subscriber to the kuri. He had taken two tickets in the kuri and had paid Rs. 270 representing forty-five monthly payments on his two tickets but had not drawn a prize. He sued the defendants, the promoters of the kuri, for the recovery of the said sum of Rs. 270 with interest. The two main questions for decision were (i) whether the kuri or prize chit in question was a lottery and (ii) whether the plaintiff was entitled to recover the amount paid by him as and for his subscriptions to the kuri. There was no evidence that he took part in the organization of the kuri or even that he was present at the drawing, though under the prospectus he had a right to be present if he so wished. All that was known was that he had bought two tickets which were to be drawn at a particular place.

Held by CORNISH, VARADACHARIAR, WADSWORTH and LAKSHMANA RAO JJ. (VENKATARAMANA RAO J. dissenting) that the kuri or prize chit in question was a lottery.

Held by CORNISH, WADSWORTH and LAKSHMANA RAO JJ. that the defendants, the promoters of the kuri, committed offences under both the parts of section 294-A, Indian Penal Code, and that the lottery was illegal from the manner in which it was conducted.

Held by the Full Bench that the plaintiff was not guilty of any offence and was not in pari delicto with the defendants, the promoters of the scheme; that he was entitled, under the second clause of section 84 of the Indian Trusts Act, to a refund of the subscription which had been actually paid by

* Civil Revision Petition No. 1683 of 1934.

SESHA AYYAR
v.
KRISHNA
AYYAR.

SESHA AYYAR v. KRISHNA AYYAR. him; and that the terms of the kuri chit in question did not exclude the personal liability of the defendants.

Per VENKATARAMANA RAO J. *Seemle*, the third class of cases mentioned in section 84 of the Indian Trusts Act would cover cases like the present and the suit transaction might also fall under it.

Review of the law as to (i) the elements necessary to make a scheme a lottery, (ii) the conditions to be established before persons participating in a lottery can be held guilty under section 294-A, Indian Penal Code, (iii) the position for the purposes of the Criminal Law of persons who subscribe to or purchase tickets in a lottery as distinguished from that of those who organise, promote or manage the lottery and (iv) the position for the purpose of the Civil Law of such subscribers or ticket-holders in relation to the organisers, promoters or managers.

Shanmuga Mudali v. Kumaraswami Mudali, (1925) I.L.R. 48 Mad. 661, *Narayana Ayyangar v. Vellachami Ambalam*, (1927) I.L.R. 50 Mad. 696 (F.B.), *Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu*, (1932) I.L.R. 56 Mad. 26, *Udumalpet Nidhi, Ltd. In re*, (1934) I.L.R. 57 Mad. 844, *Nagappa Pillai v. Arunachalam Chetty*, (1924) 47 M.L.J. 876, *Veeranan Ambalam v. Ayyachi Ambalam*, (1925) 49 M.L.J. 791, and *Venkatramana v. Sanyasayya*, (1933) 66 M. L. J. 76, considered.

Meaning of "keep any office or place for the purpose of drawing any lottery" and of "publish" in section 294-A, Indian Penal Code, explained.

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 Palghat in Small Cause Suit No. 800 of 1933.

T. M. Krishnaswami Ayyar and *C. K. Visvanatha Ayyar* for petitioner.

Ch. Raghava Rao for respondents.

Cur. adv. vult.

JUDGMENT.

CORNISH J.—This reference has been made upon a civil revision petition in which the

petitioner was the third defendant in a suit brought by plaintiff-respondents to recover money paid as subscriptions to a prize kuri. The third defendant and the other defendants promoted this kuri for the purpose of raising funds for a temple.

The plaint alleges that the first plaintiff took two tickets in the kuri, and had paid Rs. 270 representing forty-five monthly payments on his two tickets. It states that the scheme was that the kuri was to be conducted for fifty months and that those subscribers who had not been so fortunate as to draw a prize were, at the close of the kuri after the fiftieth drawing, to be refunded the amount of the money subscribed by them. There is the further allegation that the kuri came to an end after payment of the forty-five instalments, and that despite the plaintiff's demand for a refund of his subscriptions no repayment has been made by defendants. The sum claimed is Rs. 270 which is the amount of forty-five instalments paid by the first plaintiff on his two tickets. The material defence to the claim, so far as this reference is concerned, is in paragraph three of the written statement, where the plea is raised that the agreement between the parties being in respect of a lottery unauthorized by Government was for an illegal object, and was therefore unenforceable at law.

The lower Court held the defendants liable to refund the money. Hence the revision petition. The question has been referred to a Full Bench as there are decisions of this High Court on the status of kuris which are not always easy to reconcile.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

The first question to be decided is whether this kuri is a lottery. A lottery has been defined as the distribution of prizes by lot or chance without the use of any skill; see Archibold's Criminal Pleadings, 7th edn., page 1345. In the Oxford New English Dictionary, a lottery is defined as "an arrangement for the distribution of prizes by chance among persons purchasing tickets." Tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery. And this is the test which has been adopted by the Courts in England in the later cases as making a thing a lottery. Thus, in *Willis v. Young and Stenbridge*(1) it was held that a lottery involves the collective contribution of the prize-money by the competitors, though some of them may have paid nothing; and DARLING J. stated that in his opinion an absolutely free and gratuitous distribution of chances, none of which had been paid for by the competitors, would not be a lottery. In *Bartlett v. Parker*(2) too, it seems to have been accepted that the purchase of a chance of winning a prize made the thing a lottery. Taking this then as the definition of a lottery, it has to be seen whether the kuri in question comes within the definition. The character of the kuri appears from the printed kuri regulations. It consisted of 625 subscribers,

"each subscriber agreeing to pay at the rate of Rs. 3 per month for fifty months, in all amounting to Rs. 150 per ticket" (clause 4).

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

(2) [1912] 2 K.B. 497.

"On the 25th of every English month after 25th March 1929, one ticket will be drawn out of the 625 tickets and the winning ticket will be paid as prize Rs. 150 without any liability to pay for future instalments. Fifty such tickets will be drawn in fifty months." (clause 5).

SESHA AYYA
v.
KRISHNA
AYYAR.
—
CORNISH J.

Then clause 7 provides that at the end of the fifty-first month the 575 subscribers who have not drawn prizes will be repaid without interest, the total amount of their subscription, viz., Rs. 150. Clause 6 shows the benefit which the temple was to derive from the arrangement: it permitted the subscription money to be deposited for interest with banks and merchants or to be lent to subscribers, and the temple was to get the profit from these deposits and loans. So that a subscriber to the kuri had the prospect of at least getting back the amount of his total subscription of Rs. 150 at the termination of the drawings; but his purchase of a ticket for Rs. 3 gave him a chance of a prize of Rs. 150 if his ticket was drawn at the first drawing, a chance of a prize of Rs. 150 for a payment of Rs. 6 if his ticket was successful at the second drawing, and so on down to the forty-ninth drawing, when the winner would get Rs. 150 for an expenditure of Rs. 147 on his ticket. In my opinion this kuri was clearly within the above-mentioned definition of a lottery.

But it has been contended that a lottery requires that the dominant motive of the persons participating in it is to gamble; and as a corollary to this proposition it is argued that a loss to some of the parties is a necessary element of a lottery. No case has been produced to show that the definition of lottery is qualified by the motives of the participants. On the contrary, in *Hall v.*

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

McWilliam(1), where a lottery was a competition promoted by a newspaper with the object of increasing the number of its purchasers and of its circulation, RIDLEY J. said :

“ It may be that the owners of the newspaper have other objects in their mind as to what they will do and how they will benefit by the offering of these prizes ; but as far as the purchaser is concerned I think he does buy with this newspaper the chance of obtaining the prize ” ;

which goes to show that the question, lottery or no lottery, is not to be determined by the quality of the promoters' motive. The contention, too, that it is an element of a lottery that some of the competitors must stand to lose seems to be founded upon a misconception of the passage in Halsbury's Laws of England, Vol. XV, page 525, which has been cited in its support. This passage reads :

“ Though the gambling element does not appear to be wholly absent, yet it need not be common to all the adventurers ; it is enough if some of them stand to lose.”

It is a commentary on *Willis v. Young and Stenbridge*(2) and has to be read in that connection. It gives no warrant for the theory that a lottery is not a lottery unless it fulfils one of the essential conditions of a wager. A lottery and a wagering contract are two distinct things. A scheme may amount to a lottery though none of the competitors is a loser, as in *Reg v. Harris*(3) where subscribers of a shilling were given a ticket which entitled them at all events to what was professed to be a shilling's worth of goods and also to the chance of certain bonuses of

(1) (1901) 85 L.T. 239.

(2) [1907] 1 K.B. 448.

(3) (1866) 10 Cox C.C. 352.

goods of greater value than the shilling. This was held to be an illegal lottery. *Taylor v. Smetten*(1) (*the Packets of Tea* case) is another illustration. But if it were necessary I would hold that the subscribers to this kuri whose tickets had not been drawn had suffered loss to the extent of their contributions to the Rs. 150 taken by the prize-winner. And here I may observe that the headnote in *Narayana Ayyangar v. Vellachami Ambalam*(2) is misleading. The Full Bench in deciding that the kuri was not a wagering contract did not decide that it was not a lottery. There was no occasion for such decision after the lower Court had returned a finding that there was no evidence of an offence against section 294-A of the Penal Code.

There is another matter touching this part of the case to which I must refer. In *Shanmuga Mudali v. Kumaraswami Mudali*(3) VENKATA-SUBBA RAO J. was of the opinion that a scheme would not be a lottery if the prize-money came out of the interest earned from the subscribers' contributions. With great respect I am unable to agree to this being a correct test. If the subscribers have purchased a chance of winning a prize it can make no difference whether the prizes are paid circuitously from the interest earned on the subscribers' contributions or are paid directly from those contributions.

But for the purpose of determining the legal or illegal character of this kuri it does not suffice to show that it is a lottery. A lottery is not in

(1) (1883) 11 Q.B.D. 207.

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

(3) (1925) I.L.R. 48 Mad. 661.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

British India unlawful in the sense that it is prohibited by law. It is only in relation to section 294-A of the Penal Code that a lottery becomes illegal. This section makes it an offence (i) to keep any office or place for the purpose of drawing any lottery not authorised by Government, or (ii) to publish any proposal to pay any sum on an event or contingency relative to the drawing of any ticket in such lottery. The evidence distinctly proves a publishing of the kuri regulations which contained the proposals relative to the lottery. One of the defendants says that the regulations were printed—a copy is before us—and a plaintiff's witness says that the regulations were shown to him. This constituted an offence against the second part of section 294-A. Regarding the question whether the defendants offended against the first part of the section, I think the temple would be a "a place", and that it is apparent from the regulations (clause 9) that the defendants had a control, possibly only *de facto*, over the place for the purpose of drawing the lottery there. Section 294-A does not make it an offence for the owner or occupier of the place to keep it for the unlawful purpose; it simply makes it an offence for *any person* to keep the place, and this, in my opinion, would include the case of a person who, without being owner or occupier, is permitted to keep the place for the particular object. Clause 9 of the regulations says that the drawings will be held in the temple, and there is the evidence of witnesses that the drawings did take place there. It is not essential to the commission of the offence of keeping a place for an unlawful purpose that it should be solely appropriated to that purpose. Thus, in

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

Jenks v. Turpin(1), it was held that a house which served a double purpose, a social club for members who did not wish to play, and a place for gaming for those who did, was a house kept for the purpose of gaming. And in *Fielding v. Turner*(2), where the defendant had installed a gaming machine in his shop, it was held that he kept the shop for unlawful gaming. The word "keep", however, signifies an habitual keeping of the place for the unlawful purpose; *Martin v. Benjamin*(3). But when the evidence supports the conclusion, as I think it does, that forty-five out of fifty projected drawings of the lottery have been held as intended by the regulations within the temple, it seems to me that this is a sufficient "keeping" of the place for this purpose. In my opinion the evidence sustains the commission of an offence by the defendants against the first part of section 294-A.

The lottery therefore being illegal from the manner in which it was conducted, how does this affect the plaintiffs' right to recover their subscription money from the defendants? The general rule is that money paid or lent to a defendant to carry out an illegal purpose cannot be recovered if the purpose has been carried out either wholly or to a substantial extent; *McKinnell v. Robinson*(4) and *Kearley v. Thomson*(5). This rule is embodied in section 84 of the Indian Trusts Act. But there are exceptions. One exception is that, when the Act creating the illegality has been passed for the purpose of

(1) (1884) 13 Q.B.D. 505.

(3) [1907] 1 K.B. 64.

(5) (1890) 24 Q.B.D. 742.

(2) [1903] 1 K.B. 867.

(4) (1838) 3 M. & W. 434; 150 E.R. 1215.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

protecting a particular class of persons, persons belonging to that class may recover payments made by them. The classic authority is *Browning v. Morris*(1), where Lord MANSFIELD said :

“Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, then the parties are not in *pari delicto*: and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.”

The Lottery Acts in England make it an offence to sell or deliver a lottery ticket, to keep a lottery, to keep a place for the exercise of a lottery, and to publish a lottery. Section 294-A of the Penal Code makes it an offence to keep a place for drawing a lottery or to publish a lottery. Neither under the English Acts nor under the Penal Code is it made an offence to buy a ticket in a lottery. Can it be doubted that these enactments are aimed at the class of persons who promote lotteries, and that they are intended to protect the class of persons who are tempted to take tickets in lotteries? This was the view of the policy of the Lottery Acts taken by STIRLING J. in *Barclay v. Pearson*(2); and in this view the plaintiffs would be entitled to recover their subscriptions from the defendants even if the money had been distributed. But the argument is that the plaintiffs cannot recover because they are in *pari delicto* with the defendants. It is suggested that they have abetted the illegal acts committed by the defendants. All

(1) (1778) 2 Cowp. 790; 98 E.R. 1364.

(2) [1893] 2 Ch. 154.

that the plaintiffs are shown to have done is that they bought two tickets in the lottery. In my opinion this does not amount to aiding the defendants in keeping a place for the drawing of a lottery.

“A customer who buys an article in a shop might just as well be said to assist in conducting the business of the shop”;

per HAWKINS J. in *Jenks v. Turpin*(1). There was certainly no abetment by plaintiffs of the publication of the lottery proposals.

The last contention is that the defendants cannot be made personally liable. It appears from the kuri regulations that the duty of receiving the collections of subscriptions was committed to the first defendant. But this was only a matter of convenience in the management, as all the defendants were clothed with authority to manage the kuri, and the investment of the moneys was to be on the advice of all. It is said that the first defendant abused his trust; but of that we have no evidence. The third defendant is undoubtedly a trustee with the other defendants of the money paid in subscriptions, and is personally liable for its due appropriation in accordance with the terms of the regulations, unless these rules give him an exemption. Clause 13, which is the only provision bearing on the matter, while declaring that the kuri property shall be liable in case of default, does not give the defendants exemption from personal liability. It makes the kuri property security against the defendants' default.

For these reasons I am of opinion that defendants were rightly held liable to refund the money

(1) (1884) 13 Q.B.D. 505, 526.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
CORNISH J.

SESHA AYYAR
v.
KRISHNA
AYYAR.

VARADA-
CHARIAR J.

claimed by the plaintiffs, and that this petition should be dismissed with costs.

VARADACHARIAR J.—In the view that I take of the application of the “*pari delicto*” rule to the circumstances of this case, it would have been sufficient for the disposal of the revision petition to say that the claim is in substance not for the *enforcement* of an illegal contract but for refund of money paid and, even assuming that the money had been paid for an illegal purpose, the plaintiff would be entitled to recover the same on the ground that he is not as guilty as the defendants (*vide* section 84 of the Trusts Act). But, as the case has been placed before this Bench because of the conflict between *Udumalpet Nidhi, Ltd., In re* (1) and *Shanmuga Mudali v. Kumaraswami Mudali* (2) [affirmed in *Narayana Ayyangar v. Vellachami Ambalam* (3)] and the points arising therefrom have been argued at great length before us, I have thought it right to express my opinion on some aspects of the wider question.

The arguments before us may be grouped under four heads : (i) what are the elements necessary to make a scheme a lottery ? (ii) what are the conditions to be established before persons participating in a lottery can be held guilty under section 294-A, Indian Penal Code ? (iii) what is the position for the purposes of the “Criminal” law of persons who subscribe to or purchase tickets in a lottery as distinguished from that of those who organise, promote or manage the lottery ? and (iv) what is the position for the

(1) (1934) I.L.R. 57 Mad. 844

(2) (1925) I.L.R. 48 Mad. 661.

(3) (1927) I.L.R. 50 Mad. 696 (F.B.).

purpose of the Civil law of such subscribers or ticket-holders in relation to the organisers, promoters or managers ?

Though there is no formal definition of “lottery” in the Indian Penal Code, the second clause of section 294-A sufficiently indicates its ingredients in the terms found in the older dictionaries. After it was pointed out that a *gratuitous* distribution of prizes by lot may not amount to a lottery, the definition has been amplified in the Oxford Dictionary and in recent editions of Webster’s Dictionary, so as to include the idea of a *purchase* of a ticket or the passing of something in the nature of “consideration” from the subscriber or competitor. When schemes came to be so contrived as to give the subscriber or competitor not merely the *chance* of getting a prize but *also* the certainty of getting some return in the shape of goods or amusements or other advantage, elaborate discussions are found in reported judgments as to how much of the “consideration” paid by the subscriber or competitor must be deemed to be paid for the return which he *certainly* gets and how much of it is the price paid for the “prize” which he hopes to get. As most of the relevant authorities have been noticed in the recent Madras decisions, I do not think it necessary to discuss the cases in detail ; but it is clear that it is not possible or desirable to *fix* any proportion between the part of the consideration which corresponds to the value of the advantage necessarily received and the part which must be regarded as the price paid for the chance. The result of the authorities seems to me to be that a scheme may fairly be regarded as a lottery if it is

SESHA AYYAR
v.
KRISHNA
AYYAR.

VARADA-
CHARIAR J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

clear that whatever *other benefit* the subscriber or competitor may get in return for his money, the chance of his getting the prize was also part of the bargain and must have entered into his calculation. It is the fact of the *prize* and not the source from which it is paid that I think is the deciding factor.

It may however not be easy to say with precision what constitutes a "prize" for this purpose; it will be too much to say that any and every *advantage* which a person subscribing to a scheme may hope to get will amount to a "prize" if his getting it will depend on the drawing of lots. The course of decisions in this Presidency relating to the older *kuri chits* is opposed to such a wide interpretation of the word "prize" and the same principle underlies the decision in the *Wallingford* case, *Wallingford v. Mutual Society*(1). The rule is correctly stated in paragraph 929 of the Articles on "Gaming and Wagering" in Halsbury's laws of England (Vol. XV) that "the substantial object of the whole scheme" must be looked at and where the object is "the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot" will not make it a lottery.

On behalf of the respondent, Mr. Raghava Rao insisted that a scheme cannot amount to a lottery unless it involved the elements to be found in a "wagering" contract and the deciding factor should be taken to be not the chance of getting a "prize" but the *chance of loss* in certain contingencies. There may not be much in this antithesis but for the fact that in *Shanmuga Mudali v.*

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

Kumaraswami Mudali(1) the learned Judges laid stress on the fact that every subscriber at least got back the principal amount contributed by him and in *Narayana Ayyangar v. Vellachami Ambalam*(2) RAMESAM J. held that any payment out of the *interest* derived or likely to be derived from the investment of the subscriptions must not be regarded as a "loss" sustained by the subscribers. With great respect, I am not able to concur in some of the steps in the reasoning on which the decision in *Shanmuga Mudali v. Kumaraswami Mudali*(1) is based, nor in the statement in *Narayana Ayyangar v. Vellachami Ambalam*(2), above referred to if it is meant to be taken as a rule of *law*. The mere fact that the subscribers to such a scheme may at some time be able to receive a *lump* sum made up of their monthly payments of small sums ought not to blind us to the other features of the scheme. That a considerable sum must result as interest from the investment of the monthly contributions over a period of something like fifty months and that a large portion of this interest goes to the promoters and is lost to the subscribers cannot be denied. If the interest earned is divided among the subscribers themselves, the position may be different. It was suggested that, even in cases like the present, it may be taken that the interest thus earned was notionally taken by the subscribers and then made a *gift* of to the promoters or to the temple for whose benefit the scheme was started. I do not feel justified in importing such a "fiction" and must therefore proceed on the footing that the large body of subscribers, who after fifty

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

(1) (1925) I.L.R. 48 Mad. 661. (2) (1927) I.L.R. 50 Mad. 696, 703 (F.B.).

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

months merely get back the principal amount contributed by them, lose the interest earned by the investment of their contributions. It seems to me a legitimate inference that they were willing to incur this loss because there was the chance of their getting a prize of Rs. 150 even in the first month or in the next few months, should they be lucky in the matter of the drawing of lots. Here again, the position may be different if their good fortune in the matter of the draw merely meant an early repayment, subject to their liability to continue payment of their subscriptions to the end ; but the spirit of speculation suggested a further attraction in the form of the provision that as soon as any subscriber draws the prize his liability to pay subscriptions will cease.

Nor am I able to view the prize paid to the early winners as "distribution of profit". In the first few months, the probable interest will not suffice to cover the "prizes" and the payment of the prize is not made contingent on the earning of profits. The fact that the promoters hoped to reimburse themselves in due course from out of the interest earned will not make the payments to the subscribers who are lucky in the early drawings any the less a "prize".

I cannot help feeling that, in the judgments of RAMESAM and VENKATASUBBA RAO JJ. in *Shanmuga Mudali v. Kumaraswami Mudali*(1), and that of RAMESAM J. in *Narayana Ayyangar v. Vellachami Ambalam*(2), a great deal too much has been read into the observations on this point in the *Wallingford* case(3). Lord BLACKBURN (at

(1) (1925) I.L.R. 48 Mad. 661. (2) (1927) I.L.R. 50 Mad. 696 (F.B.).
(3) (1880) 5 App. Cas. 685.

page 705) disposed of the objection under the Lottery Act by pointing out that "a drawing of lots on one occasion" would not make the society illegal. Lord WATSON contented himself with the remark that "the appellant stated no case showing that this mutual society is a gaming or gambling society" (page 709). Lord HATHERLEY said :

"If this were held to be a lottery nearly every one of the societies I have referred to, namely building societies and a great many other societies framed upon a similar footing, might be found to fall within the enactments against lotteries."

These observations afford no clue to anything like a general principle and an attempt has therefore been made to found an argument upon the rules of the society then under consideration. Neither the terms as to distribution of profits nor those relating to the giving of loans to members (so far as one could gather them from the report) would seem to involve anything like a "prize" except the provision in Article 27 (set out on page 687) that appropriation certificates (certifying the title of the member to receive loans from the society's funds and to participate in its profits)

"shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively".

It must be remembered that the society being a mutual aid institution, the benefit of the premium thus levied would ultimately go to the members themselves. The only benefit left to chance therefore was that some members may get a certificate without payment of premium. One may legitimately use the decision as authority to

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

this extent, that, having regard to the objects and other incidents of membership in the society, this element of chance was not regarded as amounting to a “prize” or rendering the transaction a “gambling transaction”. This only illustrates the difficulty already adverted to of exactly defining the word “prize”. On analysis it may turn out to be a question of *degree*, to be determined with reference to *all* the circumstances of a case. It only remains to add that the remarks made on this case in the 17th edition of Chitty on Contracts [relied on by the learned Judges in *Shanmuga Mudali v. Kumaraswami Mudali* (1)] have been omitted from the latest edition.

The reference in the speech of the Lord CHANCELLOR (at page 697) to the Lottery Acts, as applicable to persons who kept lottery offices at which “the public were invited to pay” for lottery tickets, has been interpreted by RAMESAM J. as excluding from its scope cases where, before the society becomes known to the public, all its members are ascertained and there is no invitation (in another place, “standing invitation”) to any member of the public to join it; see *Shanmuga Mudali v. Kumaraswami Mudali* (1) and *Venkataramana v. Sanyasayya* (2). In *Narayana Ayyangar v. Vellachami Ambalam* (3) the headnote would make it appear that the decision of the Full Bench in some measure rested on the circumstance that the “number of subscribers is determined beforehand”. This is somewhat misleading. In the order calling for a finding, the only relevant observation (on page 700) is :

(1) (1925) I.L.R. 48 Mad. 651, 664. (2) (1933) 66 M.L.J. 76.
(3) (1927) I.L.R. 50 Mad. 696 (F.B.).

“It is essential to know how it was organised and advertised and whether any one who liked could join by merely paying subscriptions.”

On the return of the finding the Court only observed that no offence has been committed “as no office or place for the purpose of drawing any lottery was kept”. It is true that the expression “keeping an office or place” implies a degree of habitualness and continuity of operations, but this will be satisfied as much by a *repetition* of drawings as amongst a fixed number of persons as by permitting an unlimited number of persons to come in as and when they please. Further, it is disclosed by the evidence in this case and it is only natural that after the promoters had conceived the scheme they canvassed for subscribers till they reached a certain number. This stage may well be described as an “invitation” to the public. There is no reason why—and Lord SELBORNE does not say—this invitation should be a standing invitation in the sense that it is *always* kept open.

In *Narayana Ayyangar v. Vellachami Ambalam* (1) RAMESAM J. gives it as one of his reasons for not following *Veeranan Ambalam v. Ayyachi Ambalam* (2) that the decision there “was mainly based upon a judgment of CHANNELL J. in *Richards v. Starck* (3)” and adds, on the strength of a note in Halsbury’s Laws of England, that the decision of CHANNELL J. is inconsistent with two earlier decisions of the Court of Appeal which were not considered by CHANNELL J., viz., *Fuller v. Perryman* (4) and *Hirst v. Williams and*

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

(1) (1927) I.L.R. 50 Mad. 696, 704 (F.B.).
(2) (1925) 49 M.L.J. 791. (3) [1911] 1 K.B. 296.
(4) (1895) 11 T.L.R. 350.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

Perryman(1). Whatever may be the nature of the arrangement in the case of *Fuller v. Perryman*(2) the argument was based on the Gaming Act and the judgment proceeded on the footing (put forward in argument by respondent's Counsel) that as "there was no evidence that the defendant entered into contracts that there should be no delivery of the stock and that differences only should be paid" the agreement did not relate to a gambling transaction. This line of reasoning throws no light on the question now under consideration. In *Hirst v. Williams and Perryman*(1) the statement of facts makes it appear that there was no intention or liability on the part of the plaintiff to take up the stock; but, for reasons which do not appear in the judgment and about which there is no use speculating, the Court of Appeal said :

"The case raised the same point as *Fuller v. Perryman*(2) and there was no gambling between the defendants and the plaintiff."

The remarks that follow seem to treat the case as one of a contract of *advance* to speculators and a guarantee for the return of the money in any event. With due respect, I am unable to read into these judgments anything necessarily inconsistent with the observation of CHANNELL J. in *Richards v. Starck*(3).

Proceeding next to the second of the questions argued before us, I do not think it necessary or expedient to express any definite opinion on the evidence in this case as to whether or not the defendants are guilty of an offence under section

(1) (1895) 12 T.L.R. 128. (2) (1895) 11 T.L.R. 350.
(3) [1911] 1 K.B. 296.

294-A of the Indian Penal Code. Though the interest of the moment has tempted them to plead that the case falls within section 294-A, I am sure they would be the first to plead "not guilty" if they were threatened with a prosecution. It is well settled that it is not sufficient for the purposes of the first part of section 294-A that the scheme amounts to a lottery; it is further required that the person charged should "keep any office or place for the purpose of drawing any lottery". It has frequently been pointed out that the scope of this provision is very much more limited than that of the law in England relating to lotteries; see the varieties of offences under the English Law referred to in *Martin v. Benjamin*(1) and Halsbury's Laws of England, Vol. XV, paragraph 934, in the Article on "Gaming and Wagering". Even in India, the prohibition was wider under Act V of 1844 but, when incorporating this portion of the law into the Penal Code in 1870, the Legislature has to some extent narrowed it. Under similar Acts in England much discussion has taken place as to the connotation of the word "keep" in this context and of the words "office or place". It is obvious that a certain degree of habitualness or continuity of operation is intended as also a fixed or ascertained locality for the drawing; *Marks v. Benjamin*(2), *Martin v. Benjamin*(1), *Doggett v. Catterns*(3), *Shaw v. Morley*(4), *Bows v. Fenwick*(5) and *Powell v. Kempton Park Racecourse Company*(6). See also *Jenks v. Turpin*(7). Whether, in addition, the place where

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

(1) [1907] 1 K.B. 64, 66. (2) (1839) 5 M. & W. 565; 151 E.R. 239.
(3) (1864) 17 C.B. (N.S.) 669; 144 E.R. 268.
(4) (1868) L.R. 3 Ex. 137. (5) (1874) L.R. 9 C.P. 339.
(6) [1899] A.C. 143. (7) (1884) 13 Q.B.D. 505.

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

the lottery is drawn should not also be a "structure" and should not be under some degree of control of the organisers and in some matter "appropriated" to the purpose is not beyond doubt. The evidence in the present case is not very clear whether the place where the lots are to be drawn every month is within the temple enclosure, or is merely an open space in front of the temple ; nor is it clear whether the promoters or any of them are trustees having control over the locality or are merely permitted by the temple authorities to hold the drawing there. The District Munsif was of opinion that the evidence did not establish an offence under section 294-A, either under the first part or under the second part of the section. As to the second part of the section, I am unable to agree with him that the "publication" contemplated is some public advertisement in the sense of a *written* publication in newspapers or hand bills. If a number of persons go about canvassing for subscribers on the basis of the scheme settled beforehand by the promoters, I do not see why it should not amount to a publication of the proposal. I proceed to consider the third and fourth questions on the *assumption* that so far as the promoters are concerned an offence under section 294-A has been proved.

It has been suggested before us on behalf of the petitioner that the subscribers must also be held to be guilty at least as abettors. So far as the publication is concerned, even this is not possible. As to the keeping of the place for a lottery, it has been argued that, as they enter into a scheme with full knowledge that according

to its terms a place has been fixed for the purpose of drawing, they must be deemed to aid in the "keeping". I am not however sure that this is the correct view. Assuming that they aid in the lottery by subscribing thereto or taking tickets, it cannot necessarily be said that they aid in the "keeping" of a place for the purpose. It would make no difference to them if the lots are drawn at one place on one occasion, and at another place on another occasion so as to avoid the *habitual* user of a place as required by the section.

It remains to deal with the relations of the parties for the purpose of the civil law. In *Veeranan Ambalam v. Ayyachi Ambalam*(1) SPENCER J. says :

"The Civil law goes further (than the Criminal law) and prevents obligations arising out of lotteries being enforced in a Court of law whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking."

The meaning of this passage is not very clear. In *Narayana Ayyangar v. Vellachami Ambalam*(2) RAMESAM J. understood it only to mean that such obligations will be unenforceable if the arrangement is in the nature of a "wagering contract". In some of the cases it has been attempted to assimilate a lottery to a "wagering contract" by splitting it into a number of contracts between the promoters on the one side and *each* individual subscriber or competitor on the other and then pointing out that such subscriber or competitor may gain or lose according to the chance of the draw. With due respect I am unable

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VARADA-
CHARIAR J.

(1) (1925) 49 M.L.J. 791, 794.

(2) (1927) I.L.R. 50 Mad. 696, 702 (F.B.).

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

to agree that this is a correct way of viewing the transaction. As shown by *Willis v. Young and Stenbridge*(1), we must look upon the subscribers or competitors as a collective body dealing with the promoters as the *other* party. From the point of view of the promoters there is no "gain or loss" depending on *chance*. The number of some subscriber must *necessarily* be drawn each month and he has to be paid the sum of Rs. 150. The uncertainty as to which of the subscribers may have the luck of the draw is no uncertainty from the point of view of the promoters. Their profits and outgoings never depended on the chances of the draw because they are bound to pay Rs. 150 to each subscriber and the balance of interest earned (after allowing for sundry expenses) represents their profits. I respectfully agree with the decision in *Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu* (2) that a lottery should not be judged of by the tests applicable to a wagering contract.

In dealing with actions by subscribers against promoters, a distinction must be drawn between suits for recovery of the prize or the enforcement of any of the other terms of the contract and suits for *refund* of moneys paid, because in the latter case there will be no question of "enforcement" of the illegal contract. The suggestion of KRISHNAN J. in *Nagappa Pillai v. Arunachalam Chetty*(3) that some portions of the agreement may be severed from the other portions is undoubtedly open to criticism and has rightly been disapproved of. But the view taken in many of

the Madras cases that even a claim for *refund* must fail seems to me with all respect equally open to question. Even here, the learned Judges were (if I may say so) right in holding that the subscriber cannot in such cases claim the benefit of section 65 of the Contract Act; but he is in my opinion entitled to rely on section 84 of the Trusts Act. I am unable to agree with the view that both parties are in such cases in *pari delicto*. Assuming that the payment was made by the subscriber "for an illegal purpose", section 84 of the Trusts Act contemplates *three* cases in which the payment may be claimed back. In the face of the terms of the section, I am unable to agree with the contention of Mr. Krishnaswami Ayyar (on behalf of the petitioner) that the statement of the rule in *Petherpermal Chetty v. Muniandy Servai*(1) is exhaustive. The second class contemplated by section 84 comprises cases where the person making the payment or transfer "is not as guilty as the transferee" and is meant to reproduce a well recognised exception known to the English law; see *Reynell v. Sprye*(2). As early as in *Browning v. Morris*(3), Lord MANSFIELD recognised the right of the subscriber to claim a refund from the lottery office keeper, on the principle that lottery was prohibited by statute for the sake of protecting one set of men from another set of men, and that therefore the parties are not in *pari delicto*. This principle, which has been re-affirmed in *Kearley v. Thomson*(4), *Barclay v. Pearson*(5) and *Greenberg v. Cooperstein*(6), has not been adverted to

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J

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

(2) (1932) I.L.R. 56 Mad. 26.

(3) (1924) 47 M.L.J. 876.

(1) (1908) I.L.R. 35 Cal. 551 (P.C.).

(2) (1852) 1 D.E.G. M. & G. 660; 42 E.R. 710.

(3) (1778) 2 Cowp. 790; 98 E.R. 1364.

(4) (1890) 24 Q.B.D. 742.

(5) [1893] 2 Ch. 154.

(6) [1926] 1 Ch. 657, 665.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VARADA-
CHARIAR J.

in any of the Madras cases which disallowed the subscriber's claim for refund. It was suggested before us by Mr. Krishnaswami Ayyar that the *dicta* of STIRLING J. on this point in *Barclay v. Pearson*(1) are scarcely reconcilable with the final order in the case by which the learned Judge refused to *administer* the fund. I see no force in this suggestion. All that the order means is that there was no "trust" which the Court of Chancery could administer and that the plaintiff must therefore be left to his remedy at law. In a recent judgment delivered by STONE J. on the Original Side [Application No. 2720 of 1933 in Original Petition No. 11 of 1931 reported in (1933) 4 Company Cases 256], the learned Judge would appear to have restricted the operation of this rule to cases where the defendant has not disbursed the money because, according to him, the subscriber will on such disbursement "become in *pari delicto*, having stood by". With due respect, this view seems to me to ignore the observation of STIRLING J. in *Barclay v. Pearson*(1) that the unsuccessful competitor would be entitled to sue "even if the fund has been distributed". The learned Judge does not notice that section 84 of the Trusts Act states this rule as different from the first case provided for in the section, namely, where the illegal purpose has not been carried out. I would however add that, even taking the rule in the limited form adopted by STONE J., the plaintiff will be entitled to a decree in this case, because it has not been pleaded, and, in the circumstances, it cannot be pleaded, that the

(1) [1893] 2 Ch. 154, 168.

defendants have *disbursed* all the moneys received from the subscribers.

SESHA AYYAR
v.
KRISHNA
AYYAR.

I agree with my learned brother that the terms of the *kuri chit* in this case do not exclude the personal liability of the defendants and that the civil revision petition must be dismissed with costs.

WADSWORTH J.—The first question is whether the *kuri* or prize *chit* to which the plaintiff subscribed and which the defendants managed is a lottery. Most of the leading cases on lottery law start from a dictionary definition of the term "lottery", usually that of Webster, who defines a lottery as a distribution of prizes by lot or chance; and I think it has been held consistently both in England and here that this distribution must not be entirely gratuitous. An attempt has been made to argue before us that a lottery is necessarily a type of wager and that the element of hazard and risk of loss necessarily enters therein. In a sense it is true that whenever a man purchases a chance in a lottery he risks losing the money which he has paid for that chance. But I do not think that it can be said that risk of loss necessarily enters into the contract of every person who joins a lottery. Otherwise it would be obvious that a case like that covered by *Willis v. Young and Stemberidge*(1) could not be a lottery; for, in that case, the distribution of medals which supplied the place of tickets was gratuitous. The element of payment entered only to the extent that most of the holders (but not all of them) purchased copies of the newspaper in order to

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

ascertain the result. Similarly, in such cases as the *Tea Packet* case, *Taylor v. Smetten*(1), or the *Music Hall* case, *Morris v. Blackman*(2), or the case of the *Lucky Newspaper*, *Hall v. McWilliam*(3), notionally there is a purchase of a chance along with the packet of tea or the music hall ticket or the newspaper as the case may be. But in all these cases the purchaser gets his money's worth apart from the purchase of a chance so that the element of hazard is very slight indeed.

Counsel for the respondent has elaborated the theory that a lottery is not a lottery unless there be a risk of loss, mainly in order to get the advantage of the observations in *Narayana Ayyangar v. Vellachami Ambalam*(4) to the effect that loss of interest is not a loss strictly so called, though it may be failure to make a profit. Now it has been explained in the *Udumalpet Nidhi* case, reported as *Udumalpet Nidhi, Ltd., In re*(5) that the actual decision in *Narayana Ayyangar v. Vellachami Ambalam*(4) was to the effect that, on a finding of fact that there was no lottery, it could not be held that the scheme (similar to that which we are considering) amounted to a wagering contract. In the view that I take that, though the risk of loss is usually found in any lottery scheme, it is not an essential part of the definition of a lottery, it is strictly unnecessary to consider the correctness of the dictum in *Narayana Ayyangar v. Vellachami Ambalam*(4) and other cases similar to it that loss of interest is not strictly speaking a loss. I may, however, observe

(1) (1883) 11 Q.B.D. 207. (2) (1864) 2 H. & C. 912; 159 E.R. 378.
(3) (1901) 85 L.T. 239.
(4) (1927) I.L.R. 50 Mad. 696 (F.B.). (5) (1934) I.L.R. 57 Mad. 844.

with great respect that the question seems to me to be one of degree. A man might not be considered to have suffered a loss by foregoing interest on a small sum of money for a short time during which period the possibility of earning interest would be problematic. But the matter stands on a different footing when we are dealing with a large sum of money held over a long period. For we must consider the normal conduct of a prudent person and a prudent person normally would not allow a large sum of money to lie idle for a long period and, if the scheme entails such a consequence, I would be prepared to hold that it entails a loss. Whether that view be correct or not, in the present case it seems to me clear that there was a distribution of prizes by lot and that this distribution was not gratuitous. It seems to me therefore to follow that the scheme now under consideration is certainly a lottery.

Now a lottery is not *per se* illegal, though, if it could be shown that the lottery was in fact a series of wagering contracts [as was held by SPENCER J. in *Veeranan Ambalam v. Ayyachi Ambalam*(1)] so as to fall within section 30 of the Indian Contract Act, the contract might be void. But it has not been contended by the petitioner before us that this lottery is in fact a wagering contract and we are only concerned with the question of the extent to which the parties to the lottery committed offences under section 294-A of the Indian Penal Code. In dealing with this question, one has necessarily to refer to the decision of the House of Lords in *Wallingford v. Mutual Society*(2) which has given rise to a great

(1) (1925) 49 M.L.J. 791.

(2) (1880) 5 App. Cas. 685.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

deal of discussion. The difficulty about this case is that the consideration of the lottery question was a minor point in that case not discussed at any length in their Lordships' speeches, and it is not easy to be certain of the reasons which govern the decision on this point in the case. Probably the best summary of the effect of this decision is that given in Halsbury's Laws of England, Vol. XV, page 527, namely, that, when the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme. From this case it has been argued that the motive of the promoters of the scheme and the subscribers thereto is the governing factor. I doubt very much whether this is a correct view of the law. Surely a more correct statement of the effect of this decision is that, if the distribution of the profits by lot is only a subsidiary item of an extensive legitimate business, it ordinarily could not be said that the offence of keeping an office for the purpose of drawing a lottery has been committed.

In some of the cases on lotteries following *Wallingford v. Mutual Society*(1), for instance *Shanmuga Mudali v. Kumaraswami Mudali*(2), it has been held that a person cannot be said to keep a lottery office with reference to section 294-A, Indian Penal Code, unless there is something in the nature of a "standing invitation to the public". Hence apparently has arisen the theory that when there is a pre-determined number of subscribers there is no possibility of an offence under section 294-A. With all respect for the

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

(2) (1925) I.L.R. 48 Mad. 661.

learned Judges who have held this view I must differ from them. The theory of a standing invitation to the public seems to be traceable to an observation of Lord SELBORNE in *Wallingford v. Mutual Society*(1) (referring to a provision of an English Act which is not in the same terms as section 294-A, Indian Penal Code) to the effect that

"the other Act relied on had reference to persons who kept lottery offices at which the public were invited to buy lottery tickets".

It seems to me clear that section 294-A has no reference to keeping an office in which the public are invited to buy lottery tickets. It has express reference to the keeping of an office or place for the purpose of *drawing* unauthorized lotteries and it seems to me apparent that the drawing of the lottery must necessarily follow the invitation to subscribe and that the number of subscribers must ordinarily be known when the draw takes place. So that not only is it in my opinion incorrect to say that there is no keeping of an office within the mischief of the first part of section 294-A if the number of subscribers is known, but I would go so far as to say that it is almost inevitable that the number of subscribers should be known when the drawing takes place and when the offence under section 294-A, first part, is committed.

The second part of this section deals with the publication of the proposals connected with "any such lottery". It seems to me that the words "such lottery" must only refer to a lottery not authorized by the Government and that publication would be complete by the circulation of

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

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

printed prospectuses to members of the public or to persons known to be likely to subscribe. In the present case, it is established that at least 600 persons were recruited to the scheme by means of canvassing agents, private letters and circulation of printed prospectuses. There can, I think, be no doubt as to the fact of publication and it seems to me to make no difference whatever on the question of publication or on the question of keeping an office, how and when the number of subscribers was fixed. As a matter of fact in the present case the number was fixed in the first instance at 500 and was later increased presumably as a result of popular response to 625. But the point seems to me to have no bearing on the offence under section 294-A.

Having arrived at the position that the scheme in question is a lottery, that there has been publication and that neither the fixing of the number of subscribers nor the absence of any standing invitation to the public will in any way take the scheme out of the mischief of section 294-A, first part, it remains to be considered whether there was a keeping of an office or place for the purpose of drawing the unauthorized lottery. Now it is not seriously contended that the provision in the prospectus of the scheme that the records should be placed in the iron safe in the temple constitutes the temple an office for the drawing of the lottery. But it is for consideration whether the provision in the prospectus, which was carried into effect on no fewer than forty-five occasions, that the drawings should be held every month in connection with this lottery at the temple (which according to the evidence was

understood to mean the portico in front of the temple) is not sufficient to constitute this portico a place kept for the purpose of drawing the lottery. Clearly it is a place, that is to say, it is a definite area where the person responsible can be found. [Vide *Powell v. Kempton Park Racecourse Company*(1)]. Was there a keeping? Keeping implies not occasional user, but something habitual or regular; [*Martin v. Benjamin*(2)]. It is argued that the notion of keeping also implies some dominion over the place kept. I am prepared to concede that there would not be a keeping of a place unless there was an occupation so effective as to enable the persons drawing the lottery to be regularly found in that place at stated times. But I do not consider that any exclusive dedication of the place for the purpose of drawing the lottery is necessary to bring this act within section 294-A. The essential thing to my mind is the habitual or regular user of a place for the purpose of drawing lots, such user being sufficiently effective as to enable anyone interested in the lottery to know where the promoters can be found at the time of the draw. It is not in my opinion necessary that the members of the public should be excluded from the place or that the place should not be used for any purpose other than the drawing of the lottery. Applying these criteria it seems to me clear that the proprietors of the present scheme did keep a place for the purpose of drawing an unauthorized lottery. That is to say, the defendants as proprietors committed offences under both the parts of section 294-A, Indian Penal Code.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

(1) [1899] A.C. 143.

(2) [1907] 1 K.B. 64, 67.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

The next question is, to what extent the plaintiff can be said to be a party to the illegality of the action of the defendants? He was a mere subscriber. There is, so far as I am aware, no evidence that he took part in the organization of the lottery or even that he was present at the drawing, though under the prospectus he had a right to be present if he so wished. He certainly cannot be said to have committed an offence under section 294-A. It is suggested that he may be an abettor of such an offence. Clearly he did not abet the publication of this lottery proposal for it was published presumably before he paid over his money and it was by the publication that he was induced to join the scheme. Can he be said to have abetted the keeping of the place for the drawing of the lots? I do not think he can. Granted that the scheme under which he bought a ticket contemplated the keeping of a place for the drawing of lots, the mere purchase by the plaintiff of a ticket would not in my opinion amount to such intentional aiding or conspiracy as is contemplated under section 107, Indian Penal Code. When the plaintiff bought his ticket, he intended to buy a chance in the lottery and an incident of that lottery was the drawing at a stated place. It was presumably within the power of the defendants as managers to alter that place. The plaintiff, so far as we know, had nothing to do with the draw. We do not know whether any expense was incurred in connection with the draw or that the plaintiff's money went to finance it. All that we know is that he bought a ticket which was to be drawn at a particular place. I do not consider that this amounts to an

abetment of the keeping of the place at which the ticket was to be drawn.

If the plaintiff joined in a contract which contemplated the doing of an unlawful act by the defendants but not by himself and if it is not necessary for the plaintiff to plead his own turpitude, it seems to me that there is no reason why the plaintiff should not be allowed to recover the money which he has actually subscribed to the scheme, that money not having been paid out to anybody else under the scheme. To hold otherwise would be to permit the guilty party to misappropriate the funds of a comparatively innocent party. The case of *Barclay v. Pearson*(1) is an authority for the position that when the parties are not in *pari delicto*, the innocent or the hoodwinked party may claim the return of his money. The matter is also covered by the second clause of section 84 of the Indian Trusts Act which prescribes that

“where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.”

In the present case, the plaintiff not being guilty of any offence, the most that can be said against him is that he knew or ought to have known that an offence would be committed in connection with the scheme to which he had subscribed. Emphatically therefore he is not in *pari delicto* with the promoters of the scheme who have, in the eye of the law, committed a

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

(1) [1893] 2 Ch. 154.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
WADSWORTH J.

crime. There is no question therefore of *potior est conditio possidentis* nor can it be a question of *ex turpi causa non oritur actio*. The plaintiff can plead the contract without pleading his own criminality and he should therefore be allowed to recover his money.

It seems to me unnecessary to consider at length the plea that there is no personal liability upon the defendants, for such a liability is in my opinion imposed by the terms of the contract.

In this view therefore I agree that the petition should be dismissed with costs.

VENKATA-
RAMANA
RAO J.

VENKATARAMANA RAO J.—The suit out of which this civil revision petition arises was instituted by the plaintiff to recover a sum of Rs. 270 being the amount contributed by him towards his share of subscriptions to a chit fund which was conducted by the defendants with interest thereon at twelve per cent per annum. The defence was that the chit fund transaction was a lottery within the meaning of section 294-A of the Indian Penal Code and any claim arising thereunder could not be legally enforced and that the petitioners were not personally liable and at best the remedy of the plaintiff could only be against the moneys, if any, of the fund.

The learned District Munsif, Palghat, was of opinion that the chit fund in question was not a lottery and that in any event an offence under section 294-A was not made out and decreed the plaintiff's suit. Against the said order the present civil revision petition has been filed and, when it came up before VENKATASUBBA RAO, Offg. C.J.

he found it difficult to reconcile *Udumalpet Nidhi, Ltd. In re*(1) with the Full Bench decision in *Narayana Ayyangar v. Vellachami Ambalam*(2) and *Shanmuga Mudali v. Kumaraswami Mudali*(3) which it in terms approves, and therefore had this matter placed before this Full Bench.

The two main questions which fall to be decided in this case are (i) whether the chit fund in question is a lottery and (ii) whether the plaintiff is entitled to recover the amount paid by him as and for his subscriptions to the fund.

The nature of the transaction in this case may be described thus : The chit was started with the object of creating a fund for the Lakshminarayana Perumal Temple. It consists of 625 subscribers, the monthly subscription being Rs. 3. The number of months for which subscriptions have to be paid is 50. The arrangement is that a drawing takes place every month, one ticket is drawn out of 625 tickets and the subscriber who draws the ticket is paid Rs. 150 without any liability to pay for future instalments. This process is repeated month after month till the fiftieth month. After the fiftieth month the remaining 575 subscribers will be each paid in a particular order Rs. 150, i.e., the amount actually paid by them, and the chit fund will then be closed. On the termination of the said chit fund as aforesaid,

“the entire profits accruing from the kuri shall be utilised either in the purchase of some land at the manager's choice or for other purposes connected with the temple”,

(1) (1934) I.L.R. 57 Mad. 844. (2) (1927) I.L.R. 50 Mad. 696 (F.B.).
(3) (1925) I.L.R. 48 Mad. 661.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

SESHA AYYAR

v.
KRISHNA
Ayyar.—
VENKATA-
RAMANA
RAO J.

as it was agreed at the inception that the entire profits accruing from the kuri shall belong to the temple.

As stated above, the question for consideration is whether a kuri or chit fund of the said description is a lottery. A lottery is a species of gaming or wagering and may be described as an agreement whereby a prize or prizes are to be awarded by drawing lots or any other chance method to one or more of the persons who risk the payment of money or other valuable consideration for the chance of winning a prize. In Webster's Dictionary, "lottery" is defined as

"a scheme for the distribution of prizes by lot or chance, especially a scheme by which one or more prizes are distributed by chance among persons who have paid or promised a consideration for a chance to win them, usually as determined by the numbers on tickets as drawn from a lottery wheel."

In Murray's Dictionary, the following meaning is given :

"An arrangement for distribution of prizes by chance among persons purchasing tickets."

In the latest Universal Dictionary of English Language, it is defined as follows :

"Organised competition for money or other prizes the winners of which are selected by lots, the funds being subscribed by the competitors."

From a study of decisions both English and Indian, the following four elements appear to be essential to constitute a lottery :

- (i) a prize or some advantage in the nature of a prize ;
- (ii) distribution by chance ;
- (iii) consideration paid or promised ;
- and (iv) risk or loss.

I shall endeavour with reference to the decisions to show that if any one of these elements is wanting the transaction will not be a lottery. Before proceeding to do so it is necessary to advert briefly to the development of the law both in England and in India regarding lotteries and the underlying principle on which they have been rendered illegal or in certain circumstances made punishable. In England, lotteries were perfectly valid at Common law but, between the years 1698 and 1846, a series of statutes were enacted in order to suppress lotteries. The original purpose of these Acts was two-fold : to authorise only State lotteries which in fact throve from 1709 to 1803, and also to prevent any opposition to those State lotteries either at home or from abroad. Later statutes were also intended to prevent innocent persons from being ruined. It is unnecessary to refer to these various statutes excepting two of them in so far as they have a bearing on the Indian statute law. Two of the said statutes are the Gaming Act of 1802, 42 Geo. III, c. 119, and the Lotteries Act of 1823, 4 Geo. IV, c. 60. The relevant provisions of the said two Acts are as follows :—

(42 Geo. III c. 119)—An Act to suppress certain Games and Lotteries not authorised by law :

"Whereas evil-disposed persons do frequently resort to public houses and other places to set up certain mischievous games or lotteries called little goes, and to induce servants, children, and unwary persons to play at the said games ; and thereby most fraudulently obtain great sums of money from servants, children, and unwary persons to the great impoverishment, and utter ruin of many families. For remedy whereof Be it enacted that all such games or lotteries called little goes shall from and after the passing of this Act be deemed and are hereby declared common and public nuisances and against law.

SESHA AYYAR

v.
KRISHNA
Ayyar.—
VENKATA-
RAMANA
RAO J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

From and after the 1st day of July, 1802, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goes or any other lottery whatsoever not authorised by Parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place upon pain of forfeiting for every such offence the sum of five hundred pounds, to be recovered in the Court of Exchequer at the suit of His Majesty's Attorney-General, and to be to the use of His Majesty, his heirs and successors."

The Lotteries Act, 1823, provided that if any person or persons were to sell tickets or chances in any lottery not authorised by an Act of Parliament or publish any scheme or proposal for the sale of any ticket or chance in such a lottery, for every such offence he had to forfeit and pay a sum of fifty pounds.

It will be seen from the preamble of 42 Geo. III that the underlying public policy which declared the lotteries common public nuisances was that they promote gambling and speculation so that great sums are obtained fraudulently from servants, children and unwary persons to the great impoverishment and utter ruin of many families. In India, Act V of 1844 was enacted on these lines. The relevant provisions are as follows :

"Whereas great mischief has been found to result from the existence of Lotteries :

i. It is hereby enacted, that in the territories subject to the Government of the East India Company, all lotteries not authorised by Government, shall, from and after the 31st day of March 1844, be deemed, and are hereby declared common and public nuisances and against law.

ii. And it is hereby enacted, that from and after the day aforesaid, no persons shall, in the said territories, publicly or privately, keep any office or place for the purpose of drawing any lottery not authorised by Government, or shall have any such lottery drawn, or shall knowingly suffer any such lottery to be drawn in his or her house ; and any person so offending shall for every such offence, upon conviction before a Justice of the Peace, or Magistrate, be punished by fine not exceeding 5,000 rupees."

Their Lordships, SCOTLAND C. J. and FRERE J., in *Kamakshi Achari v. Appavu Pillai*(1), in pronouncing that a certain transaction is not a lottery within the meaning of the said Act, observe as follows at page 450 :

"There is in this, we think, nothing of that risk, speculation and gaming which make ordinary lotteries a common and public nuisance, and which it was the policy and intention of the Act in question to provide against."

A kuri is a well-known institution in Southern India for at least nearly a century. As held by PHILLIPS J. in *Sankunni v. Ikkora Kirtti*(2), "a kuri as ordinarily conducted does not amount to a lottery." It is often resorted to for promoting thrift and co-operation and for various beneficial purposes. In the language of the learned Judges of the Sadar Dewani Adalat in *Iyyanar Kone v. Vidoomada Kone*(3), "it is a provident and a beneficial arrangement." The class of chit funds to which their Lordships were referring in the above cases consisted in a number of people agreeing to contribute monthly sums for a specified number of months and each in his turn, as determined by lot, taking the whole of the money subscribed in a month. The persons who draw sums execute a

(1) (1863) 1 M.H.C.R. 448.

(2) 1919 M.W.N. 570.

(3) (1858) S.D.A. 33.

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VENKATA-
RAMANA
RAO J.

bond for the amount which will have to be subscribed less the amount already subscribed. In a scheme like this certain persons get the use of a lump sum early and others later. If the question of interest on the amounts subscribed is taken into consideration, there is a certain amount of inequality of benefit and consequent advantage gained at the expense of others by those who receive the sum early and thus there is a prize gained by some which is made the matter of chance. But this loss of interest by some or gain of interest by others by itself will not constitute the transaction a lottery as the return of their contributions is not made a matter of chance. Both in the *Saddar Dewani* decision and in *Kamakshi Achari v. Appavu Pillai*(1) their Lordships held such a transaction will not amount to a lottery. It is well worth quoting the reasons on which the conclusion was arrived at :

(i) " It has in it no element of *chance or risk*, the monies paid by each subscriber being eventually returned to him; *Iyyanar Kone v. Vidoomada Kone*(2);

(ii) " Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the persons concerned is made wholly dependent upon the drawing of or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. *It is to lotteries of this description that the Act, we think, must be construed to apply when declaring them to be common and public nuisances and against law* and as such providing for their suppression. Here no such lottery appears to have taken place . . . and neither the right of the subscribers to the return of their contributions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded,

(1) (1863) 1 M.H.C.R. 448.

(2) (1858) S.D.A. 53.

nor any gain made a matter of chance." *Kamakshi Achari v. Appavu Pillai*(1).

SESHA AYYAR
v.
KRISHNA
Ayyar.
—
VENKATA-
RAMANA
RAO J.

The interpretation of lottery in Act IV of 1844 by these two decisions was accepted by the Legislature and with the knowledge of that interpretation the Indian Penal Code was amended by Act XXVII of 1870, section 10, by enacting section 294-A which it may be observed is more restricted in scope than Act V of 1844. Even after the introduction of that section, in *Vasudevan Nambudri v. Mammod*(2) a kuri of the above kind was held not to be a lottery and their Lordships observe :

" The law as laid down in *Kamakshi Achari v. Appavu Pillai*(1) has been followed without question for thirty-five years. The introduction of section 294-A into the Indian Penal Code makes no difference."

These decisions therefore clearly establish that, where the dominant feature of the transaction is the promotion of mutual thrift and co-operation and the object is a beneficial purpose and not the purpose of gaming or speculation, the fact that certain matters are determined by lot will not constitute it a lottery and that risk of loss is a necessary element. In this connection it will be necessary to note how English lawyers viewed a transaction like this. In Halsbury's Laws of England, Vol. XV, section 929, it is stated thus :

" It seems that the substantial object of the whole scheme will be looked at in order to ascertain whether it is a lottery. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme."

For this proposition reliance has been placed on the decision in *Wallingford v. Mutual Society*(3).

(1) (1863) 1 M.H.C.R. 448.

(2) (1898) I.L.R. 22 Mad. 212.

(3) (1880) 5 App. Cas. 685.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

In that case, there was a formation of a mutual society the declared object of which was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation, to secure payment of such advances by taking over and holding real or other securities and ultimately to divide among the members all the profits that had been made. The mode of operation was this : to obtain subscriptions from members, to advance them money on interest upon certificates of appropriation. By article 27 it was declared that appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively. All appropriations were to be repaid by equal quarterly payments extending over twenty years from the advance. It was urged in that case that the constitution of the society itself was illegal, as its promised benefits were to be given to the members by drawings, which made the society illegal under the Lottery Acts. Their Lordships had no hesitation in repelling the contention. Referring to the Lottery Acts, Lord SELBORNE observed as follows :

“ One of those Acts plainly—on the face of its recitals (the enacting part not departing from those recitals)—had reference to gambling transactions only ; and in my judgment this was not a gambling transaction within the meaning of that Act.”

Thus it will be seen that in this case there was a prize obtained by some of the subscribers at the expense of the others. That prize was determined by chance. There was consideration paid for that

chance. Still it was not characterised as a lottery because the dominant feature of the scheme was that it was not a gambling transaction. It has therefore in every case to be considered before a scheme can be pronounced to be a lottery what is the dominant feature of the transaction. In *Shanmuga Mudali v. Kumaraswami Mudali*(1) their Lordships refused to condemn a transaction of the description in this suit as a lottery. His Lordship, VENKATASUBBA RAO J., observed at page 669 :

“ Though it may be said that it is the small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme in their case is an incentive to thrift.”

To a similar effect RAMESAM J. says at page 664. A reference to the case of *Sykes v. Beadon*(2) will be necessary in this connection because that case has been relied on in two later Madras cases, *Universal Mutual Aid and Poor Houses Association, Limited v. Thoppa Naidu*(3) and *Udumalpet Nidhi, Ltd., In re*(4), for the conclusion they arrive at in describing a transaction like this as a lottery. JESSEL M. R. in that case characterised an association similar to the one in the *Wallingford* case(5) an illegal association. The main question in that case was whether the association was formed for the acquisition of gain and therefore ought to have been registered under the Companies Act of 1862. The learned Judge was of opinion that it was such an association and not having been registered was illegal and he ventured to remark that it would also offend against the

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

(1) (1925) I.L.R. 48 Mad. 661. (2) (1879) 11 Ch. D. 170.
(3) (1932) I.L.R. 56 Mad. 26. (4) (1934) I.L.R. 57 Mad. 844.
(5) (1880) 5 App. Cas. 685.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

Lottery Act. The decision in the *Wallingford* case(1) was given on 8th June 1880. The question identical with that which arose in *Sykes v. Beadon*(2) came up in the Court of Appeal for decision on 16th July 1880 in *Smith v. Anderson*(3). In that case, shares in a number of submarine telegraph companies of the aggregate nominal amount of £400,000 were purchased by subscription and vested in trustees. Each subscriber received for every £90 subscribed a certificate for the nominal amount of £100 and a deferred coupon for one 4200th part of the funds, the number of certificates being 4,200, and the profits therefrom were to be divided in a certain manner stated therein. There was provision for redemption of certificates by purchase. There was also provision for redemption in a certain event by a drawing of the certificates which entitled the recipient of that certificate to particular benefits, i.e., gain of £30 per share. It was contended in that case that the object of the association being the acquisition of gain, the drawing of the certificates for purchase by lot was a lottery. CHITTY Q. C. who appeared for the association in that case met the argument relating to lottery by saying : "All argument that this case is within the Lottery Acts is precluded by the decision of the House of Lords in *Wallingford v. Mutual Society*(1)." Their Lordships in the Court of Appeal reversed the judgment of JESSEL M. R., holding that the association was not for the purpose of gain within the meaning of the Companies Act, and that

"if there is any business at all it is to be carried on by the trustees. Whatever is to be done is to be done by the

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

(2) (1879) 11 Ch. D. 170.

(3) (1880) 15 Ch. D. 247.

trustees . . . Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them."

The learned Judges did not deem it necessary to deal with the question of lottery apparently owing to the decision of the House of Lords. The transaction could have been condemned as a lottery if the dictum of JESSEL M. R. in *Sykes v. Beadon*(1) was applied. It would appear from Chitty on Contracts, 16th edn., that the authority of *Sykes v. Beadon*(1) is not of much weight having regard to the decision of the House of Lords (page 748). In the latest edition, in the body of the book the result of the decision in the *Wallingford* case(2) is stated and no reference is made to *Sykes v. Beadon*(1) except in the footnotes.

Coming to the suit transaction, its dominant feature is to raise a fund for the purpose of the temple and not gaming or speculation. The object is stated in Rule 3:

"The terms and the object of the Kuri.

The object of the kuri is to create a special fund for the temple and, as the expenses of the fund are increasing year by year, and as there is no fund from which these expenses could be met, to create a fund for the purpose so that such expenses may be met in future without any default."

No one will deny that it was a legitimate object and such schemes are now generally being resorted to for such purposes. If the chit funds of the nature described in *Kamakshi Achari v. Appavu Pillai*(3) and *Vasudevan Nambudri v. Mammood*(4) are legitimate transactions on the

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

(2) (1880) 5 App. Cas. 685.

(3) (1863) 1 M. H. C. R. 448.

(4) (1898) I.L.R. 22 Mad. 212.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

ground that their object was to promote thrift, prudence and co-operation, it is not possible to see why this transaction should be viewed differently. Here also everybody gets a lump sum of Rs. 150 just as in those chit funds everybody got the amount which he subscribed. The fact that some of them got more and that that could probably have been an inducement for people to subscribe does not detract from the legitimate object of the transaction, namely, to provide for a charitable object and to get a lump sum at the end of a prescribed number of months.

Taking the various elements which go to constitute a lottery, the mere obtaining of a prize by chance will not do. There must be consideration paid or promised, because it has been held in *Willis v. Young and Stembridge*(1) that an absolutely free and gratuitous distribution of chances, none of which has been paid for, would not be a lottery. It will thus be seen that the combination of a prize chance and gain would not be enough. That which is essential therefore is consideration paid or promised because it is only then that the fourth element of risk or loss comes in. If there is no consideration there can be no question of gain or loss. Every one of the English cases on which reliance is placed tends undoubtedly to establish this. As rightly observed in Halsbury's Laws of England, Vol. XV, page 525, foot-note (f):

"In spite of the fact that the Courts have adopted as a definition the description of a lottery given above, in which the gambling element is not mentioned, (a lottery has been described as a scheme for distributing prizes by lot or chance), there is no reported case in which the element has been wholly absent.

(1) [1907] 1 K.B. 448, 455.

Indeed the Courts have gone out of their way to discover its presence."

In *Taylor v. Smetten*(1) a packet containing a pound of tea was sold at 2 s. 6 d. a packet. In each packet was a coupon entitling the purchaser to a prize. HAWKINS J., who delivered the leading judgment in that case, having stated the definition given in Webster's Dictionary of lottery to be a distribution of prizes by lot or chance, proceeded to consider what the nature of the transaction was upon which he was asked to pronounce an opinion. If he had merely decided on Webster's definition according to which only two elements are required, a prize and a chance, there was no need to do so as he had done. It was conceded in that case that the tea was good and worth the money. But he refused to accept that concession and proceeded to observe :

"Although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes. Nor can it be doubted that, in buying a package, the purchaser treated and considered it as a purchase of the tea and the coupon whatever its value might turn out to be. Therefore in so far as he lost the prize he has lost so much of the consideration that went in for it."

In *Hall v. McWilliam*(2) in an issue of an evening newspaper, worth a half-penny, a prize was offered for every purchaser of it. BIGHAM J. observed as follows :

"It is said that in some way or another no chance is sold because the one half-penny that is given for the newspaper is said to be exhausted by the receipt of the newspaper by the person who pays the half-penny. That is not accurate. What the person who buys this newspaper gets for his half-penny is

(1) (1883) 11 Q.B.D. 207.

(2) (1901) 85 L.T. 239.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

SESHA AYYAR v. KRISHNA AYYAR.

not the mere newspaper, but the chance as well. *The two things—the newspaper and the chance—are sold together.*”

VENKATA-RAMANA RAO J.

In *Kerslake v. Knight*(1) this aspect is much more neatly put by Lord HEWART C.J. It is also a case of a sale of a newspaper with a prize. He observes :

“ I think that the purchaser *bought for one undivided price an article and a chance.* The ticket was just as much bought as if it had been priced separately. ”

In *Willis v. Young and Stenbridge*(2) medals were distributed by the proprietor of the Weekly Telegraph. DARLING J. observed :

“ All chances are *paid for* in the mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance. ”

In *Bartlett v. Parker*(3) tickets bearing four different numbers were sold for 6 d. each upon the terms that the purchaser of the ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle in this case was presented as a gift by a firm of cycle manufacturers for the purpose of advertisement. The ground on which this transaction was held to be a lottery is thus stated by RIDLEY J. :

“ I am unable to see how the fact that no part of the money which was paid for tickets went for the purchase of the prize, which was presented by the Cycle Company, makes any difference. I think a lottery is held *whenever there is a sale of tickets which give the holders of them the chance of winning a prize.* It is *selling a chance* where one ticket, by chance, entitles the holder to a prize. ”

This again emphasises the necessity of a consideration. It is unnecessary to multiply cases because every one of the cases when examined

(1) (1925) 133 L.T.R. 606.

(2) [1907] 1 K.B. 448.

(3) [1912] 2 K. B. 497.

establishes the necessity of a loss as an element in determining whether the transaction is a lottery or not.

Coming to Indian cases, I have already shown that, in the two cases decided under Act V of 1844, “ risk ” was considered an element of lottery and the same interpretation must be placed on the said word in Act XXVII of 1870 and it was accordingly done in cases since the Act was enacted. In *In re Doraisamai Mudaly and another*(1) a transaction similar to the one in suit was held to be a lottery on the ground that all those who did not get the prize would get back the prize without any interest. The learned Judges observe :

“ As the prize-winner thereafter ceased to be subscriber to the fund, it must necessarily follow that the rest out of whose subscriptions the prize has been paid and also continue to be subscribers, are the losers. ”

They can only be losers by reason of their failure to get interest because everybody gets his subscription back. This case shows that the loss is an element which is insisted on. See also *Sankunni v. Ikkora Kirtti*(2). In *Veeranan Ambalam v. Ayyachi Ambalam*(3) this aspect of the loss is well brought out. SPENCER J. observes :

“ In the present chit transaction, out of 500 subscribers there were 450 losers of interest on their money deposited with the promoters. ”

MADHAVAN NAIR J. observes at page 797 :

“ I have already shown how the subscribers’ gain is made a matter of chance. As regards the loss, the plaintiff, no doubt, gets back the entire capital which he has subscribed. In one sense, therefore, it is true that the transaction involves no

(1) (1890) 1 Weir. 251.

(2) 1919 M.W.N. 570.

(3) (1925) 49 M.L.J. 791.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

SESHA AYYAR

v.
KRISHNA
Ayyar.VENKATA-
RAMANA
RAO J.

loss in any event to the plaintiff as he is to have his money returned to him *but he loses his interest.*"

Leaving aside the question which I shall presently consider how far loss of interest is a hazard of loss for the purpose of lottery, it is absolutely clear that every decision English and Indian regards the risk of loss as a necessary element of lottery. It may be that in some cases it is difficult to estimate the loss, as in the *Tea* or *Sweetmeat Packet* cases or *Newspaper* cases or the *Musical Entertainment* cases where you cannot allocate how much was paid for chance and how much for the purpose of tea or newspaper or the entertainment, still the Courts are at pains to discover a loss, call such a loss what you will, notional or hypothetical. It is a fallacy to consider the case from the point of view of gain only. Where there is gain to one there is necessary loss to another. The gain cannot be separated from the corresponding loss.

VENKATASUBBA RAO J., if I may say so with respect, approaches the question from the correct standpoint when on page 664 he observes :

"The element, therefore, that is generally present in a lottery or wagering transaction, viz., that loss is occasioned to one or more, does not exist in this transaction."

It is necessary now to consider whether loss of interest to some of the subscribers can be considered a hazard of loss to constitute the transaction a lottery. The view taken in *Shanmuga Mudali v. Kumaraswami Mudali*(1) was that it was not, but in *Veeranan Ambalam v. Ayyachi Ambalam*(2) SPENCER J. and MADHAVAN NAIR J. held it was. In so holding they relied upon the judgment in

(1) (1925) I.L.R. 48 Mad. 661.

(2) (1925) 49 M.L.J. 791.

Richards v. Starck(1). The scheme therein is thus described by CHANNELL J. :

"A person who desires to participate in the scheme deposits a sum of money, whether 5 £ or 10 £ or some multiple thereof, with the defendant, who is to be at liberty to speculate with it on the Stock Exchange in certain stocks, and if at the end of three months from the date of the deposit the price of those stocks is higher than the price at the date when the deposit is made the defendant undertakes to pay to the depositor the amount of his deposit and also the amount of the rise in the price of the stocks less ten per cent upon this latter amount. . . . And in the event of the particular stock not having risen in price he will have the deposit in any event."

The learned Judge observes :

"In one sense the transaction involves no loss in any event to the plaintiff, as he was to have his money returned to him, though without interest. But the plaintiff has lost the interest upon his deposit, and that is, to my mind, sufficiently a loss to bring the contract within the spirit though not perhaps within the actual wording of the definition."

In view of the conflict between *Shanmuga Mudali v. Kumaraswami Mudali*(2) and *Veeranan Ambalam v. Ayyachi Ambalam*(3), the question came up before the Full Bench in *Narayana Ayyangar v. Vellachami Ambalam*(4). RAMESAM J., who delivered the leading judgment, observes as follows :

"In my opinion, loss of interest is not loss strictly so called. It may be failure to make a profit. If a person makes a hand loan to a friend and gets back his money after some time without any interest, he does not lose any part of his money but only fails to make a profit, namely, interest. There are so many varieties of interest ranging from zero to very high rates of interest. It cannot be said that any one is bound to earn a particular rate and that not earning a particular rate is loss. It is clear that in most chit fund transactions, no subscriber loses the money he has contributed; and so long as getting

(1) [1911] 1 K.B. 296.

(3) (1925) 49 M.L.J. 791.

(2) (1925) I.L.R. 48 Mad. 661.

(4) (1927) I.L.R. 50 Mad. 696 (F.B.).

SESHA AYYAR

v.
KRISHNA
Ayyar.VENKATA-
RAMANA
RAO J.

SESHA AYYAR
v.
KRISHNA
AYYAR.

VENKATA-
RAMANA
RAO J.

back the actual amount of subscription is always assured, the interval of time, however long it may be, is immaterial and it cannot be said any subscriber loses."

He refused to follow *Richards v. Starck*(1) as on a similar set of facts the Court of Appeal in *Hirst v. Williams and Perryman*(2) took a different view. There, the office of a certain newspaper issued a circular headed "Unique opportunity for speculation" with reference to contemplated rise in "Brighton Stock". The scheme propounded was that those who were willing to participate in it should subscribe £25 or £50 and that the sum subscribed would be returned with profit if *there is any* rise in price and if there is loss the return of the money is guaranteed. Lord ESHER M. R. observed :

"There was no gambling between the defendants and the plaintiff. The defendants in effect said to the plaintiff, 'we (the defendants) are going to speculate on the Stock Exchange, and if you will advance us money we guarantee its return in the event of our speculations resulting in a loss.' " (*Vide* also Halsbury's Laws of England, Vol. XV, page 474 footnote).

The decision of the Full Bench is thus a distinct authority that loss of interest is not an element which would go to constitute a lottery. So far as the suit chit transaction is concerned, no question of loss of interest arises as all the subscribers have made a gift of such interest as may be earned to the temple. It is competent for a subscriber to forego interest and there is nothing illegal in it and there is thus no loss hazarded and the return of the subscription is not made a matter of risk or speculation. Pollock and Mulla in their Commentary on the Indian Contract Act (6th edn., page 250),

(1) [1911] 1 K.B. 296.

(2) (1895) 12 T.L.R. 128.

approving *Narayana Ayyangar v. Vellachami Ambalam*(1), observe :

"A 'Chit Fund' plan under which all subscribers are repaid their capital by a fixed date, though some determined by lot get more and sooner, is not a lottery."

I am therefore distinctly of opinion that the chit fund in question is not a lottery and with due respect do not agree with the opinion of my learned brothers on this point. It is paramount public policy not to condemn a transaction like this which in the social consciousness of the people is not considered illegal and considerations founded on the possible scope for swindling by unscrupulous persons ought not to make one pronounce a transaction unlawful which is otherwise lawful. As RAMESAM J. rightly observes :

"If it is considered that chit fund transactions require to be regulated in the interests of the public to avoid the perpetration of fraud on poor and innocent persons, legislation on the lines of the Provident Fund Act is the proper course and not to declare them illegal by the straining of the law relating to wagering contracts." ; *Narayana Ayyangar v. Vellachami Ambalam*(1).

Assuming however the transaction to be a lottery, the next question is, has an offence under section 294-A been committed? To constitute an offence under that section there must be keeping an office or place for the purpose of drawing any lottery. The word "keep" implies control *de facto* or *de jure*. The cases cited at the Bar do not throw much light on the meaning of the word "keep" except showing that mere incidental or casual use is not enough, *Marks v. Benjamin*(2), and that the use must be habitual, *Martin v.*

(1) (1927) I.L.R. 50 Mad. 696, 705 (F.B.).

(2) (1839) 5 M. & W. 565; 15 E.R. 239.

SESHA AYYAR
v.
KRISHNA
AYYAR.
VENKATA-
RAMANA
RAO J.

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

Benjamin(1), and the place must have been appropriated for the purpose. The juxta-position of the word "office" with the word "place" connotes that "keep" implies control. In this case, the place of drawing is the portico of the temple and it has not been shown that the defendants had any control over it. In fact the finding is that the defendants did not keep a place within the meaning of the section. Even assuming that the defendants are guilty of an offence under the first part of the section, the subscribers can in no event be guilty of it or an abetment of it. They were in no sense keeping a place for the purpose of drawing. Subscribing moneys for the maintenance of a lottery is not the same as keeping a place for the drawing of a lottery.

Again, though the promoters may be guilty of a publication under the second clause of section 294-A, the subscribers can in no sense be guilty.

The next question is whether the plaintiff is entitled to recover the subscriptions paid by him. It is contended by Mr. T. M. Krishnaswami Ayyar that the plaintiff having been a party to an illegal contract and the illegal purpose having been substantially carried out, he is disentitled from getting any relief. Strong reliance is placed on the decision in *Petherpermal Chetty v. Muniandy Servai*(2). There is no doubt that the general rule is that no person can claim any right or remedy on the basis or ground that he has been a party to an illegal contract and, as the illegal contract is an essential constituent of the cause of action, he cannot succeed. In English law there are well

(1) [1907] 1 K.B. 64.

(2) (1908) I.L.R. 35 Cal. 551, 559 (P.C.).

recognised exceptions to this rule and one of them is where the contracting parties are not in *pari delicto*.

"The offence of one of them so far exceeds that of the other as to make it just and reasonable that the other should be entitled not indeed to enforce the contract but to obtain in some measure or form *restitutio in integrum* in respect of acts of performance done by him in favour of the more guilty party."

It is in virtue of this principle that relief has been given in cases where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men. Under this protected class come the subscribers to a lottery declared illegal under the Lottery Acts of England. (*Vide* preamble to 42 Geo. III already referred to.) The Indian enactments, Act V of 1844 and section 294-A of the Indian Penal Code, are based on the same policy. The relief has been given though the transaction has been finished and completed. [See *Browning v. Morris*(1), *Barclay v. Pearson*(2) and *Chitty on Contracts*, 18th edn., page 786.] This principle has been embodied in section 84 of the Trusts Act which mentions three classes of cases, namely, (i) where the illegal purpose is not carried into execution, (ii) where the transferor is not as guilty as the transferee and (iii) where the effect of permitting the transferee to retain the property might be to defeat the provisions of any law. *Petherpermal Chetty v. Muniandy Servai*(3) would come within the first class of cases. The suit transaction would come within the second class of cases. There is also another recognised

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

(1) (1778) 2 Cowp. 790; 98 E.R. 1364. (2) [1893] 2 Ch. 154, 164.
(3) (1908) I.L.R. 35 Cal. 551 (P.C.).

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
VENKATA-
RAMANA
RAO J.

exception in English law to the rule of *turpis causa* in cases where there exists between the parties the relation of trustee and beneficiary and a trustee holds on behalf of his beneficiary all the moneys he receives in his capacity as trustee. The law will not permit him to keep them for himself on the plea of illegality in the transaction in which they were received.

"In such cases public policy requires that the rule of *turpis causa* shall be excluded in favour of the more important and imperative rule that agents and trustees must faithfully perform the duties of their office."

I am inclined to think that the third class of cases mentioned in section 84 would cover cases like this and the suit transaction might also fall under it. In *Veeranan Ambalam v. Ayyachi Ambalam*(1), and in the judgment of ODGERS J. in *Nagappa Pillai v. Arunachalam Chetty*(2), section 84 of the Trusts Act is not adverted to, nor the well-recognised exceptions in English law considered. I am therefore of opinion that the plaintiff is clearly entitled to get back the subscription paid by him.

The last argument of Mr. T. M. Krishnaswami Ayyar is that in any event his client cannot be made personally liable. He based his argument on clause 13 of the regulations of the kuri. From a reading of the regulations of the kuri there is nothing to exclude the personal liability of the defendants and clause 13 only confers an additional security on the moneys of the kuri.

In the result the petition fails and I concur with my learned brothers in dismissing the revision petition with costs.

(1) (1925) 49 M.L.J. 791.

(2) (1924) 47 M.L.J. 876.

LAKSHMANA RAO J.—I agree that the petition should be dismissed with costs, and in my opinion the crucial test is whether or not the chance of winning a prize by lot enters into the bargain. If it does, the subscribers would necessarily be risking something, and it is not essential that the fund out of which the prizes are provided should consist, only or at all, of sums contributed by them. That every one of them would in any event obtain full value for his subscription would not prevent the scheme from being a lottery and it is only when the chances of a prize are obtained wholly gratuitously that the scheme would not be a lottery. Viewed in this light, the scheme under consideration is clearly a lottery, and publication of relative proposals by the defendants, the promoters, was not seriously disputed. The drawing was, according to clause 9 of Exhibit I (a), the kuri regulations, to take place at the temple premises at 8 a.m. on the 25th of every month and the evidence is that it took place accordingly in the portico of the temple till the discontinuance of the kuri after forty-five drawings. There was thus a habitual and regular user of the portico for drawing the lottery. This in my opinion amounts to keeping a place for the purpose of drawing the lottery within the meaning of section 294-A of the Indian Penal Code. The promoters would therefore be guilty under both clauses of section 294-A of the Indian Penal Code, but lottery *per se* is not an offence nor was it suggested that the subscribers were parties or privies to the publication of the relative proposals. They had no control whatever over the place of drawing and it is impossible to hold that by purchasing

SESHA AYYAR
v.
KRISHNA
AYYAR.
—
LAKSHMANA
RAO J.

SESHA AYYAR
v.
KRISHNA
AYYAR.¹
—
LAKSHMANA
RAO J.

tickets they intentionally aided the keeping of a place for the purpose of drawing a lottery. They would not therefore be guilty of any offence, and the object of section 294-A of the Indian Penal Code was undoubtedly to save people from the effects of unauthorised lotteries. If so, the subscribers would be a protected class and the principle of "*pari delicto*" cannot be invoked. Even otherwise the *delictum* in such cases would not be at par and the second part of section 84 of the Indian Trusts Act which requires the transferee of property for an illegal purpose to hold it for the benefit of the transferor who is not as guilty as himself would be applicable. The subscribers would in this view be entitled to recover what was actually paid by them and clause 13 of Exhibit I (a), the kuri regulations, does not exclude the personal liability of the promoters.

A.S.V.

APPELLATE CRIMINAL.

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

IN RE SANGAMA NAICKER AND ANOTHER
(ACCUSED), PRISONERS.*

*Code of Criminal Procedure (Act V of 1898), sec. 342 (1)—
Trial Judge—Matters from which adverse inferences can be
drawn against accused—Putting to accused of—Duty as to.*

Under section 342 (1) of the Code of Criminal Procedure, though it is not obligatory on a trial Judge to put to an accused

* Referred Trial No. 26 of 1936 and Criminal Appeals
Nos. 153 and 154 of 1936.

every piece of evidence or point which has been given or made against him, yet, he should put matters from which, in the absence of an explanation by the accused, adverse inferences could be drawn against him.

Dwarkanath Varma v. The King-Emperor, (1933) 64 M.L.J. 466 (P.C.), followed.

Panchu Choudhry v. Emperor, (1921) 23 Cr.L.J. 233, referred to.

TRIAL referred by the Court of Session of the Ramnad Division at Madura for confirmation of the sentence of death passed upon the prisoners in Case No. 109 of the Calendar for 1935 and Criminal Appeals by the said prisoners respectively against the said sentence of death passed upon them.

K. S. Jayarama Ayyar for first accused.

G. K. Damodar Rao for second accused.

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

Cur adv. vult.

The JUDGMENT of the Court was delivered by GENTLE J.—This is an appeal by two accused who were convicted by the learned Sessions Judge of Ramnad Division at Madura on 19th February 1936 under sections 364 and 302, Indian Penal Code, or sections 302 and 109, Indian Penal Code.

The offences are alleged to have been committed on or about 18th January 1935. Since we are setting aside the conviction and ordering a re-trial of these two accused, we are not dealing with any facts save those which are necessary for the purposes of our judgment. It is alleged by the prosecution that the two accused, together with the deceased, left the village of Nachiarpatti on the

SANGAMA
NAICKER,
In re.

GENTLE J.

1936,
April 15.

SANGAMA
NAICKER,
In re.

GENTLE J.

morning of 18th January 1935, the deceased driving a bullock cart and the two accused riding as passengers. It was their intention to go to a village six miles away named Rajapalaiyam there to buy some plough shares—stopping on the way to Rajapalaiyam at the Sanjivi hills to cut some pegs for the bullock cart—and to return to Nachiarpatti. The father of the deceased (first witness for the prosecution) saw them leave and as they had not returned by sunset he went to the first accused at his house in that village and according to the evidence of the first witness for the prosecution the first accused told him that they had made their purchases in Rajapalaiyam and the deceased and bullock cart would be returning to Nachiarpatti the next morning. They never returned. The bullock cart and the bullocks were found outside the police station by a police constable at Srivilliputtur at about 1 a.m. on 19th January. On Sunday the 20th, the dead body of the deceased was found in the Sanjivi hills badly mutilated; and on 21st January a number of witnesses who were called by the prosecution went to this spot. The first accused was never seen again after his interview with the first witness for the prosecution on the night of 18th January until he surrendered to the police some three months later. The second accused also disappeared and was not seen after the ninth witness for the prosecution says he saw him driving the bullock cart with the first accused and the deceased, until he was arrested on 5th February 1935 some twenty-five miles away in the Madura district. There was no explanation given by either accused regarding (i) their departure in

SANGAMA
NAICKER,
In re.
GENTLE J.

the bullock cart with the deceased on the morning of the 18th January or where and under what circumstances they parted from him and the finding of the empty cart by the police constable on the morning of 19th or (ii) why they absconded from their houses at the time when the deceased's body had not yet been discovered and it was then unknown that he was dead and, as admitted by the learned Counsel for the appellants, had been murdered. In the absence of any explanation by them, the strongest inferences can be drawn against them. Under section 342 (1) of the Code of Criminal Procedure it is provided that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against them, the Court, may, at any stage of any inquiry or trial, without previously warning the accused put such questions to them as the Court considers necessary, and shall, for the purpose aforesaid, question them generally on the case after the witnesses for the prosecution have been examined and before they are called on for their defence. The learned Sessions Judge at the close of the case by the prosecution at the trial put to each of the accused only formal questions to the effect that :—having read the statements made by them orally and given in writing in the Magistrate's Court, whether they were correct; and having heard the evidence given by the prosecution witnesses, whether they wished to say anything. He did not point out to them the two important matters which we have mentioned and which are referred to in the judgment of the learned Sessions Judge and ask them for any explanation of these circumstances. In *Dwarkanath Varma v. The*

SANGAMA
NAICKER,
In re.
GENTLE J.

King-Emperor(1), a case in the Privy Council, Lord ATKIN at page 481 says that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court shall question him generally on the case after the witnesses for the prosecution have been examined and adds :

“ In pursuance of this section one of the puisne Judges put questions to the doctor. The only questions put on the contents of the post-mortem report were as to the congestion of some of the organs, the cause of antiperistalsis, and the omission from the report of the condition of faecal matter, and clots of blood at the orifices of the ruptures deposed to at the Sessions. The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the Jury that the absence of blood in the body cavity was a vital point. If so it is plain that under section 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation. . . . But it deprives of any force the suggestion that the doctor's omission to explain what he was never asked to explain supplies evidence on which the Jury should infer. . . . ”

We are bound by this decision of the Privy Council from which it would appear that the matters which we have mentioned should have been pointed out to the two accused and explanations asked of each of them. In *Panchu Choudhry v. Emperor*(2), a decision of the Patna High Court in 1921, BUCKNILL J. dealing with this matter says that, where an accused is undefended, the tribunal may point out to him the elements of the evidence adduced against him which seem in his own interest to demand an explanation, but, where an accused is defended by a legal practitioner, it

(1) (1933) 64 M.L.J. 466 (P.C.).

(2) (1921) 23 Cr.L.J. 233.

would be altogether impossible to expect or desirable to contemplate a tribunal entering upon a lengthy examination of an accused person. This decision appeals to us as one of common sense and in the spirit of section 342, Criminal Procedure Code, but since we are bound by the later decision of the Privy Council, *Dwarkanath Varma v. The King-Emperor*(1), in our view, the two matters mentioned should have been put before the two accused and their explanations invited. It is not necessary or practicably possible for a trial Judge to put to an accused every piece of evidence or point which has been given or made against him but he should put matters from which, in the absence of an explanation by him, adverse inferences can be drawn against the accused. Since this was not done by the learned Sessions Judge, we have no other course but to set aside the conviction and to order a re-trial.

[The following judgments were referred to in the course of the arguments :]

Criminal Appeal No. 113 of 1934.

PANDRANG ROW J.—The appellant has been convicted of the murder of his wife whose dead body was found on 7th September 1933 floating in a tank about 6½ furlongs distant from the “Salai” of the appellant where according to the case for the prosecution the murder took place during the night of 5th September. There was no direct evidence connecting the appellant with the murder of his wife who was admittedly living separately from him till the 4th September for over a year. The learned Additional Sessions Judge relied on several circumstances in coming to the conclusion that the appellant had murdered his wife but he did not put them to the appellant in order to give him an opportunity to explain them. As observed by their Lordships of the Judicial Committee in *Dwarkanath Varma v. The*

SANGAMA
NAICKER,
In re.
GENTLE J.

1934,
May 4.

(1) (1933) 64 M.L.J. 466 (P.C.).

King-Emperor(1), it is the duty of the trial Judge under section 342, Criminal Procedure Code, to call the accused's attention to all vital points, i.e., points which the Judge considers to be vital, and ask for an explanation. This duty has not been performed by the learned Additional Sessions Judge in this case, for, what he did was to ask the accused whether the statements made by him during the preliminary inquiry were correct and after he answered this question in the affirmative to ask whether he wished "to say anything more here" to which he answered in the negative. The importance of the performance of the duty to which their Lordships of the Judicial Committee refer is, if I may say so, all the greater in cases where the evidence incriminating the accused entirely consists of a number of circumstances not of a directly incriminating character, and the accused is not in a position to know which circumstances are going to be relied upon by the Court as evidence of his guilt, and which therefore require explanation. The learned trial Judge has relied not only on several circumstances but also on the accused's omission to give any explanation regarding them. Some of these circumstances are circumstances which the accused might not have really thought necessary to explain. For instance, the absence of a bodice from the dead body, the medical evidence to the effect that the deceased must have been in a recumbent position when she was injured, and the absence of any mutilation of the sex organs have been relied upon by the trial Judge as evidence of the accused's guilt—*Vide* paragraph 13 of his judgment. Then again the scratches seen on the accused's person on 8th September are found by the trial Judge to be "undoubtedly indirect admissions of guilt", and he adds that there is "not a word of explanation concerning these injuries". (Paragraph 14.) The same remark is made about the evidence regarding the cart and the tracks made by it which according to the trial Judge "only too clearly show that it carried the corpse of the deceased from the Salai of the accused to the tank and then came back again to the Salai" (*Ibid*). The trial Judge also relies on the circumstance that one of the four cloths handed over by the accused to his cousins on the 6th September was stained with blood; there was no reference to this also in the

(1) (1933) 64 M.L.J. 466, 481 (P.C.).

accused's statements during the preliminary inquiry. The omission of the learned trial Judge to call the attention of the accused during the trial to these points which he apparently considered to be vital, in spite of the fact that nothing had been said by the accused about them in his statements in the Magistrate's Court during the preliminary inquiry, coupled with the stress laid by the Judge on the absence of any explanation by the accused as regards these points has led to this result, namely, that the accused was not really given the opportunity of explaining "the circumstances appearing in the evidence against him" which section 342 of the Code of Criminal Procedure enjoins to be given to the accused. I am of opinion that the appellant has been seriously prejudiced thereby and that his trial has not been substantially in accordance with law. I therefore reverse the finding and sentence of the Additional Sessions Judge, Coimbatore, in this case and direct that the appellant be retried on the same charge by the Sessions Judge, Coimbatore.

Criminal Appeal No. 782 of 1935.

The JUDGMENT of the Court (WADSWORTH and K. S. MENON JJ.) was delivered by K. S. MENON J.—The appellant has been convicted of the murder of one Nachammal and sentenced to death by the Sessions Judge of Coimbatore.

1936,
January 24.

The husband of the deceased died about five years ago leaving some property. The deceased leased it to P.W. 5. The appellant, who was intimate with the deceased even during the life-time of her husband, prevailed upon the deceased to ask P.W. 5 to surrender possession of the property. The latter, it is said, at the instigation of P.W. 4, a brother of the deceased, who was not on good terms with the deceased because the daughter of the deceased was not given in marriage to him, refused to surrender possession. It is alleged that, in order to get possession of the property free from the obstruction of P.Ws. 4 and 5, the appellant took the deceased in the evening of the 25th August 1935 towards Pannaikinar and killed her on the way at about 8 p.m. at a place about six furlongs from their house and at once made a report to the Village Munsif, foisting the murder on P.Ws. 5, 6, 7 and another. As suspicion, however, fell on the appellant after the Sub-Inspector examined some witnesses in the village, he was arrested, and on information given by him the

aruval (M.O. 1) which is alleged to have been lent to the appellant by P.W. 15, and the bichuva (M.O. 3), both blood-stained, were recovered from a place about fifty yards from where the dead body was found. There were some marks of blood found on the cloth worn by the appellant. This is the case for the prosecution.

It will be seen that the evidence against the appellant is entirely circumstantial, and apart from the motive alleged, namely to get possession of the properties, the only incriminating circumstances against him are that M.Os. 1 and 3 were discovered on information given by him and that his cloth had marks of blood on it. But neither before the Committing Magistrate nor before the Sessions Court was the attention of the appellant drawn to these circumstances when he was examined under the provisions of section 342, Criminal Procedure Code. Before the Committing Magistrate he was simply asked: "What have you to say with reference to this case?", and he answered "I did not kill Nachammal. I did not do anything at all".

In the Sessions Court, he was asked: "Do you wish to add anything more" and he answered, "No. My elder brother's son and his wife Ranganayaki should be examined."

The important circumstances on which the conviction is based were not specifically pointed out to him, to enable him to give an explanation, if any, which is really the object of the questioning under section 342, Criminal Procedure Code.

In cases where the evidence against the accused is not direct but entirely circumstantial, we think it is all the more necessary that the circumstances which, if unexplained, would lead to conviction, should be pointed out to the accused by the Court, so that he may have an opportunity to give his explanation, if any, in regard to them. It may also be observed that in this case the witnesses who speak to the recovery of the articles do not appear to have been properly cross-examined. In these circumstances, especially the failure to comply properly with the provisions of section 342, Criminal Procedure Code, we think it is necessary in the interests of justice to send the case back for re-trial. And as we have decided to do so, we make no observations whatever on the merits.

We accordingly set aside the conviction and the sentence and order under section 423, Criminal Procedure Code, that the

appellant be re-tried by the Sessions Judge, Coimbatore, for the offence charged.

*Referred Trial No. 12 of 1936 and Criminal Appeal
No. 101 of 1936.*

The JUDGMENT of the Court (BURN and PANDRANG ROW JJ.) was delivered by PANDRANG ROW J.—The appellant has been convicted of the murder of a boy of twelve years and sentenced to death by the Sessions Judge of Vizagapatam. The boy was last seen alive in the morning of the 22nd October last. A search was made for him and a report was made to the police that he was missing and a dead body was discovered on the 26th October at a spot (marked A in the plan). The body was considerably decomposed, most of the soft parts having been eaten away by maggots, but the mother and two other relations of the boy were able to identify what remained of the deceased as his remains. A pair of gold ear ornaments which the boy was wearing when he was last seen alive were, however, found to be missing and these are alleged to have been sold by the appellant on the very day on which the boy was last seen alive and in the very village to which the boy belonged.

The evidence against the appellant is entirely of a circumstantial nature, but this is not to say that the evidence is not strong enough to justify and in fact to require, his conviction. Unfortunately, however, it is impossible for us to say whether the evidence is sufficient or not because of the failure of the learned Judge to elicit from the appellant any explanation which he had to give in respect of the facts appearing in the evidence against him. In the absence of any such opportunity given by putting the particular points to the appellant and asking for his explanation in respect of these points, it may not be fair to him to say, as the learned Judge did, that, in the absence of any explanation from him about the ear-rings which he sold, the inference should be drawn that he stole them from the deceased after murdering him. It has been very clearly laid down as a general rule by their Lordships of the Privy Council in *Dwarkanath Varma v. The King-Emperor*(1) that it is the duty of the examining Judge

1936,
March 30.

(1) (1933) 64 M.L.J. 406, 481 (P.C.).

under section 342, Criminal Procedure Code, to call the accused's attention to any point which the Judge considers to be vital or, in other words, to lead to the inference of guilt, and to ask for an explanation. In this particular case it is clear that the examining Judge was certainly of opinion that, in the absence of any explanation about the jewels said to have been sold by the appellant, the proper inference to be drawn was that the appellant stole them from the deceased after murdering him because the appellant was the last person seen with the deceased when he was alive. This duty has not been performed in this case with the result that there is no explanation in the record by the appellant as to any of the points appearing in the evidence against him, viz., the sale of the jewels by him, his being seen with the deceased when he was last seen alive, his putting the search party off the scent when an attempt was made to discover the missing boy and so on. In a case of circumstantial evidence it is all the more necessary to perform this duty, because the accused cannot be expected to know, when all the evidence against him is of a circumstantial nature and some of it is important while some of it is not, which are the points on which an explanation from him would be necessary to avoid the inference of his guilt. For instance, in this case the learned Judge appears to have thought that "the finding of a partially-smoked cigarette near the dead body strengthens the case against the accused to a trifling extent". If, because the appellant himself smokes cigarettes and beedies, the learned Judge thought that this was a point leading to an inference of guilt, however slight, and was going to use it against the accused, the accused ought to have been given an opportunity of explaining, if possible, the discovery of a half-smoked cigarette near the dead body. It is unfortunate that the non-performance of an imperative duty by the learned trial Judge compels us to order a fresh trial. It is not fair that the appellant's case should be decided in the absence of an explanation from him about the points that were urged against him by the prosecution and regarded by the learned Judge as important or vital.

The conviction and sentence must therefore be set aside and there must be a re-trial of the appellant on the same charge, during the course of which he must be given a proper opportunity to explain all the points appearing in the evidence against him which should be stated to him.

G.R.

PRIVY COUNCIL.

CHOTA RAJA SAHEB, APPELLANT,

v.

SUNDARAM AYYAR AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Interpretation of deed—Government grant—Successive estates—Vested interest.

The last King of Tanjore died in 1855, leaving no male issue. On his death the East India Company, in exercise of its sovereign powers, took possession, as an act of State, of all his properties.

In 1862, the Government made a grant of the late king's estate in the following terms:

"The Estate will be made over to the senior widow who will have the management and control of the properties, and it will be her duty to provide in a suitable manner for the participative enjoyment of the Estate in question, by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her the next heirs of the late Raja, if any, will inherit the property."

The daughter died in 1885. The last surviving widow died in 1912.

On the question whether the daughter took a vested interest under the grant,

held, that there was no gift expressed in favour of the daughter until the death of the last surviving widow, and no right vested in her until she survived that period, and the words "or failing her" meant failing her survivance at the death of the last surviving widow. "Next heirs" meant nearest heirs at the time when the succession opened on the death of the last surviving widow.

Judgment of the High Court affirmed.

APPEAL (No. 111 of 1928) from a decree of the High Court (January 21st, 1924) which affirmed,

* *Present*: Lord THANKERTON, Sir SHADI LAL and Sir GEORGE RANKIN.

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.

subject to a modification, a decree of the Subordinate Judge of Tanjore (July 1st, 1918).

The judgment of the High Court is reported as *Maharaja of Kolhapur v. Sundaram Ayyar*(1).

The facts and contentions are stated in the judgment of the Judicial Committee.

Subba Row for appellant.

[The following decisions were referred to by him:—*Tijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(2), *Edgeworth v. Edgeworth*(3), *Finch v. Lane*(4), *Watkins v. Frederick*(5), *Lallu v. Jagmohan*(6), *Chunilal v. Bai Muli*(7) and *Bhagbutti Deyi v. Bholanath Thakoor*(8).]

A. V. *Visvanatha Sastri* for respondents 2, 3, 6, 7 and 20 was not called on.

LORD
THANKERTON.

The JUDGMENT of the Judicial Committee was delivered by Lord THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated 21st January 1924, which affirmed, subject to a modification, a decree of the Subordinate Judge of Tanjore, dated 1st July 1918, and made in an interpleader suit which was instituted on 8th July 1912, by the receiver and manager of the Tanjore Palace estate, in order to have the right of succession to these properties determined by the Court.

Maharaja Sivaji, the last King of Tanjore, died in 1855, leaving no male issue. On his death the East India Company, in the exercise of its sovereign powers, took possession, as an act of State,

- | | |
|---|----------------------------------|
| (1) (1924) I.L.R. 48 Mad. 1. | (2) (1868) 3 M.H.C.R. 424, 445. |
| (3) (1869) L.R. 4 H.L. 35, 40. | (4) (1870) L.R. 10 Eq. Cas. 501. |
| (5) (1865) 11 H.L.C. 358, 366; 11 E.R. 1371. | |
| (6) (1896) I.L.R. 22 Bom. 409. | (7) (1899) I.L.R. 24 Bom. 420. |
| (8) (1875) L.R. 2 I.A. 256, 260; I.L.R. 1 Cal. 104. | |

of all his properties, which included the properties in suit.

About a year later, the senior widow of the Raja filed a bill in equity against the East India Company, disputing the legality of the seizure of the private properties of the Raja, and seeking recovery of the same in her right as senior widow of the Raja. The litigation was finally determined by this Board on 27th July 1859 when it was held that the seizure of the properties was an act of State, into which the municipal Courts were not entitled to enquire, and that those who, otherwise, might have had by law a claim on the inheritance of the late Raja could have no such claim on the properties in the hands of the Government. The case is reported as *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1), which may be referred to for the history of the seizure. It is sufficient to quote two passages from the judgment of the Board (page 531) which was delivered by Lord KINGSDOWN, viz. :

“The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of *Great Britain* of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late *Raja of Tanjore*, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right, on the part of the East India Company, or of the Crown of *Great Britain*, to the possession of this *Raj*, or of any part of the property of the *Raja* on his death; and, indeed, the seizure was denounced by the Attorney-General (who,

(1) (1859) 7 M.I.A. 476.

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

from circumstances explained to us at the hearing, appeared as Counsel for the respondent, and not in his official character for the appellant), as a most violent and unjustifiable measure. The *Raja* was an independent sovereign of territories undoubtedly small, and bound by treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the *Raja* without a son, by any legal title either as an escheat, or as *bona vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds.”

and later, at page 539 :

“With respect to the property of the *Raja*, whether public or private, it is clear that the Government intended to seize the whole, for, the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations and dependants; but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts.”

After various steps had been taken unsuccessfully to persuade the Government to restore the Raj, and, failing that, to make permanent provision for the family of the late *Raja*, on 23rd June 1862, the Government of India, which had succeeded the East India Company, informed the Government of Madras that they sanctioned the relinquishment of the whole of the landed property of the Tanjore Raj in favour of the heirs of the late *Raja*. In pursuance of these instructions the Government of Madras, on 21st August 1862, passed an order, the material part of which is as follows :

“In Colonel Durand’s letter above recorded the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj

regarding which, this Government addressed them under date the 17th May last. Their decision is to the effect that ‘since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy for treating them as the private property of the *Raja* is so strong that it commands the unanimous support of the members of the Madras Government’ the whole of the lands are to be relinquished in favour of the heirs of the late *Raja*.

2. This question having been settled, it has to be determined on what principle the distribution of the property, both real and personal, shall be made, or in other words, what are the respective rights of the *Raja*’s widows and of his daughter. The Government have now before them the opinion of the Hindu Law officers of the Sudder Court on a question put with a view of ascertaining the Hindu Law as applicable to the case.

3. The Law officers differ. The Senior Pandit is of opinion that the real property should go to the widow who has a daughter, and if there be no widow having a daughter, then the real property as well as the personal property should be divided among the widows in equal shares without any regard to seniority. The Junior Pandit holds that the senior widow should succeed to the enjoyment of the whole of the property, both real and personal, being at the same time responsible for the maintenance of the others.

4. The Governor in Council concurs in the opinion of the Junior Pandit which, he observes, is in accordance with the provisions of the Hindu Law as sanctioned by several decisions of the Sudder Court. In the decree passed by that Court in Appeal Suit No. 5 of 1824 printed at page 454 of the first volume of ‘Selected Decrees’, and in that passed in Appeal Suit No. 1 of 1835 printed at page 40 of the second volume, the principle that, where there are no male heirs, the senior widow is entitled to succeed to the management of the estate, both real and personal, is distinctly recognized. The Senior Pandit admits that the rights of the widows, according to his construction of the law, whereby they are severally declared to be entitled to an equal share of the real and personal property, are limited to the use of it during their lifetime, that they cannot alienate it, and that on the death of the widows it goes to the next heir of the husband. It is obvious that such a distribution of the property, as the Senior Pandit contends for,

CHOTA RAJ
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

would greatly endanger its security and the rights of those next in succession. On the other hand, the recognition by the law of a senior widow who during her lifetime manages the property providing for the due participation in its proceeds by the other widows, her co-heirs, prevents much confusion and endless disputes, and by limiting the responsibility to a single individual gives greater security to the property itself.

5. The Senior Pandit refers to an opinion given by himself and by the Junior Pandit in reply to a question put to them on the 22nd October 1855 which it appears to the Governor in Council, exactly meets the case now under consideration. The opinion in question is referred to by the Senior Pandit with the view of showing that the Junior Pandit did not always hold the opinion for which he now contends, but it appears to the Government to tell just the other way. In the opinion referred to, it is not suggested that the property should be divided, but it declared (and no distinction is made between real and personal property) that it vests first in the widows and after their deaths is to be inherited by the daughter. This, the Governor in Council conceives, is strictly in accordance with the principles of Hindu Law as expounded by the Court of Sudder Adawlut in the decrees already referred to, and with the evidence adduced in, and decision given by, the Supreme Court in the suit instituted against the Government by Kamakshi Bai; and by this principle the Government must be guided in dealing with the estate of the late Raja of Tanjore. The estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the Estate in question, by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her the next heirs of the late Raja, if any, will inherit the property.

6. The Governor in Council directs that the Government Agent at Tanjore will communicate this decision to the widows and daughter of the late Raja, and will take steps to place the senior widow in possession of the property, both real and personal, impressing upon her the responsibility which will attach to her both in regard to her conduct towards her co-heirs and for the security of the property. She will, of course, be required to give a receipt for the whole of the personal property on being placed in possession of it."

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

The decision of the present appeal depends on the proper construction of the terms of the grant at the end of paragraph 5.

At his death in 1855, Sivaji Rajah was survived by (a) sixteen widows, of whom Kamakshi Bai was the senior widow, (b) his mother, (c) two daughters by a predeceased wife, Rajes Bai married to Sakharam Saheb, who died in 1856, and Muktamba Bai married to Sakharam Saheb after her sister's death, and (d) forty sword wives and six sons by six of them.

The present question arose when the succession opened on the death of the last widow, Jijamba Bai Saheba, on 3rd May 1912. The parties now claiming the right to the estate are :

First, the appellant, the third defendant, who claims to be the adopted son of Sambu Singh, who was adopted by Muktamba Bai, who died without issue in 1885.

Second, the second respondent, who was original first defendant, but is now deceased, and whose representatives have been substituted for him, and the third respondent, original second defendant, but who is now insolvent and is represented by the Official Receiver, West Tanjore, the twenty-first respondent. Defendants Nos. 1 and 2 were the two sons of Rajaram, who was adopted by Kamakshi Bai, the senior widow of Sivaji, in 1863.

Third, various respondents, who either are or represent original defendants Nos. 4 to 11, and are the parties entitled to the shares of the sons of the sword wives of Sivaji.

The appellant maintains (i) that, under the grant of 21st August 1862, a right to the estate

CHOTA RAJA
SAHEB
v.
SUNDARAM
AYYAR.
—
LORD
THANKERTON.

had vested in Muktamba Bai prior to her death in 1885, which passed to her heirs, and that he, as such heir, is now entitled to the whole estate, and (ii) that, in any event, he is entitled to take as a "next heir of the late Raja". In view of the concurrent findings of the Courts below, he no longer challenges the right of the sons of sword wives to share in the inheritance, but he maintains that Rajaram's descendants and the sons of sword wives and their descendants are excluded either (a) on the ground that "next heir" means next after the daughter, and that they could only come in before the daughter, or (b) on the ground that, in view of the surrounding circumstances at the time of the grant, the intention of the Government to exclude them ought to be implied in the grant.

While the adoption of the appellant by Sambu Singh is challenged by the respondent, their Lordships, in considering the contentions of the appellant, will assume that it has been established.

Both the lower Courts have rejected the appellant's contentions; the High Court only modified the decree of the Subordinate Judge as regards the share of the estate falling to the sons of sword wives and their descendants.

Their Lordships find no difficulty or ambiguity in the construction of the grant; in their opinion, no gift is expressed in favour of the daughter until the death of the last surviving widow, and no right vested in her until she survived that period, and the words "or failing her" mean failing her survivance at the death of the last surviving widow. This also makes clear that "next heirs"

means nearest heirs at the time when the succession opens on the death of the last surviving widow. The daughter, on survivance, would come in as a named heir, and the preceding gift to her does not affect the legal order of succession denoted by the words "next heirs".

As regards the surrounding circumstances, from which the appellant seeks to imply an intention to exclude Rajaram and his descendants and the sons of sword wives, their Lordships agree with the views of the High Court on this point, but they would also add that the stronger and more compelling that these circumstances were, the more striking would be the unqualified terms of the grant, which negative the possibility of making any such implication.

Their Lordships are therefore of opinion that the appeal fails, and should be dismissed with costs, and that the decree of the High Court should be affirmed, and they will humbly advise His Majesty accordingly.

Solicitor for appellant : *Harold Shephard.*

Solicitor for respondents Nos. 2 and 3 : *G. K.*

Kannepalli.

Solicitors for respondents Nos. 6, 7 and 20 :

Hy. S. L. Polak & Co.

C.S.S

CHOTA R.
SAHEB
v.
SUNDARA
AYYAR.
—
LORD
THANKERTON.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
K. S. Menon.

1936,
February 28.

MATTAI KRISHNAMURTHI, MINOR BY ADOPTIVE MOTHER AND
GUARDIAN MATTA SURYAKANTAM (PETITIONER), APPELLANT,

v.

THE IMPERIAL BANK OF INDIA AT RAJAHMUNDREY
(RESPONDENT), RESPONDENT.*

Executing Court—Decree under execution—Validity of—Jurisdiction to pronounce upon—Minor—Decree against—Plea of invalidity of, on ground of guardian ad litem having interest adverse to minor.

An executing Court has no power to question the validity of the decree under execution on the ground that the minor, against whom the decree was passed, was represented in the suit by a guardian *ad litem* whose interest was adverse to his own.

Review of the authorities on the question as to the power of an executing Court to pronounce upon the validity of the decree which it is called upon to execute.

APPEAL against the order of the District Court of East Godavari at Rajahmundry in Execution Application No. 412 of 1935, Execution Petition No. 116 of 1934 in Original Suit No. 43 of 1933.

P. V. Rajamannar and K. Subba Rao for appellant.

O. T. G. Nambiar for respondent.

Cur. adv. vult.

JUDGMENT.

VENKATA-
SUBBA RAO J.

VENKATASUBBA RAO J.—This appeal raises the difficult question as to the power of an

* Appeal Against Order No. 389 of 1935.

executing Court to pronounce upon the validity of the decree which it is called upon to execute. In this case, on behalf of the minor third defendant, it was contended that, as he had been represented in the suit by his father whose interest was adverse to his own, the decree passed was a nullity and could not therefore be executed. This point was taken at the stage of execution and the lower Court held that it had no power to go into that question. The correctness of this view is challenged before us and we have had long and learned arguments on the point.

I do not think I can do better than refer at the very outset to the oft-quoted case of *Kalipada Sarkar v. Hari Mohan Dalal*(1). The decree in that case was one passed against a lunatic represented by a minor as his next friend and the learned Judges rightly treated that decree as a nullity. That being granted, the question arose whether an objection to its validity could be raised in proceedings in execution. MOOKERJEE and CUMING JJ. held that the Court executing a decree must take the decree as it stands and has no power to go behind it or to entertain an objection to its legality or correctness. They observe that the right principle is that a proceeding to enforce a judgment is a collateral and not a direct proceeding and therefore no enquiry into its regularity or validity can be permitted in such a collateral proceeding. In *Zamindar of Ettiyapuram v. Chidambaram Chetty*(2), though it must be observed that the case was one under section 21, Civil Procedure Code, and the point did not directly

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

(1) (1916) I.L.R. 44 Cal. 627. (2) (1920) I.L.R. 43 Mad. 675 (F.B.).

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

arise, WALLIS C.J., delivering the judgment of the Full Bench, refers to the Calcutta case just quoted and approves of the principle it laid down (see page 687). In *Sami Mudaliar v. Muthiah Chetti*(1) the validity of a decree was challenged in a regular suit on the ground that, on the date it was passed, the defendant had died and his legal representative had not been brought on the record. It was contended before the High Court that the proper way of impeaching the decree was to raise the question in execution and that the regular suit did not therefore lie. The learned Judges repelled this argument, citing *Kalipada Sarkar v. Hari Mohan Dalal*(2) and *Zamindar of Ettiyapuram v. Chidambaram Chetty*(3). They declare :

“It seems therefore clear that, as far as this Court is concerned, the executing Court cannot go behind the decree.”

It is worthy of note that, although the decree there was a nullity having been passed against a dead person [see *Khizarajmal v. Daim*(4)], the learned Judges held that the executing Court could not go behind it. The reason given in the two Madras cases cited above for holding that the objection could not be taken in the executing Court is different from what was given in the judgment of the Calcutta High Court. In *Kalipada Sarkar v. Hari Mohan Dalal*(2) the view of the learned Judges was based not on a narrow but upon the general ground, namely, that an execution proceeding is one to enforce a judgment, that is to say, such a proceeding is collateral to the judgment, and therefore no enquiry into the

(1) (1922) 43 M.L.J. 293.

(3) (1920) I.L.R. 43 Mad. 675 (F.B.).

(2) (1916) I.L.R. 44 Cal. 627.

(4) (1904) L.R. 32 I.A. 23, 33.

validity of the judgment should be permitted in such a proceeding. But in the two Madras cases referred to above, although the same conclusion was reached, the reason given was that section 47, Civil Procedure Code, was a bar to the question of the validity of the decree being decided in execution and therefore a regular suit would lie. With great respect, there is a fallacy underlying this argument. Section 47 merely enacts that certain questions shall be determined by the executing Court and not by a separate suit; it does not profess to lay down what the questions are that an executing Court shall not go into [*Mahabir Singh v. Dip Narain Tewari*(1)]. However, I am concerned with the conclusion and not with the reasoning, and all that I wish to point out at this stage is, that the Calcutta view that an executing Court cannot go behind the decree was affirmed and approved in the two Madras cases aforesaid. I must mention that this principle, namely, that the executing Court should not take upon itself the determination of the validity of the decree, is much older than *Kalipada Sarkar v. Hari Mohan Dalal*(2). It was declared by WEST J., who delivered the judgment of the Bench in a very early case, that the sound rule was not to invest the executing Court with this power, for, as the learned Judge points out,

“a contrary rule would virtually subject the decrees of the Civil Courts to revision and reversal by superior Courts (or even equal or inferior ones) to which they are not subordinate.”

He points out that in case of doubt the Court where execution is sought may adjourn the execution in order to enable the party interested

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

(1) (1931) I.L.R. 54 All. 25, 38, 39 (F.B.).

(2) (1916) I.L.R. 44 Cal. 627.

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

to make an application to the Court passing the decree.

“Thence”,
the learned Judge goes on to observe,

“the applicant may of course proceed by appeal, if dissatisfied, in the ascending scale of Courts until he reaches the highest of the province in which the decree was made.”
Chogalal v. Trueman(1).

The question that was attempted to be raised there in execution was that the Court that passed the decree had no jurisdiction. Then again, in *Kasturshet Javershet v. Rama Kanhoji*(2) it was contended that the defendant being an agriculturist, the decree passed by the Small Cause Court was a nullity. The Subordinate Judge, agreeing with this contention, refused to execute the decree. SARGENT C.J., who delivered the judgment of the Bench, held that the lower Court's duty was confined to enforcing the decree and that the Court was not competent to question its validity.

A distinction may be suggested (though no allusion was made at the Bar to this) based upon the executing Court being the same Court as passed the decree, or a different Court, i.e., the Court to which the decree is merely transmitted for execution. Order XXI, rule 7, Civil Procedure Code, deals with Courts of the latter description. The words “or of the jurisdiction of the Court which passed it”, which occurred in the earlier Code, have been omitted. From this it may be argued, as has often been done, that, when the executing Court happens to be different from that which passed the decree, the intention of the Legislature is clear that the executing Court cannot

(1) (1883) I.L.R. 7 Bom. 481.

(2) (1885) I.L.R. 10 Bom. 65.

arrogate to itself the function of pronouncing upon the validity of the decree it is called on to execute. Perfectly true, but the principle is of wider application as *Kalipada Sarkar v. Hari Mohan Dalal*(1) shows, for, in that case, the executing Court and the Court which passed the decree were identical and yet the doctrine that the executing Court cannot go behind the decree was enforced.

In a later case, *Gora Chand Haldar v. Prafulla Kumar Roy*(2), the Calcutta High Court gave but a qualified assent to the principle enunciated in *Kalipada Sarkar v. Hari Mohan Dalal*(1) and the various interpretations placed by different Judges on the observations in the case first mentioned have left the law on the subject in hand in a most uncertain state. There, the learned Judges held that the correct view is that, where the decree presented for execution was 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, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

“Within these narrow limits”,
the learned Judges go on to say and those words are important,

“the executing Court is authorised to question the validity of a decree.”

The word “apparently” has been the subject of a good deal of debate. What is meant by that word? Does it mean that if the defect is patent,

(1) (1916) I.L.R. 44 Cal. 627.

(2) (1925) I.L.R. 53 Cal. 166 (F.B.).

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

the executing Court can question the decree, otherwise it cannot? But, upon the facts, the defect such as it was, far from being apparent or patent, became evident only on investigation and a finding had to be given that there was such a defect. Notwithstanding this, the learned Judges of the Full Bench assumed that the decree was void and a nullity. That being so, it is difficult to ascribe to the word "apparently" the meaning which has been given to it in some decisions. This point is well brought out in the judgment of COSTELLO J. in *Kalicharan Singha v. Bibhuti-bhushan Singha*(1). An attempt was made in that case on behalf of the judgment-debtor to get rid of the decree, at the stage of execution, on the ground that, when the decree was passed, the judgment-debtor had been a lunatic not properly represented in the action. The learned Judge held that the decree could not be challenged in execution and, after expressing considerable doubts as to the correctness of the Full Bench decision, felt himself constrained to distinguish it on the ground that that case "does not cover the exact point" before him. Then again, in *Govindan Nadar v. Natesa Pillai*(2) a similar contention was raised in execution proceedings and JACKSON J., purporting to follow *Gora Chand Haldar v. Prafulla Kumar Roy*(3), held that the executing Court ought not to enquire whether the judgment-debtor on the date of the decree was or was not a lunatic. The learned Judge says ;

"It is an accepted principle that the executing Court cannot go behind the decree. To employ other words but the same metaphor it must take the decree at its face value."

(1) (1932) I.L.R. 60 Cal. 191.
(2) (1931) 61 M.L.J. 520.

(3) (1925) I.L.R. 53 Cal. 166 (F.B.).

Then, referring to the Full Bench case, he observes that the word "apparently" is a third way of expressing the same principle, being synonymous with, "on its face" or "without going behind". It is significant that, although JACKSON J. expresses agreement with the view of the Judges of the Full Bench, he declares most unequivocally that the correct principle is to be found in *Kalipada Sarkar v. Hari Mohan Dalal*(1). What is more, he observes, referring to the crucial passage in that judgment, that it cannot be improved upon. In *Amalabala Dasi v. Sarat Kumari Dasi*(2) the decree was one passed by the Calcutta High Court on its Original Side. On its being transmitted to the Court of a Subordinate Judge for execution, the defendant contended that the High Court had no jurisdiction to pass the decree, the money not having been advanced at Calcutta and there having been no contract to repay it there. The Subordinate Judge, finding on the evidence that the defendant's contention was in fact well founded, refused to execute the decree. MUKERJI and GUHA JJ. set aside that order, observing that the word "apparently" in the Full Bench case means "on the face of the decree" and adding, by way of a rider, that the word "decree" means "decree and the relevant papers for the purpose of understanding it". In a very instructive judgment in *S. A. Nathan v. S. R. Samson*(3), PAGE C.J. deals with the question of the powers of an executing Court at great

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

(1) (1916) I.L.R. 44 Cal. 627.

(2) (1931) 54 C.L.J. 593.

(3) (1931) I.L.R. 9 Rang. 480 (F.B.).

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

length. Referring to *Gora Chand Halidar v. Prafulla Kumar Roy*(1), he says :

"But was it rightly decided? With all respect to the learned Judges who were parties to it, in my opinion it was not."

Then, referring to the word "apparently", the learned Chief Justice makes, if I may say so with respect, a pertinent observation, namely, that, if it is only a patent want of jurisdiction that can be questioned, the executing Court would not be entitled to question the validity of a decree passed against a dead person, for, whether the person was dead or not when the decree was passed can only be ascertained "*aliunde* by evidence or otherwise". In other words, such a defect would be a latent and not a patent defect, and would not fall within the purview of the Full Bench judgment. Referring to what is known as "defect of jurisdiction", PAGE C.J. points out that it would be against public policy and good sense that the executing Court should be empowered to question the validity of a decree as vitiated by such a defect. When the Court assumes jurisdiction and passes a decree, it must be presumed that the decree that it made was passed in the exercise of jurisdiction with which it was invested—*Omnia presumuntur esse rite acta* (page 494). The presumption is of course not irrebuttable, but is the Court charged with the duty of executing the decree entitled to question its validity? I put this case: suppose the Court which passed the decree went into the question of jurisdiction fully and gave a specific finding, is the executing Court to be at liberty to give a different finding and in fact reverse the decision of the original Court?

(1) (1925) 1 L.R. 53 Cal. 166 (F.B.).

This would lead to the clashing of powers adverted to in the referring judgment in the same case. The following passage from the judgment of WEST J. in *Vishnu Sakharam Nagarkar v. Krishna-rao Malhar*(1) cited by PAGE C.J. tersely states the principle :

"The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry."

The fundamental difference between a collateral and a direct proceeding is here clearly brought out, and I may observe that it is the very same principle that was acted upon in *Kalipada Sarkar v. Hari Mohan Dalal*(2). In the words of the Chief Justice, it is difficult to understand how it can reasonably be contended that a subsisting decree passed by a Court constituted in accordance with law against parties thereto who have been duly impleaded, can be regarded as a nullity, "a mere nothing" (page 493).

Even in the case of a decree against a dead person, as regards the power of the executing Court, there has not been unanimity of opinion. In *Subramania Aiyar v. Vaithinatha Aiyar*(3) OLDFIELD J. held that the objection to the decree could be taken in execution proceedings; and to the same effect is the decision in *Jungli Lall v. Laddu Ram Marwari*(4). But the correctness of this view was doubted by CURGENVEN and CORNISH JJ. in *Lakshmanan Chettiar v. Chidambaram Chettiar*(5). PAGE C.J., in the ruling already referred to, seems to think that the case of a decree passed against a dead person constitutes

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

(1) (1886) 1 L.R. 11 Bom. 153, 160.

(2) (1916) 1 L.R. 44 Cal. 627.

(3) (1913) 1 L.R. 38 Mad. 682.

(4) (1919) 4 P.L.J. 240 (F.B.).

(5) (1934) 1 L.R. 58 Mad. 752, 759.

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.VENKATA-
SUBBA RAO J.

one of the very few exceptions to the general rule that the validity of a decree should not be allowed to be questioned by the executing Court.

Where the party is a person under disability not properly represented, as to the power of the executing Court, there has been, as already pointed out, a similar conflict of opinion. In *Lahore Bank v. Ghulam Jilani*(1) and again in the two cases referred to above, namely, *Govindan Nadar v. Natesa Pillai*(2) and *Kalicharan Singha v. Bibhuti-bhushan Singha*(3), the view was taken that the executing Court must take the decree as it stands, although in *Arunachalam Chetty v. Abdul Subhan Sahib*(4) a different view prevailed.

In this appeal, the question is not in regard to a decree either against a dead man or a person under disability totally unrepresented; nor is the question one of want of jurisdiction in the strict sense of the term. It is therefore unnecessary to express any final opinion as to the power of the executing Court when the vitiating circumstance falls within one of these categories.

In the present case, it is alleged that the interest of the guardian was adverse to that of the minor. If that be so, the question arises, is the decree a nullity? On this point again, there has been a considerable difference of opinion. In *Sellappa Goundan v. Masa Naiken*(5), in Second Appeal No. 1092 of 1918 and also in *Paramasivam Pillai v. Venkatachellam Chettiar*(6) it was held that representation by a guardian whose interest is adverse is no legal representation at all and that

(1) (1923) I.L.R. 5 Lah. 54.
(3) (1932) I.L.R. 60 Cal. 191.
(5) (1923) I.L.R. 47 Mad. 79.

(2) (1931) 61 M.L.J. 520.
(4) (1925) 50 M.L.J. 232.
(6) (1935) M.W.N. 1109.

the decree obtained is null and void. A different view was taken in Appeal No. 347 of 1919, in *Payidanna v. Lakshminarasamma*(1) and in *Kuppuswami Ayyangar v. Kamalammal*(2), the Judges holding that the decree is valid until set aside. I may also observe that the two referring Judges in *Venkatasomeswara Rao v. Lakshmanaswami*(3) took opposite views on this point. The question however is, is the decree a nullity in the sense that the objection can be taken in the executing Court? For the purpose of the Limitation Act there is a distinction between a void and a voidable decree. The only effect of holding that the decree is void and not voidable is, that it need not be set aside within the prescribed period. But because a decree is null and void it does not necessarily follow that the question can be gone into in execution. The observation therefore of their Lordships in *Khiarajmal v. Daim*(4), that a void decree may be disregarded without any proceeding brought to set it aside, has no bearing on the present question [see *Lakshmanan Chettiar v. Chidambaram Chettiar*(5) already cited, at page 757].

There is no authority for the position that, when the decree is questioned on the ground that the guardian's interest was adverse to that of the minor, the objection can be entertained by the executing Court. Mr. Rajamannar contends that the necessary effect of their Lordships' decision in *Jnanendra Moham Bhaduri v. Rabindra Nath Chakravarti*(6) is that an executing Court can

(1) (1914) I.L.R. 38 Mad. 1076.
(3) (1928) I.L.R. 52 Mad. 275 (F.B.).
(5) (1934) I.L.R. 58 Mad. 752.

(2) (1920) I.L.R. 43 Mad. 842.
(4) (1904) L.R. 32 I.A. 23.
(6) (1932) L.R. 60 I.A. 71.

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA
SUBBA RAO

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

treat a decree passed without jurisdiction as a nullity. It is doubtful whether the Judicial Committee intended by the single sentence to which our attention has been drawn to lay down such a doctrine. It is unnecessary however for the present purpose to express my final opinion on the matter. Mr. Rajamannar's contention that the point must be deemed to have been concluded in his favour by implication by the opinion of the Full Bench in *Venkatasomeswara Rao v. Lakshmanaswami*(1) I am not prepared to accede to. The learned Judges disposed of the matter on the simple ground that the question raised was one of fact and I am not prepared to infer from the course adopted by them that the question has been answered in a particular way.

I have shown, by a review of the authorities, how even the Judges who wished to concede to the executing Court power to go behind the decree have used language to indicate that that power should be circumscribed and kept within the narrowest possible limits. It is against public policy and good sense alike, as PAGE C.J. points out in *S. A. Nathan v. S. R. Samson*(2), that the Court charged with the execution of a decree should be allowed to question its validity; granting that certain exceptions have been and ought to be recognised to this salutary rule, I am not prepared to hold that, where the objection is that the guardian's interest was adverse to that of the minor, the point can be taken in execution. Such an objection if allowed in this country would indefinitely protract proceedings and, as CARR J.

(1) (1928) I.L.R. 52 Mad. 275 (F.B.).
(2) (1931) I.L.R. 9 Rang. 480, 495 (F.B.).

observes on page 505 of the same case there would be "no end to litigation".

Moreover, the appointment of a guardian *ad litem* is made in the exercise of judicial discretion [*Venkatasomeswara Rao v. Lakshmanaswami*(1)] and the order of appointment amounts therefore to an implied finding that the guardian's interest is not adverse to that of the minor; cases also can be imagined in which the Court gives a specific finding to that effect. The observation I have made, when dealing with the question of jurisdiction, in regard to the clashing of powers, equally applies here. I am clearly of the opinion that the lower Court's view is right and must be upheld.

In the result the appeal is dismissed with costs.

K. S. MENON J.—I agree.

Solicitors for respondents : *King and Partridge.*

A.S.V.

(1) (1928) I.L.R. 52 Mad. 275, 284 (F.B.).

KRISHNA-
MURTHI
v.
IMPERIAL
BANK OF
INDIA.
—
VENKATA-
SUBBA RAO J.

APPELLATE CIVIL.

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

1935,
November 12

M. R. ANANTHANARAYANA IYER (PETITIONER),
APPELLANT,

v.

RARICHAN (minor) BY guardian UNNOOLI *alias* MADHAVI
(RESPONDENT), RESPONDENT.*

*Letters Patent (Madras), Cl. 15—Judgment—Pauper appeal—
Delay in filing—Order of single Judge excusing, and
admitting appeal—Order refusing to set aside—Judg-
ment, if—Appeal against—Competency of.*

An order of a single Judge of the High Court excusing the delay in the filing of a pauper appeal and admitting the appeal is not a "judgment" which can be the subject of an appeal under Clause 15 of the Letters Patent. The order is not one which puts an end to a proceeding but on the contrary it enables it to go on. No appeal lies under that clause from an order of the learned Judge refusing to set aside that order.

Tuljaram Row v. Alagappa Chettiar, (1910) I.L.R. 35 Mad. 1 (F.B.), referred to.

Brajagopal Ray Burman v. Amar Chandra Bhattacharjee, (1928) I.L.R. 56 Cal. 135, relied upon.

APPEAL under Clause 15 of the Letters Patent against the order of LAKSHMANA RAO J. dated 3rd August 1934 and made in Civil Miscellaneous Petition No. 1280 of 1934 presented to the High Court praying for an order to set aside the order excusing the delay in filing Serial Register No. 21178 appeal in *forma pauperis* sought to be preferred to the High Court against Original Suit

* Letters Patent Appeal No. 33 of 1934.

No. 48 of 1932 on the file of the Court of the Subordinate Judge of Calicut dated 30th March 1933 and made in Civil Miscellaneous Petition No. 4002 of 1933 in Appeal Suit No. 389 on the file of the High Court.

C. S. Swaminathan for appellant.

S. Venkatachala Sastri for respondent.

ANANTHA-
NARAYANA
v.
RARICHAN.

JUDGMENT.

BEASLEY C. J.—The respondent was the fifth BEASLEY C.J. defendant in a suit in which a decree had been granted in favour of the third plaintiff. He put in an application for leave to appeal as a pauper to the High Court. That application was out of time by a few days. The application for excusing the delay and for the admission of the appeal was heard *ex parte* by LAKSHMANA RAO J. who excused the delay and admitted the appeal and gave the necessary directions upon the question of pauperism. The appellant here, who was the successful third plaintiff in the suit, put in an application before LAKSHMANA RAO J. for the setting aside of his previous order excusing the delay. LAKSHMANA RAO J. saw no reason for setting aside his previous order; and it is with regard to that order that this appeal under Clause 15 of the Letters Patent is before us. A preliminary objection has been taken by the respondent that no appeal lies from such an order under Clause 15 of the Letters Patent; and reference has been made to the well-known case of *Tuljaram Row v. Alagappa Chettiar*(1) where, on the question as to what is a "judgment" which

(1) (1910) I.L.R. 35 Mad. 1 (F.B.).

ANANTHA-
NARAYANA
v.
RABICHAN.
BEASLEY C.J.

under Clause 15 of the Letters Patent is an appealable one, WHITE C. J. laid down the test as "whether its effect is to put an end to the suit or proceeding so far as the Court is concerned . . . even if it does not affect the merits of the suit or proceeding and does not determine any question or right raised".

If it merely allows the proceedings to go on, then it is not a final "judgment" which can be the subject of an appeal under Clause 15 of the Letters Patent. This decision has been applied in a number of other later cases in the Madras High Court although not dealing with an order precisely similar to this. The effect of the order in the present case is that the appeal which would otherwise not have been admitted was, by the excusing of the delay, allowed to proceed. The order, therefore, was not one which put an end to a proceeding but, on the contrary, it enabled it to go on. A case in the Calcutta High Court which is similar to the present one is *Brajagopal Ray Burman v. Amar Chandra Bhattacharjee*(1), a decision of a Bench of three Judges consisting of RANKIN C. J. and SUHRAWARDY and GRAHAM JJ. There, a second appeal was presented out of time and the appellants obtained a rule calling upon their opponents to show cause why the appeal should not be registered. The two Judges composing the Bench who heard the rule differed in opinion. The rule was made absolute in accordance with the opinion of the senior Judge. From this order an appeal was lodged under Clause 15 of the Letters Patent which is exactly similar to Clause 15 of the Letters Patent of the Madras High Court. It was there held that the

(1) (1928) I.L.R. 56 Cal. 135.

ANANTHA-
NARAYANA
v.
RABICHAN.
BEASLEY C.J.

order allowing the second appeal to be presented out of time was not a "judgment" within the meaning of Clause 15 of the Letters Patent although this opinion was come to by RANKIN C.J. with some hesitation. Dealing with the matter, he says on page 144:

"On the whole and not without some doubt I think that the mere circumstance that an order puts in peril the finality of a decision given in the respondent's favour does not of itself make that order a 'judgment' within the meaning of Clause 15 of the Letters Patent. The same might be said of an order restoring a suit under Order IX, rule 9, and with much greater reason. The same might be said of any order giving leave to appeal or granting a certificate that a case was a fit one to be taken on appeal. Whether any distinction can logically or practically be maintained between an order setting aside an abatement and an order restoring a suit after dismissal for default may well be doubted. But in the case now before us the order complained of does not set anything aside. It operates merely to declare that the appeal may be entertained."

I agree with the view there expressed by RANKIN C. J. and in my opinion, therefore, the preliminary objection raised here must be upheld and the appeal dismissed without costs.

STODART J.—I agree with my Lord the Chief Justice.

A.S.V.

APPELLATE CIVIL.

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

1935,
November 13.

A. P. L. M. P. L. MUTHURAMAN CHETTIAR (APPELLANT),
APPELLANT,

v.

ADAIKAPPA CHETTY AND EIGHT OTHERS (RESPONDENTS
AND FIRST RESPONDENT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXII, rr. 4 and 11
—Legal representatives of deceased defendant or respondent brought on record—Death of one of, and abatement of suit or appeal as against him—Entire suit or appeal, if abates in case of.*

Where, on the death of a party to an action, the right persons are brought on record as his legal representatives and one of them dies, the estate continues to be sufficiently represented for the purposes of that litigation by the remaining legal representative or representatives.

Begam Jan v. Jannat Bibi, (1926) 98 I.C. 612, approved.

Wajid Ali Khan v. Puran Singh, (1928) I.L.R. 51 All. 267 (P.C.), *Pukhraj Jeshraj v. Jamsetji Rustum*, (1926) I.L.R. 50 Bom. 802, and *Shankerbhai Manorbhai v. Motilal Ramdas*, (1924) I.L.R. 49 Bom. 118, distinguished.

Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali, (1930) I.L.R. 54 Mad. 212, *Lilo Sonar v. Jhagru Sahu*, (1924) I.L.R. 3 Pat. 853, and *Shib Dutta Singh v. Sheikh Karim Bakhsh*, (1924) I.L.R. 4 Pat. 320, referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J., dated 9th May 1934, in Second Appeal No. 468 of 1930 and reported as *Muthuraman Chettiar v. Adaikappa Chetty*(1) preferred to the High Court

* Letters Patent Appeal No. 40 of 1934.
(1) (1934) I.L.R. 58 Mad. 497.

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 1927.

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.

R. Ramamurthi for *C. Somasundaram Chettiar*
for appellant.

V. Ramaswami Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by STODART J.—A field which was joint family property belonging to two coparceners was sold by one of them Muthuraman Chetty. In 1918 the other coparcener filed a suit for partition and separate possession of his half share. Muthuraman Chetty was the first defendant in that suit. He died during the trial and his sons Adaikappa and Palniappa were substituted. The suit was dismissed on 24th February 1923. The plaintiff appealed and his appeal was allowed on 28th August 1925. Some of the defendants filed a second appeal in the High Court and this was dismissed and finally on 27th February 1926 the trial Court having divided the land gave the plaintiff a decree. Up to the last, Adaikappa and Palniappa remained on the record as the representatives of the deceased vendee. They had a common defence and appeared by the same Vakils.

STODART J.

In 1927, the suit now under appeal was filed on behalf of the minor son of Palniappa. He alleged that Palniappa had died in January 1924, pending the hearing of the first appeal, and that this fact was fraudulently kept from the knowledge of the several Courts in which the

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.
STODART J.

suit was thereafter litigated, and sued for a declaration that all proceedings subsequent to the first decree of the trial Court should be declared null and void. At the trial, the District Munsif did not decide the issue of fact whether Palniappa had died in January 1924 but, assuming that he had, held that the appeal which was then pending did not on that account abate.

This decision was affirmed on first and second appeal. VARADACHARIAR J. (who appears to have taken it as a proved fact that Palniappa died in 1924), while accepting the general proposition that a decree obtained after the death of a defendant cannot bind his representatives unless they had been made parties to the suit, observes :

"The position in the present case was that the suit had originally been instituted against the plaintiff's grandfather . . . 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. 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."

And he answers in the negative the question :

"Does the estate that was at first represented by two persons as legal representatives and is later on represented by one of them only, cease to be represented for the purpose of that litigation?"

And the learned Judge goes on to say :

"The 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 the record . . . and cases in which only one of several representatives—brought in as such during the pendency of an action—dies, and the estate continues to be represented by the remaining legal representatives . . . I am of the 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 . . ."

In that view we have no hesitation in concurring. Learned Counsel for the appellant contends for the position that by the original decree dismissing the suit against the appellant's uncle and father these two acquired a right of their own in the property so that when the appellant's father died pending appeal and the appeal and second appeal were decided without anyone being substituted for him, the appellant's rights in the property which had descended to him from his father were not affected. The answer to this argument is twofold. By the decree while it was still under appeal Palniappa acquired no final right in the property. Secondly, the subject of the litigation was not the title of Palniappa to the property but the title of his father Muthuraman Chetty. What the Courts were then deciding was whether Muthuraman had acquired a title to the property in defeasance of the suit claim. And if plaintiff had been brought on the record it would not have been in substitution of his father Palniappa but of his grandfather Muthuraman Chetty.

Again—looking at the matter from the point of view of the plaintiff in that suit who is the first respondent here—it is clear that everything was done to make him believe that Palniappa was alive throughout the whole course of the proceedings. And at the final stage when the suit was remanded to the trial Court to pass a final decree Palniappa must have been represented in some way. The field could not have been divided by metes and bounds and final decree passed without notice to the parties. If Palniappa was then dead, it is difficult to see how his son's guardian

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.
STODART J.

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.
—
STODART J.

could have remained in ignorance of these proceedings. Wilfully or negligently this guardian permitted this respondent to proceed with the suit as if Palniappa were alive. And the preponderance of authority is that when a party takes proper steps to substitute on the record the representatives of an adversary who has died *pendente lite*, he is not to be penalised because he has not brought on the whole of the representatives. He can only act to the best of his knowledge. Learned Counsel for the appellant relies on the Privy Council decision, *Wajid Ali Khan v. Puran Singh*(1). In that case there were four respondents and one died during appeal. The appeal proceeded without his representative being substituted. It was held that the appeal abated and the decree did not affect his rights. But that was a case where each plaintiff had a separate and individual right of pre-emption. It was merely an example of the ordinary rule. Nor does *Pukhraj Jeshraj v. Jamsetji Rustum*(2), also relied on by learned Counsel, apply to the facts of this case. There, wrong persons were brought on in place of a deceased respondent and it was held that the decree did not affect the rightful heirs. But even in such a case it has been held recently in our own Court that in certain circumstances the substitution of a wrong person will save the suit from abatement; *Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali*(3). There, the deceased defendant left his estate by will to a nephew. The plaintiff brought on as his legal representative his widow who was disputing

(1) (1928) I.L.R. 51 All. 267 (P.C.). (2) (1926) I.L.R. 50 Bom. 802.
(3) (1930) I.L.R. 54 Mad. 212.

the will, and who was in possession of part of the estate, and whom he *bona fide* believed to be the proper legal representative. It was held that the widow was interested in defending the estate and sufficiently represented the estate. It is not necessary however in this case to consider these cases where a wrong person was substituted. Here, the right persons were substituted and the only question for decision is that propounded by VARADACHARIAR J. :

“Was the deceased sufficiently represented after the death of one of them?”

There is ample authority for the proposition stated above that a suit does not abate merely because all the representatives of a deceased party have not been brought on the record; see *Lilo Sonar v. Jhagru Sahu*(1) and *Shib Dutta Singh v. Sheikh Karim Bakhsh*(2). In the latter case it is stated :

“When an appellant applies for the substitution of such of the heirs of the deceased respondent as he *bona fide* believes to be in existence the appeal does not abate.”

How much stronger is the case here where all the proper heirs were brought on in the first instance and remained on the record till the end? It may be that one of them had died but the appellant (respondent here) did not know this. So far as his knowledge went, Muthuraman Chetty's heirs were all on the record and the suit was contested up to the last stage by one of them at least, who was competent to contest it and interested in contesting it. A case in the Lahore

(1) (1924) I.L.R. 3 Pat. 853.

(2) (1924) I.L.R. 4 Pat. 320.

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.
—
STODART J.

MUTHURAMAN
CHETTIAR
v.
ADAIKAPPA
CHETTY.
STODART J.

High Court, *Begam Jan v. Jannat Bibi*(1), is to the same effect.

Lastly, the learned Counsel for the appellant cites a case of the Bombay High Court, *Shankerbhai Manorbhai v. Motilal Ramdas*(2). In that case, an uncle and nephew sued as tenants in common for the possession of property. The nephew died during suit and his widow came on the record as his legal representative. The plaintiffs obtained a decree. During the appeal the widow died and appellants applied to have her husband's uncle, already on the record as first plaintiff, declared her heir. This application was disallowed and the appellants took no steps to bring on her real heir. It was held that the appeal abated against the latter. But this was merely the ordinary case of a party to a suit with a distinct and separate interest of her own dying during the suit and no steps thereafter taken to substitute her legal representatives.

In the result we dismiss the appeal with costs.
A.S.V.

(1) (1926) 98 I.C. 612.

(2) (1924) LL.R. 49 Bom. 118.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Stone.

MADDALI VISWESWARA RAO (PLAINTIFF),
APPELLANT,

v.

MADDALA SURYA RAO AND FORTY-EIGHT OTHERS
(DEFENDANTS), RESPONDENTS.*

1935,
October 18.

Hindu Law—Joint family—Alienation of joint family property by father—Existence of a son—After-born son—Rights of, to contest the said alienation—Scope and nature of the right—Alienation becoming conclusive so far as the existing son is concerned—Effect of, on the after-born son.

An after-born son, not conceived during the lifetime of his brother, which brother was, apart from the father, the only other coparcener of the joint Hindu family, cannot sue to set aside, as being without necessity, an alienation effected by the father without the consent of the son then living.

Held further that, whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting. The right to attack begins to exist at the moment of the alienation and at the highest (without deciding whether it extends so high) exists in all members of the family that exist while such right of action is intact. If that right of action is lost by those members of the family who had it when it arose, i.e., those coparceners who were in existence and not consenting at the time of the alienation, by the operation of the statute of limitation, it is lost to the family and does not live on in some child who becomes a coparcener even during the lifetime of the coparceners that existed when the alienation took place where such coparceners' cause of action has been barred. And by parity of reasoning, just as where the right of action possessed by the coparceners existing at the time of the alienation, if

* Appeal No. 384 of 1927.

VISWESWARA RAO v. SURYA RAO. barred, is lost, not only by them but also by any member of the family later-born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child; for the after-born child has got no right of action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or, when they permit the period of limitation to expire.

APPEAL in *forma pauperis* against the decree of the Court of the Subordinate Judge of Ellore, in Original Suit No. 7 of 1926, dated 5th November 1926.

Ch. Raghava Rao for appellant.

V. Suryanarayana, G. Lakshmanna for *P. Panini Rao* and *S. Kanakam* for respondents.

Cur. adv. vult.

STONE J.—The JUDGMENT of the Court was delivered by STONE J.—This is an appeal from the decree of the Subordinate Judge of Ellore in Original Suit No. 7 of 1926, an action which was in the nature of a partition action, asking *inter alia* for a declaration that a certain mortgage is void, that the decree granted in an action brought by the mortgagee upon the mortgage should be set aside, that the consequential auction held following upon that decree should be set aside and that certain alienations made before that suit was brought in order to pay the moneys due under that mortgage should also be set aside. The decree was granted in the suit as before mentioned brought by the mortgagee, in which suit there was a minor, which

minor was represented by a Court guardian, which Court guardian was a clerk of the Court having been appointed in consequence of the failure of the minor's uncle adequately to represent the minor's interests. The reason why it is now said the decree should be set aside is that that Court guardian was negligent, and the ground upon which this charge is made is that, when the case came on for trial, the Counsel who had represented the Court guardian said he had no instructions. That minor and the present plaintiff are the same. The ground of attack in law is that it was an alienation by the mortgagor for which there was no necessity, he being the managing member of the joint Hindu family comprising himself and his son. At the time of the transaction those were the two members of the joint Hindu family. The son subsequently died without having either ratified or attacked the alienation and some considerable time after his death, a time exceeding the period of gestation, the present plaintiff was born into that family.

The following questions arise : (i) Can an after-born son, not conceived during the lifetime of his brother, which brother, was, apart from the father, the only other coparcener of the joint Hindu family, sue to set aside, as being without necessity, an alienation effected by the father without the consent of the son then living ? (ii) If such a person can so sue, what is the cause of action and when in respect of that cause of action does time begin to run, it being common ground that the proper article for the purpose of limitation is article 120 ? (iii) Assuming there is a great doubt as to the capacity of such an after-born son

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

to sue, but that in the result and after full debate it were decided that he could sue, is a Court guardian to be convicted of gross negligence simply because he does not defend the action on behalf of such minor when a defendant in an action by a mortgagee seeking to enforce the liability?

On the threshold it may be said that there are two cases and two cases only, of which only one is reported, brought to our attention in which the question has been considered whether such an after-born son has a cause of action, that is to say, in circumstances where there is a period exceeding the period of gestation between his birth and the death of the only other coparcener (his brother) except the father. The unreported case is a decision in Appeal No. 179 of 1928 by a Bench of this High Court composed of CURGENVEN and SUNDARAM CHETTI JJ. in which the learned Judges say as follows :—

“ If the gift was valid until avoided, Ramachandra Reddi (the son living at the time) no doubt had an opportunity of avoiding it, but upon his death that right must have expired, and on the occurrence of that event, there being no one in existence who could avoid the deed, it must have become valid for all purposes just as if it had been made at a time when no other coparcener existed. That being so, the plaintiff who was subsequently born would have no cause of action for the relief now claimed and the proper course will be to dismiss his suit.”

The reported case is *Mukand Singh v. Wazir-uddin*(1). There, a Bench of the Lahore High Court observed :

“ The plaintiff's son *M.* was not alive at the time of this alienation. The eldest son *M.S.* was. There being two definite gaps between the death of *A.S.* and the birth of *B.S.*, and the

(1) A.I.R. 1933 Lah. 359, 360.

death of *B.S.* and the birth of *M.*, and those gaps not being bridged over by the fact that the subsequently-born son had been begotten or any reversioner being shown to have been in existence, the question is whether the plaintiff can challenge the alienation merely in virtue of his elder brother having been in existence at the time of the alienation, though he died in the following year. It appears to us quite clear that he cannot. Allowing the usual nine months there was an interval of eight or nine months between the death of *A.S.* and the date on which *B.S.* was begotten; and similarly, there was an interval of eight or nine months between the death of *B.S.* and the begetting of *M.* It not being shown that there was a reversioner in existence during these intervals, the alienations could not be challenged during such intervals, and therefore no subsequently-born son could possibly do so as the alienation had become indefeasible and absolute.”

The same position was apparently assumed in the course of the argument in *Hitendra Narayan Singh v. Sukhdeb Prasad Jha*(1).

On the other hand, there are a number of decisions in which there is no gap, in which it has been held that, where the son that is alive at the time of the alienation is *A* and during his lifetime *B* enters his family by birth and *A* attacks the alienation, he does so not only for his own advantage but also for the advantage of *B*; and there are other cases that decide that, although in such cases *A* would, being the only son alive, be able to ratify the alienation before the birth of *B*, still, after the birth of *B*, *A* alone could not ratify the alienation but the consent of *B* also would be required. The present question is whether they go beyond that and decide that *B* in such a case has an individual right to challenge the alienation (i.e. a right that continues after *A*'s right is lost) although he was not born at the

(1) (1929) I.L.R. 8 Pat. 558, 564.

VISWESWA
RAO
v.
SURYA RAJ
—
STONE J

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

time of the alienation. It will be found that all these cases are cases where there was no gap between the death of *A* and the conception of *B*. The cases in question, all of which will require some examination, are *Amirthalinga Thevan v. Arumuga Ambalagaran*(1), *Bhup Kunwar v. Balbir Sahai*(2), *Tulshi Ram v. Babu*(3) and *Chandramani Prushti v. Jambeswara Raya Garu*(4) which follows *Tulshi Ram v. Babu*(3). In order to see how far they really go, it becomes necessary to consider the statement so frequently quoted from Mayne's Hindu Law, ninth edn., page 468, paragraph 342, and the cases which it is urged form the foundation of the essential paragraphs in that statement, that is to say, *Bunwari Lal v. Daya Sunker Misser*(5), *Hurodoot Narain Singh v. Beer Narain Singh*(6) and the case that criticised those cases, *Chuttan Lal v. Kallu*(7). It will also be helpful to consider *Konga Ramaswami v. Thambusami Maniagar*(8), the important decision of the Privy Council in *Lal Bahadur v. Ambika Prasad*(9) and the further decision in the same volume of the Privy Council, *Ranodip Singh v. Parmeshwar Prasad*(10), which was followed in *Udayamuthier v. Shunmugam Chettiar*(11).

Before embarking upon an enquiry into those cases, it is desirable to put on one side an argument that was strongly pressed in reply by Mr. Raghava Rao. It was said by him that an alienation by the manager of a joint Hindu

- (1) (1928) 28 L.W. 634. (2) (1921) I.L.R. 44 All. 190.
(3) (1911) I.L.R. 33 All. 654. (4) (1930) 34 L.W. 598.
(5) (1909) 13 C.W.N. 815. (6) (1869) 11 Suth. W.R. 480.
(7) (1910) I.L.R. 33 All. 283. (8) (1922) 16 L.W. 981, 986, 987 (F.B.).
(9) (1925) I.L.R. 47 All. 795, 797, 800 (P.C.).
(10) (1924) I.L.R. 47 All. 165 (P.C.). (11) (1934) 41 L.W. 610.

family, while the son was living, was not merely a voidable transaction but a transaction which was wholly null and void. That point is dealt with in Mulla at page 273 in very unambiguous terms as follows :

"An alienation by the manager of a joint family made without legal necessity is not void, but voidable at the option of the other coparceners. They may affirm it or they may repudiate it."

It will be observed that this was impliedly assumed as correct in the above cited case of *Mukand Singh v. Waziruddin*(1), in the unreported Madras case above referred to and in *Hitendra Narayan Singh v. Sukhdeb Prasad Jha*(2). It is said that this statement is wrong because of the decision of a Bench of this High Court reported as *Kandasami Asari v. Somaskanda Ela Nidhi, Ltd.*(3). The relevant part of the headnote reads as follows :

"An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety."

In *Subba Goundan v. Krishnamachari*(4) another Bench of this High Court held as follows :

"The alienation by the father to the extent of his share will be good. In the case of sales by a father or managing member of the joint family for alleged necessity, we think the sale will be good till avoided, as it is open to the other coparceners to affirm the transaction. The position of such a purchaser cannot be worse than that of a purchaser from a widow without legal necessity, in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by KRISHNASWAMI

- (1) A.I.R. 1933 Lah. 359. (2) (1929) I.L.R. 8 Pat. 558, 564.
(3) (1910) I.L.R. 35 Mad. 177.
(4) (1921) I.L.R. 45 Mad. 449, 465, 466.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

AYYAR J. in *Kandasami Asari v. Somaskanda Ela Nidhi, Ltd.*(1) that a sale without necessity is incapable of ratification by the other coparceners."

On the other hand in *Amirthalinga Thevan v. Arumuga Ambalagaran*(2) it was decided by another Bench of this High Court that such a sale is a void transaction so far as the shares of the minor coparceners are concerned. But in that case at page 637 the learned Judge who was delivering the judgment observes, criticising ODGERS J. in *Alagar Aiyangar v. Srinivasa Aiyangar*(3) :

"I respectfully think that the dictum in *Subba Goundan v. Krishnamachari*(4) has not the meaning attributed to it by ODGERS J. I think what the learned Judges in that case meant to say is that, if the other coparceners do not seek to set aside the transaction, it may be practically treated as good."

We do not understand how a void transaction may be either practically treated as good or treated as practically good. He proceeds:

"If the manager in effecting the sale acted within his powers the sale will be good apart from the assent or dissent of the other coparceners whose interests also he purports to convey. Otherwise it cannot *per se* be binding on the other coparceners. But even a sale made by the father or manager without necessity may be assented to by the other coparceners and if they do so it will bind their interests also."

We find it very difficult to see how a wholly void transaction could be ratified, and of these views we prefer the view expressed in *Subba Goundan v. Krishnamachari* (4). The fact that the Privy Council have in certain cases, for example *Sahu Ram Chandra v. Bhup Singh* (5) and *Lachman Prasad v. Sarnam Singh* (6), used words which suggest that such a transaction is void

(1) (1910) I.L.R. 35 Mad. 177.

(2) (1928) 28 L.W. 634.

(3) (1925) 22 L.W. 515.

(4) (1921) I.L.R. 45 Mad. 449.

(5) (1917) I.L.R. 39 All. 437 (P.C.).

(6) (1917) I.L.R. 39 All. 500 (P.C.).

does not assist us. Their Lordships were not deciding the question whether such a transaction is void *ab initio* and so incapable of ratification or merely voidable. Further, those cases were Allahabad decisions, and there is a difference between Allahabad and Madras as regards the alienation by a manager of a joint Hindu family. Bearing in mind the fact that it is commonplace that a transaction of this nature can be perfected by the subsequent consent of the sons and that it can be repudiated and set aside by the subsequent action of the sons and that such repudiation goes back to the date of the original alienation, we think that it is preferable to regard such an alienation as perfect unless and until set aside, and one that accordingly becomes unchallengeable when the power to sue to set aside is lost. Terms such as voidable or void, valid or invalid, may each be a little misleading.

Concerning the citation from Mayne's Hindu Law which we find relied upon in *Tulshi Ram v. Babu*(1), *Bhup Kunwar v. Balbir Sahai*(2), *Amirthalinga Thevan v. Arumuga Ambalagaran*(3) and *Chandramani Prushti v. Jambeswara Rayagaru*(4), it is perhaps desirable, instead of endeavouring to construe the words used in that text book, to go direct to the cases on which those words are founded. One should not, we think, treat a text-book, however eminent, like a sacred text and endeavour to ascertain what the law is by regarding the true construction of what the text writer says. The words in question will be

(1) (1911) I.L.R. 33 All. 654.

(2) (1921) I.L.R. 44 All. 190.

(3) (1928) 28 L.W. 634.

(4) (1930) 34 L.W. 598.

VISWESWARA
RAO
v.
SURYA RAO
STONE J.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

found in the ninth edition at page 468, paragraph 342, beginning with the words :

"Therefore, a son cannot object to alienations validly (it was debated what does 'validly' here mean) made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor. [For this proposition *Chuttan Lal v. Kallu*(1) and *Bholanath Khettry v. Kartick Kissen Das Khettry*(2) are relied upon.] Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction. [No difficulty arises as to this.] Where, however, the father had contracted to sell family land, of which he was not in possession, as soon as he obtained possession, and after the contract, but before possession, a son was born, it was held that a decree for specific performance was not binding on the son, who had not been made a party to the suit. The Court held that the same decision would have been proper in the case of a son born after contract for sale, but before actual transfer. [Again no difficulty arises as to this.] On the other hand, if the alienation was made by a father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction: and no consent given by them after his birth would render it binding upon him. [What is relied on for that is *Hurodoot Narain Singh v. Beer Narain Singh*(3) and *Tulshi Ram v. Babu*(4).] The reason of the thing is not of course that the unborn son has any right in the family property at the time of the alienation, but that on his birth he acquires a share in the family property as it then stands. [The question here raised is as to the meaning of the expression 'as it then stands'.] If a previous alienation of any portion of the family property was validated by consent or failure to set it aside in time on the part of the other members of the family then in existence, the property in which he acquires a share at birth is diminished to the extent of the portion thus alienated. If the alienation was invalid, he acquires a share in the whole property including

(1) (1910) I.L.R. 33 All. 283.

(3) (1869) 11 Suth. W.R. 480.

(2) (1907) I.L.R. 34 Cal. 372.

(4) (1911) I.L.R. 33 All. 654.

the portion purported to be alienated—not because the alienation was an invasion of his rights, for he had none: but because it was bad in itself and did not diminish the corpus of the joint family property. [For that *Lachmi Narain Prasad v. Kishan Kishore Chand*(1) is relied upon]."

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

In *Lachmi Narain Prasad v. Kishan Kishore Chand*(1) it will be found that what was decided was this: that where A alienates at a time when he had a minor son B, which minor son attained majority in 1895 so that his right to challenge was lost under the Limitation Act by 1898 and then, after 1898 B had sons born to him, those minors have no right of action because the right of the son B to sue was barred in 1898, so that the property ceased to be joint family property and the subsequently-born grandsons were not in a position to dispute the sale. This case therefore decides that, if there is an alienation, and if the person living at the time of the alienation loses the right which he undoubtedly has to challenge that alienation by effluxion of time, the result will be as though the alienation was good because it cannot be challenged, the right to challenge having been lost under the Limitation Act. Therefore the family is divested of the property completely and therefore the member of the family coming later on the scene after the family property is thus lost cannot challenge that alienation.

As to Mayne's earlier statement that the alienation, if without necessity and without consent, would not only be invalid against sons born at the time but also against any son born before such sons had ratified, it is necessary to consider

(1) (1915) I.L.R. 38 All. 126.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

Hurodoot Narain Singh v. Beer Narain Singh(1), *Bunwari Lal v. Daya Sunker Misser*(2) and *Chuttan Lal v. Kallu*(3). *Hurodoot Narain Singh v. Beer Narain Singh*(1) decides this: that a Hindu father has no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death, without the consent of all his sons living at the time. If such sons living at the time will not consent they cannot consent after another son is born so as to bind the latter. That is to say, even regarding the position of a settlement as similar to an alienation, this is merely an authority for the last two lines in the passage quoted, viz. ;

“and no consent given by them after his birth would render it binding upon him”.

The reason for this, we think, is as follows—it is not necessary for us to decide anything as regards this—when the sons consent they perfect the alienation and finally divest the family of the property ; that is to say, the final and effective divesting of the family of the property takes place on the giving of the consent, assuming the family has not been already divested as a consequence of the right to sue possessed by the coparceners existing at the time of the alienation having been lost. Until the family has been divested it has got a right to attack the alienation, and as against the family the alienation is not complete. This view proceeds on the assumption that the alienation can be perfected by the consent of all the members of the family living not merely at the time of the alienation by the father but at the time of the completion of that alienation by

(1) (1869) 11 Suth. W.R. 480.

(2) (1909) 13 C.W.N. 815.

(3) (1910) I.L.R. 33 All. 283.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J

the assent of the sons. Therefore the assent of the sons living at the time of the father's alienation, it might be urged, does not bind a son not assenting and living at the time when the other sons give their consent. In *Bunwari Lal v. Daya Sunker Misser*(1) the following *obiter dictum* is to be found :

“It is well settled that any coparcener who was born at the time of the completion of the alienation (two cases are cited) would be entitled to sue to set aside the invalid alienation, and such alienation, if invalid because made without the consent of all the coparceners then in existence, can be set aside even at the instance of another coparcener who was born subsequent to the alienation.”

For that latter proposition the case relied upon is the case before mentioned, viz., *Hurodoot Narain Singh v. Beer Narain Singh*(2). In *Chuttan Lal v. Kallu*(3) it was held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation, and the following observations are passed upon *Hurodoot Narain Singh v. Beer Narain Singh*(2) and *Bunwari Lal v. Daya Sunker Misser*(1) :

“The learned Vakil for the appellant, in support of the contention that the plaintiff is entitled to maintain the suit, relies upon a passage in the *Mitakshara* He further relies upon a decision of the Calcutta High Court in *Hurodoot Narain Singh v. Beer Narain Singh*(2). That case in our opinion has no bearing upon the question before us. There it was held that a Hindu father had no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death without the consent of all his sons living at the time ; and where such a settlement was not assented to by the sons living at the time and another son was

(1) (1909) 13 C.W.N. 815, 822.

(2) (1869) 11 Suth. W.R. 480.

(3) (1910) I.L.R. 33 All. 283.

VISWESWARA
R O
v.
SURYA RAO.
STONE J.

afterwards born, no subsequent assent of the former would be binding on the latter . . . The learned Vakil also relies upon a dictum of the learned Judges who decided the case in *Bunwari Lal v. Daya Sunker Misser*(1). The dictum is to the effect that an alienation, if invalid, because made without the consent of all the coparceners then in existence, can be set aside even at the instance of another coparcener who was born subsequent to the alienation. The authority cited for this view is the case of *Hurodoot Narain Singh v. Beer Narain Singh*(2), to which we have referred. That case, as we have pointed out above, did not decide the question whether an alienation validly made at a time when a coparcener was not in existence could be questioned by such a coparcener. It seems to us to be clear that a plaintiff can question the validity of an alienation of such property only in which he had an interest at the date of the alienation. If his interest came into existence subsequent to the alienation, he cannot question the validity thereof."

As to this, see *Udayamuthier v. Shunmugam Chettiar*(3) where the same conclusion was arrived at. Then the learned Judges cite Mayne:

"A son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor."

They then proceed:

"Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction."

Again there is very little difficulty in following that. The question arises, what was the position where there was an after-born son and at the time of the alienation the alienor was not by himself

(1) (1909) 13 C.W.N. 815. (2) (1869) 11 Suth. W.R. 480.
(3) (1934) 41 L.W. 610.

but had sons living who neither consented nor repudiated and then died.

It is now necessary to turn to the series commencing with *Tulshi Ram v. Babu*(1). That decides that, where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the coparcenary without the consent of the rest, it is open to coparceners to object to such alienation notwithstanding that they were born subsequently thereto. This distinguishes *Chuttan Lal v. Kallu*(2). It is a case where there was no gap between the birth of the subsequently-born son and the death of the coparcener. It is founded upon the quotation from Mayne. The facts were that a mortgage was made in 1891 by A. A had two sons B and C. B left two sons D and E. The suit was instituted by the mortgagee against C, D and E. D and E were not born at the time of the mortgage and it was argued that they could not as defendants question the validity of the mortgage even though a co-defendant C was in existence at the time of the mortgage. *Chandramani Prushti v. Jambeswara Rayagaru*(3) decides that in an action of the mortgagee to enforce a mortgage an after-born son can challenge the mortgage made by his father (also a party) if there be other coparceners not assenting at the time of the alienation. The decision follows *Tulshi Ram v. Babu*(1), which is treated as sufficient authority, and there are no further reasons given for adopting the view that he can. That again was a case where the plaintiff was the mortgagee and there

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

(1) (1911) I.L.R. 33 All. 654. (2) (1910) I.L.R. 33 All. 283.
(3) (1930) 34 L.W. 598.

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

was also in that case no gap and the defendants in that case included a son in existence at the time of the alienation as well as the second defendant who was not in existence at the time of the alienation. But there is this difference between the two cases, that in *Chandramani Prushti v. Jambeswara Rayagaru*(1) the son who was in existence at the time of the alienation was barred by *res judicata* from litigating the question of the validity of the mortgage. In *Bhup Kunwar v. Balbir Sahai*(2) again there was no gap. In that case, A mortgaged joint family property at a time when he had a son B living. Almost immediately after the alienation, B by his guardian filed a suit to declare the mortgage not binding. While that suit was pending, C, another son, was born. B died and the suit he brought was dismissed. Then the mortgagee sued C and A's widow and it was held that C could defend the suit on the same pleas as had been urged by B in B's suit. This decision in my opinion involves necessarily the view that there is a distinct cause of action in B and in C, for otherwise the litigation on that cause of action by B, for B was the plaintiff, would preclude C thereafter from litigating the same point in the role of defendant. And we understood Mr. Raghava Rao not to seriously challenge that view and he did not rely on *Bhup Kunwar v. Balbir Sahai*(2) to its full extent but only that part of it that suggested, apart from the question of *res judicata*, that the second son though after-born could raise the defence in the mortgagee's suit. The case proceeds, as is apparent from

(1) (1930) 34 L.W. 598.

(2) (1921) I.L.R. 44 All. 190.

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

pages 194 and 195, on the view that if there is a son in existence the father's power to alienate is imperfect and consequently the family has a right either to set aside the alienation or to defend the suit brought by the mortgagee and that right can be wielded while that cause of action exists either by a son born at the time or a son born subsequent to the transaction. In our present case, conceding that view for the sake of argument, it would be necessary to go further and show that various members of the family have got separate and distinct causes of action, because, here, all the members of the family who could have challenged the alienation at the time are dead, and, with their death, their right of action, and the cause of action itself disappears; see *Lachmi Narain Prasad v. Kishan Kishore Chand*(1), *Konga Ramaswami v. Thambusami Maniagar*(2), *Ranodip Singh v. Parmeshwar Prasad*(3) and *Udayamuthier v. Shunmugam Chettiar*(4). After a period of time during which the father is the sole coparcener a son comes on the scene. Unless with his birth there springs into existence a new cause of action, it is difficult to see how he can challenge the alienation in respect of which all the other coparceners had lost their cause of action by death. In *Amirthalinga Thevan v. Arumuga Ambalagaran*(5) the same quotation from Mayne is relied upon and no further authority is quoted. That case again is a case where the plaintiff was the mortgagee and the defendants included

(1) (1915) I.L.R. 38 All. 126. (2) (1922) 16 L.W. 981, 986, 987 (F.B.).

(3) (1924) I.L.R. 47 All. 165 (P.C.).

(4) (1934) 41 L.W. 610.

(5) (1928) 28 L.W. 634, 640.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

a coparcener at the time of the transaction, and so this case could have been decided, as it was, on the principle that the successful defendant, the coparcener living at the time of the alienation, defended not only in his own interest but in the interests of the family and therefore all benefited who were members of the family at the time of the successful defence. There again there was no gap, and had there been, the Court would presumably have considered not merely the question of whether the action died with the death of an existing coparcener but whether a new cause of action sprang up with the birth of an after-born coparcener. In *Konga Ramaswami v. Thambusami Maniagar*(1) it is indicated by a Full Bench of this High Court that an after-born son would not have an independent cause of action to set aside an alienation which had taken effect before he was born and acquired a status in the coparcenary. The same was decided by a Bench of the Allahabad High Court in *Lachmi Narain Prasad v. Kishan Kishore Chand*(2). And, finally and, so far as we are concerned, conclusively, it was decided by the Privy Council in *Ranodip Singh v. Parmeshwar Prasad*(3) that, where there was a Hindu father with three sons at the time of the alienation which was in 1893, and there was born to him a fourth son in 1900, and a suit was brought to recover possession of the alienated property in 1920, and the right of action of the three sons living at the time of the alienation was barred because they had waited until beyond the three years after they attained majority, the right of

(1) (1922) 16 L.W. 981, 986, 987 (F.B.). (2) (1915) I.L.R. 38 All. 126.
(3) (1924) I.L.R. 47 All. 165 (P.C.).

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

action of the fourth son who had brought the action within the three years was barred also, the reasons being that he had no separate cause of action, the cause of action was that of his elder brothers (as being the coparceners in existence at the time of the alienation) and that cause of action was barred. So obviously, had he had a separate cause of action it would not have been barred. Their Lordships of the Privy Council observe at page 169 :

“To the contention that by the cited sections (viz., 6, 7 and 8 of the Limitation Act) the period of limitation is extended for three years from the cessation of the fourth plaintiff's minority, the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence.”

It was faintly argued that, but for sections 6, 7 and 8, this suggests that the after-born son has in himself a separate cause of action, i.e., the restriction imposed is only a restriction for the purposes of the Limitation Act. But their Lordships state in quite unambiguous language at page 169 that the plaintiff's subsequent birth did not create a fresh cause of action. It follows directly that the only cause of action is one which arose at the time of the alienation. It is, at the highest, restricted to those who are, or come into (as to this I express no opinion), existence while that cause of action is subsisting, i.e., while someone exists who can sue. If that class fails by death it is at an end and it would require a fresh cause of action to spring into existence by the birth of, after a gap, a later-born son who could sue. This is also important when considering the question of what

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

is the starting point of limitation in this present case. *Ranodip Singh v. Parmeshwar Prasad*(1) was followed in *Udayamuthier v. Shunmugam Chettiar*(2).

In *Bholanath Khettry v. Kartick Kissen Das Khettry*(3) it was decided that a member of a joint family can contest the validity of the alienation by his father or grandfather only of such an interest in the ancestral property as existed at his birth and vested in him by his birth, and that, where there is a complete transfer of property by mortgage by the father or grandfather prior to the birth of such member, the only interest that may vest on birth is the equity of redemption. This was a case where it was assumed that the alienation was for an immoral purpose. Again Mayne is relied upon. The alienations were by the grandfather who had at that time a son, which son joined in them. It therefore perhaps does not carry the matter very much further because it is in the class of cases where the alienation is by the whole of the coparceners existing at the time. In *Lal Bahadur v. Ambika Prasad*(4), however, at page 797 Lord BLANESBURGH delivering the judgment of the Privy Council stated that where A, a father, having two sons living in 1895, alienates property, both his sons being then minors, and one of those sons whom I will call B grows up and in course of time has two sons, those two sons will have no right to challenge the grandfather's alienation in 1895. His Lordship's observations are as follows :

" Ram Din, one of these joint managers, had two sons Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was

(1) (1924) I.L.R. 47 All. 165 (P.C.).
(2) (1934) 41 L.W. 610. (3) (1907) I.L.R. 34 Cal. 372.
(4) (1925) I.L.R. 47 All. 795 (P.C.).

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

about 13 years old, Jantri Prasad about 3. The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate, to an interest in which they succeeded, was an estate which to the extent of these two mortgages had already been alienated."

Our conclusion from the above is as follows : That, whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting. The right to attack begins to exist at the moment of the alienation and at the highest (we do not decide whether it extends so high) exists in all members of the family that exist while such right of action is intact. If that right of action is lost by those members of the family who had it when it arose, i.e., those coparceners who were in existence and not consenting at the time of the alienation, if that right of action is lost by them by the operation of the statute of limitation, it is lost to the family and does not live on in some child who becomes a coparcener even during the lifetime of the coparceners that existed when the alienation took place where such coparceners' cause of action has been barred. And by parity of reasoning, just as where the right of action possessed by the coparceners existing at the time of the alienation, if barred, is lost, not only by them but also by any member of the family later-born if they allowed the period of limitation to expire, so it is also lost if those persons who were

VISWESWARA
RAO
v.
SURYA RAO.
STONE J.

in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child ; for the after-born child has got no right of action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or, when they permit the period of limitation to expire.

And now remains the question as to limitation. It was argued by Mr. Raghava Rao, who admits that article 120 is the proper article to apply here, that the starting point is not the date of the alienation but the date when the action was launched by the mortgagee seeking to enforce the mortgage. It will be remembered that in this case two separate causes of action at least are being pursued. The one is to set aside a decree which in effect declares that the mortgage is valid and the other is to set aside the mortgage, and the former is merely a step towards the latter and is an idle step unless the latter point on being reached is successfully achieved. Now it may be that the starting point of the cause of action which seeks to set aside the decree on the ground of gross negligence was either (i) the date of the bringing of that suit or (ii) the date on which occurred the act of gross negligence on the part of the guardian or (iii) the date of the decree in that suit. I do not pursue these various alternatives because that is not the point that has to be determined. Assuming that the action is in time so

VISWESWARA
RAO
v.
SURYA RAO.
STONE J

far as that cause of action is concerned, the question remains, is the action in time so far as the latter cause of action is concerned, viz., that part of the claim that seeks to set aside the mortgage?

Divested of all the complexities due to the previous suit, this action simply becomes an action by a coparcener to set aside the alienation of another coparcener on the ground that it was made without necessity, and I should have thought that it was beyond argument that that cause of action arose at the time of the alienation. If that be the time, then admittedly this action was brought more than six years after the starting point of article 120, which is that time when the right to sue accrues. And therefore on this ground also, even though the answer to the first point is wrong, this action would fail as being time-barred so far as that part of it is concerned which seeks to set aside this alienation. So far as that part of it is concerned which seeks to set aside the decree, other considerations might apply.

It is said that this is not the right way to regard the matter, for, assuming the right to sue to set aside the alienation is now lost, and was lost at the time of the institution of this suit, it was not lost at the time of the institution of the mortgagee's action ; that, therefore, if that action is restored by the setting aside of that decree, the minor will be relegated to the position he then was in. Then he had not lost his right of action and accordingly the alienation had not been perfected even assuming Appeal No. 179 of 1928,

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

Mukand Singh v. Waziruddin(1) and *Lachmi Narain Prasad v. Kishan Kishore Chand*(2) were right when they said, once the cause of action to set aside the alienation is lost, the alienation is perfected. It is accordingly urged that, although that part of the cause of action which seeks to set aside the alienation is barred (and accordingly the alienation is now perfected), the part of the cause of action which seeks to set aside the decree is not barred; if set aside, the minor may defend on any grounds open to him at the time that action was launched and he might accordingly win that action (assuming the first point above considered was decided in the plaintiff's favour instead of against him). Thus we should have this action deciding that the right to sue being barred the alienation is perfected and yet we should send the minor off to defend a suit which if he won it would decide that the alienation must be set on one side. The logic, I confess, appears good, the result unsatisfactory. To avoid such a result, I think it must be that, whatever may be the position where the minor restricts himself to defence, where he adopts the role also of attacker he must fail if the attack fails; he cannot lose in the role of attacker and win in the role of defender at the same time. Otherwise the Court stultifies itself by deciding that the alienation is perfected while asking another Court to consider whether this now perfected alienation should not now be set aside on the ground that it once was voidable.

(1) A.I.R. 1933 Lah. 359.

(2) (1915) I.L.R. 38 All. 126.

This difficulty, of course, only arises on the assumption that the conclusion arrived at on the first point is wrong. If the decision on the first point is right, this minor can neither successfully attack nor defend.

But in my opinion the cause of action (to set aside the decree) fails for another reason. It was necessary for the plaintiff to maintain that in that case the guardian that was representing the minor's interests was so grossly negligent that it is necessary in the interests of justice to set aside the decree that was made in that case. The reason why it is said that that guardian, who was a Court guardian, not a relative but a clerk of the Court, should be held to have behaved in this grossly negligent way is, that Counsel for him reported no instructions; in other words he did not fight the case. In my opinion before a Court guardian can be charged with gross negligence and a decree of a Court set aside on that ground, very cogent evidence is necessary to show that no reasonable man could fairly have behaved as the Court guardian in question behaved. Here the Court guardian behaved wisely if the law was as a Bench of this High Court has since considered it to be, as a Bench of the Lahore High Court has since held it to be or as I have now regarded it as being. It may be, of course, that we are all wrong. But there is no decision to the contrary, where, as here, there is a gap. There are two decisions of the Privy Council to the effect that an after-born son has no independent cause of action and it seems to me that where the law is such that so many Judges can take such a view it would be unreasonable to find a layman guilty of

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

VISWESWARA
RAO
v.
SURYA RAO.
—
STONE J.

gross negligence because he arrived at the same conclusion. Mr. Raghava Rao has urged that there is no evidence that he arrived at such a conclusion. But we think one must assume that *prima facie* a Court guardian is doing everything rightly and properly in his office until there is some ground for making one think he is not; and if one sees a Court guardian abandoning a case one should assume, unless there are reasons to think the contrary, he is abandoning the case because he honestly thinks it cannot be fought with any prospect of success, and not assume, especially when he is not a relative but an officer of Court in the double sense he is not only the guardian but on the staff of the Court, that he is negligently sacrificing the interests of a minor. On this ground also in my opinion the appeal fails and must be dismissed with costs (one set). The plaintiff will pay the court-fee due to Government.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

ELAYAT KARTHIYAYINI KUNCHI AMMA AND SIX
OTHERS (RESPONDENTS 2 TO 8), PETITIONERS,

1935.
October 18.

v.

MINAKSHI AMMA AND NINE OTHERS (PETITIONERS 1 TO 6
AND RESPONDENTS 1 AND 9 TO 11), RESPONDENTS.*

*Madras Marumakkattayam Act (XXII of 1933), secs. 38, 40, 43
and 50—Severance of status—Doctrine of—Applicability
of, to tavazhis under Marumakkattayam law—Sec. 38 of
Act—Suit by tavazhi under—Subsequent petition under
sec. 43 of Act, if can defeat.*

The change in the law introduced by the enactment of the Madras Marumakkattayam Act XXII of 1933 has made the doctrine of severance of status applicable to tavazhis under the Marumakkattayam law as it is to persons under the Mitakshara law, and for precisely the same reason. Under the new law every tavazhi in a joint undivided Marumakkattayam family has an indefeasible right to demand partition of its own share in the joint family property, and all the other tavazhis must submit to it whether they like it or not. Section 38 of the Act indicates that so far as a tavazhi is concerned the separation from the tarwad is effected on its claiming to take its share of the properties of the tarwad. There is thus an express provision in the Act itself that severance of status is effected when a tavazhi claims to take its share of the tarwad properties. Such a claim must be deemed to have been made when a notice demanding its share is given, or at least when a suit is filed for that purpose.

Krishnan v. Maruvalamma, (1934) 41 L.W. 353, and Second Appeal No. 457 of 1930, considered.

Semble: It is not the effect of section 43 of the Act that a suit brought by a tavazhi under section 38 of the Act can be defeated by a petition under section 43 even if the suit under section 38 had been filed before the petition under section 43.

* Civil Revision Petition No. 1481 of 1934.

KUNCHI AMMA
v.
MINAKSHI
AMMA.

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 Alatur in Interlocutory Application No. 184 of 1934 in Original Suit No. 444 of 1933.

K. Kuttikrishna Menon and K. V. Raghavan Nair for petitioners.

B. Sitarama Rao for *Parakat Govinda Menon* for respondents.

Cur. adv. vult.

BURN J.—The JUDGMENT of the Court was delivered by BURN J.—This is a petition to revise the order of the learned District Munsif of Alatur in Interlocutory Application No. 184 of 1934 in Original Suit No. 444 of 1933. This is connected with Interlocutory Application No. 183 of 1934 in Original Suit No. 2 of 1934. The suits were filed by the karnavan of a Malabar Marumakkattayam tarwad. The learned District Munsif's order shows that one suit was for a separate share in the tavazhi properties and the other suit is for his share in another tavazhi which is said to be a Puthravakasam tavazhi. The plaintiff sent a registered notice demanding partition and executed a will in favour of his wife and children bequeathing to them his share in both these sets of properties. Then he filed two suits and it is said that he executed another will in favour of his wife and children thereafter. Then he died and his widow and children put in these applications, Interlocutory Applications Nos. 183 and 184 of 1934, to be impleaded as the legal representatives of the deceased plaintiff.

It was contended on behalf of the defendants that on the death of the plaintiff both the suits

abated and therefore no legal representatives can be brought on record. This contention was based on the peculiarities of the Marumakkattayam law. The suits were filed in pursuance of section 38 of the Madras Marumakkattayam Act XXII of 1933. Section 50 (b) of the same Act provides :

“Nothing contained in this Act shall be deemed to affect any rule of Marumakkattayam law, custom, or usage, except to the extent expressly laid down in this Act.”

If the parties had been Hindus governed by the Mitakshara law, it is not disputed that the filing of the suits by the plaintiff would have effected a division in status between him and the other members of the joint family and it would have been possible for his legal representatives to be brought on record and to continue the suits. Under the Marumakkattayam law the contention is that this theory of division in status being effected by the filing of a suit for partition is not tenable, and section 50 of the Marumakkattayam Act is relied upon as indicating that this peculiar feature of the Mitakshara law is not to be imported into the Marumakkattayam law in the absence of an express provision in the Act itself.

When this petition came on for hearing, it was admitted by Mr. Kuttikrishna Menon, Advocate for the petitioners, that there was no express ruling on the point. This we think is a fact which ought to have prevented the petitioners from bringing this petition at all. It cannot be said that the learned District Munsif's decision is so clearly wrong in law that his order impleading the widow and children of the deceased plaintiff is

KUNCHI AMMA
v.
MINAKSHI
AMMA.
BURN J.

KUNCHI AMMA
v.
MINAKSHI
AMMA.
—
BURN J.

one without jurisdiction and therefore revisable under section 115 of the Code of Civil Procedure. It is obvious that the appropriate procedure for a decision of such a point as this is to bring it up in appeal. However, as the petition is admitted and is posted before a Bench and as we have heard the arguments fully, we cannot avoid giving a decision upon it.

For the petitioners, Mr. Kuttikrishna Menon has quoted the cases reported as *Krishnan v. Maruvalamma*(1) and *Narayanan Moosad v. Raman Moosad*(2). He has also referred us to the decision in Second Appeal No. 457 of 1930 which has not been reported. In *Krishnan v. Maruvalamma*(1) his Lordship the CHIEF JUSTICE has expressed an opinion opposed to the view taken by the learned District Munsif in this case. This expression of opinion is however *obiter*, and his Lordship the CHIEF JUSTICE has agreed that the matter may be described as arguable. The point did not arise for express decision in the case before his Lordship and the words used by his Lordship are as follows :

“ It is at the most only arguable that the same consequences as those in *Balusami Ayyar, In re*(3) will result in the case of a suit for partition of a Malabar Marumakkattayam tarwad ; and, in my view, the Subordinate Judge was wrong in thinking that they did.”

That case was one in which the propriety of appointing a receiver for the tarwad properties after the institution of a suit for partition was in question and his Lordship the CHIEF JUSTICE decided the point on other grounds.

(1) (1934) 41 L.W. 353.

(2) (1935) I.L.R. 58 Mad. 811.

(3) (1928) I.L.R. 51 Mad. 417 (F.B.).

The case of *Narayanan Moosad v. Raman Moosad*(1) has not, we think, any bearing on the point before us. In that case, VENKATASUBBA RAO J. was dealing with an application by a Nambudiri Brahmin for leave to sue in *forma pauperis*. The learned Judge pointed out that, under the Nambudiri Act, section 26,

“ nothing contained in this Act shall be deemed to affect any law, custom or usage applicable to Nambudiri Brahmins except to the extent expressly laid down in this Act.”

He went on to show that since, before the passing of the Act, a Nambudiri Brahmin could sue for the removal of a karnavan, he had not lost that right by reason of the passing of the Act and therefore leave to sue could be granted. The point with which we are concerned did not arise in that case.

The judgment of MADHAVAN NAIR J. in Second Appeal No. 457 of 1930 was relied upon by the learned Advocate for the petitioners, but, when closely examined, we think that that case practically supports the case of the respondents. The decision was given in Second Appeal No. 457 of 1930 in a suit of 1924 filed long before the passing of the Madras Marumakkattayam Act. MADHAVAN NAIR J. says :

“ I am not at all satisfied that the doctrine of severance of status so familiar in Hindu Law can be introduced into Marumakkattayam law under which compulsory partition at the instance of a single individual is not permitted. As the law does not declare the share of an individual member in the properties held in common by members of a Malabar tarwad, it is in my opinion difficult to apply the doctrine of severance of status in Marumakkattayam law. That law is essentially a

(1) (1935) I.L.R. 58 Mad. 811.

KUNCHI AMMA
v.
MINAKSHI
AMMA.
—
BURN J.

KUNCHI AMMA
v.
MINAKSHI
AMMA.
BURN J.

customary law and the underlying principle of it which disallows partition at the instance of a single individual is by its very nature opposed to the conception of 'severance of status' which has for its basis the right of a single individual to claim partition. The question has never been raised in the British Courts."

As Mr. Sitarama Rao points out for the respondents, the law now applicable to Malabar is very different. Section 38 of the Act expressly provides that

"any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad."

And section 40 defines what share would fall to such tavazhi on a division. It says :

"In the case referred to in section 38, the tavazhi shall be entitled to such share of the tarwad properties as would fall to the tavazhi if a division *per capita* were made among all the members of the tarwad then living."

Under the present law, therefore, the tavazhi, which in some cases may be a single person, has an absolute right to demand partition of the tavazhi's share of the joint family property as defined in section 40, and that share must be allotted in accordance with a simple mathematical calculation to be made on the basis of the number of persons in the tarwad at the time the division takes place. The whole of the reasoning of MADHAVAN NAIR J. in Second Appeal No. 457 of 1930 is, therefore, as we have already stated, in favour of the respondents. Apparently partition at the instance of a single individual is now permitted by law. It should follow that the doctrine of severance of status by reason of the filing of a suit for partition is equally applicable to persons governed by Marumakkattayam law.

It is to be noticed that this doctrine does not depend upon any principles peculiar to the Mitakshara law. It depends upon principles of quite general application. In *Girja Bai v. Sadashiv Dhundiraj*(1) their Lordships of the Privy Council observe :

"Separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status ; whilst the other is a natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable ; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient ; the Court has simply to give effect to his right to have his share allocated separately from the others."

Again at page 1048 their Lordships of the Privy Council point out :

"Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers."

They conclude with the observations of Lord WATSON in *Madho Parshad v. Mehrban Singh*(2) :

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes ;

(1) (1916) I.L.R. 43 Cal. 1031, 1047 (P.C.).

(2) (1890) I.L.R. 18 Cal. 157 (P.C.).

KUNCHI AMMA v. MINAKSHI AMMA.
BURN J.

but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

Their Lordships also refer to the language used by DWARKANATH MITTER J. in *Deo Bunsee Kooer v. Dwarkanath*(1) :

"Now it is a settled doctrine of Hindu Law 'that every member of a joint undivided family has an indefeasible right to demand a partition of his own share'. The other members of the family must submit to it whether they like it or not."

The change in the law introduced by the enactment of the Marumakkattayam Act has, we think, made the doctrine of severance of status applicable to tavazhis under the Marumakkattayam law as it is to persons under the Mitakshara law, and for precisely the same reason. Under the new law every tavazhi in a joint undivided Marumakkattayam family has an indefeasible right to demand partition of its own share in the joint family property, and all the other tavazhis must submit to it whether they like it or not.

Mr. Kuttikrishna Menon for the petitioners has referred to the provisions of section 43 of the Act. It is there provided :

"Not less than two-thirds of the major members of a tarwad may, at any time, present a petition to the Collector for the registration of the tarwad as impartible."

He lays stress upon the words "at any time". His contention appears to be that by reason of these words any suit brought by a tavazhi under section 38 can be defeated by a petition under section 43 even if the suit under section 38 had been filed before the petition under section 43.

(1) (1868) 10 Suth. W.R. 273.

Mr. Kuttikrishna Menon contends that if two-thirds or more of the major members of the tarwad present a petition to the Collector under section 43 and if the Collector thereupon registers the tarwad as impartible, the suit already filed under section 38 would have to be dismissed. We cannot agree with this view. This construction of section 43 would render the right granted under section 38 illusory, and we do not believe that such was the intention of the Legislature or that the words "at any time" could bear such a meaning. This point, however, cannot possibly arise in this case because the properties, of which partition is required in the two suits in question, are properties belonging to two tavazhis and not properties belonging to a tarwad. By section 41 of the Act the provisions of Chapter VI apply to every tavazhi possessing separate properties as if it were a tarwad. It is not however enacted that the provisions of Chapter VII which deal with impartible tarwads are applicable to tavazhis.

It is also argued that, as there is no express provision in the Act that a severance of status is effected on the filing of a suit for partition, section 50 of the Act prohibits the introduction of such a rule in the Marumakkattayam law. But, under section 38,

"any tavazhi represented by a majority of its members may claim to take its share of all the properties of the tarwad . . . and separate from the tarwad."

This indicates that so far as a tavazhi is concerned the separation from the tarwad is effected on its claiming to take its share of the properties of the tarwad. There is thus an express provision in the Act itself that severance of status is effected

702 THE INDIAN LAW REPORTS [VOL. LIX

KUNCHI AMMA
v.
MINAKSHI
AMMA.

when a tavazhi claims to take its share of the tarwad properties. Such a claim must be deemed to have been made when a notice demanding its share is given, or at least when a suit is filed for that purpose. There is, therefore, no substance in this contention.

For these reasons, we consider that the decision of the learned District Munsif was correct and we dismiss this petition with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

K. R. M. T. T. THYAGARAJA CHETTIAR, PETITIONER,

v.

THE COLLECTOR OF MADURA, RESPONDENT.*

Indian Income-tax (Act XI of 1922), sec. 46—Arrears of income-tax—Proceedings taken by Collector to recover—Jurisdiction of High Court to issue writ of certiorari where the Collector bona fide believed he was acting under sec. 46 of Act—Government of India Act, 1915, sec. 106 (2)—High Court's jurisdiction, if barred by.

Where an assessee applied to the High Court for the issue of a writ of *certiorari* to quash the proceedings for his arrest taken by the Collector for realizing arrears of income-tax levied upon him, on the ground that the said proceedings were in contravention of section 46 (7) of the Indian Income-tax Act (XI of 1922) and of section 48 of the Revenue Recovery Act (I of 1890), and it appeared that, in issuing the certificates required by section 46 of the Income-tax Act and in making the orders for arrest and issuing

warrants, the Collector *bona fide* believed that he was acting according to section 46 of the Income-tax Act,

held, that the application was unsustainable because (i) income-tax is revenue, and the Supreme Court had no jurisdiction to issue a writ of *certiorari* in matters concerning revenue, and the High Court, which has in this respect only such jurisdiction as the Supreme Court had, had no jurisdiction to do so either, and (ii) section 106 (2) of the Government of India Act bars the jurisdiction of the High Court to issue such a writ.

The phrase "original jurisdiction" in section 106 (2) of the Government of India Act is not confined to ordinary original civil jurisdiction; under section 106 the High Court is vested with the original jurisdiction more specifically described in Clauses 12 and 13 of the Letters Patent as well as the original jurisdiction of the abolished Supreme Court.

Govindarajulu Naidu v. Secretary of State, (1926) I.L.R. 50 Mad. 449, referred to and distinguished.

It does not matter whether the executive acts done were justified or not on a right construction of the statute (in this case section 46 of the Income-tax Act) so long as they were done in the *bona fide* belief that its requirements were complied with. If so, the jurisdiction of the Court to deal with the said executive act is gone.

Spooner v. Juddow, (1850) 4 M.I.A. 353, followed.

Observations of BARON PARKE in *Calder v. Halket*, (1839) 2 M.I.A. 293, distinguished.

PETITION praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* to the Collector of Madura acting under the statutory powers given by section 46 of the Indian Income-tax Act directing the prosecution of the petitioner for the recovery of the arrears of income-tax due by him for the assessment years 1931-32, 1932-33 and 1933-34 and to quash the same.

K. V. Krishnaswami Ayyar and *T. M. Ramaswami Ayyar* for petitioner.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

1935,
October 23.

* Civil Miscellaneous Petition No. 2544 of 1935.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

Government Pleader (K. S. Krishnaswami Ayyangar) for respondent.

Cur. adv. vult.

ORDER.

This is an application for the issue of a writ of *certiorari* to quash the proceedings of the Collector of Madura taken in regard to the realization of the arrears of income-tax levied on the petitioner. The case of the petitioner is that he was assessed to income-tax for the years 1931-32, 1932-33 and 1933-34 in the sum of Rs. 5,610-2-0, Rs. 7,503-5-0 and Rs. 8,333-6-0 respectively, totalling Rs. 21,746-13-0. The notices of demand for the several years were respectively issued on 31st January 1932, 31st January 1933 and 16th November 1933. After assessment, proceedings under section 46 of the Income-tax Act were commenced and certificates as required by the said section were issued. In March 1935 the Revenue Divisional Officer issued an order for the arrest of the petitioner for the said arrears and the petitioner was arrested on 26th March 1935, when he gave twenty-two post-dated cheques commencing from 1st April to 6th September 1935 and he was thereafter released and then two of these cheques were cashed but he understands that proceedings for arresting him had already been issued and he seeks to quash them on the ground that they violate section 46 (7) of the Income-tax Act in that the proceedings were not commenced within the expiration of one year from the last day of the year in which any demand was made under the Act and also in contravention of the provisions of section 48 of the Revenue Recovery Act which

requires as a condition precedent that there should be wilful default.

On behalf of the Government a preliminary objection has been taken that the jurisdiction to issue a writ is barred under section 106 (2) of the Government of India Act, and, even assuming jurisdiction, no writ can lie for quashing a ministerial act as, in this case what is sought to be quashed is the warrant issued. It was further contended that even the preliminary order in and by which the warrant was directed to be issued is also ministerial. The argument based on section 106, clause 2, is thus put: Income-tax is revenue. The proceedings that are sought to be quashed were in respect of acts ordered or done in the collection thereof and the Collector acted under section 46 of the Income-tax Act, according to the law for the time being in force. The writ of *certiorari* being an original writ, the jurisdiction is thus barred. It is contended in answer by Mr. K. V. Krishnaswami Ayyar that section 106 (2) does not apply to this case as the original jurisdiction in that clause relates only to suits or actions instituted on the Original Side of the Madras High Court, as section 106 (2) is nothing but a re-enactment of the saving clause in the Supreme Court Act, 39 and 40 Geo. III, Chapter 79, and under that Act the Supreme Court had jurisdiction exercisable only within the limits of the Presidency-town and the saving clause related only to that jurisdiction. He relied on the Privy Council decision in *Alcock, Ashdown and Company, Limited v. Chief Revenue-Authority of Bombay*(1). He further contended that the act

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

(1) (1923) I.L.R. 47 Bom. 742 (P.C.).

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

sought to be quashed is a judicial act. He also contended that even if section 106 (2) may be said to have taken away the power to issue a writ of *certiorari*, if the act which is sought to be quashed is in excess of the jurisdiction of a body which exercises judicial functions, the High Court has power to issue a writ of *certiorari* in the exercise of its inherent jurisdiction.

Before examining the soundness of these contentions, it will be necessary to refer to the relevant provisions of the various statutes which define the scope and extent of the power to issue the writ of *certiorari* possessed by the High Court. The jurisdiction which the High Court has to issue writs of *certiorari* or other prerogative writs is derived from the Supreme Court and it has in this respect only such jurisdiction as the Supreme Court had. The Supreme Court of Madras was established by the Government of India Act, 1800, (39 and 40 Geo. III, c. 79). It provided for the establishment of a Supreme Court of Judicature at Madras

“with full power to exercise jurisdiction . . . and to be invested with such power and authorities, privileges and immunities . . . and subject to the same limitations, restrictions and control within the said . . . Town of Madras and Territories dependent on the Government of Madras, . . . as the said Supreme Court of Judicature at Fort William in Bengal . . . is invested with or subject to within the said Fort William or the Kingdoms or provinces of Bengal, Bihar and Orissa”.

Therefore it is necessary to note what were the powers and limitations of the Supreme Court at Fort William in 1800. The Supreme Court at Fort William was itself established by virtue of the East India Act, 1772, 13 Geo. III, c. 63. Under

the Letters Patent by which the Supreme Court of Bengal was constituted, one of the powers it had was the power to issue a writ of *certiorari* conferred on it by section 4 of the Letters Patent. It is a well known fact that owing to the conflict which arose between the Judges of that Court and the Executive Government it was thought desirable to define and restrict the powers of the Supreme Court. Accordingly, 21 Geo. III, c. 70, was passed. Among others there were two limitations imposed on the powers of the Supreme Court:

(1) “That the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason or any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor-General and Council.”

(2) “And . . . the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the Regulations of the Governor-General in Council.”

It will thus be seen that in two matters, i.e., in regard to the jurisdiction over the Governor-General and Council and in regard to matters concerning revenue, the jurisdiction has been curtailed.

These limitations again were emphasized and enacted by 39 and 40 Geo. III, c. 79, and by the Letters Patent which were issued in pursuance thereof constituting the Supreme Court at Madras. The Letters Patent provided in Clause 8

“that the said Chief Justice, and the said Puisne Judges, shall severally and respectively be, and they are all and every one of them hereby appointed to be, Justices and Conservators of

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

the Peace, and Governors, within and throughout the Settlement of Fort St. George, and the Town of Madras, and the limits thereof, and the Factories subordinate thereto, and all the Territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that Part of Great Britain called England, as far as circumstances will permit."

It is in virtue of this clause the Supreme Court derived the power to issue a writ of *certiorari*. 'The proviso in the Letters Patent defined the exception to the jurisdiction of the Court. The relevant provision ran as follows :

"Nor shall the said Court have or exercise any jurisdiction, in any matter concerning the Revenue, under the management of the said Governor and Council, respectively, either within or beyond the limits of the said town or the Forts or the Factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the Regulations of the Governor and Council."

Thus the Supreme Court had no power to issue a writ of *certiorari* or other prerogative writs in matters concerning revenue within or beyond the limits of the town of Madras or the Forts or Factories subordinate thereto. The present High Court was constituted under the Indian High Courts Act, 1861 (24 and 25 Vic. c. 104). Section 9 of that Act runs as follows :—

"Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed and subject

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA

and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts."

Dealing with this section VENKATASUBBA RAO J. observed in *Venkataratnam v. Secretary of State for India*(1) :

"They (the Letters Patent) contain, in fact, no provision corresponding to clause 8 of the Charter of 1800. The High Court, therefore, derives its power to issue prerogative writs, not from any express clause in the Charter, but from section 9 of the Act, which preserves intact the powers of the abolished Courts. It follows therefore that the Letters Patent have not enlarged the jurisdiction of the High Court in *certiorari*."

Section 106 of the Government of India Act does not carry the matter further. Section 106 (1) is as follows :—

"The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the 'administration of justice', including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the practice of the Court, as are vested in them by Letters Patent, and subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act."

Therefore the question is, had the Supreme Court the power to issue a writ of *certiorari* in regard to matters of revenue and, if so, subject to what limitations? As will be seen from the provisions of the statutes already stated, it had no jurisdiction to issue a writ of *certiorari* concerning any act ordered or done in the collection

(1) (1929) I.L.R. 53 Mad. 979, 994.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

of revenue according to the usage and the practice of the country or the Regulations of the Governor and Council. If the Supreme Court had no jurisdiction to issue a writ of *certiorari*, the High Court has no jurisdiction to do so. This application for the issue of a writ is not therefore maintainable. I am also of opinion that the application is unsustainable in view of section 106, clause 2. I shall now deal with the contention of Mr. Krishnaswami Ayyar on this point. In one sense his argument is self-destructive. According to him the jurisdiction of the Supreme Court to issue a writ of *certiorari* was confined only to the Presidency-town because the jurisdiction of the Supreme Court can only be exercised within the limits of the Presidency-town and not beyond it. If so, the High Court's jurisdiction being only such jurisdiction which the Supreme Court had, his application to this Court for the writ of *certiorari* cannot lie. I do not agree with Mr. Krishnaswami Ayyar that the phrase "original jurisdiction" in section 106 (2) should be confined to ordinary original civil jurisdiction. There is no doubt an observation of the late CHIEF JUSTICE in *Govindarajulu Naidu v. Secretary of State*(1) which appears to lend support to the contention of Mr. Krishnaswami Ayyar. The learned CHIEF JUSTICE on page 455, commenting on section 106, clause 2, of the Government of India Act, observes thus:

"In matters affecting the revenue, the Original Side of this Court and that side alone is debarred from interfering in revenue matters."

(1) (1926) I.L.R. 50 Mad. 449.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

The learned Judges in that case were not considering the power of the High Court to issue a writ of *certiorari*. Under section 106, it will be seen that the High Court is vested with (i) the original jurisdiction more specifically described in Clauses 12 and 13 of the Letters Patent and (ii) the original jurisdiction of the abolished Supreme Court which is conferred by the words

"such jurisdiction, powers and authority as are vested in those Courts, respectively, at the commencement of this Act".

It is not disputed that the writ of *certiorari* is issued in the exercise of original jurisdiction; *Venkataratnam v. Secretary of State for India*(1). As an exception to both sets of original jurisdiction above mentioned, section 106, clause 2, has been enacted, just as they have enacted section 110 in regard to exemption conferred in favour of the Governor and Council. The wording of section 106 (2) is in my opinion very suggestive and instructive. The words "have not" and "may not" are both declaratory and prospective and would aptly comprise also the jurisdiction vested in the Court at the commencement of the Act apart from the jurisdiction vested by the Letters Patent.

Considerable stress was laid by Mr. K. V. Krishnaswami Ayyar on the decision of the Privy Council in *Alcock, Ashdown and Company, Limited v. Chief Revenue-Authority of Bombay*(2). In that case, the Income-tax Officer refused to refer a case to the High Court of Bombay under section 51 of the Income-tax Act of 1918. Both the Bombay

(1) (1929) I.L.R. 53 Mad. 979, 999, 1017.

(2) (1923) I.L.R. 47 Bom. 742 (P.C.).

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

High Court and the Madras High Court had taken the view that an order under section 45 of the Specific Relief Act could not be issued compelling the Income-tax Officer to refer the case to them because of section 106 (2) of the Government of India Act. Their Lordships of the Judicial Committee negatived this view and held that

“the order of a High Court to a Revenue Officer to do his statutory duty would not be the exercise of original jurisdiction in any matter concerning the revenue”.

As I understand their observation, in their Lordships' view, to ask a Revenue Officer to do his statutory duty would not be a matter concerning revenue. This is made clear by a passage from the previous paragraph :

“To argue that if the Legislature says that a public officer, even a Revenue Officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable and there would be no power in the Court to compel him to give relief to the subject, is to state a proposition to which their Lordships must refuse assent.”

Two things are necessary to constitute a bar under section 106 (2), viz., (i) an exercise of original jurisdiction, (ii) a matter concerning revenue or the collection thereof. In their Lordships' view as aforesaid, there was no matter concerning revenue in the case. I do not think their Lordships meant to decide that there was no exercise of original jurisdiction as section 45 of the Specific Relief Act refers to ordinary original civil jurisdiction.

Mr. Krishnaswami Ayyar attempted to argue that income-tax is not revenue but this argument is not open to him after the ruling in *Messrs. Best & Co., Ltd. v. The Collector of Madras*(1).

(1) (1918) 35 M.L.J. 23.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

Another argument of Mr. K. V. Krishnaswami Ayyar may be noticed, namely, even if the statute has taken away the writ, when a judicial body acts *ultra vires* this Court can nevertheless issue the writ. The short answer to this is that the High Court had never any jurisdiction to issue the writ in matters concerning revenue.

It was next contended by Mr. K. V. Krishnaswami Ayyar that the exception can only be in favour of acts which have been done according to the law for the time being in force and therefore if the act is not in conformity with the law and in direct contravention of it the jurisdiction is not barred. In this case, the Collector having acted in contravention of section 46, clause 7, he must be deemed to have not acted according to the law for the time being in force. I am unable to accept this contention. This clause was interpreted very early by their Lordships of the Judicial Committee in *Spooner v. Juddow*(1). In that case, it was found that the Collector illegally levied quit rent from a person who was not liable to pay it. Dealing with the argument that the exception of jurisdiction would avail only when the act is according to the Regulations of the Governor and Council, Lord CAMPBELL observed :

“There can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act.”

His Lordship concluded the judgment thus :

“We are, therefore, bound to differ from the Judge below who, says, ‘that the jurisdiction of his Court has not been taken

(1) (1850) 4 M.L.A. 353, 379, 381.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA.

away, when the act complained of is not warranted by the country, or by the Company's Regulations'. If it concerned the revenue or was a matter concerning an act *bona fide* believed to be done according to the Regulations of the Governor and Council of Bombay, his jurisdiction was gone, although *prima facie* it appeared to be a trespass over which his jurisdiction might be properly exercised."

Mr. K. V. Krishnaswami Ayyar sought to distinguish this case by relying on the observations of BARON PARKE in *Calder v. Halket*(1). In that case, there was an action on trespass brought to recover damages for the arrest and false imprisonment of the plaintiff by the Magistrate of Foujdary (criminal) Court of the Zillah of Nuddeah in Bengal. The action was held not to lie by virtue of 21 Geo. III, c. 70, section 24. It prohibited an action against any person exercising a judicial office for an act done by or in virtue of the order of the Court. Dealing with this, his Lordship observed :

"The object may have been to put the Judges of the Native Courts on the footing of Judges of the Superior Courts of Record, or Courts having similar jurisdiction to the native Courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction."

The question in this case is entirely different. It is not merely exemption from liability in a personal action. In *Spooner v. Juddow*(2) their Lordships considered the jurisdiction of the Court from the point of view of the subject-matter and ruled that in respect of the subject-matter the jurisdiction of the Court had been entirely taken away, if the officer acted in the belief that he had jurisdiction. In the present case, it is not

denied that certificates were issued in accordance with the provisions of section 46 of the Income-tax Act and orders for arrest made and warrants issued in pursuance of the said provision. Whether the said orders were justified on a right construction of the said provision does not matter ; but what matters is whether the Collector *bona fide* believed that he was acting according to the said provision. If so, the jurisdiction of the Court to deal with the said act is gone. In this case, it has been conceded that the Collector was not acting *mala fide*. I have therefore come to the conclusion that the preliminary objection must prevail and that this Court has no jurisdiction to issue a writ of *certiorari* to quash the proceedings concerned. I, therefore, dismiss the petition with costs, viz., Rs. 100 (to be paid by the petitioner).

K.W.B.

THYAGARAJA
CHETTIAR
v.
COLLECTOR
OF MADURA

(1) (1839) 2 M.I.A. 293, 306.  (2) (1850) 4 M.I.A. 353.

PRIVY COUNCIL.

ARUNACHALAM CHETTIAR, APPELLANT,

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Indian Income-tax Act (XI of 1922), sec. 24—Liability of partners—Loss of one partner irrecoverable—Debit in independent money-lending business of another partner—Right to set off partner's loss as a bad debt in independent money-lending business.

A, a money-lender, entered into an unregistered partnership with P in a cotton business. The cotton business was closed as on 31st March 1930. The accounts then showed a loss. P was unable to meet his share of the loss. The amount of P's loss was debited to him as a loan in A's money-lending business on 1st April 1930. In the return of his income for the year 1931-32, A claimed the right to set off the amount so debited against P as a bad debt incurred in his money-lending business.

Held, that the debt was not a bad debt incurred in A's money-lending business, nor was it a debt incurred in the year of account and A was, therefore, not entitled to set it off against his profits in his money-lending business in the accounting year.

APPEAL (No. 29 of 1935) from a judgment of the High Court (May 1, 1934) on a reference under section 66 (2) of the Indian Income-tax Act of 1922. The material facts are stated in the judgment of the Judicial Committee.

Godfrey for appellant.—The assessment is made under section 23 of the Act. The return is the return of the appellant's income. Under section 24 the loss in one business may

* *Present*: Lord BLANESBURGH, Sir SHADI LAL and Sir GEORGE RANKIN.

be set off against the gains in another. Pillai became a debtor to the appellant in respect of his share of the loss in the cotton business which the appellant had to meet. The appellant was entitled to add interest and, when he found the debt was irrecoverable, to write it off as a bad debt and to deduct it from his profits.

Gavin Simonds K.C. and Wallach for respondent.—The money-lending business of the appellant did not advance any loan to Pillai and the loss cannot be treated as an irrecoverable loan in the money-lending business. In any event the appellant would not be entitled to deduct the loss as admittedly it occurred in the year prior to the year of account.

Godfrey replied.

The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—This is an appeal by the assessee from the decision of the High Court at Madras on a reference made by the Commissioner of Income-tax, Madras, under section 66 (2) of the Indian Income-tax Act (XI of 1922). The appellant is the manager of a Hindu undivided family and the order of assessment, dated 11th March 1932, was in form an assessment to income-tax of the Hindu undivided family. The year of assessment is the year 1931-32 and the year of account is the previous year, viz., 1930-31. The appellant took exception to the assessment made by the Income-tax Officer on 11th March 1932, as aforesaid, but his appeal to the Assistant Commissioner of Income-tax was, on 10th December 1932, dismissed and the High Court of Madras has in effect upheld the orders of the Income-tax authorities.

The facts of the case as stated by the Commissioner and as appearing by the orders of the Assistant Commissioner and Income-tax Officer [extracts from these orders being exhibited to the letter of reference] are as follows. The appellant

718 THE INDIAN LAW REPORTS [VOL. LIX]

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME
TAX.
—
SIR GEORGE
RANKIN.

[for this purpose he will be referred to as an individual] carries on a money-lending business in various places and in addition is possessed of property at various places and of dividends, all of which are subject to Indian income-tax. At a place called Perambalur, he carries on two businesses, one of which is a business of money-lending, and, prior to 31st March 1930, he had also carried on, but in partnership with one A. Somasundaram Pillai, a third business in the purchase and sale of cotton. This business had been started in 1926, the respective shares of the appellant and Pillai in both profit and loss being five-eighths and three-eighths. It appears that Pillai was a working partner, a man of little or no means; there does not appear to have been any written agreement of partnership; and neither partner undertook to bring any capital into the partnership in the strict sense of this expression—that is in the sense in which the word is used in clauses (c) and (d) of section 13 of the Indian Partnership Act (IX of 1932). The money necessary for purchasing cotton and carrying on the business was provided by the appellant on the terms that interest was to be paid upon his advances. In the books of his money-lending business at Perambalur these advances were debited to the cotton partnership. It is not clear how far interest was actually paid in any particular year, but interest was charged and was entered in the books of both businesses. The cotton business was started in the year 1926, but there is not in evidence any statement of the profits or losses of each year, nor of the details of the interest account in the books of the money-lending business. It is clear, however, that the

accounts of the cotton partnership were made up on the footing that it was liable to pay interest in respect of the advances. The business was a losing one. Accounts were first settled between the partners on 31st March 1928, with the result that Pillai's share of the loss up to that date was found to be Rs. 9,396 and the appellant's Rs. 15,660. Thereafter the business incurred further losses and when it was discontinued as at 31st March 1930, Pillai's share of the further losses was Rs. 20,268 and the appellant's Rs. 33,780. Pillai's share of loss debited to his account in the partnership books on 31st March 1930 was with interest Rs. 34,069.

The appellant in his assessment for the year 1928-29 was allowed to deduct his share of the loss in this cotton partnership. This presumably refers to the loss made in the year 1927-28. It would seem that the appellant in the year of assessment 1930-31 was allowed to deduct for income-tax purposes his share of the rest of the partnership losses. In this way five-eighths of the total losses of the firm have in due course been deducted from his other profits. This was doubtless done in accordance with the ruling given by the Madras High Court in the case of *Commissioner of Income-tax v. Arunachalam Chettiar*(1) where it was held that a partner in an unregistered firm which has made a loss in the year of account is entitled to set off his share of the loss against the profits and gains made by him in his individual trade and otherwise. At no time before the year of assessment with which we are now concerned (viz., 1931-32) does it appear that

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

(1) (1923) I.L.R. 47 Mad. 660.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

any attempt was made by the appellant to claim that his partner Pillai being unable to meet any share of the firm's losses, the appellant, for purposes of income-tax, could claim to deduct from his other profits any greater share than five-eighths of the losses of the cotton firm. In particular, although the cotton business was closed at the end of the year 1929-30, viz., on 31st March 1930, no such claim was made in respect of the year of assessment 1930-31, for which assessment the last year of the cotton business was the year of account.

What happened after March 1930 was as follows: On 1st April 1930, the debit against Pillai in the books of the cotton partnership was transferred to the account of the appellant's money-lending business at Perambalur. The meaning of this transfer and its justification invite comment which may be postponed for the present. On 29th September 1930, a further debit was made to this new account of Rs. 2,569 by way of interest bringing the total debit to Rs. 36,638. On this date Pillai gave to the appellant a promissory note for this amount, and a fresh folio was opened in the books of the appellant's money-lending business styled "A. Somasundaram Pillai, Promissory Note Account". On 28th March 1931, the appellant took from Pillai a mortgage of certain house property for Rs. 500. On 31st March 1931, that is on the last day of the year of account with which the present assessment is concerned, the appellant wrote off the balance Rs. 36,138 as a bad debt.

In his assessment for 1931-32 the appellant claimed to deduct the above sum of Rs. 36,138 from the amount of the profits of his money-lending

business at Perambalur for the year 1930-31. It would seem that, apart from this deduction, the money-lending business in the year of account made a loss, but the appellant in that year had other taxable profits.

The Income-tax authorities, supported by the High Court of Madras, have disallowed this claim, which in form, as already shown, was a claim to have an allowance in respect of a bad debt made in the year of account by the money-lending business at Perambalur. The question which the appellant desired the Commissioner to refer to the High Court was framed by him as follows:—

"Whether the debt of A. Somasundaram Pillai written off as an irrecoverable loan in the year of account is not liable to be deducted from the assessee's income for the year."

The Commissioner, being of opinion that in fact no loan was ever made by the appellant's money-lending business at Perambalur to Pillai, refused to state the question in this form, but referred for the decision of the High Court the following question:—

"Whether the ex-partner's share of the loss in the cotton trade, which the petitioner had to bear by reason of the ex-partner being unable to meet his share of loss in the partnership business, can be set off against the petitioner's other income, profits or gains as a loss of profits or gains within the meaning of section 24 of the Act."

Upon this question, so referred as being the real question which arises in the case, the Commissioner gave as his opinion that as Pillai had no capital the appellant had to meet the loss from the capital contributed by him to the cotton partnership, and that the loss claimed to be deducted was a loss of capital and not a loss of profits or gains within the meaning of section 24.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

The learned Chief Justice of the High Court at Madras, with whom the other Judges agreed, answered the question referred in the negative, holding that in the books of the cotton business there was nothing to show that the appellant had made any other or further loss in that business than his five-eighths share, and that as the money-lending business never lent any money to Pillai but only to the cotton partnership, Pillai never became a debtor of the money-lending business at all.

As it is reasonably clear that Pillai, who is described by the learned Chief Justice as "a man of straw", was at no material date possessed of any capital, it will be convenient to consider the question propounded by the Commissioner, first of all from the point of view of the appellant as at the time when the cotton business was closed down. It appears to their Lordships to be reasonably clear that in respect of five-eighths of the loss made by the cotton partnership in its last year of trading, namely 1929-30, the appellant in the year of assessment, 1930-31, was entitled to claim a deduction from his other income. The same is true, *mutatis mutandis*, in respect of previous assessments. Their Lordships fully approve of the decision in the case already cited, *Commissioner of Income-tax v. Arunachalam Chettiar*(1), and of the reasons given in the judgment of SCHWABE C.J. for so holding. In particular they are of opinion that the learned Chief Justice rightly rejected the contention put forward in that case, that an unregistered firm was for income-tax purposes an "entity", or that the same

(1) (1923) I.L.R. 47 Mad. 660.

person as an individual and as a partner of a firm is two separate "entities", merely because the business of the firm is a separate business, and the firm is treated as an assessee. From section 24 (2) of the Indian Income-tax Act it would seem that the Indian Legislature thought it necessary to anticipate any possible apprehension that a partnership, by being registered as a registered firm within the meaning of section 26 of the Act, might be treated as a separate assessee in so absolute a sense as to prevent a partner's share of loss being set off against his individual profits or gains. In their Lordships' opinion, whether a firm is registered or unregistered, partnership does not obstruct or defeat the right of a partner to an adjustment on account of his share of loss in the firm, whether the set off be against other profits under the same head of income within the meaning of section 6 of the Act or under a different head [in which case only need recourse be had to section 24 (1)]. So long as the set off is of his share of the loss made by the firm in the year of account, the adjustment does not involve the taking of any general or other account between the partners or indeed any examination of the accounts of the individual partners in the books of the firm. No question of the amounts paid by individual partners on the firm's behalf or of the right of one partner to contribution from another complicates the calculation which is based (a) upon the amount of profit or loss made by the firm as a firm, and (b) on the share or fraction attributable to each partner by the agreement of partnership between them.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

If, however, a partner can claim to deduct against other profits or gains a sum which he has become liable to bear or pay (a) by reason that he has paid, or will have to pay, on account of the firm more than his share, (b) so as to give him a right of contribution from the other partner, who is insolvent, the character of the investigation to be made is entirely altered. Logically, it may, perhaps, be said, the whole of the loss of the last year of trading at least is in a case like the present falling upon one partner and not merely his proper share of the loss. But, for income-tax purposes, very different considerations arise. As the appellant on the conclusion of the last year of trading did not in his character of partner formulate any claim to a deduction of more than five-eighths of the loss in the cotton business, it is necessary now, if the question stated by the Commissioner is to be answered, to formulate precisely the further claim which is under discussion. Is the suggestion that at the end of any year's trading one partner in a continuing partnership, treating the other as insolvent, can claim to set off the whole of the firm's loss in the previous year? Or is it that he can do so on the dissolution of the firm? Or that later, according as the other partner's insolvency becomes established, he can set off in one year the whole of such partner's shares of loss for several years? Looking at the matter as a question of what a partner in a firm may claim to deduct from his other income, their Lordships are not of opinion that in any of these forms the claim can be regarded as permissible.

In one year a partner may draw out more, in another year less, than his share of profits. In

one year a partner may have expended money on behalf of his firm; in another year another partner may have done the like. Questions may arise, regardless of whether the firm has otherwise made a profit or loss, as to the firm's right to be indemnified by a partner for loss caused to it by his wilful neglect. [Cf. Indian Partnership Act (IX of 1932), section 13 (e) and (f).] Between partners any right of contribution has reference, *prima facie* at least, to the ultimate balance appearing as the result of a general account. For this purpose let all questions of mere procedure for the enforcement of a partner's right be disregarded, and let the money owing from one partner to another be treated as in equity a debt. Whether the old rule as stated by Lord COTTENHAM in *Richardson v. The Bank of England*(1) that "pending a partnership, equity will not interfere to set right the balance between the partners", is still to be adhered to rigidly or not, the kind of account which is necessary between partners to settle questions and cross-claims between them is beyond the scope of an Income-tax Officer's investigation. His duty is to compute properly the profits made by the firm or the loss incurred by the firm. For this purpose he has no occasion to embark upon the computation of the exact value of any partner's interest in the capital or the details of the partner's accounts in the firm's ledger. He has only to enquire what is each partner's share. The firm is considered as doing business with third parties. For the present purpose individual partners are not to be considered as trading with or doing business with

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

(1) (1838) 4 My. & Cr. 165, 172; 41 E.R. 65.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

each other, but as having shares in the profit or loss of the firm. On any other principle profits made by the firm may go untaxed and losses made by the firm may be allowed for more than once. The present case may be quite free from complication. But that the claim now in question clashes with the principles of the Indian Income-tax Act will be apparent from an examination of that statute.

Under the Act both the firm and the individual partners have to make returns and are assessed whether the firm is a registered firm or not. This principle or practice, for it is both, has sometimes been referred to as the principle of "double assessment" and was much discussed in the case of *In re Neemchand Daga*(1). An unregistered firm is treated as an individual both as regards rate of tax and as regards super-tax. The registered firm on the other hand pays income-tax at the maximum rate in all cases independently of the amount of its total profits, but is not assessed to super-tax at all. In neither case does the individual partner have to *pay* again on his share of profits if the tax has already been assessed on the firm. [Section 14 (2) (b).] Moreover, in the case of a registered firm, by the operation of section 48 the individual partner may obtain a refund of tax paid on his share if the rate at which he is chargeable to tax as an individual is not the maximum rate. This full procedure however is not always followed in the case of registered firms: in order to avoid unnecessary payments and unnecessary proceedings for a refund, the partner is sometimes taxed directly on his share

(1) (1931) I.L.R. 58 Cal. 1204.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

at the rate ultimately payable by him. Now the basis of this system is that the individual partner is chargeable on his share of the firm's profit regardless of all question whether he actually receives it as income paid to him or whether under the articles of partnership he is entitled to draw it out. Special stipulations between the partners may obstruct the partner's right in the year of account or at all to withdraw his aliquot portion of the total profit. All such matters are discharged by the statute and, save upon this principle, the working of the Act could hardly proceed. That the tax is to be levied by reference (a) to the total profits of the firm, and (b) the particular partner's share in the profits, is manifest in sections 14 (2) (b), 23-A(1) and 4 (i), 26-A, 48 (2) and 55.

It is in no way surprising therefore that in the only case in which express reference is made by the Act to the deduction which an individual partner may make from his other income in respect of his share of his firm's loss—the case, namely, of a registered firm—the same principle should be recognised. The words used in section 24 (2) are :

"Any member of such firm shall be entitled to have set off . . . such amount of the loss . . . as is proportionate to his share in the firm."

The phrase "share in the firm" is not beyond criticism as it ignores the fact that, however usual, it is not actually necessary that the aliquot portion or interest of a partner should be the same in profits as in losses, but no reasonable doubt can exist that the measure of this right of set off, in the case of a registered firm, is given by the

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

phrase. Both upon principle and as a matter of construction of the statute, the alternative in the case of an unregistered firm is between holding that the right of set off does not arise and holding that it is a right of the same character and measure to be worked out in the same way. After all, even if a partner is insolvent he may nevertheless have had in the year of account income from other business or sources against which his share of the firm's loss can be deducted for purposes of income-tax. If B may get credit for his share of the loss there is at least a formidable difficulty in the way of giving credit to A for the whole. That persons without capital should be taken as partners in a business is doubtless at times both reasonable and desirable, but it is not clear that this would be unduly discouraged merely because in case of loss the capitalist partner might be better off if by the partnership articles in accordance with reality he took the whole responsibility for losses.

Their Lordships moreover can give no countenance to a suggestion that upon a dissolution of partnership a partner's share of the losses for several preceding years can be accumulated and thrown into the scale against the income of another partner for a particular year. No principle of writing off a bad debt could justify such a course, whether in the year following the dissolution or, as logic would permit, in some subsequent year in which the partner's insolvency has crystallised. The "bad debt" would not, if good, have come in to swell the taxable profits of the other partner. In the present case the claim to set off is in fact made in the second year of assessment after the dissolution of the business. It has already

been observed that the scheme of the statute is not to treat partner A as if in connection with the firm's affairs he was trading *vis-a-vis* B, or doing business with B as the other party. Still less can it properly be held that years after the dissolution of the business A is doing business with B and making good debts or bad debts due from him. Their Lordships are accordingly of opinion that the question propounded by the Commissioner of Income-tax has been rightly answered by the High Court of Madras in the negative.

It remains, however, to note that the appellant in the year 1930-31 took steps to give another character to his partner's share of the losses made in the cotton business between 1926 and 1930. As the Income-tax Officer put it: "On 1st April 1930, the debit against A. Somasundaram Pillai in the accounts of the partnership was transferred to the petitioner's money-lending business." On 29th September 1930, interest of Rs. 2,569-6-0 was added, bringing the total amount to Rs. 36,638-4-9. On the same day, 29th September 1930, the appellant took a promissory note from Pillai and on 28th March 1931 took a mortgage deed for Rs. 500. On 31st March 1931, he wrote off as bad the sum of Rs. 36,138-4-9. These steps can only have been taken in order to found a claim that in the year of account, 1930-31, the appellant had made a loss in his money-lending business. But this claim was rejected by the Commissioner on the short ground that no loan was as a matter of fact advanced by the appellant's money-lending business to Pillai, though it is true that the appellant advanced monies to the cotton partnership. Their Lordships have the greatest

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

difficulty in seeing how the circumstance that the appellant carries on business as a money-lender can affect his rights in respect of advances made to his own firm. It is no part of the business of a money-lender to finance the money-lender's ventures in the cotton market. Conversely, it is not a sign or index of the money-lender that one advances money to one's own firm. The basis of the right to deduct irrecoverable loans before arriving at the profits of money-lending is that to the money-lender, as to the banker, money is his stock in trade or circulating capital: he is dealing in money. But a solvent man can hardly make a loss by lending money to himself even if another be made responsible for the loan as well. And, when the loan is in reality but a putting of the hand into the pocket to pay for cotton, it seems desirable to ask what is the real equity between the parties. Their Lordships think that a reference to sections 24 and 44 of the English, and sections 13 and 48 of the Indian Partnership Act provides a correct answer, and that the true and ultimate right of the appellant against Pillai was a right to contribution in proportion to the *latter's* share of profits. This is none the less true that the money was not put up by way of partner's capital. Even if three-eighths of the money can also be regarded as in equity a loan to Pillai, it is very far from being money lent in the course of business as a money-lender, as is shown by the equities affecting the right to be repaid.

When A purports to lend money to A and B, much may be done with the consent of B. The transfer of the entry to the debit of Pillai from the books of the cotton partnership to the books

of the appellant's money-lending business may in the circumstances of this case be taken as having been effected with the consent of Pillai. The element of novation, however, comes in too late. Pillai's inability to meet his share of the loss was just as hopeless by the end of March 1930, as at any later time. The appellant's return for the year 1930-31 did not have to be rendered until months after March 1930, and if he filled in time by making entries in his books at the beginning and end of the year 1930-31, that delay does not entitle him to choose the next year for his claim to a set-off. From before the moment at which this debt was transferred from the cotton business to the money-lending business it was altogether bad and its badness was the reason of the transfer. It cannot, therefore, be considered as a bad debt made by the appellant in the course of money-lending and still less can it be considered as becoming bad in the year of account: hence the process by which the transfer is made on the first day of the year 1930-31 and cancelled as a bad debt upon the last day of that year is of no avail to the appellant.

Their Lordships are not in any way disposed to criticise the decision of the Commissioner refusing to regard the transaction as an irrecoverable loan made in the course of a money-lending business. They think, however, that it would have been more convenient, and more strictly in accordance with section 66 (2) of the Act, if the Commissioner had, after setting out the evidence upon this question and his findings thereon, stated and referred to the High Court the question of law, viz.: Whether it was open to

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

ARUNACHALAM
CHETTIAR
v.
COMMISSIONER
OF INCOME-
TAX.
—
SIR GEORGE
RANKIN.

him in law to hold that the loss in question was not a loss of profits or gains incurred by the appellant in the year of account by reason of an irrecoverable loan made in the course of his business as money-lender so as to entitle the appellant to have the amount thereof set off against his other income, profits or gains in the said year.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors for appellant: *Douglas Grant & Dold.*

Solicitor for respondent: *The Solicitor to the India Office.*

C.S.S.

APPELLATE CIVIL—FULL BENCH.

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

1935,
November 19.

IN RE A SECOND GRADE PLEADER.*

Legal Practitioners' Act (XVIII of 1879), sec. 12—Pleader—Conviction of, under sec. 121, Indian Penal Code (Act XLV of 1860)—Implies defect of character rendering him unfit to remain in profession.

In proceedings against a pleader under section 12 of the Legal Practitioners' Act (XVIII of 1879), (a) the pleader is not entitled to question the correctness of his conviction, although he would be entitled to show that such conviction does not imply that he possesses a defect of character which unfits him to be a pleader, and (b) the High Court has jurisdiction to take disciplinary action against him, though the criminal offence was not one committed in his professional capacity.

* *In re A Second Grade Pleader.*

Where a pleader was convicted of the offence of waging war against the King under section 121 of the Indian Penal Code (Act XLV of 1860), and it was found that he had assisted, by words proved to have been spoken by him, a revolutionary and unconstitutional movement having for its object the destruction of Government, involving of necessity the grave impairing of the efficiency of Courts, if not their total destruction, and that in the course of the rebellion many people were brutally murdered and others lost their lives, and many of the active participants in the movement were subsequently executed,

held, that a person convicted of so serious an offence against the State had a defect of character rendering him unfit to remain in the ranks of the legal profession.

Observations of BEAUMONT C.J. in *Sir Jamshed Kanga v. Kaikhushru*, (1934) 36 Bom. L.R. 1136, 1148 (F.B.), referred to and approved.

APPLICATION by Mr. M. P. Narayana Menon for renewal of a Second Grade Pledership certificate made through the District Judge of South Malabar at Calicut to the High Court, and NOTICE issued to him by the High Court under section 12 of the Legal Practitioners' Act calling on him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in the circumstances stated therein.

The Advocate-General (Sir A. Krishnaswami Ayyar) in support of the notice.

Respondent in person.

Cur. adv. vult.

ORDER

BEASLEY C.J.—The respondent is an applicant for BEASLEY C.J. the renewal for the year 1935 of a Second Grade Pledership certificate. This application he sent to the High Court through the District Judge of South Malabar. In his application he stated that he was a second grade pleader, that his certificate was last renewed on 1st January 1921, that

A SECOND
GRADE
PLEADER,
In re.

734 THE INDIAN LAW REPORTS [VOL. LIX

A SECOND
GRADE
PLEADER,
In re.
BEASLEY C.J.

he was unable to apply for the renewal of the certificate because on 10th September 1921 he was arrested under the orders of the District Magistrate of South Malabar under the Moplah Outrages Act (XX of 1859) and kept as a detainee, and subsequently was charged with the offence of waging war against His Majesty, tried by the Special Court at Calicut presided over by Mr. E. Pakenham Walsh and convicted and sentenced to transportation for life on 25th September 1922, and that he was released only on 1st October 1934. His application is dated 14th March 1935. On 17th October 1935 the High Court issued a notice to him of proceedings under section 12 of the Legal Practitioners' Act calling upon him to show cause why he should not be dealt with under that section. When the matter first came before a Full Bench of this Court the respondent was absent and the matter was adjourned in order to give him an opportunity of appearing, and at the adjourned hearing he appeared in person and, in addition to presenting a written statement, he also addressed the Court, after the learned Advocate-General had presented the legal aspect of the case and cited reported cases touching upon the matter.

A brief outline of the history of the respondent's conviction is necessary and the judgment of the Special Judge of Malabar, Mr. E. Pakenham Walsh, is before us. The respondent was charged before him with the offence of waging war against the King, an offence under section 121 of the Indian Penal Code. In his judgment, the learned Judge says that, in addition to a general charge that the respondent assisted in the Non-Co-operation and

Khilafat movements in the Ernad and Walluvanad taluks, which the Crown alleged were made in preparation for, and with a view to, rebellion, and that he associated himself in these proceedings with notorious rebel leaders, who subsequently were either killed in fighting the forces of the Crown or were convicted for waging war, the prosecution alleged four specific acts, two before the rebellion which broke out on 20th August 1921 and two after its outbreak. On these four specific acts, the learned Judge held that only one of them had been made out, and that was that on 24th August 1921, after the rebellion had broken out, the respondent delivered a speech at Manjeri. The rebel leader, Kunhayammad Haji, had come to Manjeri and for two days ruled the town. As a mark of the establishment of his Khilafat kingdom he returned the jewels pledged with the Nambudri Bank there without payment of the amounts owing. The respondent was there at the time, alleged to be assisting him, and made a speech in which he said:

"The rule of the white man has come to an end. Moplahs have been known to be brave men. They alone drove the white men from Tirurangadi. If we all unite and stand together we will accomplish our cause. White men have only a few soldiers. If we withstand them for a few days we will get help from outside. I believe you will do it. Those who work against Khilafat are our enemies. They should not be spared."

or words to this effect. Convicting the respondent in respect of that charge, the learned Judge sentenced him to transportation for life.

The question now is whether under section 12 of the Legal Practitioners' Act the criminal offence of which he has been convicted implies a defect of character which unfits him to be a pleader. In

A SECOND
GRADE
PLEADER,
In re.
BEASLEY C.J.

A SECOND
GRADE
PLEADER,
In re.
BEASLEY C.J.

considering this question two principles have first to be stated. One is that in such proceedings the respondent is not entitled to question the correctness of his conviction. Apart from the reported cases to which reference is not necessary, this has been the established practice of this High Court. I have stated this principle because in his written statement the respondent states that he is absolutely innocent of the offence of which he has been convicted and sentenced; and practically the whole of his written statement relates to that issue. Furthermore, when he appeared before us he contended that he was entitled to show that he had been convicted wrongly. We, however, refused to entertain any such argument but the respondent was told that the Court would listen to any argument by him that, although convicted of this criminal offence, it did not imply that he had a defect of character which unfits him to be a pleader. The second principle is that the High Court has jurisdiction to take disciplinary action against a pleader though the criminal offence was not one committed in his professional capacity. We have therefore only to address ourselves to the question whether a legal practitioner who has been convicted of the offence of waging war against the King has a defect of character which unfits him to be a pleader.

The gravity of the offence is so obvious that it is hardly necessary to refer to the punishment which can be inflicted in respect of it. Does this offence imply a defect of character, and, if it does, does it unfit the respondent to be a pleader? Clearly a person convicted of so serious an offence against the State as this has a defect of character.

A SECOND
GRADE
PLEADER,
In re.
BEASLEY C.J.

How does his conduct affect his position as a legal practitioner and his relations to the Court? Here I cannot do better than refer to a passage from the judgment of BEAUMONT C.J. in *Sir Jamshed Kanga v. Kaikhushru* (1), namely :

"Advocates, however, are a privileged class enjoying a monopoly of audience in the Courts, and their position gives them considerable opportunities for good or evil. It is of the highest importance that the High Court should be invested with power to ensure that only Advocates of good character shall be upon the roll, but it is also important that that power be in no way abused. In cases of misconduct involving moral turpitude the Court has to see whether the Advocate has shown himself to be unworthy of the confidence of the Court, or unfit to be entrusted with the business of his client, or a person with whom his professional brethren cannot be expected to associate. But in our opinion cases involving moral turpitude are not the only ones in which the Court may be called upon to take disciplinary action. The Court has a right to expect a high standard of loyalty to the Court and co-operation from the Advocates on its roll. Cases may arise in which it is proved that an Advocate has been engaged in revolutionary activities designed to destroy the system of which this Court forms part, or activities likely to hamper or embarrass the administration of justice by this Court or any of the Courts subordinate thereto. Courts of law can only function under a stable Government, and the destruction of Government by revolutionary and unconstitutional means must of necessity involve the destruction of the Courts, or the grave impairing of their efficiency. . . . This Court will not tolerate upon its rolls an Advocate who is endeavouring to destroy or undermine the authority of the Courts."

What were the circumstances in the present case? The learned Special Judge says :

"The outbreak of the rebellion was caused by the attempt of the District Magistrate to arrest Ali Musaliar, the Khilafat Secretary, at Tirurangadi, and other prominent Khilafatists there on 20th August. The events are too well known to need repetition. Mr. Rowley, the Assistant Superintendent of Police,

(1) (1934) 36 Bom. L.R. 1136, 1148 (F.B.).

A SECOND
GRADE
PLEADER,
In re.
BEASLEY C.J.

and Lieutenant Johnston were killed and the District Magistrate with special police had to retreat *via* Parappanangadi to Calicut, and had to walk to Feroke, as the rails had been torn up. The rebellion blazed out at once all over the Ernad and Walluvanad taluks. Almost every police station was destroyed as well as Government buildings and Government administration was paralysed for six months."

It appears also that on the night of 20th August at Nilambur, sixteen miles from Manjeri, seventeen Hindus and a police constable at Edavanna were murdered and at Tirurangadi, in addition to Mr. Rowley and Lieutenant Johnston, nine other persons were murdered. The police station at Manjeri was attacked on the night of the 21st; public offices at Manjeri on the 22nd. On the 24th of August Kunhayammad Haji, who is described as the notorious rebel leader, arrived at Manjeri. All these incidents had occurred when the respondent made the speech already referred to, and it was in such dangerous surroundings that he made it and the reference to Tirurangadi in that speech has, in consequence, a particular significance. Subsequent events are that on 26th August a retired Police Inspector was brutally murdered at Anakayam near Manjeri by Kunhayammad Haji and his followers and on 30th of August his head was paraded on a spear; and it was common ground that the respondent was at Manjeri from the morning of the 21st of August until the 30th of August.

It is not necessary, in my view, to refer to any other facts. The respondent assisted, by words proved to have been spoken by him, a revolutionary and unconstitutional movement having for its object the destruction of Government, involving of necessity the grave impairing of the efficiency

of Courts, if not their total destruction. In the course of the rebellion many people were brutally murdered and others lost their lives and many of the active participants in the movement subsequently were executed. A legal practitioner who has been guilty of such conduct is, in my view, unfit to remain in the ranks of the profession, and the respondent must accordingly be dismissed from practice.

The order of the Court is that Mr. M. P. Narayana Menon be dismissed from practice.

KING J.—I agree.

LAKSHMANA RAO J.—I too agree.

K.W.R.

APPELLATE CIVIL.

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

IN RE R. R. GOPALACHARI (PLAINTIFF), RESPONDENT.*

1935,
November 21.

*Court Fees Act (VII of 1870), sec. 17—"Distinct subjects"—
Dealings and cost of sending notice of demand—Claims for
—Distinct subjects, if.*

In a suit for the recovery of a sum of money alleged to be due in respect of dealings, the particulars filed with the plaint set out the amounts due in respect of the dealings and claimed in addition a sum stated to be the cost of sending a notice of demand.

Held that the item relating to the cost of sending notice of demand was not a separate and distinct subject from the items relating to the dealings within the meaning of section 17 of

* Referred Case No. 10 of 1934.

A SECOND
GRADE
PLEADER,
In re.

GOPALACHARI, the Court Fees Act and that the valuation of the suit as if the
In re. claim related to one subject only was correct.

The items in respect of the charges for sending the notice of demand and the dealings can be treated as so linked up together as not to be separate and distinct subjects but one subject.

CASE stated under Order XLVI, rule 1, of the Code of Civil Procedure (Act V of 1908) by the District Munsif of Madura Town in Small Cause Suits Nos. 2508 and 2509 of 1934 on his file.

Government Pleader (K. S. Krishnaswami Ayyangar) for the Crown.

V. Meenakshisundaram (amicus curiae) for respondent.

BEASLEY C.J. BEASLEY C.J.—This is a reference made by the District Munsif of Madura Town under Order XLVI, rule 1, Civil Procedure Code, and raises a question of court-fees in relation to the plaints in two small cause suits there (Small Cause Suit No. 2508 of 1934 and Small Cause Suit No. 2509 of 1934). In each of the two cases, the plaintiff claims a sum of money as being due from the defendant in respect of dealings, those dealings being the sale and delivery of goods which the plaintiffs in the suits claim have not been paid for. In the particulars filed with the plaints, the various dealings are set out and also the amounts due in respect of them. In Small Cause Suit No. 2508 of 1934 there is in addition a claim in respect of the following matters :

		RS.	A.	P.
" 6th February 1933.	Debit to Vakil's clerk for sending lawyer's notice ...	0	6	0
25th February 1933.	Debit Re. 1 as fees for sending lawyer's notice through Vakil			

P. S. Nagaswami Iyer,
 registration charges for the
 same 0-5-3; out of Rs. 1-5-3
 in all, deducting 0-6-0 paid
 to the Vakil's clerk on the
 25th, balance ... 0 15 3"

RS. A. P. GOPALACHARI,
In re.
 BEASLEY C.J.

making a total of Rs. 1-5-3. In Small Cause Suit No. 2509 of 1934 similar particulars are set out with regard to the dealings between the parties in respect of the goods delivered and at the end of the particulars there is the following item:

RS. A. P.
 " 10th October 1934. Debit—Vakil's fees, registration charges, etc., for the lawyer's notice sent registered on 27th August 1934 ... 1 1 0".

In each case the plaintiff paid court-fee on the aggregate of all the items found in the account but objection was taken to this practice by the Court Fee Examiner during his inspection, his objection being that the item regarding costs of the lawyer's notice, etc., should be valued as a separate and distinct subject from the other items relating only to the dealings. This question arises under section 17 of the Court Fees Act which reads as follows :

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

The Court Fee Examiner was of the opinion that the items relating to the dealings, that is to say, goods sold and delivered, should be separately valued and that the items relating to the costs of sending notice of demand should also be

GOPALACHARI,
In re.
BEASLEY C.J.

separately valued. We are told that, if this had been done, an additional court-fee of eight annas would be due from the plaintiff in each case. The question here is whether the item in respect of the cost of sending the notice of demand is a "distinct subject" within the meaning of section 17 of the Court Fees Act. The matter is, in our view, entirely free from authority unless the decision of the Full Bench in *Parameswara Pattar, In re* (1) is of assistance to us here. That was a case of a suit claiming possession of immovable property and past mesne profits and it was there held that the court-fee is payable on the aggregate value of both the reliefs and that the claims for possession of land and for mesne profits are not "distinct subjects" under section 17 of the Court Fees Act. As SUNDARAM CHETTI J. says in his judgment, there is no definition of the word "subject" in the Act and the Full Bench, therefore, did not think it wise to attempt to define it in that case and expressed the opinion that it should be guided by the long course of practice. Undoubtedly this has been the practice in the City Civil Court and the Small Cause Court and appears to be the practice also in the mofussil. No doubt, if there was no inter-relationship between the claim for the cost of sending the notice of demand and the dealings, the claim in the present cases to have the suit valued as if the claim related to one subject only would be untenable. But it is impossible to say that there is not some inter-relationship between the item in respect of the charges for sending the notices and the dealings. Although it may not be strictly necessary for a

(1) (1930) I.L.R. 54 Mad. 1 (F.B.).

notice of demand before suit to be sent in which the particulars of the claim are set out, such is usually given and sometimes there might be some just cause for complaint by the defendant in a suit, were a suit to be launched against him without any previous demand and without any particulars of the account between himself and the plaintiff being given to him beforehand. It seems to us that there is some inter-relationship between these items; and furthermore, we do not think it would be wise in this case to attempt to define what "distinct subjects" under section 17 of the Court Fees Act are. It is sufficient for us to say that, in our view, these two items can be treated as so linked up together as not to be separate and distinct subjects but one subject. Furthermore, this is of course a taxing Act and, if there is any ambiguity about it, it should be construed in favour of the subject. We accordingly answer the reference by saying that the valuation placed upon the two suits was correct and that there were here not two "distinct subjects" such as is intended by section 17 of the Court Fees Act. No costs have been incurred by the respondent whose case has been very ably argued by Mr. V. Meenakshisundaram as *amicus curiae* to whom we are very much indebted; so that, we make no order as to costs here. The reference is returned to the District Munsif's Court.

GOPALACHARI
In re.
BEASLEY C.J.

A.S.V.

APPELLATE CIVIL.

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

1935,
November 27.

T. S. SANKARA AYYAR (RESPONDENT), APPELLANT,

v.

MUHAMMAD GANNI ROWTHER AND TWO OTHERS
(PETITIONERS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIX, r. 1—
Execution of decree—Sale of property in—Injunction
restraining—Grant of, on application by party to decree—
Permissibility—Decree under execution not appealed
against—Appeal in another suit raising issue of liability of
property for sale—Pendency of—Injunction sought for on
ground of.*

In a mortgage suit by the appellant against the respondents and in a partition suit by the latter against the former a common issue was raised as to whether the mortgage sued upon by the appellant was binding on the shares of the respondents. The decision on that issue in the partition suit was agreed by the parties to be taken as the decision on the issue in the mortgage suit. In the partition suit the mortgage was declared binding on the shares of the respondents and a decree by consent was accordingly passed in the mortgage suit against their shares. There was no appeal against the decree in the mortgage suit but an appeal was presented to the High Court against the decree in the partition suit. The respondents applied to the High Court, under Order XXXIX, rule 1, of the Code of Civil Procedure, for an injunction restraining the appellant from bringing the property of the respondents to sale in execution of the decree in the mortgage suit pending the appeal in the partition suit.

Held that the injunction applied for could not be granted.

When a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever, merely because an appeal is pending in another suit,

* Letters Patent Appeal No. 84 of 1935

to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal.

Varadacharyulu v. Narasimhacharyulu, (1925) 23 L.W. 85, *Ayyamperumal v. Muthuswami*, A.I.R. 1927 Mad. 687, and *Karuppayya v. Ponnusami*, (1932) I.L.R. 56 Mad. 563, approved.

Abdullah Khan v. Banke Lal, (1910) I.L.R. 33 All. 79 (F.B.), and *Sri Sri Radha Gobinda Deb Thakur v. Girija Prasanna Mookherjee*, (1931) 35 C.W.N. 912, distinguished.

APPEAL under Clause 15 of the Letters Patent against the order of K. S. MENON J. dated 20th August 1935 and made in Civil Miscellaneous Petition No. 2960 of 1935 for issue of an injunction restraining the respondent therein from bringing the properties to sale in Original Suit No. 31 of 1932 on the file of the Court of the Subordinate Judge of Kumbakonam, pursuant to the declaration granted in his favour in Original Suit No. 59 of 1931 on the file of the said Court of the Subordinate Judge of Kumbakonam, pending Appeal No. 10 of 1935 preferred to the High Court against the decree of the said Court in Original Suit No. 59 of 1931.

Government Pleader (K. S. Krishnaswami Ayyangar) and *S. Ramachandra Ayyar* for appellant.

C. S. Venkatachariar for *D. Ramaswami Ayyangar* for respondents.

JUDGMENT.

BEASLEY C.J.—This is a Letters Patent Appeal from an order made by K. S. MENON J. restraining the appellant here from bringing the property of the respondents to sale in execution of the decree which he had obtained in Original Suit No. 31 of

SANKARA
Ayyar
v.
MUHAMMAD
GANNI
ROWTHER.

BEASLEY C.J.

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.
 —
 BEASLEY C.J.

1932 in the Subordinate Judge's Court, Kunjankonam. That was a mortgage suit and the appellant was the plaintiff in it. One Abdul Karim, the brother of the three respondents in this appeal, executed a mortgage in favour of the appellant for Rs. 10,000 on 1st October 1928. Abdul Karim died leaving the respondents his three brothers and they were made defendants 4 to 6 in the suit. The mother of the respondents filed a suit for partition (Original Suit No. 59 of 1931) in the same Court and on her death the three respondents were transposed as the plaintiffs and the appellant was added as the eleventh defendant as it was alleged in the suit that the mortgage by Abdul Karim in the appellant's favour was not binding on the shares of the three respondents. That defence was also raised by the three respondents in the mortgage suit, so that, both in the partition suit and in the mortgage suit there was that common issue and it was agreed between all the parties that the decision on that issue in the partition suit should be taken as the decision on the issue in the mortgage suit, that is to say, if it was declared in the partition suit that the mortgage was binding on the shares of the three brothers (respondents) then a decree to that effect binding their shares should be passed in the mortgage suit. In the partition suit the mortgage was declared binding on the shares of the three brothers. In the result a decree by consent was passed in the mortgage suit, but for the sale of the share of Abdul Karim only. Subsequently the appellant applied to have the decree amended in order to make it clear that the

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.
 —
 BEASLEY C.J.

decree was against the shares of the three defendants; and the amendment was made. The position, therefore, is that in Original Suit No. 31 of 1932 there is a mortgage decree in favour of the appellant under which the mortgage is binding upon the shares of the respondents. An appeal (Appeal Suit No. 10 of 1935) has been presented against the decree in the partition suit; and pending it, the application, the order on which is the subject of the appeal before us, was made and, as before stated, our learned brother granted the application. The application was of course under Order XXXIX, rule 1, Civil Procedure Code, and K. S. MENON J. says that, in effect, the application is to stay the operation of the decree in the mortgage suit pending the appeal in the partition suit. That of course is the effect; but it is quite clear that, having regard to the fact that the decree in the mortgage suit was not appealed against, no application under Order XLI, rule 5, Civil Procedure Code, for a stay of execution will lie. That rule only applies to staying of execution in suits which are themselves under appeal and cannot apply to a decree in a suit which is not under appeal. The ground put forward in support of the petition is that the decree in the partition suit is under appeal and that it is expedient that execution of the decree in the mortgage suit should meanwhile be stopped by injunction. An injunction can only be granted under Order XXXIX, rule 1, upon certain grounds, namely, where it appears that any property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit—that certainly is not suggested here—or wrongfully sold in

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.
 —
 BEASLEY C.J.

execution of a decree or the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors. Clearly the latter condition is not relied upon in this case. Therefore the only reason which was before our learned brother was that the property was in danger of being wrongfully sold in execution of the decree. How was it about to be wrongfully sold in execution of the decree? There was a decree before our learned brother and all the parties before him were parties to that decree. This is not a case where the property of somebody not a party to the decree is in danger of being sold and that person comes forward with a claim that it is his property and cannot be sold. Admittedly, the property in question is the property of one of the parties to the decree, namely, the three brothers. The fact that there is an appeal against the decree in the partition suit cannot possibly affect the question. The decree in the mortgage suit, until it has been shown in appeal to be a wrong decree, is a good decree; and the decree-holder is entitled to take all steps which he is entitled to take. This matter has been dealt with in a judgment of PHILLIPS J. in *Varadacharyulu v. Narasimhacharyulu*(1). There was a petition to revise the order of the District Court refusing to grant an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father. The Subordinate Judge held that he had no jurisdiction to grant such an injunction and the District Judge upheld his order. PHILLIPS J. says :

(1) (1925) 23 L.W. 85.

"It is now contended that such an injunction will come under Order XXXIX either rule 1 or rule 2. It certainly cannot come within the language of rule 1 for there is no suggestion that the property of which delivery is to be given is in danger of being wasted, damaged or alienated. It is then argued that rule 2 would be applicable and that this is an injunction to restrain the defendant from committing other injury of any kind. The alleged injury is the execution of a decree lawfully obtained. In order to hold that that does constitute an injury, it is necessary to hold that that decree is illegal, for, if the decree is legal, the defendant has every right to execute it and in doing so he cannot be said to commit any injury."

Those observations apply directly to this case. PHILLIPS J. then deals with the contention that under section 94 of the Code of Civil Procedure the Court would be justified, in order to prevent the ends of justice from being defeated, in granting an injunction. He holds that it is not open to the Court to grant an injunction under section 94, Civil Procedure Code. A further contention was put forward before him that the Court could under its inherent powers under section 151, Civil Procedure Code, grant such an injunction and that was also negatived. This case is directly in point and has been followed by CURGENVEN J. in *Ayyamperumal v. Muthuswami*(1) and also by BARDSWELL J. in *Karuppayya v. Ponnusami*(2), where the observations of CURGENVEN J. in *Govindarajulu Naidu v. Imperial Bank of India, Vellore*(3) were explained by him. K. S. MENON J. refers to the decision of the Allahabad High Court in *Abdullah Khan v. Banke Lal*(4) and the decision in *Sri Sri Radha*

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.
 —
 BEASLEY C.J.

(1) A.I.R. 1927 Mad. 687.
 (3) (1931) 35 L.W. 168.

(2) (1932) I.L.R. 56 Mad. 563.
 (4) (1910) I.L.R. 33 All. 79 (F.B.).

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.
 —
 BEASLEY C.J.

Gobinda Deb Thakur v. Girija Prasanna Mookherjee(1), but the observation to be made with regard to both those cases is that there the Court was dealing with a petition by a person who was not a party to the suit at all. Although there are some observations which are *obiter* in *Abdullah Khan v. Banke Lal*(2) and which may be taken as expressing the opinion that even when an application is made by one of the parties to a decree an injunction can be granted, on closer examination it would appear that that view is limited to cases where it is alleged that the decree has been obtained by fraud. These observations are merely *obiter*. I very strongly take the view that, when a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever, merely because an appeal is pending in another suit, to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. If the other view were correct, then the appellant would have a greater remedy in such cases, i.e., an injunction, than he has in the suit under appeal. Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal. For these reasons, I am quite unable to agree with the order granting this injunction. I think that it was made under a misapprehension of the cases to which reference is made in the judgment. The order under appeal must, therefore, be set aside and the injunction dissolved and this appeal allowed with costs here and before K. S. MENON J. With

(1) (1931) 35 C.W.N. 912.

(2) (1910) I.L.R. 33 All. 79 (F.B.).

SANKARA
 AYYAR
 v.
 MUHAMMAD
 GANNI
 ROWTHER.

regard to Appeal Suit No. 10 of 1935, the appeal in the partition suit, it is most desirable that it should be disposed of as quickly as possible and there must therefore be a direction that it be heard during the first week of February peremptorily.

STODART J.—I agree with my Lord the CHIEF JUSTICE.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

BAVA C. VAITHILINGA MUDALIAR (SECOND RESPONDENT), APPELLANT,

v.

THE BOARD OF CONTROL, SRI THYAGARAJASWAMI DEVASTHANAM, TIRUVARUR, BY THE PRESENT PRESIDENT K. MANATHURAINATHA DESIKAR, AND ANOTHER (PETITIONER AND FIRST RESPONDENT), RESPONDENTS.*

1936,
 March 25.

Scheme suit—Decree in—Provision in scheme part of—Executable, if—Removal of trustee in event of his committing breach of trust or failing to perform his duties—Power of—Reservation to Court as part of a scheme of—Permissibility—Remedy in such a case.

A provision in a scheme decree is inexecutable, whether the provision is directory or declaratory.

The preponderance of judicial opinion in the Madras High Court is against the view to the contrary held in *Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur*, (1931) 61 M.L.J. 904.

Per CORNISH J.—There cannot be reserved to the Court as part of a scheme for a charitable trust a power to remove a

* Appeal Against Order No. 160 of 1931.

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.

trustee in the event of his committing a breach of trust or failing to perform his duties. The only remedy available is a suit to remove him or to have the scheme modified.

Veeraraghavachariar v. Advocate-General, Madras, (1927) I.L.R. 51 Mad. 31 (F.B.), applied.

APPEAL against the order of the Court of the Subordinate Judge of Tiruvarur, dated 4th September 1930 and made in Execution Petition No. 56 of 1930 in Original Suit No. 125 of 1921 on the file of the Court of the Subordinate Judge of Negapatam.

S. Panchapagesa Sastri for appellant.

R. Sundaralingam and *A. V. Viswanatha Sastri* for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA
RAO J.

VENKATASUBBA RAO J.—The question raised in this appeal is whether the provisions in a scheme decree are executable. I have repeatedly held that they are not, but, as in two cases decided by RAMESAM J. and my learned brother a different view has been expressed, I have considered the matter carefully and anxiously in the light of the long and learned arguments which have been addressed to us. The difficulty, in my opinion, arises from the differing view-points as regards the meaning and scope of what is generally termed a scheme suit. As I observed in *Ranganatha Thathachariar v. Krishnaswami Thathachariar*(1) decided by OLDFIELD J. and myself, what the plaintiff in a scheme suit prays for is a scheme and, when the decree frames a scheme, there

remains nothing further to obtain by way of execution. I distinguish there the other classes of suits from scheme suits in this respect. In a money suit, for example, the successful plaintiff obtains a decree for money, that is to say, a decree directing the opposite party to pay him the money, but in a scheme suit the decree that is passed is not that a scheme shall hereafter be settled, but the decree itself embodies the scheme. Let us suppose that for endowing a hospital a testator has left property. The Court is invited to frame a scheme and it does so. In the scheme are set forth the duties of the various functionaries and bodies. The treasurer, let us say, it provides, shall keep the accounts in such and such a manner; he shall remit the monies received on such and such dates to the bank. Then, let us suppose there is another provision which says that the members of the Governing Board shall retire annually by rotation. It will be seen that the provisions I have indicated are of a directory as distinguished from a declaratory nature. Let us examine the argument that any provision in a scheme, provided it is directory, must be enforced in execution. In the case supposed, if the person happening to be the treasurer, say a hundred years after the settling of the scheme, fails to keep the accounts in the manner specified or makes default in the remitting of the monies to the bank, the erring treasurer, according to the argument, is to be proceeded against in execution of the decree. Again, if a member of the Governing Board due to retire fails to do so and continues on it with the consent of his fellows, the proper way, according to this argument, of enforcing compliance with

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.
—
VENKATASUBBA
RAO J.

(1) (1923) I.L.R. 47 Mad. 139.

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.
—
VENKATASUBBA
RAO J.

the scheme is to execute the decree under the Code. A position that leads to such anomalies I find it difficult to accept. Again, as a necessary corollary, to be logical, if these are matters to be decided in execution, section 47 of the Code bars a regular suit. Further, as I observed in the same case, I fail to see how a scheme or constitution embodied in a decree stands on a different footing from a scheme contained in a will or in an instrument of dedication.

The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed is or is not in what is really the scheme part of the decree. To this distinction both REILLY J. and myself have adverted in *Ramacharyulu v. Narasimha Suryanarayana*(1). There, both of us point out that the proper way of dealing with the matter is first to separate the scheme part from the rest of the decree and that, when that is done, no provision in the scheme part is executable, whether it is directory or declaratory.

The Courts sometimes insert in schemes framed by the decree what is known as a *liberty clause*. In virtue of the liberty so reserved, a party may, in accordance with, and subject to the terms of, the scheme, approach the Court, invoking its aid in regard to matters covered by the liberty clause, which may provide for matters of various types. When the trustees feel a doubt as to the proper interpretation of a clause or as to their duties in any emergency not foreseen, the liberty clause may

(1) 1933 M.W.N. 183.

confer upon them the right to seek advice from Court. Again, in the matter of carrying out the existing provisions of a scheme framed, power may be conferred upon a party (he may be a trustee, treasurer, secretary or worshipper—it makes no difference) to approach the Court invoking its aid. In such cases, the Court intervenes not by way of executing the decree but by reason of its respect for the decree which has settled the constitution. When the Court, acting under the liberty clause, intervenes to give effect to a provision in a scheme, it does undoubtedly, according to the dictionary meaning of the word, “execute”, carry out that provision; but the execution with which we are concerned is not that kind of execution but “execution” under the Code of Civil Procedure.

Veeraraghavachariar v. Advocate-General, Madras (1) shows definitely when a “liberty clause” can be regarded as *intra vires* and when as *ultra vires*. Provided that the clause does not contravene the principles formulated in that decision, it can be taken advantage of; on the other hand, if it does contravene, it is perfectly worthless and must be ignored.

I have now stated what in my opinion the correct principle is, on which the matter rests. My view receives support from a considerable body of authority; in fact it has been adopted by several Benches of this Court; *Sivan Pillai v. Venkateswara Aiyar* (2) (SPENCER and MADHAVAN NAIR JJ.), *Brahmayya v. Venkatasuryanarayanamurthy* (3) (DEVADOSS and WALLER JJ.),

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.
—
VENKATASUBBA
RAO J.

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

(2) (1925) 22 L.W. 796.

(3) (1925) 50 M.L.J. 409.

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM
TIRUVARUR.
—
VENKATASUBBA
RAO J.

Abdul Hakim Baig v. Burramiddin(1) (DEVADOSS and WALLACE JJ.), *Sivaram Dubai v. Rajagopala Misra*(2) (REILLY and ANANTAKRISHNA AYYAR JJ.) and *Vythelinga Mudaliar v. Mahadeva Iyer*(3) (JACKSON J. and myself). Therefore, both on principle and on authority, I must hold that a provision in a scheme decree is inexecutable. It is on this ground that I primarily rest my judgment.

Granting for a moment that a directory provision in a scheme decree is executable, I fail to see how the present application can lie. The provision that is sought to be executed runs thus :

“ The trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer.”

It is said that here is a mandatory injunction directed against the trustees and that Order XXI, rule 32, Civil Procedure Code, applies. But what is the nature of the injunction? Under it, the trustees are bound to hand over the cash proceeds to the treasurer, that is to say, such proceeds as they have collected. But the complaint now is that the trustee in question has failed to make the collections. That being so, Order XXI, rule 32, which relates to the execution of a decree for injunction, is inapplicable.

The lower Court has, however, by way of what is known as equitable execution, appointed a receiver. Here again, the question arises, which is the direction that the trustee has infringed? The object of appointing the receiver was to collect the outstandings due to the trust, but, as

(1) (1925) I.L.R. 49 Mad. 580. (2) (1930) I.L.R. 54 Mad. 315.
(3) A.I.R. 1926 Mad. 659

I have already said, the decree does not expressly enjoin on the trustee the duty of making such collections. Where then is the clause which is of a directory nature that can be executed? The application for execution, in whatever way it may be construed, is, in my opinion, utterly misconceived.

In the view I have taken, it is unnecessary to express any opinion upon the question, whether or not the parties are the representatives of the judgment-creditors and the judgment-debtors respectively for the purpose of section 47.

In the result, the appeal is allowed, but in the circumstances each party will bear his costs.

CORNISH J.—I agree. The preponderance of judicial opinion in this High Court is against the view held in *Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur* (1) that a direction in a charity scheme is capable of being executed as a decree ; and I think that the preponderating opinion should prevail. Upon this view of the case there is nothing to justify the order made by the lower Court appointing a receiver. Clause 26 of the scheme, which enables the Court to frame rules for the regulation of the conduct and duties of the treasurer and superintendent, does not concern the conduct of the kattalai trustees. And clause 27, which gives the parties or the Board of Control liberty to apply to the Court for any modification of the scheme, cannot, I think, be stretched into meaning that the duties which the trustees are directed by the scheme

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.
—
VENKATASUBBA
RAO J.

CORNISH J.

(1) (1931) 61 M.L.J. 904.

VAITHILINGA
MUDALIAR
v.
BOARD OF
CONTROL, SRI
THYAGARAJA-
SWAMI
DEVASTHANAM,
TIRUVARUR.
—
CORNISH J.

to perform may be taken away from a trustee and conferred on a receiver upon a mere application to the Court. In *Veeraraghavachariar v. Advocate-General, Madras*(1) the Full Bench laid down the principle that in a scheme suit the Court should only give liberty to apply for directions in respect of such matters which it thinks advisable not to finally determine at the time but which should be left to future decision. And it rules that this liberty to apply for directions must not be used to effect that which can only be done by means of a suit under section 92, Civil Procedure Code. It is obvious that according to this principle there cannot be reserved to the Court as part of a scheme for a charitable trust a power to remove a trustee in the event of his committing a breach of trust or failing to perform his duties. The only power that exists for the removal of the trustee of a charitable trust (apart from the provisions of the Hindu Religious Endowments Act) is contained in section 92 of the Code of Civil Procedure, and removal can only be effected by means of a suit instituted in accordance with that provision. No doubt on the institution of such a suit it would be open to the Court to appoint a receiver of the trust property pending the determination of the suit. In the present case, the scheme does not profess to reserve any power to the Court to displace a trustee; but what the Court has done is to appoint a receiver for an indefinite period to carry out the duties of the recalcitrant trustee. This is virtually a suspension of the trustee from his office. The objection to this course was indicated in *Vythilinga Pandara*

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

Sannadhi v. The Board of Control, Sri Thiagaraja-swami Devasthanam, Tiruvarur(1), which the lower Court has taken to justify it. Indeed, it is difficult to understand why in such circumstances the trustee should be continued in his useless office. But, apart from the question of the merits of the lower Court's order, I think it must be held that there is no short-cut to a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme, but that the only remedy available is a suit to remove him or to have the scheme modified.

A.S.V.

APPELLATE CIVIL

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

JAGADISAN PILLAI (PETITIONER), APPELLANT,

v.

NARAYANAN CHETTIAR AND FOUR OTHERS (RESPONDENTS
1 AND 3 TO 6), RESPONDENTS.*

1935,
November 1.

Indian Limitation Act (IX of 1908), art. 182 (5)—Application in accordance with law—Insolvent judgment-debtor whose property has vested in Official Receiver—Execution petition filed against—Application in accordance with law, if—Provincial Insolvency Act (V of 1920), sec. 28 (2)—Effect of—Arts. 181 and 182 of Limitation Act—Applicability of—Decree capable of execution—Laches of decree-holder in applying for execution—Order exonerating defendant from liability under decree subsequently set aside—Capable of being relied upon as affording fresh starting point for limitation in such a case, if.

An execution petition cannot, by reason of section 28 (2) of the Provincial Insolvency Act, be filed without the leave of the

(1) (1931) 61 M.L.J. 904.

* Appeals Against Orders Nos. 463 and 484 of 1933.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.

Insolvency Court against a person whose property has vested in the Official Receiver appointed by the Insolvency Court. An execution petition filed without the leave of the Insolvency Court against a person whose property has vested in the Official Receiver is not an application in accordance with law and cannot save limitation.

Swami Kotayya v. Venkata Rangarao, (1934) 68 M.L.J. 148, relied upon.

The assignee of a decree passed against two defendants applied in August 1932 for execution against the assets of the second defendant, who had died in the interval, in the hands of his legal representatives. The last order passed on an execution petition properly presented in accordance with law was an order passed in March 1924. The question was whether the application of August 1932 was or was not barred by limitation and whether article 181 or 182 of the Limitation Act applied to the case.

In pursuance of a memorandum purporting to have been put in by the assignee decree-holder on 29th September 1926 exonerating the second defendant from liability under the decree, the Court, on 30th September 1926, passed an order: "Recorded as prayed for". On an application filed by the assignee decree-holder, that memorandum was found to be a forgery and the order of 30th September 1926 was cancelled by an order passed in August 1933. The assignee decree-holder contended that article 181 and not article 182 was the proper article applicable, his case being that so long as the order of 30th September 1926 was in force it was impossible for him to execute the decree as against the second defendant and that he was therefore entitled to a period of three years from the date on which that obstacle to execution was removed, and that his application of August 1932 was not barred by limitation.

Held that, as the assignee decree-holder could have applied for execution at any time after March 1924, when the assignment in his favour was recognised and the arrest of both the defendants was ordered, and the delay from March 1924 to August 1932 was due to his own negligence or laches and not to any defect in the decree or to any circumstance connected with the decree which prevented him from putting in an application for execution, article 182 applied to the case, the application of

August 1932 was barred by limitation and it was not permissible for the assignee decree-holder to rely upon the order of 30th September 1926 as giving him any fresh starting point for limitation.

Rameshvar Singh v. Homeshvar Singh, (1920) 40 M.L.J. 1, 6 (P.C.), and *Mangamma Nayakuralu v. Ramadasappa Nayanimvay*, (1924) 48 M.L.J. 563, relied upon.

Rungiah Gounden & Co. v. Nanjappa Row, (1903) I.L.R. 26 Mad. 780, and *Ramineedi Venkata Appa Rao v. Lakkoju China Ayyanna*, (1906) I.L.R. 30 Mad. 209, distinguished.

APPEALS against the orders of the Court of the Subordinate Judge of Trichinopoly dated 14th August 1933 and made in Execution Petition No. 380 of 1932 and Execution Application No. 636 of 1932 respectively in Original Suit No. 13 of 1933.

S. Srinivasa Ayyangar and T. S. Vaidyanatha Ayyar for appellant.

The Advocate-General (Sir A. Krishnaswami Ayyar) and *Watrap S. Subramania Ayyar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BURN J.—These appeals raise a question of limitation. The appellant in Civil Miscellaneous Appeal No. 463 of 1933 is the holder by assignment of the decree in Original Suit No. 13 of 1923 on the file of the Sub-Court of Trichinopoly. That suit was filed by the Imperial Bank of India against two defendants, Narayanan Chettiar and Vadivelam Pillai. A decree was passed in favour of the Bank by which the plaintiff was to proceed in the first instance against the first defendant and then against both the defendants if necessary. The Imperial Bank of India as the decree-holder

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.

BURN J.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

filed Execution Petition No. 126 of 1923 praying for the arrest of the first defendant. In a later Execution Petition No. 157 of 1923 filed on 13th August 1923, the Bank applied for attachment of the movables of the second defendant and an order for attachment was made, but this petition was not pressed.

The present appellant is the sister's son of the second defendant and he filed Execution Petition No. 201 of 1923 for recognition of the assignment to him of the decree and for the arrest of both the defendants. This was contested by the first defendant who alleged that the petitioner was only a benamidar for the second defendant. It was not objected to by the second defendant and on 17th March 1924 the Court recognised the assignment and ordered the arrest of both the defendants. The petition however was dismissed for non-payment of batta on 28th March 1924. On 29th July 1924 the first defendant, Narayanan Chettiar, filed an insolvency petition in the District Court of Ramnad and was adjudicated insolvent shortly afterwards. During the pendency of these insolvency proceedings, the assignee decree-holder, without the leave of the Insolvency Court, put in Execution Petition No. 236 of 1926 on 29th September 1926 in which he prayed for the arrest of the first defendant. After notice to the first defendant an order was passed for his arrest on 29th November 1926, but no batta was paid and this was dismissed on 21st November 1926. The first defendant obtained an order of discharge in insolvency on 13th December 1930, and the execution petition with which this appeal is concerned was filed on 31st August 1932.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

In this petition the assignee decree-holder prays for execution against the assets of the second defendant, Vadivelam Pillai, now deceased in the hands of his legal representatives—respondents 2 to 5 herein.

Since this petition was presented nearly six years after the order dated 21st December 1926 dismissing Execution Petition No. 236 of 1926, it was incumbent upon the petitioner to show that the application was not barred by limitation. He alleged several reasons why the petition was not barred. He claimed that on 5th September 1929 the first defendant had sent him a letter acknowledging his debt. He alleged also that in the insolvency petition the first defendant had acknowledged his liability under the decree. Therefore he said that the petition was not barred by limitation and he referred to sections 19 and 20 and article 182 of the Limitation Act.

The objections on behalf of the respondents were based on several grounds. It was contended for the respondents that the insolvency proceedings could not save limitation. It was also alleged that the letter of 5th September 1929 was a forgery and that the second defendant's legal representatives could not be bound by it. It was also alleged that the second defendant had never acknowledged such a debt at any time. It was also said that sections 19 and 20 of the Limitation Act had no application to that execution application and so it was barred by limitation.

A further ground of some importance alleged in the counter of the respondents was that the

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

assignee decree-holder himself when he filed Execution Petition No. 236 of 1926 on 29th September 1926 put in a memorandum exonerating the second defendant from liability under the decree. In pursuance of this it was alleged that the Court on 30th September 1926 had passed an order: "Recorded as prayed for." Therefore the respondents contended that the petitioner could not have any remedy against them.

The assignee decree-holder, on becoming aware of the statements made by the respondents in the counter, alleged that the memorandum said to have been filed in Court on 29th September 1926 was a forgery, that he never exonerated the second defendant from liability under the decree at all and he prayed that he should be allowed to execute the decree against the second defendant's legal representatives ignoring, or if necessary setting aside, the Court's order dated 30th September 1926. This was Execution Application No. 636 of 1932 which is the subject-matter of Civil Miscellaneous Appeal No. 484 of 1933. Upon the execution petition the learned Subordinate Judge has found that it was barred by limitation and on Execution Application No. 636 of 1932 he has found that the memorandum, dated 29th September 1926, was a forgery and that the order, dated 30th September 1926, should be set aside, and he has set aside that order accordingly, and the respondents have preferred Civil Miscellaneous Appeal No. 484 of 1933 from that order.

Mr. S. Srinivasa Ayyangar on behalf of the appellant practically abandoned all the contentions on the point of limitation which had been raised on behalf of the decree-holder before the

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

learned Subordinate Judge. But he did attempt to contend that Execution Petition No. 236 of 1926 was a petition in accordance with law, although it had been filed after the institution of the insolvency proceedings against the first defendant and without the leave of the Insolvency Court. This is clearly contrary to section 28 (2) of the Provincial Insolvency Act and the decision in *Swami Kotayya v. Venkata Rangarao*(1) is quite clearly to the effect that an execution petition cannot be filed without the leave of the Insolvency Court against a person whose property has vested in the Official Receiver appointed by the Insolvency Court. It is therefore clear that the Execution Petition No. 236 of 1926 cannot be said to be an application in accordance with law. If Execution Petition No. 236 of 1926 is disregarded, the last order passed on an execution petition properly presented in accordance with law was the order passed on 28th March 1924, and Execution Petition No. 380 of 1932 which was not filed until 31st August 1932 is long barred by limitation if article 182 is applicable. Mr. Srinivasa Ayyangar has therefore, as we have already said, practically abandoned all the contentions raised before the lower Court and he now seeks to contend that the proper article applicable is article 181 and not article 182 of the Limitation Act. For this purpose he relied upon the memorandum, dated 29th September 1926, and the Court's order, dated 30th September 1926. His case is that so long as the order, dated 30th September 1926, was in force it was impossible for the decree-holder to execute the decree as against the second defendant and

(1) (1934) 68 M.L.J. 148.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

therefore he is entitled to a period of three years from the date on which that obstacle to execution was removed. Actually the learned Subordinate Judge passed his order cancelling the order of 30th September 1926 only on 14th August 1933. In support of this contention, Mr. Srinivasa Ayyangar relies upon the case of *Rungiah Gounden & Co. v. Nanjappa Row*(1) and also *Ramineedi Venkata Appa Rao v. Lakkoju China Ayyanna*(2). He refers also to the Privy Council case of *Rameshvar Singh v. Homeshvar Singh*(3) and the decision of a Bench of this Court in *Mangamma Nayakuralu v. Ramadasappa Nayanimvary*(4). Mr. Srinivasa Ayyangar also mentioned the case of *Chhattar Singh v. Kamal Singh*(5), but we are unable to understand how that could have any application since it is not alleged by any party in this case that the execution of the decree has at any time been stayed by an injunction or an order. The other four cases also, so far as we can see, do not support Mr. Srinivasa Ayyangar's contention. The case reported as *Rungiah Gounden & Co. v. Nanjappa Row*(1) was a case in which on the date of the decree the decree was not executable at all. Therefore it was held that article 179, corresponding to the present article 182, was not applicable but article 178, now article 181, was applicable, the period of limitation being three years from the date on which the decree-holder got a right to execute the decree. The case of *Ramineedi Venkata Appa Rao v. Lakkoju China Ayyanna*(2) is somewhat similar. That

(1) (1903) I.L.R. 26 Mad. 780.

(3) (1920) 40 M.L.J. 1 (P.C.).

(2) (1906) I.L.R. 30 Mad. 209.

(4) (1924) 48 M.L.J. 563.

(5) (1926) I.L.R. 49 All. 276 (F.B.).

was a case in which a sale held in execution of a mortgage decree was set aside and the auction purchaser was given an order for refund of the purchase-money. It was held there that after the sale when the decree-holder was in possession of the purchase-money he could not proceed with the execution of the decree but that, when he was ordered to refund that purchase-money after the sale had been set aside, he got a right to execute the decree and could do so at any time within three years from the date of the order for refund of the purchase-money. The Privy Council case reported as *Rameshvar Singh v. Homeshvar Singh*(1) was another case in which on the date of the decree it was not capable of being enforced and their Lordships held that the period of limitation was three years under article 181 from the date on which the decree became enforceable. The case reported as *Mangamma Nayakuralu v. Ramadasappa Nayanimvary* (2) is similar to the case of *Ramineedi Venkata Appa Rao v. Lakkoju China Ayyanna*(3). The principle of these cases is apparently that when the decree on the date on which it is passed cannot be executed, but becomes executable on a later date, the decree-holder has three years from the date on which it becomes executable, article 181 being applied. But it is important to notice that in these cases no question arose as to the laches or delay on the part of the decree-holder and no such question could arise in these cases. That this is important is indicated by their Lordships of the Privy Council in *Rameshvar Singh v. Homeshvar Singh*(1). At

(1) (1920) 40 M.L.J. 1 (P.C.).

(2) (1924) 48 M.L.J. 563.

(3) (1906) I.L.R. 30 Mad. 209.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

page 6 their Lordships expressed themselves as follows :

“ They are of opinion that, in order to make the provision of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced. A decree so limited in its scope as that of the 27th July 1906 under consideration cannot, in their opinion, be regarded as being thus capable of execution. Under that decree Ekradeshvar was not made personally liable, nor did it extend to any portion of the estate of Janeshwar which was not in his hands. None of the estate came to his hands until after the decision of the Board in 1914. As to the ability of the appellant to have applied to enforce his claim when in August 1908 the Subordinate Judge decided that Ekradeshvar was entitled to recover possession against the widow, it is enough to point out that the High Court at Calcutta promptly stayed execution of this decision, and later on reversed it. Neither can their Lordships accede to an argument put forward by Counsel for the respondents that the decree against Ekradeshvar could be treated as a decree against the estate of Janeshwar, still less as one against that estate though not in the hands of Ekradeshvar. Their Lordships think that *the appellant has not been shown to have been responsible for the delay which has taken place in giving effect to his title*, which did not become complete until after the decision of this Board in 1914. They are of opinion that when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language, read with its context, refers only, as they have already indicated, to an order or decree made in such a form as to render it capable in the circumstances of being enforced.”

This point is emphasized by WALLACE J. in *Mangamma Nayakuralu v. Ramadasappa Nayanimvary*(1). Referring to the Privy Council case of *Rameshvar Singh v. Homeshvar Singh*(2), WALLACE J. points out :

“ Part of the circumstances which their Lordships considered relevant in that case was whether or not the

(1) (1924) 48 M.L.J. 563.

(2) (1920) 40 M.L.J. 1 (P.C.).

decree-holder was responsible for the delay which had taken place in giving effect to his title, that is, his right to execute.”

In the case which we are now considering, there was nothing in the decree itself which could prevent the decree-holder from applying for execution and for this reason the cases relied upon by Mr. Srinivasa Ayyangar do not assist him. These are all cases where the decree-holder could not apply for execution at all. In the present case, he could have applied for execution at any time after March 1924 and the delay from March 1924 to August 1932 was his own delay entirely. The delay was due to his own negligence or laches and not to any defect in the decree or to any circumstances connected with the decree which prevented him from putting in an application for execution. For this reason it seems to us that the application put in in August 1932 was very clearly barred by limitation and that it is not permissible for the decree-holder to rely upon the order of 30th September 1926 as giving him any fresh starting point for limitation. We are clearly of opinion that article 182 applies and that the decision of the learned Subordinate Judge is correct. Civil Miscellaneous Appeal No. 463 of 1933 must therefore be dismissed with costs.

[Portion of the judgment relating to Civil Miscellaneous Appeal No. 484 of 1933 is omitted as not being necessary for the purpose of this report.]

A.S.V.

JAGADISAN
PILLAI
v.
NARAYANAN
CHETTIAR.
—
BURN J.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

1935,
November 1.

THE PAPPANAICKENPALAYAMPUDUR RAMA VILAS
NIDHI, LIMITED, BY ITS SECRETARY
G. KUPPUSWAMI NAIDU (PLAINTIFF), APPELLANT,

v.

MINOR PERA NAICKEN BY GUARDIAN KRISHNAMA
NAICKEN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Insolvency—Official Receiver—Ex parte decree against—Gross negligence of Receiver in allowing passing of—Suit by creditors of insolvent for declaration that the decree is not binding upon them—Maintainability of—Application by Receiver to set aside ex parte decree—Dismissal of—Provincial Insolvency Act (V of 1920), sec. 56 (4) (c)—Effect of.

The sons of an insolvent, a Hindu, sued for partition of the family property. Neither of them was born or even conceived on the date on which the property of their father vested in the Official Receiver. The Official Receiver was impleaded as a defendant in that suit but he did not appear at the hearing with the result that the sons got a decree for partition which was obviously unsustainable on the merits. The Official Receiver filed an application for setting aside the *ex parte* decree but it was dismissed as having been filed out of time. Thereupon one of the creditors of the insolvent filed, with the leave of the Court, on behalf of all the creditors of the insolvent, a suit for a declaration that the decree in the partition suit was not binding upon the creditors. The Courts below found that the Official Receiver had been guilty of gross negligence but held that nevertheless the suit was not maintainable.

Held that the suit was maintainable.

The Receiver in bankruptcy in whom the property of the insolvent vests is in the position for all practical purposes of a trustee on behalf of the creditors, and if he negligently allows property to be usurped by others which ought to and might have been available for payment to creditors, any of the

* Second Appeal No. 491 of 1931.

creditors is at liberty to file a suit for the recovery of that property. RAMA VIL
NIDHI, LT

The fact that the Official Receiver put in an application v.
PERA NAICK under Order IX, rule 13, Civil Procedure Code, and that that application was dismissed is no bar to the maintainability of the suit.

The suit is not barred though the Provincial Insolvency Act itself, in section 56 (4) (c), provides a remedy for cases of gross negligence by the Official Receiver.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 188 of 1929 (before the Second Additional Sub-Judge) presented against the decree of the Court of the District Munsif of Coimbatore in Original Suit No. 45 of 1928 (before the First Additional District Munsif).

A. C. Sampath Ayyangar for appellant.

S. T. Srinivasagopalachari for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BURN J.—The facts of this case are very simple. I take the following statement of them from the order of VARADACHARIAR J. who referred this matter for disposal by a Bench :

“This second appeal arises out of a suit brought by a creditor of the third defendant to have it declared that a decree for partition which defendants 1 and 2 obtained in Original Suit No. 1466 of 1926 on the file of the Additional District Munsif's Court of Coimbatore against the fourth defendant, the Official Receiver of Coimbatore, is not binding upon the creditors. The plaintiff has been permitted to file the suit on behalf of all the creditors of the insolvent. Defendants 1 and 2 are the sons of the third defendant admittedly born after the property had vested in the Official Receiver by reason of the third defendant's insolvency. They nevertheless filed Original Suit No. 1466 claiming partition of the family property and the Official Receiver who was impleaded as a

RAMA VILAS
NIDHI, LTD.
v.
PERA NAICKEN.
BURN J.

defendant in that suit did not appear at the hearing, with the result that they got a decree for partition which is obviously unsustainable on the merits. The Official Receiver filed a belated application for setting aside the *ex parte* decree, pleading his forgetfulness in the midst of heavy work; but, as even this application was filed out of time, the Court dismissed the application. The creditors have accordingly filed this suit to have it declared that that decree which was the result of gross neglect on the part of the Official Receiver is not binding upon the estate."

The learned District Munsif dismissed the suit holding that the creditors could not file such a suit and that

"the remedy of the creditors who are aggrieved by the fraudulent or negligent conduct of the Receiver is to take proceedings against the Official Receiver under section 56 of the Provincial Insolvency Act."

The learned Subordinate Judge in appeal supported the decision of the learned District Munsif. He agreed that the Official Receiver had been guilty of gross negligence but held that the creditors must be bound by the result of the suit irrespective of the negligence of the Official Receiver.

The question for decision is whether this view taken by the learned Subordinate Judge is right or not. There is no decided case on this point so far as we have been able to ascertain. The learned Advocate for the appellant bases his argument mainly on analogies. It is quite clear that in the case of a minor, negligence on the part of the minor's next friend or guardian *ad litem* in a suit is on precisely the same footing as fraud or collusion. This was laid down in the case of *Punnayyah v. Viranna*(1) where SPENCER and RAMESAM JJ. held that

(1) (1921) I.L.B. 45 Mad. 425.

RAMA VILAS
NIDHI, LTD.
v.
PERA NAICKEN.
BURN J.

"a person who had been impleaded as a minor defendant represented by a guardian *ad litem* in a suit in which a decree was passed *ex parte* against him, can institute a suit to set aside the decree on the ground of gross negligence, apart from fraud or collusion of the guardian *ad litem* in not defending the suit properly on his behalf."

This decision was followed by PHILLIPS and ODGERS JJ. in *Moolaswami v. Tatayya*(1). ODGERS J. in that case said :

"I do not think that any good ground has been shown for distinguishing a case of gross negligence on the part of the guardian of the minor from that of fraud or collusion." There can be no doubt of the soundness of this principle.

In the case of trustees there is no doubt that fraud or collusion on the part of a trustee would be a good ground for a suit on behalf of the *cestuis que trust*, and there seems to be no good reason why the negligence of the trustee should not be on the same footing—*Vide* Lewin on Trusts, 13th Edn., page 982, where the author quotes Sir J. Jekyll :

"The forbearance of the trustees, in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust*, since at that rate it would be in the power of the trustees, either by doing or delaying to do their duty, to affect the right of other persons; which can never be maintained."

The Receiver in bankruptcy in whom the property of the insolvent vests is in the position for all practical purposes of a trustee on behalf of the creditors. It is difficult to see why, if the Official Receiver negligently allows property to be usurped by others which ought to and might have been available for payment to creditors, any of

(1) (1925) 51 M.L.J. 389.

RAMA VILAS
NIDHI, LTD.
v.
PERA NAICKEN.
BURN J.

the creditors should not be at liberty to file a suit for the recovery of the said property.

Mr. Srinivasagopalachari, who appears for the minor respondents, contended that no suit could be filed by a creditor in this case because the Official Receiver had put in an application under Order IX, rule 13, Civil Procedure Code, to have the *ex parte* decree set aside and that application had been dismissed. He relied upon the decision in *Puran Chand v. Sheodat Rai*(1) which was followed in this Court in *Yogamba Bai Ammani v. Arumuga Mudaliar*(2). These decisions we think are clearly not applicable. This is not a case of an attempt to file a suit by a person whose application under Order IX, rule 13, had been dismissed. Nor is it a suit based upon the same grounds as those alleged, or which might properly be alleged, in an application under Order IX, rule 13, Civil Procedure Code. As pointed out in *Pran Nath Roy v. Mohesh Chandra Moitra*(3) and *Khagendra Nath Mahata v. Pran Nath Roy*(4), a suit to set aside an *ex parte* decree on the ground of fraud and collusion or negligence is based upon far wider grounds than an application under Order IX, rule 13, Civil Procedure Code, and the fact that an application under Order IX, rule 13, has been dismissed is no bar to the maintainability of a separate suit.

Mr. Srinivasagopalachari contended further that the suit is barred because the Insolvency Act itself provides a remedy for cases of gross negligence by the Official Receiver. In section 56 (4) (c)

(1) (1906) I.L.R. 29 All. 212.

(3) (1897) I.L.R. 24 Cal. 546.

(2) (1916) 2 M.W.N. 63.

(4) (1902) I.L.R. 29 Cal. 395 (P.C.).

of the Provincial Insolvency Act it is laid down that where a Receiver appointed under this section

"occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him".

The contention is that where a remedy is thus provided in the Act itself a separate suit will not lie and Mr. Srinivasagopalachari relies upon the case of *Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board*(1). We are of opinion, however, that this reference to the principle enunciated in *Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board*(1) is very far-fetched. It was there held that, since in section 84 (2) of the Madras Religious Endowments Act it is provided that a trustee affected by a decision under sub-section 1 may within one year apply to the Court to modify or set aside such decision, but subject to the result of such application, the order of the Board shall be final, therefore a separate suit will not lie. The principle of that case is certainly not applicable here. It is quite impossible to say, for instance, whether the property of the Official Receiver would be sufficient to recoup the loss occasioned by his negligence in allowing the suit to be decreed *ex parte*, and, moreover, in a case like this, where it is perfectly clear that the whole of the insolvent's property ought to be available to the creditors, it is not reasonable to hold that a suit to recover that property is barred merely because the Official

RAMA VILAS
NIDHI, LTD.
v.
PERA NAICKEN.
BURN J.

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

RAMA VILAS
NIDHI, LTD.
v.
PERA NAICKEN.
BURN J.

Receiver might be punished for his negligence in another way. We would hold therefore that both the lower Courts were wrong in deciding that this suit was not maintainable.

On the merits there is no question whatever. The two minor defendants who were the plaintiffs in Original Suit No. 1466 of 1926 were neither of them born on the date on which the property of their father vested in the Official Receiver. In fact the elder of the two was not born till 26th November 1919 whereas the vesting order was passed on 23rd January 1919. It is therefore clear that the elder son was not even conceived on the date when his father's properties vested in the Official Receiver. The minors therefore could have no reasonable claim to a share in their father's property. This appeal is accordingly allowed and the plaintiff will get the declaration for which he prayed, with costs throughout to be paid by respondents 1 and 2.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

RANGACHARIAR AND NINE OTHERS (PLAINTIFFS 1 TO 10),
PETITIONERS,

1935,
October 18.

v.

J. RANGASWAMI AYYANGAR AND SIXTEEN OTHERS
(DEFENDANTS AND ELEVENTH PLAINTIFF), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Civil revision petition or appeal against a judgment—Later final judgment inter partes respecting same title during pendency of—Res judicata, if.

A suit to establish the title of the plaintiffs as nanja ayacutdars to the *vizhal* in a tank was dismissed on a finding against that title. After the decision of that suit in the trial Court and during the pendency of a civil revision petition preferred against the same, a decree was passed in another representative suit establishing the title of the nanja ayacutdars to the *vizhal* in the said tank and that decree was allowed to become final.

Held that the decree in the representative suit constituted the question of title *res judicata* even for the purpose of the civil revision petition.

There is nothing in the observations of the Full Bench in *Panchanada Velan v. Vaithinatha Sastrial*, (1905) I.L.R. 29 Mad. 333 (F.B.), to exclude from the operation of the rule of *res judicata* judgments coming into existence during the pendency of proceedings by way of appeal or revision, if such judgments are allowed to become final.

Mariamnissa Bibi v. Joynab Bibi, (1906) I.L.R. 33 Cal. 1101, 1106, 1116, 1117, relied upon.

PETITION under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise the decree of the

* Civil Revision Petition No. 1297 of 1931.

RANGACHARIAR
v.
RANGASWAMI
AYYANGAR.

Court of the District Munsif of Arni in Original Suit No. 279 of 1927.

O. P. Venkataraghavachari for petitioners.

A. C. Sampath Ayyangar for respondents.

JUDGMENT.

The only question of law arising in the case is the plea of *res judicata* raised on the strength of the compromise decree in Original Suit No. 534 of 1930 on the file of the District Munsif's Court of Tiruvattipuram. That was a representative suit and the decree therein establishes the title of the nanja ayacutdars to the *vizhal* in the suit tank. The District Munsif dismissed the present suit on a finding under issues 1 and 4 against that title. On behalf of the petitioners it has been contended that, as the decree in Original Suit No. 534 of 1930 has become final, it constitutes the question of title *res judicata* even for the purpose of this civil revision petition, though that decree was given only after the decision of this suit in the trial Court. The balance of authority is in favour of upholding the plea of *res judicata*; see *Mariamnissa Bibi v. Joynab Bibi*(1). Though the Full Bench decision in *Panchanada Velan v. Vaithinatha Sastrial*(2) approves of the case in *Abdul Majid v. Jew Narain Mahto* (3), the reasoning relates only to judgments in suits tried *together* and there is nothing in the observations of the Full Bench to exclude from the operation of the rule of *res judicata* judgments coming into existence during

(1) (1906) I.L.R. 33 Cal. 1101, 1106, 1116, 1117.

(2) (1905) I.L.R. 29 Mad. 333 (F.B.).

(3) (1888) I.L.R. 16 Cal. 233.

the pendency of proceedings by way of appeal or revision, if such judgments are allowed to become final. The findings of the first Court on the first issue and the fourth issue are accordingly set aside and that Court is directed to record a finding on those issues in accordance with the decree in Original Suit No. 534 of 1930 referred to above. The decree of the lower Court is set aside and the case sent back for disposal after dealing with issues 2 and 5. In the circumstances, I make no order as to the costs of this civil revision petition.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

MUHAMMAD GOSUKANI AND THREE OTHERS (FIRST PLAINTIFF, DEFENDANTS 1 AND 2 AND SECOND PLAINTIFF),
APPELLANTS,

1935,
October 18.

v.

MUHAMMAD SEKKA MARACAYAR AND ELEVEN OTHERS
(DEFENDANTS 3 TO 6, 8, 12, 13, 14 AND NIL), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), ss. 6 (6) and 130—
Ijaradar—Rent sale—Purchase of holding by ijaradar
at—Validity of—Effect of—Lease for fasli in which arrears
accrued—Expiry of—Sale of holding for rent arrears
after—Ijaradar's right of—Ijaradar continuing to be a
landholder at time of sale under a fresh valid lease.*

Where an ijaradar brings to sale for arrears of rent a holding comprised in his ijara and purchases it himself, the sale is not void on the ground that at such a sale there is

* Letters Patent Appeal No. 7 of 1934.

GOSUKANI
v.
SEKKA
MARACAYAR.

nothing for the landholder to purchase except the occupancy right of the tenant and that section 6, sub-section 6, of the Madras Estates Land Act forbids an ijaradar to purchase a right of occupancy in any land comprised in his ijara. What happens when an ijaradar purchases the land, as he might do under the provisions of section 130 of the Act, is that the defaulting tenant loses his holding, in which he held an occupancy right, while the ijaradar acquires the holding but without acquiring the occupancy right. Section 130 of the Act is not a general provision to which section 6, sub-section 6, is an exception. There is no necessary conflict between those two provisions.

An ijaradar is not debarred from bringing a holding to sale for arrears of rent merely because the lease held by the ijaradar for the fasli in which the arrears accrued has expired where he continues to be a landholder after the close of that fasli for a further period under another valid lease and is, at the time when the sale is held, a landholder within the meaning of the Act.

APPEAL under Clause 15 of the Letters Patent preferred against the decree of CURGENVEN J. passed in Second Appeal No. 35 of 1929 preferred to the High Court against the decree of the District Court of West Tanjore in Appeal Suit No. 231 of 1927 (Original Suit No. 23 of 1926) on the file of the Court of the District Munsif of Pattukottai.

R. Rajagopala Ayyangar for appellants.

K. S. Sankara Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the decision of CURGENVEN J. in Second Appeal No. 35 of 1929*. The facts need not be stated again. The points taken on behalf of the appellants are four in number.

* See footnote on page 784 *et seq.*

The first is based upon section 6, sub-section 6, of the Madras Estates Land Act. By that it is provided that

“a person holding land as an ijaradar or farmer of the rent shall not, while so holding, acquire otherwise than by inheritance or devise a right of occupancy in any land comprised in the ijara or farm.”

It is not disputed that when these holdings were brought to sale for arrears of rent the landholder was an ijaradar and that he bought them in for want of bidders. The argument is that at such a sale of the holdings under the provisions of the Madras Estates Land Act there is nothing for the landholder to purchase except the occupancy right of the tenant. Since section 6, sub-section 6, forbids an ijaradar to acquire a right of occupancy it is contended that the sales were void. We agree with CURGENVEN J. that this argument is not well-founded. There is no doubt that an ijaradar is a landholder for the purpose of the Madras Estates Land Act and section 130 expressly provides that

“a landholder who has brought to sale a ryot's holding or part thereof for an arrear may bid for or purchase the holding or a part thereof.”

We do not accept the contention that section 130 is a general provision to which section 6, sub-section 6, is an exception. We do not see any necessary conflict between these two provisions. It is quite true that under section 6, sub-section 6, an ijaradar cannot purchase a right of occupancy in any land comprised in his ijara. But the simple answer to this is that in the present case the ijaradar has never pretended to purchase the occupancy right. What he purchased is the

GOSUKANI
v.
SEKKA
MARACAYAR.
BURN J.

GOSUKANI
v.
SEKKA
MARACAYAR.
—
BURN J.

holding which is the sum-total of the ryot's interests in the land. By section 8 (1) of the Act it is provided that when

"the entire interests of the landholder and the occupancy ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a ryot, but shall hold it as a landholder."

This means that in such a case the landholder does not own the occupancy right in the land but nevertheless when he lets the land again to a ryot that ryot acquires an occupancy right by operation of law. As CURGENVEN J. has put it, when an ijaradar purchases the land, as he might do under the provisions of section 130,

"what happens is that the defaulting tenant loses his holding, in which he held an occupancy right, while the ijaradar acquires the holding but without acquiring the occupancy right."

We see no reason to differ from the view of the learned Judge on this point.

The second point is that a lessee cannot bring the holdings to sale after the expiry of his lease. This is concerned with items 1, 2 and 3 of the disputed lands. It is based upon the fact that the ijaradar held a lease for a single *fasli* (1320) and that the proceedings by which he purchased items 1, 2 and 3 in the sale were held after the expiry of *fasli* 1320. This point is sufficiently met in our opinion by the fact that the ijaradar continued to be a landholder after the close of *fasli* 1320 for a further period under another lease, the validity of which is not questioned. There is no doubt whatever that, at the time when the sales were held, the ijaradar was a landholder within the meaning of the Act. And we are not prepared to hold that,

merely because the lease for the *fasli* in which the arrears accrued had expired, he was therefore debarred from bringing the holdings to sale. On this point also we can find no reason to disagree with the decision of CURGENVEN J.

The third point also relates to items 1, 2 and 3 and is based upon the fact that the ijaradar's lease for *fasli* 1320 was an unregistered document. It is contended that the ijaradar was not in law a lessee at all since his lease deed, Exhibit XL, was unregistered. We do not see any force in this contention. Exhibit XL was a lease for one year only and therefore was not in our opinion necessarily registrable. This contention was as a matter of fact not raised in the plaint at all. It was raised only in the argument before the learned District Munsif. That it is a wholly academic contention is proved by the fact that the plaintiffs' father who was a ryot in *fasli* 1320 admitted that he had taken a patta from the ninth defendant in 1910 and 1911. Since the plaintiffs' predecessor in title accepted a patta from the ninth defendant it was not open to them to contend that the ninth defendant was not a landholder. In any case, even if Exhibit XL were considered to be a document required by law to be registered, we agree with the view of CURGENVEN J. that it was admissible in evidence to prove the nature of the transaction between the ninth defendant and his lessor. There was no dispute about the fact of delivery, and the existence of Exhibit XL could, we think, certainly be taken as evidence of an oral agreement in pursuance of which delivery was made. This point also therefore fails.

GOSUKANI
v.
SEKKA
MARACAYAR.
—
BURN J.

GOSUKANI
v.
SEKKA
MARACAYAR.
—
BURN J.

The fourth and last point is with regard to the extent of item 7, and we agree with the learned Judge that this was a mere question of fact and not a point of law. There was no question raised in the plaint with regard to the extent of item 7, the plaintiff had no case with regard to it until he saw the defendants' documents when he found that in the sale certificate the extent was given as 4 mahs and 86 kulis whereas the real extent of item 7 is '11 mahs and 98 kulis. The learned District Judge treated this as a mere mistake and CURGENVEN J. treated it in the same way, and we agree with them. There is no point of law connected with this item.

The result is that the Letters Patent Appeal fails and is dismissed with costs.

A.S.V.

Second Appeal No. 35 of 1929.

CURGENVEN J.—The main question for decision is whether the rent sales of the suit lands, whether for arrears of fasli 1320 or fasli 1321, were valid or void. If they were valid, or valid until set aside, article 12 of the Limitation Act will apply, and the plaintiffs' claim is barred. If they were void, the article applicable will be No. 142 and, as I have already held, the suit will be within time.

The learned District Judge has found that the sales were for arrears actually due, and that notice of them was given to the tenant; and Mr. Varadachariar does not wish to dispute these findings. He takes certain other points, which I will now consider.

The first point applies to all the eight items, and depends upon the fact that the lessee from the proprietor, who exercised the power of sale conferred by the Madras Estates Land Act, was an ijaradar or farmer of rent. It appears that there were no bidders for these holdings, and they were bought in by the ijaradar, as landholder, and subsequently regranted to the predecessors in title of the third and fourth defendants. The plea

raised depends upon the terms of sub-section 6 of section 6 of the Act, which runs as follows :—

“ A person holding land as an ijaradar or farmer of the rent shall not while so holding acquire otherwise than by inheritance or devise a right of occupancy in any land comprised in the ijara or farm.”

It is contended that, while such an ijaradar, as landholder, may sell the holdings in a rent sale under the Act to others, who thereby obtain an occupancy right in them, he cannot himself buy them, because what is sold is no more than the defaulter's occupancy right, which he cannot himself acquire. It appears to me that this is not a correct statement of the position. It is true that it is the general policy of the Act not to permit any person occupying the position of a landholder to acquire an occupancy right. The ordinary case is met by the terms of section 8 (1), which provides that, where a merger of interests would otherwise occur, the holder of these interests “ shall have no right to hold the land as a ryot, but shall hold it as a landholder ”. In the same way, the terms of section 6 (6) preclude an ijaradar, whether or not he be a “ landholder ”, from holding land as a ryot. If he is a landholder, his position, in this respect, is the same whether we apply to him section 6 (6) or section 8 (1), and if he cannot buy in land, no more can any other landholder. He can in fact buy it in as is expressly provided by section 130; but what happens is that the defaulting tenant loses his holding, in which he held an occupancy right, while the ijaradar acquires the holding, but without acquiring the occupancy right. He has the rights of a landholder over it, which include the right to dispose of it to another tenant who, when admitted to possession, obtains a permanent right of occupancy in it. If this view of the operation of the Act is correct, the objection has no foundation and I dissallow it.

The next point relates to items 1 to 3, which were sold for arrears of fasli 1320 by the ijaradar, Mahalinga Iyer. It is said that the lease granted to him by the proprietor was invalid, and that therefore he was not a landholder within the meaning of the Act, because, under clause 5 of section 3, a landholder, if not an owner, “ includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law ”, and if

the lease was invalid no transfer in fact took place. The facts are that he was granted a lease for one year by means of an unregistered lease deed which has been marked as Exhibit XL for identification, that he was given possession of the estate as landholder, and that the tenants attorned to him by accepting pattas and, in general, paying rent. In a deposition (Exhibit XIX) the plaintiffs' father stated that he had accepted pattas from Mahalinga Iyer. The fact of attornment has not been disputed. The question is whether the lease for this fasli is to be held valid upon the evidence afforded by this document and of delivery of possession.

Under section 107 of the Transfer of Property Act, a lease of this description may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The question is whether it may be taken to have been made by the latter of these two methods upon proof of an unregistered lease deed accompanied by delivery. The terms of section 54 of the Transfer of Property Act, with regard to sale, have given rise to a similar question—whether a sale of immovable property of value less than one hundred rupees can be effected by delivery under an unregistered document. The first point for consideration is whether the document, which under section 91 of the Evidence Act is alone admissible to prove the agreement between the parties, that is to say, the nature of the transaction under which possession was delivered, may be admitted for this purpose. I will refer first to a Bombay Case, *Dawal Piranshah v. Dharma Rajaram*(1), because in the view taken of it by a Full Bench of this Court, *Rama Sahu v. Gowro Ratho*(2), it appears to me to decide the whole question. The sale in question was for a sum of Rs. 40 and was effected by an unregistered deed of sale and delivery of possession. The learned Judges, BEAMAN and MACLEOD JJ., differed on the question whether the document could be adduced in evidence to show what was the character of the possession, BEAMAN J. holding against this view and MACLEOD J. in favour of it. The answer depended upon the construction to be placed upon section 4 of the Transfer of Property Act, which provides that sections 54 (2) and (3) and 107 of the Act are to be read as supplemental to the Registration Act. I need say no more here than that our Full Bench has ruled that

(1) (1917) I.L.R. 41 Bom. 550.

(2) (1920) I.L.R. 44 Mad. 55 (F.B.).

MACLEOD J.'s view was correct, and that the result is that a document of this description is not rendered inadmissible by section 49 of the Registration Act. If it is admissible, it is then for consideration what effect may be given to it. Being unregistered it is of course inoperative as a sale deed, but may it not be used to prove the oral agreement between the parties which, together with delivery, is sufficient to effect a sale? As I read the Bombay decision, both the learned Judges were of opinion that, once the question of admissibility was at rest, it would have this effect, and the sale so made would be valid. It is said that a contrary view has been taken by SRINIVASA AYYANGAR and ANANTAKRISHNA AYYAR JJ. in *Kuppuswami v. Chinnaaswami*(1). The former learned Judge does indeed say: "The expression 'sale by delivery of property' should properly be construed only as referring to and comprising a case where the parties agree that the transaction of sale should be effected by delivery of property and only in that way and cannot possibly be construed so as to include a case where the parties agree to reduce to the form of a document the terms of the sale. The moment the parties for some reason consider that it is not sufficient to effect the transaction of sale by mere delivery of property, but require that as evidence of such transaction there should be a deed or document, the transaction can scarcely be correctly described as one effected by mere delivery of property."

The expression "mere delivery of property" does not, of course, find place in section 54; and, with respect, I am unable to see why, if the property is such as may be sold by delivery, it is any the less so sold because the parties, upon agreeing to the sale, unnecessarily have recourse to the execution of a document. Nor am I able to understand why the incontestable proof afforded by such a document of an agreement between the parties may not be accepted as such. It is true that, in the case of a lease, section 107 speaks of an "oral agreement", but this only means, I take it, that, if the parties are shown to be *ad idem*, no writing is necessary. However, the decision of the case cited above really proceeded, I think, upon a different footing, that the plaintiff had set up a new case which could not be allowed. A Bench of the Patna High Court has held in *Keshwar Mahton v. Sheonandan Mahton*(2)

(1) A.I.R. 1928 Mad. 546.

(2) (1929) 122 I.C. 533.

that, where there is an unregistered sale deed followed by possession of land sold for less than Rs. 100, title will pass: "the defendants' title in this case is not based upon the unregistered sale deeds, which are used only as evidence of the transaction and of the contract between the parties evidencing the terms upon which the properties were conveyed to the defendants by delivery of possession." For these reasons I conclude that the lease for fasli 1320 was valid. This objection also therefore fails.

The next point also relates to items 1 to 3. It is urged that the sale of these items took place after the ijaradar's lease for that fasli had expired, so that he was not, so far as that lease went, a "landholder", within the meaning of section 111 of the Act, when the sale was held. One answer to this objection might be based upon the circumstance that a new lease was granted with effect from the expiry of the old one, and that it would be an unreasonably narrow construction of the Act to draw an impassable line between the landholder under the old lease and the landholder under the new. But the argument may, I think, be repelled upon grounds which are perhaps more acceptable to the legal theorist. The cognate question of the jurisdiction of a Revenue Court to try a suit for rent due to a landholder, even though the plaintiff had ceased to occupy that position at the date of his plaint, was decided in the affirmative by a Full Bench in *Venkata Lakshamma Garu v. Achi Reddi*(1), *SADASIVA AYYAR J.* expressing the view that the definition of "landholder" was wide enough to include a bare assignee of an arrear of rent from the owner. So here, by renewing the lease and leaving the collection of arrears under the former lease in the lessee's hands, the owner constituted him landholder for this purpose, and as landholder he was competent to avail himself of the power of sale under the Act.

The only remaining point relates to the extent of item 7 which passed under the rent sale. The District Munsif (paragraph 29 of his judgment) has found that the entire area of 11 mahs 98 kulis was sold, and that the smaller area of 4 mahs 86 kulis given in the delivery account (Exhibit X) and some other documents is a mistake. The learned District Judge (paragraph 7 of his finding) has, as I read his observations,

(1) (1921) I.L.R. 44 Mad. 433 (F.B.).

agreed with this view. The finding is one of fact, and is therefore final.

The result is that the appellants have failed upon all the points. I dismiss the second appeal with costs of the first, second and sixth respondents, to include the costs of the proceedings on remand.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

N. M. ROSHAN UMAR KARIM & CO. (PLAINTIFF),
APPELLANT,

1935,
December 2.

v.

THE MADRAS AND SOUTHERN MAHRATTA
RAILWAY CO., LTD., REPRESENTED BY ITS AGENT
(DEFENDANT), RESPONDENT.*

Negligence—Goods consigned under risk-note A—Goods charged at ordinary rates—Taking of risk-note A, if proper—“Misconduct”—Allegation of—Burden of proof—“Misconduct” in risk-note A—What amounts to—Indian Railways Act (IX of 1890), sec. 72, rr. 39, 1, 4, 41 and 42—Indian Contract Act (IX of 1872), sec. 151.

Some bags of goat and sheep skins were consigned under risk-note form A at a station on the M. & S.M. Railway Company's line to be delivered at another place. The goods were loaded along with jars of a certain acid known as formaldehyde and two of these jars broke and the goods were damaged with the result that they became useless. The consignee took delivery under protest and filed a suit for damages. It was contended on behalf of the consignee that (i) the taking of the risk-note A in the case under consideration where the company had charged ordinary tariff rates was illegal, since the

* Second Appeal No. 224 of 1932.

ROSHAN UMAR KARIM & Co.
v.
MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD.

risk-note A was intended to be taken only when the goods were consigned at the owner's risk, when the company charged less than the ordinary tariff rate, and, as such, the taking of the risk-note A should not exempt the railway company from liability, (ii) the railway company was guilty of "misconduct" in having loaded formaldehyde along with the skins, since formaldehyde was a dangerous and deadly poison coming within the meaning of dangerous goods, according to rule 34 of the rules issued by the railway company.

Held: (1) The taking of the risk-note A by the railway company was not illegal since there was nothing to preclude the railway company even when charging ordinary rates to take risk-note A with reference to a particular class of goods. (2) In fixing the responsibility on the railway servants for "misconduct" the burden of proving the same lay on the consignor. (3) The word "misconduct" is a relative term and the same appearing in the risk-note A has to be construed in relation to the consignor and the responsibility should be judged accordingly. "Misconduct" is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be) a particular thing or to persist in the act, failure or omission, or acts with carelessness. (4) In the circumstances of the case, the servants of the railway company were not guilty of "misconduct".

Case-law reviewed and discussed and the difference between English and Indian law pointed out.

APPEAL against the decree of the District Court of Trichinopoly in Appeal Suit No. 165 of 1930 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 55 of 1928.

T. V. Ramanatha Ayyar for appellant.

C. Krishnaswami Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

This is a suit to recover damages in the sum of Rs. 4,500 for damage done to 37 bags of goat and sheep skins consigned on 17th June 1927 by a firm of Messrs. B. Syed Sahib and Brothers at Cuddapah for delivery to the plaintiff firm at Trichinopoly. The consignment was sent under a risk-note form A. The case for the plaintiff is that, when the goods had to be transhipped at Arkonam on 20th June 1927, on opening the wagon it was found that the said skins were loaded along with four jars of a certain acid known as formaldehyde and as two of these jars had broken, the skins had become wet, that on 29th June 1927 the goods reached Trichinopoly, that, though open delivery was insisted on, the railway company declined to do so and the goods were taken delivery of, and when they were taken to the plaintiff's tannery and the tanning processes were commenced, it was found impossible to remove the hair from the skins and the goods had become valueless and therefore the plaintiff is entitled to recover damages. In paragraph 8 of the plaint the ground of attack was alleged thus :

"In consequence of the negligence of the servants of the defendant company in loading the bags along with dangerous and offensive chemicals, contrary to the rules, and in not taking proper care to prevent leakage of the jars, the plaintiff firm has sustained losses as detailed below."

The defence of the railway company is stated in paragraphs 7 and 9 of the written statement thus :

Paragraph 7.—

"Paragraph 8 is not admitted and is denied. There was no negligence as alleged on the part of this defendant or its servants. The jar contained only formaldehyde which is not

ROSHAN UMAR KARIM & Co.
v.
MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

classified as a dangerous combustible or inflammable article and there is no rule alleged requiring the same to be carried separately. The suit consignment was carried and dealt with when in custody of this defendant with all the care and caution required under law. Hence this defendant is not liable in the suit."

Paragraph 9.—

"Further, the consignment was booked under conditions, the risk-note form A, executed by the sender and subject to the remark in the railway receipt 'liable to dryage and damage' relieves the company from any liability whatsoever."

The learned Subordinate Judge who tried the suit was of opinion that formaldehyde comes within the designation of dangerous goods, that the company in violation of their rules loaded the goods in the same vehicle as ordinary goods and that the damage was caused by the jars containing formaldehyde having broken, that the railway company was not protected by the risk-note and that they were guilty of misconduct and the plaintiff was entitled to get a decree and accordingly gave a decree for a sum of Rs. 3,300. The learned District Judge on appeal also found that the plaintiff's skins were damaged and rendered substantially unfit for the purpose for which they were intended to be put by no other cause than the action of the formaldehyde which was spilt in the wagon in which they were being carried by the defendant company, that the solution in the jars contained full strength commercial formaldehyde which is really dangerous to the skins, but it is commonly known as an antiseptic and a disinfectant and it does not find a place in the schedule of dangerous goods prepared by the Indian Railway Conference Association, that the servants of the company are not

expected to have expert knowledge, that the goods traffic book not having classed formaldehyde as dangerous goods the servants of the railway company were not guilty of any negligence and therefore they were not guilty of any misconduct and the defendant company is therefore exempt from liability. On appeal before me Mr. T. V. Ramanatha Ayyar has raised the following contentions: (i) The risk-note form A was intended to be taken only when the goods are consigned at owner's risk, when the railway company charge less than the ordinary tariff rate, whereas in this case the company has taken the ordinary rate and, though the plaintiffs signed Exhibit A, it should not exempt the company from liability, and the taking of risk-note form A itself was illegal, and (ii) that the railway company was guilty of misconduct in having loaded formaldehyde along with skins, formaldehyde being a dangerous and deadly poison coming within the meaning of dangerous goods according to rule 34 of the rules issued by the railway company.

It was contended in answer that the fact that the ordinary rates were charged by the railway company does not preclude them from taking risk-note form A, and once that note had been executed the railway company is exempt from liability under section 72 of the Indian Railways Act except upon proof of misconduct as indicated in the note, that formaldehyde is not dangerous, and in any event the servants of the railway company were not negligent in the circumstances of this case, and there was no misconduct on the part of the railway servants to make the administration liable.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

In regard to the contention that the railway is not protected by risk-note form A, it is urged that rule 39 of the railway rules clearly indicates that the risk notes are intended to be taken only when the goods are carried at less than the ordinary rates and rule 39 runs ;

"Risk-notes. In all cases when goods or livestock are conveyed at the risk of the owner, or on the understanding that the risk accepted by the railway is limited to any extent below the full value of the consignment, or the several sums prescribed in the Indian Railways Act IX of 1890, the consignor is required to execute a risk-note, prior to acceptance for despatch, on one of the forms given in Appendix D. The forms have been sanctioned for use by the Governor-General in Council in accordance with the provisions of section 72 of the Indian Railways Act IX of 1890, and can be obtained at any goods booking station."

In my opinion the obligation of the railway company must be judged in the light of section 72 of the Act. Section 72 provides that the obligation of the railway administration is that of a bailee under sections 151 and 152 of the Contract Act and that an agreement to limit that responsibility is void unless it is (a) in writing signed by or on behalf of the person consigning animals or goods and (b) is otherwise in form approved by the Governor-General-in-Council. The section is plain and unambiguous and the railway company is protected from the ordinary responsibility of a bailee if these two conditions above mentioned are satisfied, and it is not disputed that the risk-note form A fulfils these two conditions. It is not permissible to import any other qualification or condition when the language of the Statute is plain. No doubt rule 39 indicates that ordinarily risk-notes ought to be taken when the goods are consigned at the risk of the owner and the rule says that the consignor is required to execute it

There is nothing to preclude the railway company even when charging ordinary rates to take risk-note A with reference to a particular class of goods. In fact the risk-note form A states that the form is to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. Even when ordinary rates are charged it is open to the railway company to consign it under risk-note form A if the goods are of the description mentioned therein. The very risk-note form A, Exhibit XI, signed by the plaintiff states: "Whereas the consignment of bags of goat and sheep skins is liable to damage. . ." It is contended by Mr. Ramana Ayyar that there is no question of the bad condition of the goods in this case, nor that the goods were defectively packed, so that the risk-note form A would not obviously apply to a case like this. He contends that, so far as wet goat and sheep skins are concerned, under the rules of the railway company, no special conditions of packing are required and the only condition required is as stated in the rules issued by the railway company as special conditions applicable to certain goods at page 636 :

"S. 4, only accepted for carriage if they have been stripped of all flesh and are free from any unpleasant smell. If loaded with hides and skins, the mixed consignment is charged at the rates applicable to 'hides and skins.' When carried in open wagon they must be protected by tarpaulins provided by senders. Railways do not allow the use of their sheets for such traffic."

On the other hand he says that the goods were packed in gunnies. To my mind defective packing does not necessarily mean packing not

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY Co.,
LTD.

according to conditions prescribed by the railway. "Defective" means "not perfect". Packing may be defective in the sense that the goods may be liable to damage, leakage or wastage.

The next question then arises whether the servants of the railway company are guilty of misconduct. It may be noticed that the word "misconduct" in the risk-note forms was substituted in 1924 for the words "wilful neglect, misappropriation, theft, etc." and the circumstances under which the form was changed were noticed by SUHRAWARDY J. in *The Bengal Nagpur Railway Co. v. Moolji Sikka & Co.*(1). The word "misconduct" has been variously interpreted by the learned Judges of the different High Courts. Three views have been taken—

(i) The view taken by GUHA J. in *The Madras and Southern Mahratta Railway Co., Ltd. v. Sundarjee Kalidas* (2):—

"It may be taken to be well settled now, that 'misconduct' is not necessarily established by proving even culpable negligence. Misconduct is something opposed to accident or negligence. It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be."

This was cited with approval by MADHAVAN NAIR J. in *The S.I.Ry. Co., Ltd. v. Dandayutham Chettiar*(3). This is also the view taken by the Patna High Court in *B.N.Ry. Co. v. Hukum Chand*(4), where JAMES J. says:

"I do not consider that there is any necessity for discriminating between the meaning of the term 'misconduct' in the new form and the term 'wilful neglect' in the old. . . . The reasonable view is to hold that the term

(1) (1930) I.L.R. 58 Cal. 585, 591, 592. (2) (1933) I.L.R. 60 Cal. 996, 1000.
(3) A.I.R. 1934 Mad. 715; (1934) 67 M.L.J. 704.
(4) A.I.R. 1930 Pat. 559, 561.

misconduct means 'wilful neglect' including *a fortiori* anything more culpable, and rendering it unnecessary to complicate the form unduly by mentioning theft, or criminal misappropriation or criminal breach of trust."

(ii) The view taken in *The Bengal Nagpur Railway Co. v. Moolji Sikka & Co.*(1) by SUHRAWARDY J. at page 592 *et seq* :

"The present risk-note is wider and more comprehensive in enlarging the liability of the railway than the old form of the English note . . . 'Misconduct' is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing or to persist in the act, failure or omission, or acts with carelessness. . . . The word 'misconduct' as used in the new risk-note B is wide enough to include wrongful commission and omission, intentional or unintentional—any act which it wrongfully did or which it wrongfully neglected to do, or, to put it in another way, did what it should not have done and did not do what it should have done. . . . I am not inclined to accept the view that 'misconduct' only refers to acts of gross or culpable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment, the word 'misconduct' denotes any unbusiness-like conduct and includes negligence or want of proper care which a bailee is to take under section 151, Indian Contract Act. The immunity, which the risk-note brings to the railway company, is by shifting the burden of proof."

This is the view which MITTER J. of the same High Court also took in *B.N.Ry. Co. v. Moolji Sikka & Co.*(2) and in *Secretary of State v. Dhokalmal*(3), and which was taken by another Bench in *The Bengal Nagpur Railway Co., Ltd. v. Moolji Sikka & Co.*(4). In a later decision of the Patna High Court, *Jamunadas v. E.I.Ry. Co.*(5), JWALA PRASAD J. observes:

(1) (1930) I.L.R. 58 Cal. 585. (2) A.I.R. 1929 Cal. 654.
(3) A.I.R. 1931 Cal. 734. (4) (1931) 54 C.L.J. 314.
(5) A.I.R. 1933 Pat. 630, 632.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY Co.,
LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

"The word used in those risk-notes is 'misconduct' and not 'wilful misconduct'."

A mere omission to do what is expected of a person to do constitutes "misconduct", whereas if such failure is directed to intentionally cause mischief or loss to any person, then it is called "wilful misconduct". The railway administration or its servants might not have intended to cause any damage to the plaintiff's consignment and with that object neglected to do their duty, but a mere neglect of duty will charge them with misconduct and will bring the case within the risk-notes. Apparently in a way this seems to have been the view of WALLACE J. in *M. & S.M.Ry. Co. v. Nallathambi Chetti & Co.*(1) where he says :

"Obviously something more has to be shown, namely, that responsible care and caution was not being used by the company or by their staff or that the staff was grossly insufficient for its purpose, so insufficient as to import negligence in the administration, or that as a matter of fact the staff was negligent and was not doing its proper duty."

(iii) The view taken by FAWCETT Ag. C.J. of the Bombay High Court in *M. & S.M.Ry. v. Jumakhram*(2) is as follows :

"In any case, the expression used in the present risk-note is 'misconduct' which does not ordinarily cover acts of negligence."

KEMP Ag. C.J. of the same High Court in *B. B. & C.I.Ry. v. Rajnagar Spinning Co.*(3) observes :

"I am not prepared to accept the test of the meaning of the word 'misconduct' as what a reasonable man would have done under the circumstances. I think the word suggests that a railway servant had been guilty of doing something which

(1) A.I.R. 1927 Mad. 908.

(2) A.I.R. 1928 Bom. 504.

(3) A.I.R. 1930 Bom. 129.

was inconsistent with the conduct expected of him by the rules of the company."

One thing is plain. The word "misconduct" cannot obviously mean the same as "wilful misconduct", an expression which is used in the English risk-note forms in England and on the construction of which cases in England were decided. In my opinion the same interpretation should not be adopted in construing the word "misconduct" in the risk-note form A. In *Lewis v. Great Western Railway Co.*(1) the distinction between "misconduct" and "wilful misconduct" is noticed. BRAMWELL L.J. observes at page 206 :

" 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful."

BRETT L.J. at page 211 observes :

"Care must be taken to ascertain that it is not only 'misconduct' but 'wilful misconduct' and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission." COTTON L.J. observes at page 213 :

"I do not think there can be any doubt at all that 'wilful misconduct' is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated."

In *City Equitable Fire Insurance Co., In re* (2) ROMER J. adopts the distinction thus laid down between "misconduct" and "wilful misconduct" in *Lewis v. Great Western Railway Co.*(1) [Vide also *Forder v. Great Western Railway*(3)]. In *Norris v. Great Central Railway Company*(4), where a railway company was charged with having allowed certain scenery to be carried in an

(1) (1877) 3 Q.B.D. 195.

(3) [1905] 2 K.B. 532.

(2) [1925] 1 Ch. 407, 433, 434.

(4) (1915) 114 L.T. 183.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

ROSHAN UMAR
KARIM & CO.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

open wagon they were held not liable and protected by the risk-note. LUSH J. observes :

"There was no evidence at all upon his case of any intentional wrong conduct on the part of the servants of the railway company. . . . Looking at the case as a whole I think it is a case simply of carelessness—it may be gross, it may be what one may call ordinary carelessness—but the evidence for the plaintiff and the evidence for the defendants in my opinion make no case whatever of anything beyond carelessness on the part of the company's servants. It is quite obvious, as I say, that that is not sufficient."

His Lordship by the use of the word "intentional" in interpreting "wilful misconduct" clearly seems to indicate that "misconduct" is wrong conduct, and simple carelessness, though it was established in that case, would not come under the term "wilful misconduct". Thus it will be seen that the English cases lay stress on the word "wilful". From that standpoint even culpable negligence or gross negligence would not be misconduct. So the interpretation placed in *The Madras and Southern Mahratta Railway Co., Ltd. v. Sundarjee Kalidas*(1) by GUHA J., which is based on English cases, is not sound and should not be adopted in the interpretation of the word "misconduct" in the risk-note form A. The word "misconduct" is a relative term and occurs in various Acts, for example, in the Arbitration Act, the Legal Practitioners' Act and in a number of other Acts. It has to be construed with reference to the subject-matter and the context wherein the term occurs having regard to the scope of the Act which is being construed. "Misconduct" literally means "wrong conduct" or "improper conduct". For example, in construing the word "misconduct"

(1) (1933) I.L.R. 60 Cal 996.

in the English Arbitration Act, TINDAL C.J. observes in *In re Hall and Hinds*(1) :

"The mistake and act of carelessness is so gross as to amount, though not in a moral point of view, yet in the judicial sense of that term, to 'misconduct' on the part of the arbitrators. *Lata culpa* or *crassa negligentia*, both by the civil law and our own, approximates to, and in many instances cannot be distinguished from, *dolus malus* or 'misconduct'."

In *Moore v. The High Bailiff of Brompton County Court*(2) a question arose whether a high bailiff of a county Court was guilty of misconduct in having sold in execution of a judgment goods which were found to be implements of the debtor's trade within the meaning of the term as used in section 50 of the County Courts Act, 1888, and it was held that he was not guilty of "misconduct", and in selling the goods he did not do it with a wrongful intention though he might be guilty of error of judgment or negligence. In *Re Hill*(3), where an attorney acting as a clerk for a firm of attorneys was suspended for misappropriation of moneys received by him as balance of purchase-money in completing a sale, it was held that, though the misconduct was not strictly committed in his profession, it was misconduct which would prevent him from becoming an attorney, and BLACKBURN J. said :

"It always should be considered whether the particular wrong done is connected with the character of attorney."

The word "misconduct" in the risk-note should therefore be construed in relation to the consignor and the responsibility judged accordingly. In my opinion the correct view is that

(1) (1841) 2 M. & G. 847, 852; 133 E.R. 987.

(2) (1893) 69 L.T. 140.

(3) (1868) L.R. 3 Q.B. 545.

ROSHAN UMAR
KARIM & CO.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

laid down by SUHRAWARDY J. and I agree with him that the present risk-note is wider and more comprehensive in enlarging the liability of the railway than the old form or the English note, and also with the definition of misconduct given by him namely :

“ ‘ Misconduct ’ is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be) a particular thing or to persist in the act, failure or omission, or acts with carelessness.”

Judged by this test it will have to be seen whether in the present case the servants of the railway company were guilty of misconduct. The charge levelled is that at Cuddapah the wet skins were loaded in a wagon which contained formaldehyde. This again depends upon the fact whether formaldehyde comes under the designation of dangerous goods, and in so loading the servants of the railway company acted negligently in such a manner as to make their act amount to “misconduct”. The railway company have published rules in regard to explosives and other dangerous goods which they undertake to carry. Section 47 of the Railways Act provides that the railway company is empowered to make general rules for declaring what shall be deemed to be, for the purposes of the Act, dangerous or offensive goods, and for regulating the carriage of such goods. Under section 54 the railway administration may impose conditions not inconsistent with the Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. Rules have been framed by

the railway company in regard to the carriage of explosives and other dangerous goods.

Rule 1 says :

“ No explosives or other dangerous goods, except those provided for in Schedules I and II with conditions of carriage will, under any circumstances, be accepted for conveyance by rail.”

Rule 4 says :

“ For the purposes of section 59 of the Indian Railways Act, 1890, the commodities mentioned in Schedules I and II are hereby declared to be dangerous goods.”

It may at once be stated that formaldehyde is not one of the commodities mentioned in Schedules I and II. Rule 36 gives the definition of dangerous goods under which it is stated that dangerous, corrosive and poisonous chemicals also will be dangerous goods.

Rule 41 says :

“ Maximum quantity which may be despatched. There is no restriction as to the maximum quantity of dangerous goods other than explosives which may be despatched by goods train, but such goods shall be loaded in covered iron vehicles.”

Rule 42 says :

“ Dangerous goods must not be loaded in the same vehicle as ordinary goods.”

It will thus be seen that formaldehyde is not classed under dangerous goods either in Schedule I or Schedule II. It is admitted in this case that formaldehyde was despatched from Bombay in an ordinary wagon intended to carry all items of goods and the railway servants at Cuddapah could not ordinarily be expected to know that formaldehyde would be dangerous goods, either from the classification contained in the rules published by the railway company or

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHRATTA
RAILWAY CO.,
LTD.

ROSHAN UMAR
KARIM & Co.
v.
MADRAS AND
SOUTHERN
MAHARATTA
RAILWAY Co.,
LTD.

from the manner or method of carriage when the said goods arrived at Cuddapah. It is contended that formaldehyde of the full percentage is dangerous. But formaldehyde is also an antiseptic and a good preservative for hides in a weak solution and improves the tanning. So formaldehyde is only relatively dangerous. In fixing the responsibility on the railway servants for "misconduct", it is well settled the burden of proving "misconduct" under the risk-note is on the consignor. There is nothing on the record to show that the servants at Cuddapah who actually loaded the wet skins in the carriage containing formaldehyde must reasonably have been aware that the formaldehyde which was in the wagon was of the full strength and dangerous in the sense that they should not be loaded along with it. Giving the interpretation of the word "misconduct" as including negligence as indicated by SUHRAWARDY J. it cannot be said that the railway servants at Cuddapah who were responsible for the loading of the goods failed to take any care which was expected of them and necessary in the circumstances of this case. Therefore, on the evidence on record it cannot be said that the servants of the railway company were guilty of "misconduct" and the defendants are therefore not liable for damages.

In the result the second appeal fails and, having regard to the circumstances of this case, I direct each party to bear his or their own costs in this second appeal and the appellant to pay half the costs of the respondent in both the lower Courts.

Solicitors for respondent: *King & Partridge.*

G.R

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

KANTHIMATHI AMMAL (SECOND DEFENDANT), APPELLANT,

v.

GANESA IYER, INSANE, BY HIS WIFE AND NEXT FRIEND
PICHAMMAH (PLAINTIFF), RESPONDENT.*

1935,
August 5.

Code of Civil Procedure (Act V of 1908), O. XLIV, r. 1 proviso
—Leave to appeal in forma pauperis—Application for—
Rejection of—Hearing of applicant prior to—Failure—
Illegality, if—Court-fee—Allowing of time to applicant
for payment of, on rejecting application—Discretion of
Court as to—Rejection of appeal on ground of rejection of
application for leave to appeal in forma pauperis—Appeal
from—Competency of.

An appeal lies against the rejection of an appeal on the ground that the application for leave to appeal in *forma pauperis* was refused.

Ayyanna v. Nagabhooshanam, (1892) I.L.R. 16 Mad. 285,
Zamindar of Tuni v. Bennayya, (1898) I.L.R. 22 Mad. 155,
and *Saminatha Ayyar v. Venkatasubba Ayyar*, (1903) I.L.R.
27 Mad. 21, referred to.

The prevailing practice is undoubtedly to give the pauper appellant an opportunity of arguing that the decree against which he wishes to appeal in *forma pauperis* is unjust and contrary to law and, on the Court coming to an adverse conclusion on a pauper application, to give the appellant some time in which to pay the court-fee. But a Court does not act illegally if it disposes of an application for leave to appeal in *forma pauperis* in a summary manner without hearing the applicant and without giving him time for payment of the deficient court-fee.

In re Paramasivam Pillai, (1915) 28 I.C. 957, referred to.

SECOND APPEAL against the decree of the District Court of Trichinopoly dated 10th February

* Second Appeal No. 768 of 1933.

KANTHIMATHI
AMMAL
v.
GANESA
IYER.

1933 and made in Serial Register No. 322 of 1933 (Original Petition No. 12 of 1933) preferred against the decree of the Court of the District Munsif of Trichinopoly in Original Suit No. 415 of 1931.

A. V. Narayanaswami Ayyar and V. Natesan for appellant.

K. Bhashyam Ayyangar for respondent.

JUDGMENT.

This appeal is preferred against the rejection of an appeal on the ground that the petition for leave to appeal in *forma pauperis* was refused. A preliminary objection is taken that no appeal lies. It seems to me that this objection must fail. Although in terms the learned District Judge's order is merely a rejection of the application to appeal in *forma pauperis*, it is in fact a rejection of the appeal itself and following the line of decisions of this Court, *Ayyanna v. Nagabhooshanam*(1) *Zamindar of Tuni v. Bennayya*(2) and *Saminatha Ayyar v. Venkatasubba Ayyar*(3), I must hold that the rejection of an appeal for a preliminary defect is a decree within the definition in section 2 of the Civil Procedure Code.

The order of the learned District Judge is in the following terms :

"I have carefully read this judgment and the appeal memo. I see no reason to think that the decree is contrary to law or erroneous or unjust. This application is therefore rejected."

The Vakil, who appeared for the appellant in the District Court, has filed an affidavit to the effect that this order was passed in chambers without hearing the appellant or his Vakil and

(1) (1892) I.L.R. 16 Mad. 285.

(2) (1898) I.L.R. 22 Mad. 155.

(3) (1903) I.L.R. 27 Mad. 21.

KANTHIMATHI
AMMAL
v.
GANESA
IYER.

without giving an opportunity to pay court-fee. For the disposal of this appeal I assume these allegations to be correct, though they are not admitted by the respondent to be quite accurate. It is argued that this summary procedure is not only contrary to the usual practice of the Court but is illegal. There is no difficulty in finding that the alleged procedure is unusual. The general practice of this Court and of appellate Courts in the mofussil is to give the pauper appellant an opportunity of arguing that the decree against which he wishes to appeal in *forma pauperis* is unjust and contrary to law. It is also undoubtedly the practice of most Courts, on coming to an adverse conclusion on a pauper application, to give the appellant some time in which to pay the court-fee. But the mere fact that this is the usual practice is not in my opinion sufficient to make it law.

On the question of the necessity of hearing a pauper appellant before rejecting his appeal, Order XLIV, rule 1, is in terms opposed to the prevailing practice. The proviso to rule 1 says :

"Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary etc."

This proviso contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of rejection. I am fortified in the view that no hearing is legally necessary by the ruling in the case of *In re Paramasivam Pillai*(1).

As to the supposed obligation to give a pauper appellant time to pay court-fee, not only does this procedure involve the assumption that a man

(1) (1915) 28 I.C. 957.

KANTHIMATHI
AMMAL
v.
GANESA
IYER.

who has falsely alleged himself to be unable to pay court-fee should be given time to pay it, but it also involves the assumption that the provisions of section 149 of the Civil Procedure Code under which the Court may *in its discretion* allow a person to pay a deficient court-fee do not mean what they say. If the Court has discretion to allow time, surely it also must have a discretion to disallow time, and the argument that a discretion to grant an indulgence implies an obligation to grant that indulgence seems to me to be meaningless. In this view I hold that the lower appellate Court did not act illegally if it disposed of this application in chambers as alleged by the appellant in a summary manner without hearing the applicant and without giving time for payment of the deficient court-fee. I must however guard myself against any indication of disapproval of the present practice whereby in such matters pauper applicants are usually heard. The appeal is therefore dismissed with costs.

A.S.V.

PRIVY COUNCIL.

SRIMATH DAIVASIKHAMANI PONNAMBALA
DESIKAR AND ANOTHER, APPELLANTS,

v.

PERIYANAN CHETTI AND ANOTHER, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Indian Limitation Act (IX of 1908), art. 144—Alienation of temple lands—Permanent cowle—Payment of rent—Adverse possession.

In 1865 the then manager of a temple granted a permanent cowle of temple lands, including the suit lands, to two Chettis. The cowledars continued in possession under successive managers and began to sublet portions of the cowle lands from 1897.

N succeeded to the managership of the temple in 1902 and was substituted as plaintiff in suits then pending, which had been instituted by his predecessor in 1900 for the ejectment of certain sub-lessees of the cowledars (not the present defendants) as trespassers. The suits were dismissed on the ground that the permanent cowle subsisted.

N was removed from the managership of the temple by a decree of the High Court in 1913, which was confirmed on appeal to the Privy Council in 1920.

In 1917 a receiver was appointed to take charge of the temple properties and in 1918 he instituted the present suits against sub-lessees of the cowledars for a declaration that the cowle of 1865 was invalid, and for possession.

The defendants, *inter alia*, pleaded adverse possession. There was evidence of payment of rent to the temple by the cowledars in 1908-09 and 1912-13.

Held, that the proper inference to be drawn from the facts was that N accepted the rent as payable in respect of a permanent cowle which it was no longer in the power of the temple to repudiate, and not in respect of a new tenancy which

J.C.*
1936,
March 24.

* *Present* : Lord THANKERTON, Sir SHADI LAL and Sir GEORGE RANKIN.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.

it was within his power to create, and that the suits were therefore barred under article 144 of the Limitation Act.

The principles laid down in *Vidya Varuthi v. Balusami Ayyar*, (1921) L.R. 48 I.A. 302; I.L.R. 44 Mad. 831, applied. *Mahomed v. Ganapati*, (1839) I.L.R. 13 Mad. 277; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, (1899) L.R. 27 I.A. 69; I.L.R. 23 Mad. 271; *Damodar Das v. Lakhan Das*, (1910) L.R. 37 I.A. 147; I.L.R. 37 Cal. 885; *Subbaiya Pandaram v. Mahammad Mustapha Maricar*, (1923) L.R. 50 I.A. 295; I.L.R. 46 Mad. 751, and *Mahanth Ram Charan Das v. Naurangi Lal*, (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251, referred to.

CONSOLIDATED APPEAL (No. 75 of 1934) from decrees of the High Court (September 2, 1931) which reversed decrees of the Subordinate Judge of Ramnad (February 25, 1924) and affirmed decrees of the District Munsif of Devakottai (December 20, 1920).

The material facts are stated in the judgment of the Judicial Committee.

Upjohn K. C. and *Chinna Durai* for appellants.—The only question is the question of limitation. The action was brought on the ground that the lease was void as the manager was incompetent to grant it. The Courts below have found it was not for the benefit of the temple. The question of limitation does not turn on the language of the statute, but on the position of the Chettis as tenants. The defendants set up a permanent lease. A person claiming a permanent tenancy under a lease at rent, being in possession and paying rent, cannot acquire title by adverse possession. Further, a lease granted by the manager of a religious institution which is not for the benefit of the institution but is followed by possession and payment of rent by the lessee is not void *ab initio* but is good for the life or during the office of the manager who granted it. Any succeeding manager by accepting rent creates a new tenancy and there is no adverse possession during that time. [Reference was made to *Muhammad Mumtaz Ali Khan v. Mohan Singh*(1),

(1) (1923) L.R. 50 I.A. 202, 209; I.L.R. 45 All. 419.

Madhavrao Waman v. Raghunath Venkatesh(1), *Nainapillai Marakayar v. Ramanathan Chettiar*(2), and *President and Governors of Magdalen Hospital v. Knotts*(3).]

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.

[SIR SHADI LAL: Cannot a person prescribe for a lesser right than ownership in land?]

Rent was paid not only to the original grantor but to his successors.

There is no distinction as regards powers between the manager of a mutt and the manager of a temple: *Vidya Varuthi v. Balusami Ayyar*(4), *Mahanth Ram Charan Das v. Naurangi Lal*(5), *Mahomed v. Ganapati*(6), *Greedharee Doss v. Nundokisore Doss*, *Mohunt*(7), *Kailasam Pillai v. Nataraja Thambiran*(8), *Muthusamier v. Sree Sreemethanithi Swamiyar*(9), *Abhiram Goswami v. Shyama Charan Nandi*(10) and *Prosunno Kumari Debya v. Golab Chand Baboo*(11). The payment of rent by the Chettis is not evidence of adverse possession under the cowle. The rent is paid under a new tenancy.

Dunne K. C., *Sidney Smith* and *V. Ramaswami Ayyar* for respondents.—*Vidya Varuthi's* case (supra) must be read as dealing with the facts of that case. Here rent was paid for fifty years under the lease. That was an assertion of a right under the lease—an assertion of adverse possession. The lease, if void, would be void from the date of the lease, but the grantor cannot turn out the lessee during his life. His successor does not derive from his predecessor and may challenge the lease. The receipt of rent by the succeeding manager, without anything more, cannot be construed as the grant of a new lease by him for his life. The tenant pays under the original lease. Paying under the original lease, adverse possession begins to run against the succeeding manager from the death of the grantor. The facts must be looked at from the tenant's point of view. [*Mahanth Ram Charan Das v. Naurangi Lal*(5) and

- (1) (1923) L.R. 50 I.A. 255; I.L.R. 47 Bom. 798.
(2) (1923) L.R. 51 I.A. 83; I.L.R. 47 Mad. 337.
(3) (1879) 4 App. Cas. 324, 335.
(4) (1921) L.R. 48 I.A. 302; I.L.R. 44 Mad. 831.
(5) (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251.
(6) (1889) I.L.R. 13 Mad. 277. (7) (1867) 11 M.I.A. 405.
(8) (1909) I.L.R. 33 Mad. 265 (F.B.). (9) (1913) I.L.R. 38 Mad. 356.
(10) (1909) L.R. 36 I.A. 148; I.L.R. 36 Cal. 1003.
(11) (1875) L.R. 2 I.A. 145; 23 W.R. 253.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.

Subbaiya Pandaram v. Mahammad Mustapha Maricar(1) were referred to.]

If the plaintiff is relying on a new tenancy, it is for him to show when and how the new tenancy arose. The suits of 1900 were instituted on the strength of a new lease granted by Thandavaraya to Raman. That was a repudiation of the original cowle.

In the case of a dharmakarta of a temple, the alienation is void *ab initio*. In *Lalchand Marwari v. Mahant Ramrup Gir*(2) the question was left open. In *Srinivasa Moorthy v. Venkata Varada Aiyangar*(3) the question turned on whether the property was personal property. *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(4) was approved in *Srinivasa Chariar v. Evalappa Mudaliar*(5).

There can be prescription for a limited interest: *Sankaran v. Periasami*(6), *Parameswaram Mumbannoo v. Krishnan Tengal*(7), *Narsaya Upada v. Venkataramana Bhatta*(8), *Thakore Fatesingji v. Bamanji A. Dalal*(9) and *Icharan Singh v. Nilmoney Balidar*(10).

Upjohn K.C. in reply: The cowle was good till the death of the grantor. Tenancy from year to year would be presumed from payment of rent. So long as that tenancy continues there can be no adverse possession.

Dunne K.C. replied on the question of the presumption of a yearly tenancy.

SIR GEORGE
RANKIN.

The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—Eleven appeals are before the Board. Twelve ejectment suits were brought on 25th November 1918 by a receiver appointed to manage certain Hindu temples and their endowments. One of these temples is dedicated to a deity, Sri Subrahmanyaswami, at a village called Kunnakudi, and to this temple

(1) (1923) L.R. 50 I.A. 295; I.L.R. 46 Mad. 751.

(2) (1925) L.R. 53 I.A. 24; I.L.R. 5 Pat. 312.

(3) (1911) L.R. 38 I.A. 129; I.L.R. 34 Mad. 257.

(4) (1904) I.L.R. 27 Mad. 435, 455.

(5) (1922) L.R. 49 I.A. 237; I.L.R. 45 Mad. 565.

(6) (1890) I.L.R. 13 Mad. 457. (7) (1902) I.L.R. 26 Mad. 535.

(8) (1912) 23 M.L.J. 260. (9) (1903) I.L.R. 27 Bom. 515.

(10) (1908) I.L.R. 35 Cal. 470.

belongs the village Uyyakondan part of which is a hamlet which goes by the name Murugan Endal. In 1865 the then manager of the temple granted a perpetual lease or cowle of Murugan Endal at a rent of Rs. 20 per annum to two Chettis called Palaniappa and Subrahmanyam, the lessees professing to act with the intention of dividing the profits of the land equally between two Chetti temples. The plaintiff in the present suits claimed (*inter alia*) that on his becoming entitled by his appointment as receiver to the management of the Kunnakudi temple, the lease of 1865, even if binding theretofore upon the temple and its managers, ceased to have any validity or effect. Eleven of the suits reached the High Court of Madras on second appeal and were dismissed. The defendants were sued as persons who had taken title by sub-leases under the cowle of 1865 but in none of the suits has the plaintiff impleaded the persons in whom the leasehold interest created in 1865 is vested.

It would appear that the persons who direct the affairs of the two Chetti temples have for some years past provided the rent reserved by the cowle and possessed the lands. The manager who granted the cowle is said to have died in 1875 but the history of the Kunnakudi temple and its affairs has not been properly proved. Between him and Arumuga there may have intervened one or more managers. Arumuga died in 1893 and was succeeded by Thandavaraya who died in 1902. From 1902 until he was removed by decree of the High Court of Madras in 1913, one Nataraja was, the *de facto* manager. The plaintiff was appointed receiver on 31st March 1917.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

In or about 1897 the managers of the two Chetti temples who were in possession of Murugan Endal as cowledars began to alienate portions thereof for building purposes and since that date a considerable number of buildings have been erected thereon though not upon the land of the defendants to the present suits.

Thandavaraya, having come to hear of the building and having visited the village in 1898, brought seven suits in 1900 against persons claiming to hold portions of Murugan Endal from the cowledars. The present defendants or their predecessors in title were not among the persons then sued. Of the seven suits four were compromised, but in the other three the judgments of the Subordinate Judge, the District Judge and the High Court have been put in evidence in the present case. These documents show that the persons in whom the lease—hold interest of 1865 was vested were not impleaded, but only certain grantees from them of portions of the land. Also that Thandavaraya had purported on 1st September 1899 to grant to one Raman Chetti (co-plaintiff in the suits) a lease of the whole village of Uyyakondan and another village as well. The suits were not brought upon the footing that the cowle of 1865 was void or was no longer binding: the averment was that the defendants without any right, title or interest wrongfully entered on the suit land in February 1900 and began to raise buildings in spite of the plaintiff's objection. The defendants by their written statements pleaded (*inter alia*) the cowle of 1865 and also that the two Chetti temples had acquired the ownership of Murugan Endal by adverse possession and had sold sites for building

purposes to the defendants in 1897; that the plaintiffs had known of this all along and had consented to the defendants erecting the buildings.

From the judgment of the Subordinate Judge it would appear that the plaintiffs' objection to this averment of title by the defendants was not that the cowle of 1865 was bad as being a permanent interest granted for a fixed rent, but (a) that it was granted for agricultural purposes only and (b) that the defendants had not taken registered documents for their purchases thereunder. It appears from the judgment of the District Judge that there was, or was thought to be, a difficulty in that the cowle of 1865 was not registered: the counterpart, however, may be proved, although not registered, under the law obtaining in 1865.

The Subordinate Judge in 1902 considered that under the cowle there was no right to erect buildings but that in view of the delay no injunction could be granted. He gave Rs. 2,000 in each case as damages but refused to give the plaintiff possession, "because he has let it under permanent cowle to the persons under whom the defendants claim". The District Judge in 1903 dismissed the suits altogether, holding that even if the defendants were trespassers they could not be ejected by the plaintiffs, "unless plaintiffs can prove that they are entitled to possession; and this they are not entitled to so long as the lease to Palaniappa Chetty and Subrahmanyam Chetti subsists". Shortly before the judgment of the Subordinate Judge was delivered on 16th April 1902, Thandavaraya had died and Nataraja was brought on the record in his stead, and was a party to the proceedings before the District Judge. Raman

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.

SIR GEORGE
RANKIN.

Chetti alone, however, appealed to the High Court and that only in one of the three suits. In March 1907 this appeal was withdrawn.

There is in the evidence in the present case no information whatever as to whether, during the pendency of these suits of 1900, the rent reserved by the cowle of 1865 was being paid by the persons acting for the Chetti temples or was being refused by Thandavaraya. The cowledars were not parties to the suits.

Save for his entry upon the last scenes of this litigation there is no evidence of any actings by Nataraja, save that Periyanan Chetti, the first witness for the defendants in the present case, gives evidence that in 1908-9 and again in 1912-13, when he was acting for one of the two Chetti temples, he caused the rent of Rs. 20 under the cowle to be paid. It was paid by the monigar of the Chetti temple to the man who came to collect it—no doubt in ordinary course.

After the original plaintiff in the suits now before the Board was appointed receiver in 1917, he issued in January 1918 a notice or notices stating that

“the trustee has no authority to grant a perpetual cowle in respect of trust properties without any necessity, against the interest of the trust, for an improper consideration and for an inadequate tirwa. The said cowle will not be binding upon me. Further, ownership right is set up in the cowle lands contrary to the terms of the cowle, the buildings, etc., are raised thereon in violation of the agreement for the cultivation thereof. . . . Hence I cancel the said cowle through this notice.”

The notice goes on to demand possession of “the said lands” within one month from the date of receipt of the notice.

So far as appears, this is the first intimation of any intention on the part of the Kunnakudi temple or its manager to treat the cowle of 1865 as cancelled or determined. Their Lordships notice that from the reported case of *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(1) it would appear that Nataraja in a suit of 1905, as manager of this same temple, succeeded before this Board in March of 1917 in having set aside a permanent cowle in respect of lands not now in suit granted by his predecessor in 1897.

Nataraja having been declared by the Board in June of 1920 to have no right to be manager of the temple, the persons entitled, Annamalai, and on his death Ponnambala, were added as plaintiffs in the present cases before they were heard by the High Court.

In the present suits, before the trial Court and the Subordinate Judge as well as before the High Court on second appeal, the plaintiffs claimed relief not only on the ground that the cowle was no longer binding but also on the ground of forfeiture, by reason that the defendants were erecting buildings on the land contrary to the intention of the cowle. The latter contention was, however, abandoned before the Board who are concerned only with the claim for possession in respect that the permanent interest granted by the cowle is invalid and not binding upon the plaintiff or the temple.

To this claim the sole defence is limitation under article 144 of the First Schedule to the Limitation Act (IX of 1908).

(1) (1917) I.L.R. 40 Mad. 709 (P.C.).

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
SIR GEORGE
RANKIN.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

The High Court has held that the Limitation Act has to be applied to these suits on the footing that the cowle of 1865 was void from the commencement, not being valid even for the life-time or tenure of office of the manager who granted it. It is matter of decision that in the case of the head of a math a permanent lease granted or an alienation by sale made by him is valid during his tenure of office; *Vidya Varuthi v. Balusami Ayyar*(1) and *Mahanth Ram Charan Das v. Naurangi Lal*(2). But it is contended that the manager or dharmakarta of a temple (which is really the present case) is in a different position, as he has, substantially speaking, no personal interest or right in the income of the temple properties but only the right or duty to apply them properly for the purposes of the idol. Accordingly, it is said, a permanent lease granted by him is altogether bad, and adverse possession runs from the date of the lease.

Their Lordships cannot accept this conclusion. It is clear that a permanent lease or absolute alienation of debutter property is beyond ordinary powers of management whether in the case of the head of a math, the shebait of a family idol or the dharmakarta of a temple: such alienations can be justified only by proof of necessity for the preservation of the endowment or institution. The principle upon which such transfers have been held good for the period of office of the manager making the transfer has seldom been elaborately considered, though it has at times been suggested that this result is accounted for

by a personal bar or estoppel which prevents the manager from taking steps to avoid his own grant. Language pointing towards this principle but in no very certain or considered way may be found, e.g., in *Nainapillai Marakayar v. Ramanathan Chettiar*(1). As, however, it is now clear that the property is not vested in the manager, by whatever name he be called, but in the idol or institution, it is difficult to accept the notion of personal bar as regulating the validity or invalidity of the transaction. Even if this were accepted, however, it would still remain obscure why personal benefit claimable by the manager in respect of the idol's property should be held to decide the existence or non-existence of an estoppel. One can appreciate the view that the extent of a manager's authority may depend on the extent of his personal interest; but when once he has exceeded his authority the absence of personal interest seems hardly to determine that his act should be held void altogether. In all classes of religious institution the objection to alienation beyond the lifetime or tenure of office of the manager is equally clear: the offence lies entirely in the unnecessarily great interest which has been parted with. To treat the act of the dharmakarta as completely void *ab initio* would be to go beyond what is required to correct his failure to keep within acts of proper management.

Their Lordships do not find that the distinction now taken between the head of a math and the manager of a temple—a distinction valid as regards their personal interest in or accountability for the debutter income—has been recognised in

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

(1) (1921) L.R. 48 I.A. 302; I.L.R. 44 Mad. 831.

(2) (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251.

(1) (1923) L.R. 51 I.A. 83, 96, 97; I.L.R. 47 Mad. 337.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

previous cases as carrying the consequences now contended for. It was not so considered in *Mahomed v. Ganapati*(1) which was cited by Mr. AMEER ALI in delivering the judgment of the Board in *Vidya Varuthi's* case(2). The cases of *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(3) and *Damodar Das v. Lakhan Das*(4) are in a different class: they were explained by the Board in *Mahant Ram Charan Das v. Naurangi Lal*(5) as depending on the fact that the transfer was not of a mere item of the property of the institution, but of the institution itself and its properties. The illustrations given by Sir JOHN EDGE in the case of *Nainapillai Marakayar v. Ramanathan Chettiar*(6) show that he is recognising no such distinction as is now maintained. Their Lordships are not of opinion that for the present purpose it is necessary to recognise any difference in the consequences which flow from a permanent lease or complete alienation of the debutter property in the case of a math or temple or family idol. In all, the position is as stated by LORD BUCKMASTER in *Subbaiya Pandaram v. Mahammad Mustapha Marcayar*(7) when, referring to *Vidya Varuthi's* case(2) and another, he said :

"In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mukurrari lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent

(1) (1889) I.L.R. 13 Mad. 277.

(2) (1921) L.R. 48 I.A. 302, 318; I.L.R. 44 Mad. 831.

(3) (1899) L.R. 27 I.A. 69; I.L.R. 23 Mad. 271.

(4) (1910) L.R. 37 I.A. 147; I.L.R. 37 Cal. 885.

(5) (1933) L.R. 60 I.A. 124; I.L.R. 12 Pat. 251.

(6) (1923) L.R. 51 I.A. 83; I.L.R. 47 Mad. 337.

(7) (1923) L.R. 50 I.A. 295, 299; I.L.R. 46 Mad. 751, 756.

of his own life interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office."

Save that the period in question is not the period of the manager's life, but of his tenure of office, the language of LORD RUSSELL OF KILLOWEN in *Mahant Ram Charan Das's* case(1) is to the same effect :

"Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated."

Moreover, the right of each successive manager to authorise, create or continue a new tenancy for the period of his managership must be taken in the case of a public temple or a family idol to be the same as in the case of a math.

Accordingly, Their Lordships are of opinion that the principles laid down in *Vidya Varuthi's* case(2) are not inapplicable to the present, in so far as article 144 of the Limitation Act is concerned. That decision was pronounced by the Board on 5th July 1921—that is after the present case had been heard and decided by the trial Judge (District Munsif) in 1920, and before the hearing of the first appeal by the Subordinate Judge in February 1924.

The conclusion of the High Court upon this aspect of the case was thus expressed :—

"Whether the proper date from which adverse possession generally runs in cases of permanent lease by dharmakartas be taken as the date of alienation or some subsequent date such as the death of the dharmakarta, or his resignation or removal from office, we have no doubt that, on the facts of this case,

(1) (1933) L.R. 60 I.A. 124, 132; I.L.R. 12 Pat. 251.

(2) (1921) L.R. 48 I.A. 302; I.L.R. 44 Mad. 831.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

adverse possession began from before 1902, and that the suits for possession were therefore barred under article 144."

Now what was laid down in *Vidya Varuthi's* case(1) with reference to article 144 was as follows:

"In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's life-time. According to the well settled law of India (apart from the question of necessity which does not here arise) a mahant is incompetent to create any interest in respect of the math property to endure beyond his life. With regard to mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

So far as regards the successive dharmakartas down to and including Arumuga, who died in 1893, it is difficult to discover in the evidence anything to take them out of the operation of these principles.

It may perhaps be noted—if the manager by whom the lease was granted be called manager No. 1 and his successors referred to by numbers—that as time goes on the question whether the lease was originally justified by necessity will become less easy to answer; and that after a time even if manager No. 4 or 5 knows of the absence of necessity for the lease, it may be necessary to

consider whether he also knows of, and can be taken to rely upon, the presumption which imputes such knowledge to all of his predecessors. When Nataraja succeeded in 1902 what was the position? The cowle of 1865 was thirty-seven years old and three or four managerships had intervened. The Chetti temples or the cowledars had since 1897 been alienating parcels of land for building purposes and building had been begun. Thandavaraya's suits of 1900 did not challenge the cowle as being then invalid, though upon the footing that it still subsisted the suits were misconceived. The defendants to those suits were sued as trespassers and not as persons having taken title under the cowle. It was the defendants who set up the cowle. They set up also that by acts of possession the cowledars had added by prescription to their rights under the cowle—most probably a vain contention—but the case made by Thandavaraya was that they had no registered transfers from the cowledars, and that the cowle did not authorise building. The suits were dismissed on the ground that as the cowle subsisted the plaintiff had no *locus standi* to sue in ejectment whether the defendants were trespassers or not. The cowledars were not impleaded at all.

When Nataraja succeeded in 1902 the first thing that happened was that he was substituted for Thandavaraya in the suits shortly before the trial Court gave judgment dismissing them on the ground that the permanent cowle subsisted—a finding which was repeated in November 1903 by the District Judge. Nataraja took the case no further. We hear no more of any objection by him whether on the score of building operations or

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

(1) (1921) L.R. 48 I.A. 302, 327, 328; I.L.R. 44 Mad. 831, 855.

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.
—
SIR GEORGE
RANKIN.

otherwise. During his tenure of office—or rather his *de facto* managership—from 1902 to 1913 the cowledars continued to make alienations of sites for building purposes and buildings were from time to time erected under the cowle, as is proved by the defendants' witness Periyanan Chetti. That these events could escape the knowledge or attention of Nataraja cannot reasonably be suggested. The evidence in the case, as contained in the paper book before Their Lordships, does not make clear whether the lease of the two villages given by Thandavaraya to Raman Chetti continued in the time of Nataraja, nor does the proof of payment of the cowle rent by the Chetti temples in Nataraja's time extend backwards beyond 1908.

The plaintiffs are in no stronger position if they try to repudiate Nataraja as not being *de jure* the manager: this indeed would establish the defendants' case. The question for decision is as to the proper inference to be drawn from these facts—whether it is that Nataraja, knowing of the infirmity of the cowle, accepted the cowle rent as payable in respect of a new tenancy which it was in his power either to create for the period of his own managership or to create for a shorter period and to continue from time to time, or whether on the other hand it is that he accepted it as payable in respect of a permanent right which it was no longer in the power of his temple to repudiate. Their Lordships are of opinion that the latter of these alternatives is the only one of which the facts permit. There is no doubt that from 1902 until the original plaintiff in these suits was appointed receiver in 1917 the position of the

PONNAMBALA
DESIKAR
v.
PERIYANAN
CHETTI.

cowledars in no way altered: their adverse possession under the cowle thus extended over twelve years. The claim to eject the defendants fails in all the suits.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed. The appellants must pay the costs.

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

Solicitors for respondents : *Douglas Grant & Dold.*

C.S.S.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Cornish, Mr. Justice Varadachariar
and Mr. Justice Venkataramana Rao.*

SRI SRI SRI RAMACHENDRA MARADARAJ DEO
GARU, ZAMINDAR OF KHALLIKOTE AND
ATTAGADA ESTATES (PLAINTIFF), APPELLANT,

1935,
September 2

v.

BEERO POLLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 173—Right of suit conferred by—Scope of suit—Grounds on which it can be instituted—Relief obtainable in it—Effect of suit—Record-of-rights—Entry in, of rent settled under ss. 168 to 172—Suit for alteration of—Maintainability of, under sec. 173—Suit not based on any of grounds in sec. 173 (3)—Sec. 171—Order of Board of Revenue under—Revision of—Power of Board under sec. 172—Sec. 172—Power of Board under—Fixing of rate finally—Irregularity of procedure only, if—Right of suit, if conferred by.

The right of suit conferred by section 173 of the Madras Estates Land Act is restricted and limited, because the grounds on which such suit can be instituted are only those enumerated

* Appeals Nos. 22 to 69 of 1930.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.

in sub-section (3) of that section and no others. The whole settlement cannot be reopened and the Court called upon to make a fresh settlement of a fair and equitable rent.

The relief in such a suit is in respect of an entry in a settlement record relating to a rent settled or a rent omitted to be settled, and the effect of the suit is to challenge the correctness of the entry. Sub-section (3) however limits the grounds on which an entry of a rent in a settlement record or an omission to settle a rent may be attacked to the grounds mentioned in clauses (a) to (f) of that section. But the grounds set out in that section do not themselves constitute the reliefs obtainable in a suit under section 173.

The expression "the rent lawfully payable at the time the record is being prepared" in clause (e) of section 165 does not refer to the rent as finally settled under section 168 and the connected sections.

Observations to the contrary of WALLACE J., one of the referring Judges, and of REILLY J., a member of the Full Bench, in *Rajah of Mandasa v. Jagannayakulu*, (1931) 63 M.L.J. 450 (F.B.), disapproved.

The entry in the latter part of sub-section (4) of section 173 refers to the entry in the opening part of the sub-section, and that is the entry relating to rent. It does not refer to the entry under section 165.

Held, accordingly, that a suit brought in a Civil Court, which was, in substance, for the alteration of an entry in a record-of-rights of a rent settled under sections 168 to 172, but which was not based on any of the grounds mentioned in sub-clause 3 of section 173, was not maintainable under section 173, and that section 179 operated as a bar to the suit.

Under section 172 of the Act the Board of Revenue has power to revise its own order under section 171.

Under section 172 the Board of Revenue cannot itself fix finally a rate. It can only direct a revision in the sense of a re-trial, i.e., a re-settlement. But where, instead of directing a revision, the Board itself fixes finally a rent, there is only an irregularity of procedure, and the case is not one of such total want of jurisdiction as to confer a right of suit on the aggrieved party.

Zamindarini of Mandasa v. Ryots of Mandasa Zamindari, (1932) I.L.R. 56 Mad. 579, approved.

APPEALS against the decrees of the District Court of Ganjam at Berhampur in Original Suits Nos. 17 to 21 of 1926, 38 and 39 of 1926, 3 to 10 of 1927, 15 to 36 of 1927, 40 to 48 of 1927 and 61 and 62 of 1927 respectively.

The Advocate-General (Sir A. Krishnaswami Ayyar) and C. Sambasiva Rao for appellant.

B. Jagannadha Das for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—The appellant in these appeals—the plaintiff in the Court below—is the zamindar of Khallikote and Attagada estates in the District of Ganjam and the respondents, the defendants in the Court below, are his ryots. The suits arise out of a settlement of rents carried out under Chapter XI of the Madras Estates Land Act. By an order dated 4th September 1923 the Local Government directed a settlement of rents in respect of seventy-one villages in the plaintiff's estate under section 168 (1) of the said Act. A survey and preparation of a record-of-rights under sections 164 to 166 had preceded the sanction of the settlement of rents. The Special Revenue Officer proceeded to settle a fair and equitable rent for the lands in the villages specified in accordance with the rules made by the Local Government under section 215 of the Act. Though the officer followed almost identical lines in settling the rents of all these villages, yet, owing to events which happened subsequently and will be mentioned later, it is convenient to divide the villages we are concerned with in these appeals into two distinct groups, one group consisting of

ZAMINDAR
KHALLIKOT
v.
BEERO
POLLAI.

VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

fourteen villages and the other of fifty-one villages.

In respect of the first group, the Revenue Officer published draft rent rolls on 21st June 1924. The method of settlement followed by him was necessarily based on the prevailing system of rent collection in the estate (which differs considerably from that prevailing in other parts of the presidency) known as *khostgutta* system, the chief incidents of which are : (i) in theory, the landlord is entitled to half the gross produce but (ii) in practice, however, rent is not collected in kind from each ryot but a single cash demand is fixed annually in respect of the lands in the whole village and a single joint *muchilika* obtained from the leading ryots. "All *khost muchilika* lands in each village form a single holding over which a rent is annually settled between the zamindar and the ryots according to the estimated gross produce thereon." The settlement of rents on these lands by the Revenue Officer consisted merely of a commutation of grain rents into cash rents and apportioning the total cash rent on the several lands on which they were due, the apportionment being made "in an equitable manner with reference to the nature of the soil, the advantages of irrigation, etc., possessed by each field and all other considerations mentioned in statutory rule 18".

Several objections were preferred against the draft proposals of the Revenue Officer under section 169 of the Act by the landholder and the ryots. Only two of such objections are relevant for the purpose of the present appeals. The landholder's objection was this. As a result of the

survey it was found that the actual extent of lands in a village was greater than the extent mentioned in the *khost muchilika* for that village. The Revenue Officer divided and distributed the consolidated rent according to the *muchilika* over the whole area as surveyed on the ground that "from the terms of the *khost muchilika* it will be seen that the rent taken on the whole set of *khost muchilika* lands in each village was a consolidated one in respect of the said set of lands". The landholder on the other hand wanted the total rent to be treated as the rent for the estimated areas mentioned in the *muchilikas* and the excess area found on survey to be assessed in addition. The objection of the ryots related to what are described as "*choppamani* lands" in the possession and enjoyment of certain artisans, purohits, etc., who paid no rent but were performing services to the village community in general. According to the ryots, such lands were included in the area for which a rent was fixed in and by the *khost muchilika*, but the Revenue Officer proceeded on the footing that they were not so included and assessed the lands to rent though at favourable rates. The Revenue Officer by his order dated 19th November 1924 overruled both the objections.

The landholder and the ryots preferred appeals under section 171 of the Act to the Board of Revenue (which was the superior Revenue authority prescribed by the Local Government). In respect of fourteen of the villages, the appeals were heard by one of the members of the Board of Revenue, the then Commissioner of Land Revenue and Settlement, Dewan Bahadur T. Raghaviah

ZAMINDAR
KHALLIKOTv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

Pantulu, and disposed of on 8th October 1925. He confirmed the Revenue Officer's decision on the objection as to "*choppamani* lands" on the ground that they were excluded from the *khost muchilikas* but reversed the officer's decision on the landholder's objection and held that the correct way to arrive at a fair and equitable rent for a holding was to divide the consolidated village rent demand by the estimated extent of ryoti land and not by the actual measured area.

The appeals in respect of the other group of villages happened to be heard by a different member, Mr. Mac Michael, who in his order dated 7th December 1925 completely differed from Mr. Raghaviah on both the points. He held that the *khost muchilika* demand ought to be divided by the actual surveyed area and not by the estimated area mentioned in the *muchilika*. He also held that the *choppamani* lands were included in the *khost muchilika*. In view of these findings he made an all-round reduction in the money rates fixed by the Revenue Officer.

The ryots in the first group of villages above-mentioned then filed a petition under section 172 of the Act for the revision of the order passed by Mr. Raghaviah under section 171 on 8th October 1925. The petition was heard by the Collective Board consisting of three members who, after overruling the objection that they had no power to revise an order of the Board under section 171, reversed the decision of Mr. Raghaviah on both the points, namely excess area and *choppamani* lands. In the result, the Board decided that "a general reduction of practically two annas in the

rupee should be made in the rates" and revised accordingly the rates fixed by the Revenue Officer.

The zamindar thereupon filed two sets of suits. The reliefs claimed in all the suits are in substance the same, but in respect of the first group he also questioned the power of the Board of Revenue to act under section 172 in the manner set forth above. The District Judge of Ganjam first heard arguments on the first two issues which are as follows :

(i) Whether the Court has no jurisdiction to try the suit ?

(ii) Whether the suit is not maintainable as contended by the defendant ?

The learned Judge held against the plaintiff on these issues, and dismissed the suits. The present appeals are against this decree of dismissal.

Before proceeding to deal with the contentions pressed before us by the learned Advocates on either side based on the several relevant provisions of the Act, it is necessary to examine the case of the plaintiff as set out in the plaint. The prayers in both sets of suits are identical. The plaintiff prays for a decree in his favour declaring

"that the entry in the record-of-rights in the circumstances set forth above is not correct in so far as it relates to the excess area and *choppamani* area and that the plaintiff is consequently entitled to charge and assess to rent separately the excess area and the *choppamani* lands as per survey instead of the *khost* or *royani* lease amount being distributed both on the assumed and the excess area and *choppamani* area".

The circumstances set forth are also substantially identical and are contained in paragraphs 5, 6 and 7 of the plaint in Original Suit No. 17 of 1926 (Appeal Suit No. 22 of 1930). In respect of the

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

first group, however, there is an additional circumstance, namely, the interference by the Board of Revenue under section 172 of the Act. Postponing for the present a consideration of the latter circumstance as conferring by itself the right of suit on the plaintiff, the general question as to the maintainability of the suits otherwise may be dealt with first.

No direct authority on this question has been cited before us. Incidental observations by learned Judges of this Court were referred to, but the decision really turns on a construction of certain sections of the statute. The provisions of Chapter XI of the Act, and particularly the sections from 169 to 179, have presented considerable difficulty in interpretation. Several inconsistencies appear between section and section, several anomalies result from a literal construction of the words of some of the sections. WALLACE J. was

“hampered by the difficulty . . . to reduce to a logical consistency the provisions of sections 165 to 179 of the Estates Land Act”.

TIRUVENKATACHARIAR J. observes

“that the drafting of the many sections referred to is by no means happy and the intention of the Legislature, as it may be inferred from one section, seems to be repelled by the language of the other sections relating to the same subject-matter”.

It is well known that the provisions of Chapter XI of the Madras Estates Land Act are substantially reproduced from the Bengal Tenancy Act, but unfortunately modifications have been made in the Madras Act which do not fit into the original scheme according to the Bengal Act and have given rise to much confusion. It is

regrettable that, in spite of the numerous defects pointed out by the High Court, the Legislature should have taken no steps to remedy them even in the recent Amending Act of 1934, thus leaving the law relating to a matter in which the landholder and tenant are vitally interested in a state of uncertainty.

The question now is whether the plaintiff's suit is maintainable. Section 179 of the Madras Estates Land Act imposes a limitation on the jurisdiction of Civil Courts in the following terms :

“No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this Chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it, or, save as provided in section 173, for the alteration of any entry in such a record of rent settled under sections 168 to 172.”

The proviso is not relevant to the present discussion. The plaintiff's suit is in substance for the alteration of an entry in a record-of-rights of a rent settled under sections 168 to 172 and would not therefore be maintainable unless it is held to be a suit of the nature provided in section 173 of the Act. WALLACE J. was only expressing the opinion of every Judge who had occasion to deal with the section, including the members of the present Bench, when he said: “Section 173 is very difficult to understand.” As there has been considerable divergence of judicial opinion on the interpretation of this section, it becomes necessary to examine it with several connected sections at some length.

The Local Government, either on application by parties or *suo motu*, may make an order directing that a survey be made and a record-of-rights be prepared by a Revenue Officer in respect of an

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAL.VENKATA-
RAMANA
RAO J.

estate or part of an estate [section 164 (1)]. The particulars generally to be recorded are, as enumerated in section 165, among others, the rent lawfully payable at the time. The Revenue Officer deputed for the purpose first publishes a preliminary record and, after disposal of objections thereto, the record as finally framed is published under section 166, clause 2. It might happen in certain estates that nothing further is done after such final publication of the record-of-rights. The provisions that follow, section 168 onwards, deal with a different proceeding known as the settlement of rents. If within two months from the date of the final publication of the record-of-rights under section 166 (2) either the landholder or the ryots apply for a settlement of rent, the Local Government may direct the Revenue Officer to settle a fair and equitable rent in respect of the land [section 168 (1)].

In settling rents, the officer starts with the existing rent, a rate of rent which, it may be recalled, has been entered in the record-of-rights [*vide* section 165 (e)], and such rent is presumed to be fair and equitable until the contrary is proved. The Revenue Officer first publishes the draft rent roll. Objections made to any entry in the record or omissions therefrom are considered and disposed of by him (section 169). When all objections are disposed of under section 169, the Revenue Officer submits the settlement record to the confirming authority appointed by the Local Government (who in this case is the District Collector). Section 170 (2) provides :

“ The confirming authority may sanction the settlement with or without amendment or may return it for revision”

Section 170 (3) provides :

“ After it has been sanctioned by the confirming authority, the settlement record shall be incorporated in the record-of-rights published under sub-section (2) of section 166, and the record-of-rights as so amended shall be finally republished in the prescribed manner and such publication shall be conclusive evidence that the record has been duly made.”

From the use of the words “ finally republished ” one would expect that the Act contemplates a finality as to the entries made when this stage is reached, a finality at least so far as the revenue authorities are concerned. Unfortunately, however, it is not so. Sections now follow one after another which enable the finality of the entries to be attacked and considerably affected by orders of at least four different superior authorities, viz., the authority mentioned in section 171, the Board of Revenue under section 172, the Civil Court under section 173 and the Revenue Officer specially empowered under section 175. When several authorities are given various powers to affect the settlement after what is termed a final republication of the record, one would be justified in expecting at least a clear indication of the relative jurisdiction of these several authorities and their gradation in a hierarchy of superior and inferior tribunals. One is quite familiar in the case of Civil Courts with an appeal lying from the Munsif's Court to the Subordinate Judge's Court or District Court and from the Sub-Court or the District Court to the High Court and from the High Court, if permitted, to His Majesty in Council. No such gradation is provided here nor is there a clear and unambiguous definition of the extent and scope of the jurisdiction of the several authorities mentioned above.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAL.VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

Under section 171, an appeal, if presented within two months of the order appealed against, lies from every order passed by a Revenue Officer or any direction made under section 169. In passing, a lacuna may be here noticed. The section provided for an appeal from an order passed by a Revenue Officer under section 169 but not from an order of amendment passed by the confirming authority under section 170, sub-section (2). The lacuna has since been filled up by an amendment in 1934. The appeal under section 171 lies to such superior Revenue authority as the Local Government may by rule prescribe or to an officer specially empowered by the Local Government in this behalf. The Local Government in this case have by rule prescribed the Board of Revenue as the superior Revenue authority under this section and not a little confusion has resulted therefrom. The orders passed under section 171 are given effect to in the manner prescribed under section 174, which says *inter alia* that a note of all decisions on appeal under section 171 shall be made in the record-of-rights with which the settlement record has been incorporated under section 170 and such note shall be considered as part of the record.

Then comes section 172, the scope of which it is difficult to be certain about. It confers a power on the Board of Revenue expressly by name. Reading sections 171 and 172, it is tolerably clear that the Legislature contemplated two different legal entities functioning under the two sections whereas in fact we have now the same body functioning under both sections. For the present a consideration of the nature of the powers conferred on the Board of Revenue under the section

may be postponed. It may be mentioned, however, that in the second group of cases the power of the Board of Revenue under this section was not invoked and need not therefore be considered. Section 173 comes next and runs thus :

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

“(1) Any person aggrieved by an entry in a settlement record prepared under sections 168 to 171 and incorporated in a record-of-rights finally published under sub-section (3) of section 170, or by an omission to settle a rent, may institute a suit in the Civil Court which would have jurisdiction to entertain a suit for the possession of the land to which the entry relates or in respect of which the omission was made.

(2) Such suit must be instituted within six months from the date of the final publication of the record-of-rights under sub-section (3) of section 170 or, if an appeal has been presented to a Revenue authority under section 171, then within six months from the date of the disposal of such appeal.

(3) Such suit may be instituted on any of the following grounds, and on no others, namely :—

(a) that the relation of landholder and ryot does or does not exist ;

(b) that the land is not liable to the payment of rent ;

(c) that the land, although entered in the record-of-rights as being held rent-free, is liable to the payment of rent ;

(d) that any entry made under clauses (d), (e) and (j) of section 165 is incorrect ;

(e) that special conditions in respect of holding at a favourable rate have been wrongly recorded or omitted ;

(f) that the Revenue Officer has wrongly fixed the date from which the operation of the settled rent under the provisions of section 177 should take effect.

(4) If the Court finds that the entry relating to rent is incorrect it shall, in cases (a) and (b) mentioned in sub-section (3), declare that no rent is payable, or direct that the Collector shall fix a fair and equitable rent, in case (c) it shall declare that the land is liable to rent, in cases (d) and (e) it shall decide what the entry shall be and in case (f) it shall declare the date from which the rent settled is to take effect.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.—
VENKATA-
RAMANA
RAO J.

(5) When a Civil Court has passed final orders or a decree under this section, it shall notify the same to the Collector of the district."

On the true interpretation of this section the decision as to the maintainability of the present suits rests. While not commending the section as an example of skilled drafting we are of opinion that the import of the section read as a whole is fairly clear. Though sub-section (1) is general in its terms, sub-section (3) makes it plain that the right of suit conferred under the section is restricted and limited. Now what is the nature of the relief that can be sought and obtained in a suit under section 173? Sub-section (1) implies that the cause of action is furnished by an entry (presumably, in the opinion of the person aggrieved, a wrong entry) in a settlement record incorporated in a record-of-rights or by an omission to settle a rent. That the entry mentioned here is the entry of a rent settled does not admit of much doubt. The antithetical clause "omission to settle a rent" suggests it. But all doubt is removed by sub-section (4) of the section which expressly refers to the entry relating to rent.

The relief then is in respect of an entry relating to a rent settled or a rent omitted to be settled and the object of the suit is to challenge the correctness of the entry.

Sub-section (3) limits, however, the grounds on which an entry of a rent in a settlement record or an omission to settle a rent may be attacked, to the grounds mentioned in clauses (a) to (f) of that sub-section.

The learned Advocate-General, who appeared for the appellant, contended that section 173 confers a general or unlimited right of suit to

challenge the correctness of the rent settled by the Settlement Officer or the superior authority in appeal or revision, i.e., the whole settlement can, according to him, be re-opened and canvassed in a Civil Court. He founded his case mainly upon clause (d) of sub-section (3) of section 173

"that any entry made under clauses (d), (e) and (j) of section 165 is incorrect".

Clauses (d) and (j) of section 165 are of no help in the present cases. Clause (e) of that section speaks of

"the rent lawfully payable at the time the record is being prepared and whether the ryot is entitled to the benefit of proviso (a) to clause (i) of section 30".

The learned Advocate-General urges that "the rent lawfully payable at the time the record is being prepared" must be deemed to refer to the rent as finally settled under section 168 and the connected sections after the republication of the record-of-rights with the settlement record incorporated. He supports his contention chiefly on the ground that otherwise the person aggrieved can only get the lawful rate prevailing at the time of the record-of-rights corrected, i.e., obtain a barren academic relief. For this position he relies on the observations of two learned Judges, one of whom (WALLACE J.) made the order of reference, and the other (REILLY J.) took part in the Full Bench which decided the case of the *Rajah of Mandasa* reported as *Rajah of Mandasa v. Jagannayakulu*(1).

WALLACE J. deals with the matter thus :

"Section 173 is very difficult to understand. For example, a suit may be filed under it to set aside any entry made under

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI
—
VENKATA-
RAMANA
RAO J.

clauses (d), (e) and (j) of section 165. If this is to be taken as it stands, then the suit lies only against the original entry under section 165, and not against any amendments to those entries which may have been made under section 169 as a consequence of objections to them or under section 170 by the confirming authority. Respondents press for this extreme view, but it seems to me to make nonsense of the section. To lay down that a person aggrieved by the entries in the record-of-rights made under sections 168 to 171 may not sue to set these aside but has the wholly barren remedy of suing to set aside the original entries under section 165 seems to me an interpretation of the section so opposed to common sense that it must be wrong, and such an interpretation seems also directly contradictory to the express wording of sections 176 and 179 which latter section clearly implies that a suit lies for the alteration of entries in the record-of-rights of rent settled under sections 168 to 172. Therefore I take it that what a party can sue under section 173 to have set aside are the original entries in the record-of-rights or any amended entries of these which have been incorporated in the record-of-rights, so long of course as these are of the classes set out in sub-section 3 (a) to (f)."

REILLY J. says at page 491 :

"It is contended that the result of these provisions is that the record of rent lawfully payable, which is made in the record-of-rights before the settlement of rents is begun, can be questioned by a suit under section 173, but that the entry of rent finally settled by the Revenue Officer can never be so questioned. That is a very curious result, and it cannot be suggested that any very useful purpose can be served by questioning the lawfully payable rent entered in the record-of-rights after that rent has been superseded by the settled rent, which must thereafter be treated as correct."

and at page 493 :

"If only the entry made under clause (e) of section 165, which is mentioned in section 173, is understood as the entry amended by the substitution of the settled rent, then all these references to section 173 become consistent and intelligible, and under sub-section (4) of section 173 the decision what the entry shall be will serve some practical purpose. It cannot be suggested that the words 'the rent lawfully payable at the time the record is being prepared', which describe what can be

disputed in a suit under section 173, necessarily exclude the settled rent, because when once settled the settled rent becomes the lawful rent, and, if there is a settlement, 'the time the record is being prepared' goes on until the record-of-rights is finally republished after amendment under section 170. All this appears to me to make it probable that, with whatever intention the Act was originally drafted, as finally framed it does give both the landholder and the ryot a right to question by a suit under section 173 in an ordinary Civil Court the correctness of the rent settled by the Settlement Officer as fair and equitable."

With great respect to the learned Judges, on a careful examination of the terms of the section it becomes obvious that they were proceeding on a mistaken assumption that the only alternative to the interpretation placed by them on the section was the alternative which they thought was put forward by the respondent in that case which certainly was an "extreme view". Their Lordships were not called upon to pronounce a definite opinion on the question now in issue as it did not directly arise for decision. Else they should have seen that the position taken by the respondent before them, and at one stage by the respondents before us also, was unsustainable.

The entire reasoning of WALLACE J. and REILLY J. is vitiated by a fundamental error, viz., the assumption that the grounds set out in sub-section 3 of section 173 themselves constitute the reliefs obtainable in a suit under section 173. To illustrate, WALLACE J. says on page 459 :

"For example, a suit may be filed to set aside any entry made under clauses (d), (e) and (j) of section 165."

But it is not so. Section 173 confers a right of suit only on a person aggrieved by an entry in a settlement record prepared under sections 168 to 171 and not on a person aggrieved by an entry

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

in a record-of-rights prepared under sections 164 to 166. Under section 173, the entries that are open to question are entries in the settlement record and the incorrectness of an entry made under clauses (d), (e) and (j) of section 165 is merely one of the grounds on which the entry of the rent as settled can be questioned. The right to question by suit is *limited* because the grounds on which such suits can be instituted are only the grounds enumerated in sub-section 3 of section 173 and *no others*.

It is obvious how a wrong entry made under clauses (d), (e) and (j) of section 165 in respect of a land will have an effect on the correctness of the entry of rent settled in respect of it. Clause (d) relates to particulars whether the land is irrigated, unirrigated or garden land and, if irrigated, whether double or single crop. A wrong entry of irrigated double crop land as unirrigated land will totally vitiate the rent which must have been settled on that wrong basis. Likewise mistakes in recording irrigation rights under clause (j).

So far as clause (e) is concerned, it is made up of two parts : (i) the rent lawfully payable at the time of the preparation of the record, (ii) whether the rent has been permanently fixed. It may be recalled that under section 168 (2) in settling rent the officer shall presume until the contrary is proved that the existing rent or rate of rent is fair and equitable. That shows the importance of the first of the particulars. The case of permanent fixation of rent is too obvious to need elaboration.

The extreme contention on behalf of the respondents that under section 173 no suit lies to correct an entry of rent in a settlement record may

be easily disposed of. Section 176 is conclusive on the point. It says :

“ Subject to the provisions of section 173, all rents settled under sections 168 to 170 . . . , or settled under section 171 shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of the Act.”

If a suit under section 173 has nothing to do with the correctness or otherwise of rents settled, there is no meaning in declaring the correctness of settled rent subject to the provisions of section 173. Section 179 equally negatives the contention, for it says :

“ No suit shall be brought in any Civil Court . . . save as provided in section 173, for the alteration of any entry in such a record of a rent settled under sections 168 to 172.”

An argument was addressed to us on the policy underlying the chapter to keep the settlement of rent within the exclusive jurisdiction of the Revenue authorities and to prevent a Civil Court from interfering in any manner with the rent as settled by them. It is not really permissible to speculate on such consideration or use such speculation as a basis for the interpretation of the section. It will be enough on this aspect to remark that, as it is, the right of suit under section 173 is limited and there is no opportunity afforded to an aggrieved party to re-open the settlement and call upon the Court to make a fresh settlement of a fair and equitable rent. The Civil Court can interfere with a settled rent only on a few specified grounds and it is not difficult to understand why other grounds are not open. Only grounds which can properly be subject to an adjudication in a Civil Court,

ZAMINDAR
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOT
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

grounds capable of legal proof, have been permitted to be urged in a suit under section 173. Other matters within the peculiar local and personal knowledge of the Revenue authorities are deliberately shut out from the purview of the Civil Court. In settling rents the officer under statutory rule 18 has to pay attention to the condition of the land and the nature of the soil, etc. For this purpose he is invested with power to cut and thrash the crops on any land and to weigh or measure the produce with a view to estimating the capabilities of the soil. Surely matters like these are not within the province of a Civil Court's functions and are rightly excluded therefrom.

What the Civil Court is empowered to do in a suit under section 173 is detailed in sub-section 4. In cases (a) and (b), if it finds the entry is incorrect, it shall declare that no rent is payable or direct that the Collector shall fix a fair and equitable rent. Here again, though the intention is clear, the wording is unhappy. The provision is not to be understood as implying a choice open to the Court between the two alternatives in every case. In case (b), i.e., if it finds that the land is not liable to the payment of rent, it shall declare that no rent is payable. Likewise in case (a) if it finds that the relation of landholder and ryot does not exist. On the other hand, if there has been an omission to settle a rent on the ground that the relation of landholder and ryot does not exist and the Court finds that that ground is wrong, it shall direct the Collector to fix a fair and equitable rent because in respect of the land there has been no settlement of rent at all.

Case (c) covers cases where the fair and equitable rent is noted but the land is entered as not liable to payment of rent. In such a case, if the Court finds against the rent-free nature of the land, it shall declare that the land is liable to rent.

Cases (d) and (e) relate to rent or rate of rent fixed on a basis which the Court finds to be incorrect. In such cases there is no need to direct the Revenue authorities to settle the rent again, nor is there a need for the Court to re-open the settlement in its entirety. The Court has only to decide what the entry shall be having regard to the finding on the particular matter. The Revenue Officer settles the rent on certain data and the Court finds one or more of such data is wrong in fact and makes the necessary consequential alteration.

The entry mentioned in the latter part of sub-section 4 has been sometimes assumed to refer to the entry under section 165 and the assumption has led to confusing results. But the assumption is unwarranted. According to established rules of statutory construction, the entry in the latter part of the sub-section must refer to the entry in the opening part of the sub-section, and that is the entry relating to rent. The learned District Judge fell into this error in paragraph 10 of his judgment when he speaks of a suit for an amendment of an entry under clause (d) of section 165 and a suit for a declaration that the entry of irrigation rights under clause (j) of section 165 is incorrect. Nevertheless the learned District Judge in our opinion came to the right conclusion having regard to the allegations in the plaint.

ZAMINDAR
KHALLIKOT
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAL.VENKATA-
RAMANA
RAO J.

In noticing an argument on behalf of the plaintiff that the data on which the Collector and the Board of Revenue settled the rents are wrong, the learned District Judge correctly sums up the case for the plaintiff :

"It is not the plaintiff's case that the actual lawful demand per village was wrongly entered in the record-of-rights prepared under section 165 (a). His real case is that the settlement of rents, though it had as its basis the actual lawful rent payable in previous years, was less favourable to him than it might have been, if two things had been given due weight, namely, (i) that the jeroyiti lands were much more extensive than he ever guessed and (ii) that certain *choppamani* lands were held by tenants, who for one reason or another had never actually paid any rent for them."

Though there is an attempt in paragraphs 5 and 6 of the plaint to bring the case within section 173, sub-section (3), clauses (d) and (e), the attempt has not been successful as the plaintiff has no real grievance against the entry of the rent lawfully payable at the time the record was prepared under section 165 (e).

In this view it is unnecessary to deal with a subsidiary argument on behalf of the respondents based on the definition of "rent" in the Act, viz., that even the entry under clause (e) of section 165 can be attacked only in respect of the cesses which form part of the rent according to the definition and not in respect of the amount or rate of rent.

The plaintiff's suits which fall into the second group mentioned at the opening, not being really based on any of the grounds on which a suit is permitted by sub-clause 3 of section 173, are not maintainable under that section and section 179 operates as a bar. Even the suits in the other group, in so far as they purport to be suits under section 173, must fail for the same reason as the

allegations of fact therein on this aspect are identical with the allegations in the suits in the second group.

There is, however, one additional circumstance in regard to the fourteen suits of the first group already adverted to, viz., the interference by the Full Board of Revenue under section 172 of the Act with the orders passed by it under section 171. The pleading on this point is in this wise (Original Suit No. 38 of 1926) :

"Paragraph 8. The plaintiff preferred appeals (R.P. Nos. 2 to 15) under section 171 of the Madras Estates Land Act with regard to the excess area and the defendants (ryots) filed an appeal No. 29 of 1925. The Board of Revenue decided on 8th October 1925 that the rates of rents should be revised by dividing the village rentals shown in the *Khostgutta* muchilikas by the old extents entered in them, and with regard to *Choppamani* lands the Board of Revenue confirmed the Special Revenue Officer's decision.

Paragraph 9. But the said decision of the Board of Revenue on the two points referred to in paragraph 8 above was reversed on 22nd June 1926 by the Full Board under section 172 of the Madras Estates Land Act. The plaintiff submits that the Full Board has acted without jurisdiction in reversing its own decision under section 172 of the Madras Estates Land Act and Act 1 of 1894 (Madras), Board of Revenue Act. The plaintiff is entitled to have the *Choppamani* lands and the excess area assessed to rent as held by the Board of Revenue in R.P. Nos. 2 to 25 and 29 of 1925 which have been treated by the Full Board as rent-free."

The cause of action accrued to the plaintiff not only on the date of the final publication of the record-of-rights under section 170 (3) but also on the date of the decision of the Full Board of Revenue (see paragraph 11 of the plaint).

The distinction in its nature between a suit brought for a declaration that an act or order of a statutory body is in excess of its jurisdiction and

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAL.VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

a suit brought for the correction of an entry in a settlement record on certain specified grounds is patent and substantial. In the one case, it is a suit under the general law based on a common law right. In the other, it is a suit under an enabling provision of an enactment. In the first case, apart from the question of jurisdiction, the merits do not matter. In the second case, the decision must be on the merits.

If the plaintiff is confined to the final prayer in the plaint, there can be no doubt that the suits are not for a declaration *simpliciter* that the order of the Board of Revenue dated 22nd June 1926 is without jurisdiction. And, as it has already been held that, treated as suits under section 173, they are not maintainable, it follows the suits must fail.

But, as an allegation has been made in paragraph 9 of the plaint that the Full Board has acted without jurisdiction, the maintainability of the suit as if it were a suit for a declaration of the invalidity of the Board of Revenue's order may now be examined.

The learned Advocate-General impeached the jurisdiction of the Board of Revenue to act in the manner it did on the following grounds:

(a) An order under section 171 by any appellate authority cannot be revised under section 172, as section 171 is not mentioned in section 172.

(b) The Board of Revenue has no power of revision under section 172 in cases where it has itself acted under 'section 171 as the appellate tribunal.

(c) Assuming the Board of Revenue can act under section 172, it can only "direct a revision" but cannot itself settle the rents.

On these points, the only authority directly dealing with the question is the decision reported as *Zamindarini of Mandasa v. Ryots of Mandasa Zamindari*(1). The jurisdiction of the Board was however questioned there not by a suit but by an application for a writ of *certiorari*.

The first of the grounds above mentioned may be easily disposed of. Section 172 saves only orders of a Civil Court under section 173. Orders under section 171 are not saved, nor are they mentioned specifically as subject to interference. But section 174 implies the latter position. All decisions on appeal under section 171 are noted in the record-of-rights with which the settlement record has been incorporated and such note shall be considered as *part of the record*. Under section 172 the Board of Revenue may direct the revision of any record-of-rights or any portion thereof. As orders under section 171 form part of such record the Board of Revenue can equally direct the revision of such part.

It must be conceded that there is great force in the contention that the Board of Revenue should not under section 172 revise its own decisions passed under section 171. The sections as they originally stood did not appear to contemplate such a proceeding and this complication is a direct result of the Board of Revenue being prescribed as the superior Revenue authority under section 171 by the Local Government.

Generally no Court has got a power of revising its own appellate orders nor has a Court the power of review unless specially conferred on it.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

(1) (1932) 1.L.R. 56 Mad. 579.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

Analogies however should not be pushed too far. There is no warrant for assuming that the Revenue Officer and the Board of Revenue are Courts and that "revision" is used in the sense it possesses when used in respect of Civil Courts. WALLACE J. says at page 458 in *Rajah of Mandasa v. Jagannayakulu*(1) :

"The word 'revision' has a definite legal meaning as distinct from 'appeal' on the one hand and from 'review' on the other. It means the authority *suo motu* or on motion by a party to scrutinize the proceedings of inferior and subordinate tribunals and to correct these if necessary in the interests of justice. It does not ordinarily connote authority to re-hear and alter decisions of the revising authority itself. Even the High Court has not got that power."

"It is in effect a re-hearing of the appeal or rather a hearing of an appeal against its own decision in appeal. Such a power is not inherent in a Court and it is open to grave doubt whether it is possessed by the Board of Revenue when it acts as a Civil Court."

Here WALLACE J. is assuming that the Board of Revenue acts as a Civil Court but the assumption was definitely negatived by the Full Bench to which WALLACE J. made the reference and no arguments based on ordinarily accepted notions can prevail against an interpretation which flows from the wording of the section. Moreover, a subsequent extraneous event, viz., the prescribing of the Board of Revenue as the appellate authority under section 171, ought not in strictness to be taken into account in interpreting section 172 as it stands. Supposing under section 171 the Local Government appoints not the Board but some special officer as the appellate authority, would the Board of Revenue then have the power

(1) (1931) 63 M.L.J. 450 (F.B.).

to revise the order of such special officer? If it has (and it has been shown that section 174 supports the conclusion), then equally it would have power to revise its own order under section 171. The position is certainly anomalous [*vide* TIRUVENKATACHARIAR J.'s remarks in *Rajah of Mandasa v. Jagannayakulu*(1)], but on that account only it cannot be rejected. So far as it may be permissible to refer to subsequent legislation for construing an enactment, it may be pointed out that the explanation added to section 172 by the amending Act of 1934 shows that the Legislature assumed that the Board of Revenue can act in revision even when an order under section 171 has been passed by the Revenue Board itself. The explanation runs thus :

" 'The Board of Revenue' in this section shall mean the collective board if one member of the Board has already heard an appeal under section 171."

The greatest difficulty, however, in construing the section lies in discovering the manner in which the Board of Revenue can exercise its powers under section 172. The relevant words are, "direct the revision of any record-of-rights". It has been argued (and there is considerable force in the argument) that the Board of Revenue under the section cannot itself fix finally a rate but can only remit the record back to the Revenue Officer for reconsideration necessarily involving a repetition of the settlement procedure laid down in the Act and the rules. This argument is sought to be supported by the following considerations :

(1) (1931) 63 M.L.J. 450, 476 (F.B.).

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

(i) Though orders passed under sections 171 and 173 are made part of the record, orders under section 172 are not so made. So there is no reference to section 172 in section 174.

(ii) Section 176 enacts that, subject to the provisions of section 173, all rents settled under sections 168 to 170 or settled under section 171 shall be deemed to have been correctly settled and to be fair and equitable rent within the meaning of the Act. There is no reference in this section to any rent settled under section 172. As WALLACE J. remarks, not without justification :

" We have the astonishing result that the rent determined under section 171 is deemed fair and equitable rent, but if revised under section 172 it is not."

(iii) Great hardship may result from an exercise of the powers of revision after the time for filing a suit under section 173 has expired ; but section 173 does not appear to confer a right of suit against an order in revision under section 172. The unsuccessful party under section 171 can move in two ways, by revision on the merits under section 172, or by a suit under section 173, while the successful party may be defeated without remedy by a revision under section 172 after the limitation period for a suit under section 173 has expired. PAKENHAM WALSH J. in *Zamindari of Mandasa v. Ryots of Mandasa Zamindari*(1) also refers to this aspect at page 612.

It cannot be denied that all these considerations force one to the conclusion that the power of the Board of Revenue under that section was intended to be exercised by directing a revision in the sense of a re-trial, i.e., a re-settlement.

(1) (1932) I.L.R. 56 Mad. 579

Such a course may be found desirable and expedient, because the settlement has been found to be unsatisfactory in the actual working of it, or because the settlement proceeded on fundamentally wrong principles, or because, as in this case, there have been conflicting decisions on appeal resulting in marked inequalities in the rent settled. Revision then takes on a much wider meaning than it has when used in describing the power of a superior Court to interfere with the orders of a subordinate Court. In Chapter XI itself, the word "revise" is used in a wide comprehensive sense; e.g., in section 169 (2) and in sub-section 2 of section 170 under which the confirming authority may return the settlement record for revision. This conclusion will also explain why section 179 speaks of a record of rent settled under sections 168 to 172, the word "settled" in the section also meaning "re-settled" with reference to section 172.

However, we are inclined to agree with the decision in *Zamindari of Mandasa v. Ryots of Mandasa Zamindari*(1) that the order of the Board of Revenue in the present case only reveals an irregularity of procedure and is not so totally without jurisdiction as to confer a right of suit on the plaintiff. It may be said that the plaintiff has been deprived of an opportunity of filing a suit under section 173 which he would have had if the record had been remitted to the Revenue Officer. But the loss on account of this deprivation is more academical than substantial, because any suit he may file under section 173 must be a suit on one of the grounds mentioned

ZAMINDAR OF
KHALLIKOTEv.
BEERO
POLLAI.VENKATA-
RAMANA
RAO J.

(1) (1932) I.L.R. 56 Mad. 579.

ZAMINDAR OF
KHALLIKOTE
v.
BEERO
POLLAI.
—
VENKATA-
RAMANA
RAO J.

in section 173, sub-section 3, and it has already been demonstrated that none of the said grounds are available to the plaintiff. The plaintiff does not base his claim to relief on the incorrectness of any entry under section 165, clauses (d), (e) and (j). It follows that, even if the Revenue Board had sent back the record for revision in the light of the observations in its order and the Revenue Officer had proceeded to pass orders, still the plaintiff could not have been successful in any suit purporting to have been instituted under section 173.

In this view also there is no reason to interfere with the decision of the lower Court in these suits.

The appeals fail and are dismissed with costs. We fix a consolidated fee of Rs. 1,300, at fifty rupees for each of the twenty-six appeals in which Mr. Jagannadha Das entered appearance.

A.S.V.

APPELLATE CIVIL.

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

M. MON SINGH (THIRD RESPONDENT), APPELLANT,

1935,
December 13.

v.

MOTHI BAI (PETITIONER), RESPONDENT.*

*Provident Fund amount—Nominee's death before nominator—
Right to amount on death of nominator—Heir of nominee,
if has—Rule of the Provident Rules a reproduction of
sec. 5 of the Provident Funds Act (XIX of 1925).*

An employee of a railway company nominated the respondent's husband as the person to whom the amount standing to the employee's credit in the Provident Fund of the company should be paid in the event of the employee's death while still in service. The respondent's husband predeceased the employee and a claim made by the respondent to the Provident Fund amount on the death of the employee was resisted on the ground that the effect of nomination was merely to entitle the nominee if he were alive at the death of the subscriber to draw out the money. The relevant rule of the Provident Fund Rules reproduced section 5 of the Provident Funds Act.

Held that the "absolute right to receive" the money which was conferred by the Provident Fund Rules meant a vested right in the money which passed to the heir of the nominee at his death and that the respondent was therefore entitled to the amount in question.

Bennett v. Slater, [1899] 1 Q.B. 45, and *Redman, In re. Warton v. Redman*, [1901] 2 Ch. 471, relied upon.

Ma Nu v. Ma Gun, (1924) I.L.R. 2 Rang. 388, and *Ma Kyway v. Ma Mi Lay and another*, (1928) I.L.R. 6 Rang. 682, referred to.

APPEAL against the order of the District Court of Chingleput in Original Petition No. 117 of 1931 dated 23rd February 1934.

* Appeal Against Order No. 354 of 1934.

MON SINGH
v.
MOTHI BAI.

S. T. Srinivasagopalachari for *K. Manavalan*
for appellant.

M. S. Venkatarama Ayyar for respondent.

STODART J. The JUDGMENT of the Court was delivered by STODART J.—This is an appeal against the order of the learned District Judge, Chingleput, granting Mothi Bai, the respondent here, a succession certificate entitling her to collect from the Madras and Southern Mahratta Railway Company the sum of Rs. 3,038, being the provident fund amount standing to the credit of one Lakshman Singh, a servant of the company, who died in 1931. Mothi Bai is the widow and heir of one Bhavani Singh whom Lakshman Singh nominated as the person to whom the amount standing to his credit should be paid in the event of his death while still in service. But Bhavani Singh died in 1921. The certificate has been granted to the respondent as his heir. The appellant, who is the heir of the deceased subscriber, contended before the learned District Judge that the effect of nomination is merely to entitle the nominee if he is alive at the death of the subscriber to draw out the money. That contention is pressed on appeal. The order of the learned District Judge is :

“Having regard to the provisions of the Provident Fund Rules, I think *prima facie* the petitioner (respondent here) is entitled to the certificate.”

Rule 23 of the rules which reproduces section 5 of the Provident Funds Act, leaving out words which are irrelevant, is :

“(i) Notwithstanding any disposition, whether testametary or otherwise, by a depositor of the sum standing to his credit in the Fund, any nomination in the prescribed declaration form which purports to confer upon any person the right to receive . . . such sum on the death of the depositor

shall be deemed to confer such right absolutely until such nomination is varied or expressly cancelled by the depositor.

(ii) Notwithstanding anything contained in the Succession Certificate Act of 1889, any person nominated in the declaration form shall on the death of a depositor be entitled to the grant of a certificate under that Act entitling him to receive payment of such sum and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of Probate or Letters of Administration to the Estate of the depositor.”

The short question for decision is : Does this “absolute right to receive” the money which is conferred by these provisions mean a vested right in the money, which passes to the heir of the nominee at his death? We answer this question in the affirmative.

Learned Counsel for the appellant relies on a decision of a single Judge of the Lahore High Court in *Hardial v. Janki Das*(1) where it is held (by ADDISON J.) that

“the object of the nomination system is merely to designate some person to whom the Provident Fund money due to the subscribers may be paid”.

But that case refers to the fund of a municipal corporation, the rules of which are not before us, and clearly distinguishes another case, where the declaration filed purported to be a will and to dispose of the money absolutely in favour of a nominee. Here also the declaration appended to the rules of the Fund is in the form of a will. It begins :

“I hereby declare that in the event of my death the undermentioned person shall be entitled to receive payment of my deposit in the Railway Provident Fund.”

(1) (1928) 108 I.C. 894.

MON SINGH
v.
MOTHI BAI.
STODART J.

MON SINGH
v.
MOTHI BAI.
STODART J.

At the foot of it is a note :

"If the deposit is to be apportioned among two or more nominees a separate declaration should be given in respect of each."

This, in our view, shows that the nominee or nominees are persons who are intended to acquire a title to the money and not merely persons designated to give a valid quittance to the company. Another note provides that the declaration shall become null and void and a fresh declaration shall be required in the case of the marriage or remarriage of a member who is not a Hindu, Muhammadan, Buddhist, etc., that is to say, a British employee of the company. Also, with a view obviously of applying to the case of a British employee, the declaration form itself conforms as regards execution and attestation to the provisions of an English will.

For the respondent, two recent cases decided by Benches of the Rangoon High Court are relied upon. *Ma Nu v. Ma Gun*(1), which was decided prior to the passing of the Provident Funds Act, decides that the nomination in that case amounted to a testamentary disposition and was invalid since the nominee was a Burman Buddhist, who had no power to make a will. In the second case, *Ma Kyway v. Ma MiLay and another*(2), it was held that the effect of section 5 of the Provident Funds Act is that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination. PRATT C.J. and ORMISTON J. make it clear that in their opinion the nominee is not merely a person designated to receive the money and give the railway company

(1) (1924) I.L.R. 2 Rang. 388.

(2) (1928) I.L.R. 6 Rang. 682.

a clear quittance but a beneficiary. They state the case thus :

"The deceased was an employee of the Burma Railways. He nominated his sister Ma Kyeve as his beneficiary."

The view contended for by the appellant that the nominee is a person who shall receive the money in the first instance and administer it for the benefit of the dependants or heirs of the deceased seems to us to be contrary to the rules framed by this company. The Act in section 3 provides that the company may make a rule prescribing that some particular dependants of the subscriber shall be paid the amount standing to his credit in the event of his death during the period of his employment. But this company has made no such rule. On the contrary, in setting out in order the persons to whom the Provident Fund amount is payable, the rules (rule 22) enumerate them as follows :

(a) a dependant to whom the money is payable under the rules and who is nominated in the declaration ;

(b) any person nominated to receive the money in the declaration and so on.

It appears therefore that the money is not payable to a dependant as such unless the dependant is also nominated in the declaration. And Rule 21 indicates precisely the nature and effect of the declaration. It is :

"When a deposit account is first opened, the member concerned shall be required to give a declaration in Form G-45 (printed as an annexure to these rules) particularising the person or persons by whom he is desirous that the whole or any portion of his deposit shall be received in the event of his death and the deposit shall be payable in accordance with such declaration. The declaration will remain in force until it is revised or cancelled by means of a notice in writing given to the Chief Auditor."

MON SINGH
v.
MOTHI BAI
STODART J.

MON SINGH
v.
MOTHI BAI.
STODART J.

Learned Counsel for the appellant contends that section 5 of the Act by which nomination shall be deemed to confer absolutely the right to receive the money does not vest the title to the money in the nominee, because the words "vest the money in the nominee" are not expressly used, while such words are used in another section of the Act, namely, section 3. Section 3 provides that when the sum to the credit of the subscriber at his death is payable under the rules of the Fund to any dependant of the deceased, such sum shall—with certain reservations—vest in the dependant free from any debt incurred by the deceased or incurred by the dependant before the death of the subscriber. It appears to us that the use of the expression "vest" in this section is appropriate and convenient to describe the absolute right which such a dependant has to the money. The fact that the word occurs in section 3 does not mean that an absolute right cannot be conferred by the provisions of a section in which the word is not used. In England, under the Friendly Societies Act, 1875, as amended by the Act of 1883, a member of a society can nominate any person to receive a sum not exceeding £100 out of the money payable at his death. It has been held in *Bennett v. Slater*(1) that such a nomination cannot be revoked by will but only in the manner laid down in the Act and that the sum so made payable is not part of the residuary estate of the deceased. And in the case of *Redman, in re: Warton v. Redman*(2), when the nominee died before the nominator and his representative

(1) [1899] 1 Q.B. 45.

(2) [1901] 2 Ch. 471.

claimed the money, the decision of KEKEWICH J. is :

"I cannot see why the estate of a nominee who dies before the nominator should be deprived of the benefit intended to be conferred, even although his death may be unknown to the nominator I do not see anything in the wording of the rule to prevent the policy money being due to the legal personal representative of the nominee."

Compare also the observation of A. L. SMITH L.J. in *Bennett v. Slater*(1) :

"I may in the first place remark that where there has been a nomination as in the present case, until that nomination has been revoked I think that the nominee and not the nominator is the person beneficially interested in the money."

Our conclusion therefore is that on the nomination of the respondent's husband a right became vested in him to the money which might be found to the credit of Lakshman Singh in the event of his dying during his employment.

The appeal fails and is dismissed with costs.

A.S.V.

(1) [1899] 1 Q.B. 45.

MON SINGH
v.
MOTHI BAI
STODART J

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Stone.

1935,
December 10.

K. V. AL. RM. ALAGAPPA CHETTIAR (SECOND
RESPONDENT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE, MADRAS, AND ANOTHER (FIRST
RESPONDENT AND APPLICANT), RESPONDENTS.*

Presidency-towns Insolvency Act (III of 1909), sec. 75, cl. (2) and sec. 85—"Support"—Meaning of—(English) Bankruptcy Rule 312 corresponding to old Rule 325—Criminal charge against insolvent—Insolvency Court—Power of, to order payment of sums out of estate of insolvent for conduct of defence.

The Insolvency Court has power under section 75, clause (2), of the Presidency-towns Insolvency Act, to order the payment of sums out of the estate of the insolvent in the hands of the Official Assignee for the defence of the insolvent against a criminal charge.

The *obiter dictum* of WRIGHT J. in *In re Charlwood, Ex parte The Trustee*, [1894] 1 Mans. 42, 44, referred to.

APPEAL against the judgment of MOCKETT J., dated 30th September 1935 and passed in the exercise of the insolvency jurisdiction of the Original Side of the High Court in Application No. 355 of 1935 in Insolvency Petition No. 331 of 1935.

C. S. Venkatachari for appellant.

Nugent Grant for second respondent.

The first respondent appeared in person.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
MADHAVAN NAIR J.—This appeal is from an order

MADHAVAN
NAIR J.

* Original Side Appeal No. 29 of 1935.

of the learned Judge sitting in insolvency. It raises a short point which does not appear to have been the subject of any reported decision, although there is an *obiter dictum* by WRIGHT J. in *In re Charlwood, Ex parte The Trustee*(1). The point, at the time it is taken before us, is one that is to a large extent academic, for it concerns the power of the Court to order the payment of sums out of the estate of the insolvent in the hands of the Official Assignee for the defence of the insolvent against a criminal charge. The reason why, at the time the point is urged before us, it is academic is that in fact the payments have been made, the inquiry in respect of which the legal expenses were incurred is over, and it is not suggested that there is any possible means of recovering the sums spent away, should we come to the conclusion that the learned Judge was wrong in passing the order that he did. This position could easily have been avoided by the creditor, who is the only creditor or person opposing either the making of the order or the order when made, applying that the matter should be expedited. The question at issue is a very short one and there was no need whatever to have the proceedings printed and the appeal could have been heard within a very short time of the passing of the order. However, now that the matter has come up before us, we shall dispose of it.

The appellant asked us to treat the point in issue as a pure point of law restricted to a discussion of sections 85 and 75 of the Presidency-towns Insolvency Act, and, in support of his argument that there was no power in the Court

(1) [1894] 1 Mans. 42, 44.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

to make such a provision as this, he cited a number of English cases—*In re Sinclair, Ex parte Payne*(1); *In re Beyts & Craig, Ex parte Cooper, &c.*(2) and *In re Charlwood, Ex parte The Trustee*(3). In our opinion, save for the *obiter dictum* of WRIGHT J. contained in the last-mentioned case, none of these cases are in point. I shall deal with them before passing on to consider the point that is at issue. *In re Sinclair*(1) decided that, where a debtor pays moneys to his solicitor for the purpose of enabling his solicitor to pay those moneys out on account of out of pocket expenses including Counsel's fees in opposing the proceedings in bankruptcy that have been commenced, such moneys cannot, should the debtor be adjudicated, be recovered by the trustee in bankruptcy, even though the solicitor knew of the acts of bankruptcy on which the proceedings were based. It should be observed that the motion was made by the trustee in bankruptcy and the ground for it was that the money in question was part of the estate of the bankrupt. It was held that on the facts the money in question when paid away by the debtor to his solicitor ceased to be part of the estate of the bankrupt. As CAVE J. observed at page 618 :

"It might just as well be said that, if a bankrupt goes into a baker's shop, who knows that he has committed an act of bankruptcy, and pays for a loaf of bread, the trustee can recover the money from the baker."

He also observed :

"It is right that a man should have legal advice and assistance against a bankruptcy petition, but if a solicitor has

(1) (1885) 15 Q.B.D. 616.

(2) [1894] 1 Mans. 56.

(3) [1894] 1 Mans. 42.

to refund money paid to him for such a purpose a man would be left defenceless because nobody would act for him."

In *In re Beyts & Craig, Ex parte Cooper, &c.*(1) the facts were : Two partners were arrested on a charge of forgery. They paid over a sum of money to their solicitors who at the same time verbally undertook to provide for their defence. Four days later they became bankrupt. The solicitors were ordered to repay the money which in fact had been applied by them in the bankrupts' defence. There again, the motion was filed by the trustee in bankruptcy. The question was, was the money part of the estate of the bankrupts or had it passed away from the bankrupts ? If it had ceased to be part of the bankrupts' estate, it could not be recovered ; if it remained part of the bankrupts' estate, it could be recovered. It was held that the solicitor's authority to expend the money was determined the moment the bankruptcy petition was filed, subject to payment of costs up to that date. It followed that thereafter the solicitors had no authority to expend the money. It followed from that that the money was in the hands of the solicitors unexpended in the eye of the law ; it was money thus in the hands of the solicitors as part of the estate of the bankrupts. The conclusion immediately followed that the trustee in bankruptcy could recover it back. The learned Judge, one of the most experienced of the insolvency Judges, VAUGHAN WILLIAMS J., as he then was, observed at page 59 :

"I should have been glad to find in favour of the solicitors here if I could, and for this reason I allowed evidence to be

(1) [1894] 1 Mans. 56.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.

MADHAVAN
NAIR J.

given to see if there had been acquiescence on the part of the trustee. If I could have found that the trustee had taken subject to this agreement, I should have allowed the solicitors to retain the money."

In *In re Charlwood, Ex parte The Trustee*(1), reported in the same volume, the person who subsequently became bankrupt paid over a lump sum of money to the solicitor under a binding contract that the solicitor should provide for his defence on a charge of murder. Later, but before his trial, he became bankrupt. The trustee in bankruptcy applied in the appropriate County Court for the repayment of the sum so paid to the solicitor. The County Court refused the application. An appeal was taken to a Divisional Court sitting in Bankruptcy and the members of the Court were VAUGHAN WILLIAMS and WRIGHT JJ. They dismissed the appeal. It was held that the agreement which was entered into before any act of bankruptcy was binding, that the agreement was to the effect that the sum paid was to be the whole amount to be charged by the solicitor, that is, it was a lump sum paid for definite services, that it was thus no longer a sum belonging to the estate of the bankrupt, and that the only question that remained was whether it was a transaction which gave to the solicitor an undue preference. The Court came to the conclusion that there was nothing to show that the agreement was a device to defeat the bankruptcy law and it followed that the trustee was not entitled to it, not entitled to it because it had ceased to be part of the bankrupt's estate, not entitled to it as being paid by

(1) [1894] 1 Mans. 42.

way of undue preference because it was not shown to have been paid as an undue preference. WRIGHT J. puts the matter almost in a sentence :

" Here is a *bona fide* business agreement, and the money was no longer the property of the debtor."

He adds :

" I desire only to add that, if the law is so unhuman as not to allow for a bankrupt's defence, I think the Official Receiver would be justified in making an allowance for that purpose under rule 325."

Rule 325 as it stood at that date is the same as rule 312 under the present Bankruptcy Rules and both are very similar to section 75 of the Presidency-towns Insolvency Act. There is, however, this difference, that under our Act power is conferred upon the Court, whereas, under the English rules, it is a power conferred upon the Official Trustee.

The power in question which we have to consider is that contained in section 75, clause 2, of the Act. It is as follows :

" Subject as aforesaid, the Court may, from time to time, make such allowance as it thinks just to the insolvent out of his property, for the support of the insolvent and his family."

This power conjoined with section 85, which gives discretionary powers to the Official Assignee and, in particular, enables him to apply to the Court for directions in relation to any particular matter arising in the insolvency and gives him a discretion in the management of the estate, is relied upon as justifying the making of the allowance which the learned Judge made in this case. Before we examine it, it is necessary to make some preliminary remarks with regard to the nature and form of the application and the opposition to it. The application, which is No. 331

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
MADHAVAN
NAIR J.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

of 1935, was taken out by Mr. McIver one of the insolvents, and it asked that directions be given to the Official Assignee to pay to the insolvent's solicitor funds sufficient to defend three criminal cases pending in the Chief Presidency Magistrate's Court. It was supported by an affidavit by Mr. McIver and also by the report of the Official Assignee. The only counter-affidavit that was filed was filed not on behalf of the creditors generally but on behalf of the petitioning creditor. There is nothing before us, for in this respect paragraph 8 cannot be relied upon as proving that the other creditors were supporting the opposition, to show that the petitioning creditor in any way represented the general body of creditors. The report of the Official Assignee contains, *inter alia*, the statement: "It is certainly necessary from the point of the case against the Chartered Bank that the criminal proceedings should be properly defended." The case against the Chartered Bank comes into the story in the following way: The insolvents, who (as stated without contradiction) have become indebted in a large sum of money have pending a case against the Chartered Bank in which a large sum of money is claimed. We are not of course in the least concerned with the probable result of that case, but it is said, also without contradiction, that if that case should end in favour of the insolvents, the creditors of the insolvents, if not paid in full, will be paid nearly in full. On the contrary, if that case and the other case should fail, then it is said, again without contradiction, that the estate will be very little larger than it is at present and the probable dividend will be in the neighbourhood of four annas in the

rupee. It is thus clearly very desirable, from the point of view of the creditors generally, that the case against the Chartered Bank should be won and that nothing that should imperil that case should be suffered. The Official Assignee, who is a very experienced officer, has committed himself to the opinion that it is "certainly necessary" from that point of view that the criminal proceedings should be adequately defended. This would, in our opinion, probably without more, justify the finding of reasonable sums for the purpose in hand. But the learned Judge has not based himself on that at all but upon section 75. Before us, his conclusion is, however, also sought to be supported on that ground and we think that on that ground it can be supported. We also think that it can be supported on the ground that the learned Judge founded himself upon. The critical word in section 75 is the word "support" and it will be noted that the persons that are to be supported are not only the insolvent but also his family. It has been suggested that the support must be restricted to such support as is immediately necessary to maintain life. This, however, is not the primary meaning of the word. According to the Oxford Dictionary, the primary meaning is:

"The action, or an act, of preventing a person from giving way, backing him up, or taking his part; assistance, countenance, backing."

The second meaning is:

"Bearing or defraying of charge or expense."

The third meaning is:

"The action of keeping from failing, exhaustion, or perishing; especially the supplying of a living thing with what is necessary for subsistence; the maintenance of life."

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

The Counsel opposing observed in this case that it might well be exceedingly hard that the law, having by an act of law taken away from a debtor adjudicated bankrupt, all the money that he had, should leave him defenceless in a criminal case pending against him ; but that, hard though it was, the law was contained in section 75 and had made no provision for such a case. But that argument depends upon giving to the word "support" a restricted and special meaning, and a meaning which is not its primary meaning. If either the primary or the secondary meaning is given, the word will justify the making of the allowance as was the opinion of WRIGHT J. Further, even taking the third meaning, the Court is not restricted to making an allowance which is immediately necessary for the support of life. It can make a provision that will enable the insolvent hereafter to support himself and his family rather than be a constant drain upon the estate throughout the whole period of the insolvency. In all these matters the Court, of course, has to exercise a discretion and it might well be that it should not permit the use of the funds lying in the estate for the defence of criminal charges utterly disconnected from the transactions which had led up to the insolvency, utterly disconnected from the litigation in which the insolvent is involved and success in which would not in any way affect the future of the insolvent's estate. They are all matters that must be considered.

Further, a very different state of affairs would arise if the application was made, as this application was at first made, by the insolvent and not by the Official Assignee. Here, however, in

addition to putting in a report supporting the application, the Official Assignee did, as the learned Judge observes, apply under Order XIV, rule 3, of the Insolvency Rules, the effect being to turn the application originally launched by the insolvent into an application by the Official Assignee.

Further, the Court was justified in closely scrutinising, as the learned Judge has done, the amount asked for. The amount asked for was Rs. 15,000 and the amount allowed was Rs. 150 a day which amounted in the result to something in the neighbourhood of Rs. 3,000.

We are accordingly of the opinion that the learned Judge exercised a discretionary power and that he exercised his discretion properly. The appeal is dismissed with costs which will be Rs. 75.

Solicitor for appellant : *N. T. Shamanna.*

Solicitors for second respondent : *King and Partridge.*

G. R.

ALAGAPPA
CHETTIAR
v.
OFFICIAL
ASSIGNEE,
MADRAS.
—
MADHAVAN
NAIR J.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

1935,
October 29.

O. S. VARADACHARI (SEVENTH RESPONDENT), PETITIONER,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL, REPRESENTED BY THE COLLECTOR OF MADURA
(PETITIONER), RESPONDENT.*

Crown debt—Priority—Pauper suit—Court-fee payable by plaintiff to Government in—Recovery from defendants in suit of—Decree in suit directing—Priority in respect of amount so directed to be paid over other liabilities of those defendants—Crown's right to—Code of Civil Procedure (Act V of 1908), O. XXXIII, rr. 10 and 13, and sec. 73, cl. 3—Applicability and effect of.

In a pauper suit some of the defendants were directed to pay to the Government a portion of the court-fee which would have been payable by the pauper plaintiff. The petitioner obtained a money decree against the same defendants and brought their properties to sale in execution.

Held that out of the proceeds realised by the said sale the Government was entitled to be paid in preference to the claim of the petitioner the amount directed by the decree in the pauper suit to be paid to the Government on the ground that the amount payable to the Government was a Crown debt and as a Crown debt it was payable in priority to all other liabilities of the defendants.

Civil Miscellaneous Petition No. 2083 of 1935, affirming the principle of the decisions in *Gayanoda Bala Dassee v. Butto Kristo Bairagee*, (1906) I.L.R. 33 Cal. 1040, and *Deputy Commissioner of Police v. Vedantam*, (1935) I.L.R. 59 Mad. 428, relied upon.

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

* Civil Revision Petition No. 1115 of 1933.

Court of the Subordinate Judge of Madura, dated 28th March 1933 and made in Execution Petition No. 63 of 1933 in Original Suit No. 71 of 1928.

P. N. Appuswami Ayyar for petitioner.

N. Srinivasa Ayyangar for Government Pleader
(*K. S. Krishnaswami Ayyangar*) for respondent.

JUDGMENT.

This revision petition raises a question of some importance but as there is practically no authority in favour of the petitioner's contention I do not feel called upon to refer it to a Division Bench, especially in view of the fact that the principle of the decision in *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(1) and of the decision by CORNISH J. in *Deputy Commissioner of Police v. Vedantam*(2) has been accepted by a Division Bench in Civil Miscellaneous Petition No. 2083 of 1935.

In Original Suit No. 71 of 1928 on the file of the Madura Sub-Court, defendants 11 to 15 were directed to pay to the Government a portion of the court-fee which would have been payable by the pauper plaintiff. In another suit, Original Suit No. 97 of 1930, the present petitioner obtained a money decree against the same defendants and brought certain properties to sale. This revision petition arises out of an application made on behalf of the Government that out of the proceeds realised by the sale of the properties of defendants 11 to 15 the amount directed by the decree in Original Suit No. 71 of 1928 to be paid to the Government should be paid in preference to the claim of the decree-holder in Original Suit No. 97 of 1930. The claim was made by the Government

(1) (1906) I.L.R. 33 Cal. 1040.

(2) (1935) I.L.R. 59 Mad. 428.

VARADACHARI
v.
SECRETARY OF
STATE FOR
INDIA.

on the basis that as a Crown debt it was payable in priority to all other liabilities of defendants 11 to 15. The lower Court upheld this contention on behalf of the Government. Hence this revision petition by the decree-holder in Original Suit No. 97 of 1930.

It has been argued on behalf of the petitioner that, as a first charge is declared by rule 10 of Order XXXIII, Civil Procedure Code, only on the subject-matter of the pauper suit, it could not have been the intention of the Code to recognise the doctrine of priority of Crown debts to any greater extent in connection with orders for costs passed under Order XXXIII. It was contended that Government could well have realised all the court-fee payable to them in respect of Original Suit No. 71 of 1928 from out of the properties decreed to the plaintiff in that suit. Relying upon certain observations in *Attorney-General v. De Keyser's Royal Hotel*(1), it was suggested that even assuming that the Government could have invoked the doctrine of priority of Crown debts it must, in view of the scheme of the Code, be deemed to have waived or restricted its operation.

I am not able to accede to the petitioner's contention. Assuming that the Government could have realised the court-fee payable by the pauper plaintiff from out of the properties decreed to the plaintiff in this suit, it does not take away the right of the Government to recover from the defendants in the suit such portion of the court-fee as the Court may in the exercise of its power

(1) [1920] A.C. 508.

VARADACHARI
v.
SECRETARY OF
STATE FOR
INDIA.

under rule 10 direct to be recovered from particular defendants. Rule 13 of the same Order provides that questions arising between the Government and the parties so directed to pay shall be deemed to be questions arising between the parties to the suit under section 47. The result is that the direction in the decree against any particular defendant makes him to that extent a judgment-debtor and the Government a decree-holder. It was laid down so long ago as 1868 in *Secretary of State for India v. Bombay Landing Shipping Co.*(1) that in respect of decree debts the Secretary of State is entitled to invoke the doctrine of priority of Crown debts. There is nothing in the later legislation to preclude the application of that doctrine. On the other hand, the cases I have already referred to proceed on the footing of its applicability. The third clause of section 73 of the Code is significant in this connection. It provides that nothing in the section shall affect any right of the Government. In the context, it cannot possibly refer to cases where the Government have a first charge ; because there is no possibility of such first charge being affected by anything contained in clauses 1 and 2 of that section. Such a charge will *prima facie* be paid off under the proviso to clause 1, if the property is sold free of the charge. The third clause can, therefore, reasonably refer only to cases in which the Government is in the same position as any other decree-holder, and its intention obviously is to say that in such circumstances the Secretary of State will not really be governed by the provisions of clauses 1 and 2 but will be entitled to

(1) (1868) 5 Bom. H.C.R. 23.

VARADACHARIAR v. SECRETARY OF STATE FOR INDIA. the benefit of the doctrine of priority. I, therefore, see no reason to interfere with the order of the lower Court. The revision petition is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1935,
December 9.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL REPRESENTED BY THE COLLECTOR OF ANANTAPUR
(FIRST RESPONDENT), PETITIONER,

v.

SIVASANKARAM PILLAI (PLAINTIFF), RESPONDENT.*

Madras Local Boards Act (XIV of 1920)—Surcharge certificate—Profession-tax appeals filed out of time—President placing them before Board—Allowing of appeals and reduction of tax by Board—Diminution of revenue to Taluk Board in consequence of—Surcharge certificate against President in respect of—Legality of—Sch. IV of Act—Appeals provided for in—Applicability to, of section 5 of Indian Limitation Act (IX of 1908)—Sec. 213 of Local Boards Act—Effect of—Proceedings arising out of surcharge certificate—Party to—Government, if a proper party—Cl. 7 of the Rules—Effect of.

A surcharge certificate was issued by the Examiner of Local Fund Accounts against the petitioner, who for some years was the President of a Taluk Board, in respect of a sum of money being the diminution of revenue to the Taluk Board consequent upon the allowance of certain profession-tax appeals. Those appeals were filed out of time but the Board considered the matter of the delay and nevertheless allowed the appeals and reduced the tax. The District Judge confirmed the certificate on the ground that the appeals were illegally heard and the refunds were illegally granted and that the loss to the Taluk Board was the direct result of the negligence of the

* Civil Revision Petitions Nos. 594 and 658 of 1933.

petitioner in placing the time-barred appeals before the Board for its consideration and orders.

Held that the surcharge certificate must be set aside.

The act of hearing appeals and reducing the profession-tax is an act of the Board as a corporate body and not an act of the President in his individual capacity or even in his capacity as President. In law the capacity of the President must be kept distinct from the capacity of the Board as a body.

Quaere whether section 213 of the Madras Local Boards Act does not make the principle of section 5 of the Indian Limitation Act applicable to appeals which are specifically provided for in Schedule IV of the Act.

On the Rules framed under the Madras Local Boards Act as they now stand, the impleading of the Government as a party to proceedings arising out of surcharge certificates cannot be held to be improper. Clause 7 of the Rules, by authorizing the Collector to execute the final order in the case, very nearly puts him in the position of a decree-holder and it will be anomalous to hold the Government not to be a proper party to such proceedings.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Judge of Anantapur, dated 4th January 1933 and made in Original Petition No. 5 of 1929.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Judge of Anantapur, dated 4th January 1933 and made in Original Petition No. 5 of 1929.

K. S. Champakesa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for petitioner.

S. Ranganatha Ayyar for respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—These revision petitions arise out of proceedings taken in the District

SECRETARY OF
STATE FOR
INDIA
v.
SIVASANKARAM
PILLAI.

VARADA
CHARIAR J.

878 THE INDIAN LAW REPORTS [VOL. LIX

SECRETARY OF
STATE FOR
INDIA
v.
SIVASANKARAM
PILLAI.
—
VARADA-
CHARIAR J.

Court of Anantapur to set aside certain surcharge certificates issued by the Examiner of Local Fund Accounts against one Sivasankaram Pillai who for some years was the President of the Taluk Board of Penukonda. The lower Court has set aside the surcharge certificate in respect of some of the items complained against but confirmed it so far as certificate Exhibit E was concerned. Civil Revision Petition No. 658 has been preferred against this portion of the lower Court's judgment. Civil Revision Petition No. 594 has been filed by the Government and it raises a general question of principle as to the propriety of impleading the Government as a party to proceedings arising out of surcharge certificates.

Dealing first with Civil Revision Petition No. 658, the certificate in question was issued in respect of a sum of Rs. 53-12-0 being the diminution of revenue to the Local Board consequent upon the allowance of profession-tax appeals in ten cases. It would appear that these appeals were filed out of time but nevertheless the Board considered the appeals and reduced the tax. On behalf of the petitioner it seems to have been contended before the learned District Judge that section 213 of the Madras Local Boards Act makes section 5 of the Indian Limitation Act applicable to such cases and that the Board having considered the matter of the delay and nevertheless allowed the appeals, there was nothing that he could be held liable for.

The learned District Judge, in paragraph 9 of his order, observes as follows :

"What Mr. Sivasankaram did here was merely to place all these time-barred appeals before the Board for its consideration and orders. The question of delay and condonation seem

to have been perfunctorily passed over. In view of the mandatory wording of Schedule IV, rule 28, I hold that these appeals were illegally heard and the refunds were illegally granted and that the loss to the Taluk Board is the direct result of the negligence of Mr. Sivasankaram."

SECRETARY OF
STATE FOR
INDIA
v.
SIVASANKARAM
PILLAI.
—
VARADA-
CHARIAR J.

On behalf of the Government, it has been contended that this a finding of fact or at any rate this is not a finding with which we ought to interfere in revision under section 115, Civil Procedure Code. The language of section 213 does not put it beyond doubt whether the principle of section 5 of the Limitation Act is or is not applicable to appeals which are specifically provided for in Schedule IV. It is possible to read the provisions enacted in Schedule IV as a provision to the contrary, within the meaning of the opening words of section 213, so that the whole of section 213 including the reference to section 5 of the Limitation Act will be excluded in such cases. But it seems to us equally possible to put the other interpretation upon the section whereby the provision to the contrary will merely substitute Rule 28 of Schedule IV in place of clauses (a) and (b) of section 213 and not exclude the reference in the opening clause of section 213 to section 5 of the Limitation Act. Whichever interpretation may be put upon the section, it is obvious that the act of hearing appeals and reducing the profession-tax is an act of the Board as a corporate body and not an act of the President in his individual capacity or even in his capacity as President. It is too much to expect anything like a formal judgment by the Board in such cases giving reasons for excusing the delay. It may be that the learned District Judge is justified in his remark that the

SECRETARY OF
STATE FOR
INDIA

v.
SIVASANKARAM
PILLAI.

VARADA-
CHARIAR J.

question of delay and condonation was perfunctorily passed over, but in law the capacity of the President must be kept distinct from the capacity of the Board as a body and we think that the learned District Judge omitted to keep this distinction clearly before his mind. On this ground we must set aside the surcharge certificate even in respect of this item.

On the larger question raised in the Government's revision petition, we are unable to say that on the Rules as they now stand, it was improper to have impleaded the Collector as respondent to the petition. We quite agree that *prima facie* the matters dealt with by the Examiner of Local Fund Accounts do not concern the public revenues of India as such but only the funds of the local bodies concerned. We have no sufficient information before us as to whether the Examiner of Local Fund Accounts is paid out of public revenues or in the last resort his salary is recovered from the Local Boards ; but, leaving this aspect of the matter alone, we are pressed by the fact that the resort to Civil Courts in such cases is one expressly provided for by statutory rules and it is not an ordinary common law suit. We must *prima facie* look to the Rules themselves to indicate who the proper parties to the proceedings are. Clause 7 of the Rules provides that, in default of payment by the person against whom a surcharge certificate is issued, the money may be recovered *on an application* by the Collector of the District to the Court, in the same way as an amount decreed by the Court. This very nearly puts the Collector in the position of a decree-holder, and it will be anomalous to hold the Government not to

be a proper party to such proceedings while the rule authorizes the Collector to execute the final order in the case. It is possible no doubt to say that, as these surcharge certificates are primarily for the benefit of the revenues of the Local Board concerned, the Local Board ought to be the respondent to such proceedings ; but cases have arisen and are conceivable where the Local Board itself as a body has approved of a number of items of expenditure which are afterwards taken exception to by the Examiner and it will be very embarrassing if the Board should be made respondent to proceedings arising out of a surcharge certificate in such cases. We can only throw out these suggestions for the consideration of the Government with a view to make better provision in the Rules themselves in respect of such proceedings. For instance, there is a provision in section 173 of the Madras Estates Land Act that the Secretary of State shall not be made a party to proceedings arising out of survey and settlement operations under the Estates Land Act. It will be open to the Government to introduce some such provision in respect of suits arising out of surcharge certificates. It may also be possible to provide that the costs incidental to such proceedings shall be taken or paid out of the funds of the Local Boards concerned. But with the Rules as they stand, we do not think that it is open to the Court to give such directions. With these remarks we must dismiss Civil Revision Petition No. 594 of 1933.

There will be no order as to costs in either of these civil revision petitions.

A.S.V.

SECRETARY OF
STATE FOR
INDIA

v.
SIVASANKARAM
PILLAI.

VARADA-
CHARIAR J.

APPELLATE CIVIL.

*Before Mr. Justice Wadsworth.*1935,
December 5.

C. ATHIMOOLA MUDALIAR (PLAINTIFF), PETITIONER,

v.

FATHIMATHUL KUBRA BEGAM SAHEBA AND
FIVE OTHERS (DEFENDANTS), RESPONDENTS.**Court Fees Act (VII of 1870), Sch. II, art. 17-A—Landholder—
Application under sec. 3(5) of the Madras Estates Land Act
(I of 1908) for registration as—Dismissal of—Suit
by unsuccessful applicant—Proper court-fee payable on.*

The court-fee payable on a suit brought by an unsuccessful applicant to the Collector for registration as a landholder under section 3 (5) of the Madras Estates Land Act should be calculated under article 17-A of the Court Fees Act.

PETITION under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act praying the High Court to revise the finding of the Court of the Subordinate Judge of Chingleput in Original Suit No. 40 of 1935.

*K. Raja Ayyar, R. Somasundara Ayyar and
A. K. Muthuswami Ayyar for petitioner.*

*Government Pleader (K. S. Krishnaswami
Ayyangar), T. E. Ramabhadrachari and K. Rama
Ayyangar for respondents.*

JUDGMENT.

The question for determination in this petition is the proper court-fee payable on a suit brought by an unsuccessful applicant to the Collector for registration as a landholder under section 3 (5) of

the Madras Estates Land Act. In the lower Court it was contended that the suit was one to set aside a summary order of a Revenue Court and was taxable under article 17 (1), Schedule II, of the Court Fees Act. That view was rejected by the lower Court and it is not contended before me that it is tenable, for the decision in the case of *Vannisami Thevar v. Chellasami Thevar*(1), upon which the petitioner relies for the main argument put forward, negatives the contention that the order of a Revenue Divisional Officer in such a case is an order of a Revenue Court which it is necessary for the party adversely affected to set aside.

It is established that in deciding questions of court-fee the Court must have regard to the substance and not the form of the relief prayed for. It is also settled that if the relief falls under some special provision of the Court Fees Act, it cannot be brought under any residuary or general provision. The contention for the respondents is that this is a suit to obtain a declaratory decree where no consequential relief is prayed coming under article 17-A of the Court Fees Act. For the petitioner it is now contended that the suit falls under the residuary article 17-B as being a suit not otherwise provided for, the value of which cannot be estimated. The plaint in question recites that the estate of which the plaintiff claims to be the landholder was subject to an agreement whereby the then owners contracted to sell the estate to the present plaintiff (petitioner). It recites that this agreement was approved by the High Court with reference to the interests of the

ATHIMOOLA
MUDALIAR
v.
KUBRA BEGAM.

* Civil Revision Petition No. 1333 of 1935.

(1) (1920) 13 L.W. 104.

ATHIMOOLA
MUDALIAR
v.
KUBRA BEGAM.

minors concerned, that certain sums were paid under the agreement and that the plaintiff who had originally been in possession as lessee continued to be in possession under the agreement by way of part-performance. It goes on to recite that the vendors had refused to complete the contract and had set up the sixth defendant to claim a right to collect the rents, that the plaintiff had applied to the Revenue Divisional Officer for registration as landholder under section 3 (5) of the Madras Estates Land Act and that the latter had refused to recognize him and the Collector had refused to interfere with his order. Then the prayer is that the order of the Revenue Divisional Officer and the revisional order of the District Collector should be set aside and that the plaintiff should be recognized as a landholder of the suit estate under section 3 (5) of the Madras Estates Land Act (I of 1908).

It being established that the setting aside of the orders of the Revenue Officers is not a legal necessity in a suit of this kind, it seems to me to follow that the essential relief which the plaintiff is claiming is the recognition of himself as the person entitled to hold possession and to collect the rents of the suit estate. What the plaintiff asks for is a formal statement of his right to collect the rents of this estate and to be recognized by the Government as the person so entitled to collect the rents. Such recognition must necessarily take the form of a declaration and, whatever words may be used to describe the decree sought, it is in fact a declaratory decree. The petitioner contends on the strength of the case already

ATHIMOOLA
MUDALIAR
v.
KUBRA BEGAM.

referred to, namely, *Vannisami Thevar v. Chellasami Thevar*(1), that the declaration, if it be a declaration, sought by means of this suit, is not the type of declaratory decree to which article 17-A of the Court Fees Act applied, but some special form of declaration which is a creature of statute and for which no express provision in the Court Fees Act has been made. In the case just referred to, the learned Judges do differentiate between what they call the common law right to a declaratory decree and a right conferred by some special statute. It is, of course, arguable that there is no such thing as a common law right to a declaratory decree, but it is not necessary for me to go into that question now. I would, however, restrict the decision in *Vannisami Thevar v. Chellasami Thevar*(1) to what it really decides, namely, that in a case of this kind there is no necessity to ask for the cancellation of the Revenue Officers' orders, that section 42 of the Specific Relief Act does not apply and that there is no necessity therefore to pray for any consequential relief. When so much is conceded, the petitioner would argue that this case does not fall under section 42 of the Specific Relief Act and therefore does not come under article 17-A of the Court Fees Act. I doubt whether that contention is sound. It is true that there are decisions which have held that certain suits of a quasi-declaratory nature provided for by special statutory provisions are not to be treated as declaratory suits for the purposes of Court Fees Act. Thus it has been held that a suit under section 112 of the Madras

ATHIMOOLA
MUDALIAR
v.
KUBRA BEGAM.

Estates Land Act, which is a suit to contest the right of summary distraint for rent, is not a suit for a declaration coming under article 17-A of the Court Fees Act ; vide *Aiyasami Aiyar v. District Board, Tanjore* (1). It has been held that a suit to direct the registration of a document under section 77 of the Indian Registration Act is not a suit for a declaration and consequential relief, but comes under the residuary provision ; vide *Ramu Aiyar v. Sankara Aiyar* (2). The Privy Council have held that the ordinary classes of claim suits, though they do involve the declaration of a right, are essentially suits to set aside summary orders and that article 17 (1) applies. It seems to me that the proper criterion must be whether a suit asking for a declaration is one of a special character specially provided for by a special statute. If it is merely a suit for a declaratory decree, the declaration asked for being a right which itself arises from a special statute, I do not see why it should not come under article 17-A of the Court Fees Act. If, however, it is a special form of suit involving special procedure and special defences such as a suit under section 112 of the Madras Estates Land Act, or if it involves a special mandatory power granted by statute as a suit under section 77 of the Registration Act, or if it involves the setting aside of a summary order of a Court as in the case of the ordinary claim suits, then obviously it is not a simple suit for a declaration with or without consequential relief. But in the present case the relief which the plaintiff seeks is in fact nothing more than a simple

(1) (1929) I.L.R. 52 Mad. 972.

(2) (1907) I.L.R. 31 Mad. 89 (F.B.).

declaration that he is entitled as of right to possession of the whole of this estate and to collect the rents thereon. It is true that registration of his capacity as a landholder is a thing provided for by a special statute and it is true that a Bench of this Court has held that technically the suit does not fall under section 42 of the Specific Relief Act so as to make it necessary to pray for a consequential relief. At the same time I can see nothing in the nature of the suit to give it any peculiar character so as to take it out of the general terms of article 17-A of the Court Fees Act and I therefore dismiss the civil revision petition with costs.

Time for payment is one month.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice K. S. Menon.

T. D. KARUPPANNA PILLAI (PLAINTIFF), APPELLANT,

1936,
February 6.

v.

F. W. HAUGHTON (DEFENDANT), RESPONDENT.*

Madras District Municipalities Act (V of 1920), sec. 350—
“Act done in pursuance or execution or intended execution of Act”—Act done with knowledge that it is not authorized by Act, if—Prosecution not authorized by Act—Institution of, with knowledge that it is not so authorized—Suit for damages for—Notice under sec. 350 of Act—Necessity—Prosecution malicious, if—Test of.

The respondent, the chairman of a municipal council, prosecuted the appellant under Schedule IV, Rule 30 (2), read

* Second Appeal No. 1583 of 1931.

ATHIMOOLA
MUDALIAR
v.
KUBRA BEGAM

KARUPPANA
PILLAI
v.
HAUGHTON.

with section 344 of the Madras District Municipalities Act, for non-payment of cart-stand fees. The right to collect those fees had been farmed out by the council to a contractor to whom, and not to the council, those fees were therefore due and the appellant was acquitted on that ground. In a suit thereupon filed by the appellant against the respondent for damages for malicious prosecution, the respondent admitted in his own evidence that he knew that section 344 did not authorize him to prosecute the appellant.

Held that, as the respondent was definitely aware that in filing the complaint against the appellant he was doing something which the District Municipalities Act did not permit him to do, section 350 of that Act had no application and the suit could not be dismissed on the ground that the notice required by that section had not been given.

G. Scammell & Nephew, Ltd. v. Hurley, [1929] 1 K.B. 419, followed. *Koti Reddi v. Subbiah*, (1918) I.L.R. 41 Mad. 792 (F.B.), distinguished.

Held further that the prosecution of the appellant must in law be deemed to be malicious.

Although the motive of the respondent for prosecuting the appellant might not have been to gratify a personal spite, the fact remained that he prosecuted a person who, he knew, was not guilty of any offence.

APPEAL against the decree of the Court of the District Judge of Coimbatore in Appeal Suit No. 412 of 1929 preferred against the decree of the Court of the Subordinate Judge of the Nilgiris, Ootacamund, in Original Suit No. 34 of 1929.

The second appeal came on for hearing before PANDRANG ROW J. when his Lordship made the following

ORDER :—

I find after hearing the arguments on both sides that this appeal raises a question of general importance on which there is no clear decision by any Indian High Court. The question arises out of section 350 of the Madras District Municipalities

KARUPPA
PILLAI
v.
HAUGHTON.

Act which provides that notice should be given before a suit for damages or compensation is instituted against any municipal officer or servant "*in respect of any act done in pursuance or execution or intended execution of this Act or any rule or by-law made under it*". The question put briefly is: whether, when an act is done with the knowledge that it is not authorized by a statute, it can be said to be an act done in pursuance or execution or intended execution of the statute.

In this case, it is admitted by the defendant who was the Chairman of the Municipal Council, Coonoor, that he knew at the time he prosecuted the plaintiff, who was a Councillor of the same Municipal Council, for non-payment of cart-stand fees that these cart-stand fees were not payable to the municipality. The dues were really payable to the contractor to whom the right of collecting cart-stand fees had been granted by the Municipal Council, viz., one Fakeer Muhammad, and neither the Council nor the Chairman was legally bound in any way to assist the contractor in the collection of amounts due to him. In any case the amounts due to the contractor cannot be said to be amounts due to the Municipality, and it was on this ground that the prosecution which was launched against the plaintiff by the defendant in 1927 proved a failure, the bench which heard the case being of opinion that the Municipal Council had no right to prosecute the plaintiff in respect of amounts due to its contractor.

The Full Bench decision in *Koti Reddi v. Subbiah*(1) lays down that a public officer even when he has acted *mala fide* in the discharge of his duties is entitled to notice under section 80 of the Code of Civil Procedure. The words used in that section are "any act purporting to be done by such public officer in his official capacity". These words have, however, been described as being somewhat wider in significance than the words found in section 350 of the Madras District Municipalities Act. On the other hand, the same words as are found in section 350 of the Madras District Municipalities Act are found in the English Act of 1893 and it has been held in more than one English case that they would not include acts done without authority and with the knowledge that they were without authority; vide *G. Scammell & Nephew, Ltd. v. Hurley*(2) and the cases quoted therein.

(1) (1918) I.L.R. 41 Mad. 792 (F.B.).

(2) [1929] 1 K.B. 419.

KARUPPANNA
PILLAI
v.
HAUGHTON.

It therefore appears to me that this question is one of some difficulty, and, as it is of general importance and likely to arise in future also, I am of opinion that it is desirable that it should be decided by a Bench. The appeal should therefore be posted before a Bench.

ON THE REFERENCE:

S. Panchapagesa Sastri for appellant.

K. S. Champakesa Ayyangar for *T. M. Kasturi* for respondent.

KING J.

The JUDGMENT of the Court was delivered by KING J.—The appellant in this second appeal was a member of the Municipal Council, Coonoor. The Council had farmed out the right to collect fees on cart-stands in Coonoor to one Fakeer Muhammad, and it appears that the appellant refused to pay Fakeer Muhammad certain fees which were demanded by him. Fakeer Muhammad took the matter to the respondent who was then the Chairman of the Coonoor Municipality and, after exhausting every attempt to induce the appellant to pay the fees to Fakeer Muhammad, the respondent finally prosecuted him before the Bench Magistrate of Coonoor under Schedule IV, Rule 30, sub-rule 2, read with section 344 of the Madras District Municipalities Act. The Bench Court acquitted the appellant on the ground that the fees were due not to the Council but to the contractor and therefore section 344 of the Act did not apply. The appellant thereupon filed a suit against the Chairman (respondent) for damages for malicious prosecution in the Court of the Subordinate Judge, Nilgiris. The Subordinate Judge held that the prosecution was malicious and overruled the objection raised by the Chairman that under section 350 of the Act

KARUPPANNA
PILLAI
v.
HAUGHTON.
KING J

he had not been given the requisite notice before the institution of the suit. Damages were awarded to the extent of Rs. 200. Upon appeal the learned District Judge of Coimbatore reversed both these findings and he held that the prosecution was not malicious and was not instituted without reasonable or probable cause and also that under section 350 the suit would not lie as no notice was given to the Chairman. The appellant has again brought up these two issues in this second appeal.

Section 350, which lays down the conditions under which notice is requisite, runs as follows, omitting all the unnecessary words :

“No suit for damages shall be instituted against any Municipal Officer in respect of any act done in pursuance or execution or intended execution of this Act or any rule, by-law, regulation or order made under it.”

In support of the appeal, we have been referred to an English decision reported as *G. Scammell & Nephew, Ltd. v. Hurley*(1). That is a decision in which there came for consideration a clause in the Public Authorities Protection Act which is drafted in exactly the same way as the material clause in section 350 of the District Municipalities Act and in discussing that clause quotation was made from a judgment of BLACKBURN J. delivered in *Selmes v. Judge*(2) in which that learned Judge says :

“I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute.”

Now, the respondent in his own evidence in the suit now in question has admitted that he

(1) [1929] I. K. B. 419.

(2) (1871) L.R. 6 Q.B. 724.

KARUPPANNA
PILLAI
v.
HAUGHTON.
—
KING J.

knew that section 344 did not authorize him to prosecute the appellant. It is found no doubt by the learned District Judge that in the ordinary sense of the word there was no malice and that the motives of the respondent were good. But it is perfectly clear from his own evidence, and it cannot be challenged, that the respondent was definitely aware that in filing this complaint he was doing something which the Act did not permit him to do. It seems to us then that the dictum of BLACKBURN J. must be taken to apply to the facts of this case, and that it is impossible for the respondent to argue with any hope of success that, in authorizing a prosecution which he knew he was not permitted to authorize, he was intending to execute any portion of the District Municipalities Act. It is impossible that any one can intend to do a thing which he knows he is not doing. As against this, however, we have been referred on behalf of the respondent to a ruling reported as *Koti Reddi v. Subbiah*(1). In that case, a public officer was held to be entitled to notice of a suit under section 80 of the Civil Procedure Code even though in the discharge of his duties he had acted *mala fide*. This is no doubt a good authority for section 80 of the Civil Procedure Code. But the words "purporting to be done" in section 80 of the Civil Procedure Code are not the same words as are found in section 350 of the District Municipalities Act. Of the two learned Judges who decided *Koti Reddi v. Subbiah*(1), WALLIS C.J. definitely says that the words "done or intended to be done under the provisions of this Act", which are practically the

(1) (1918) I.L.R. 41 Mad. 792 (F.B.).

same as "done in pursuance or execution or intended execution of this Act", are narrower than the words "purporting to be done". SADASIYA AYYAR J. definitely stated that it confuses the mind to attempt to interpret the meaning of the words "purporting to be done" by reference to the English decisions which deal with such a phrase as "done in execution or intended execution of his office". As the two learned Judges who decided *Koti Reddi v. Subbiah*(1) have been at pains to point out the distinction between the words they were interpreting and words identical with or similar to the words which we have now to interpret, it is obvious that *Koti Reddi v. Subbiah*(1) can be no authority against the ruling to which we have been referred, in which BLACKBURN J. says that it is impossible for anyone to intend that which he knows he is not doing. The result is that in our opinion section 350 cannot apply to the facts of the present case. No notice was therefore necessary and the suit cannot be dismissed on this ground.

The next point is whether this prosecution is malicious. The facts which we have already discussed, we think, prove that the prosecution must in law be deemed to be malicious. What is the situation here? The situation reduced to its simplest terms is this, that the Chairman knew that the appellant had committed no offence and that in spite of that knowledge he decided to prosecute him. His motive for doing so may have been not to gratify a personal spite but to promote what he thought the best interests of the Municipality. But the fact remains that he prosecuted

(1) (1918) I.L.R. 41 Mad. 792 (F.B.).

KARUPPANNA
PILLAI
v.
HAUGHTON.
—
KING J.

KARUPPANNA
PILLAI
v.
HAUGHTON.
—
KING J.

a person who, he knew, was not guilty of any offence. That being the case, it seems to us clear that there cannot have been any reasonable or probable cause for the prosecution, and whatever his motive may have been, to have embarked upon a prosecution of this kind without reasonable or probable cause must amount to malice in law.

We therefore hold that on both the grounds the decree of the learned District Judge must be set aside and that the suit is competent and must succeed.

A final argument was addressed to us with regard to the quantum of damages. Rs. 200, as already stated, has been awarded as damages to the appellant. There is a finding that the actual expenses which he has incurred in defending himself from this prosecution amount to Rs. 100 and the learned Subordinate Judge has also given details to show what standing in life the appellant occupies. We think that in the circumstances the sum of Rs. 200 is the appropriate sum to be fixed for damages and we see no sufficient reason to interfere with it.

In the result this appeal is allowed with costs throughout and the decree of the learned Subordinate Judge is restored.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice K. S. Menon.

SAVCAR U. VAIKUNTA BHAT (PLAINTIFF), APPELLANT,

v.

K. SARVOTHAMA RAO, THE OFFICIAL LIQUIDATOR OF
UPPINANGADY CO-OPERATIVE SOCIETY (DEFENDANT),
RESPONDENT.*

1936,
February 5.

Co-operative Societies Act (II of 1912), sec. 42 (6)—Past member of society—Liability of, to contribute—Determination of question of—Liquidator's power under sec. 42 (2) (b) of Act—Past member who ceased to be member more than two years before liquidation—Liability of, to contribute—Liquidator's decision as to—Suit by member to challenge—Maintainability of—Sec. 42 (6) of Act, if a bar to.

A co-operative rural credit society went into liquidation and the liquidator appointed to administer the affairs of the society made an order directing the plaintiff to contribute a certain sum. The plaintiff was admittedly once a member of the society but he contended that he ceased to be a member five years before the liquidation. The liquidator overruled the contention and held that the plaintiff was liable to contribute as an existing member. The plaintiff paid the contribution and filed a suit in the Civil Court claiming refund of the amount paid on the ground that he was not liable to contribute.

Held that the suit was not barred by section 42 (6) of the Co-operative Societies Act, 1912.

There is no clear indication in section 42 (2) (b) of the Co-operative Societies Act that the liquidator can determine, in such a way that this determination is not subject to be set aside by the Civil Courts, who are liable either as members or as past members of the society to contribute to the assets of the society.

Mukand Lal v. Liquidator, Malhotra Bank, Hafizabad, (1933) I.L.R. 14 Lah. 703, referred to.

Md. Barkat Ali v. Anjuman Imdad Qarza, A.I.R. 1935 Lah. 330, distinguished.

* Second Appeals Nos. 840 and 1102 of 1931.

VAIKUNTA
BHAT
v.
SARVOTHAMA
RAO.

APPEALS against the decrees of the District Court of South Kanara in Appeal Suits Nos. 329 of 1929 and 382 of 1929 preferred against the decrees of the Court of the District Munsif of Puttur in Original Suits Nos. 587 of 1928 and 478 of 1928 respectively.

The above second appeals came on for hearing before VENKATARAMANA RAO J. when his Lordship made the following

ORDER :—

The main question argued in this appeal is whether the suit is barred by section 42 (6) of the Co-operative Societies Act. The facts necessary for the disposal of this question may be briefly stated. The plaintiff became a member of the Rural Credit Society, Uppinangady, in 1914. His case is that he resigned his membership and withdrew his share capital in 1918. The society went into liquidation in 1923 and Mr. Giriappa became the liquidator and he passed an order on 9th July 1925 that the plaintiff was not liable; subsequently the present liquidator, Mr. Kannan Nair, succeeded him and he passed an order, Exhibit II, on 6th December 1927 directing the plaintiff to contribute a sum of Rs. 500. To avoid coercive process, the plaintiff paid the amount and seeks a refund of the same. The plaintiff's contention is that, under section 23 of the Co-operative Societies Act, 1912, which governs the case, his liability continued only for two years from the date of his ceasing to be a member and this liability ceased in 1920 and the liquidator has no jurisdiction under section 42 (2) (b) of the Act to levy any contribution from him. The answer of the liquidator is that the order made by him being a matter connected with the dissolution of the society, no suit will lie to contest the same by reason of section 42 (6) of the Act which runs as follows :

"Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act."

It is a cardinal principle of the construction of statutes that an enactment which seeks to oust the jurisdiction of Civil Courts should be construed strictly. The construction of the said

VAIKUNTA
BHAT
v.
SARVOTHAMA
RAO.

clause in accordance with this principle is that before the jurisdiction of the Civil Court is ousted it must be a matter within the jurisdiction of the liquidator, though it may be a matter connected with the dissolution of the society. Therefore the question is, has the liquidator jurisdiction to pass the order in question under section 42 (2) (b) which is in these terms :

"A liquidator appointed under sub-section 1 shall have power to determine the contribution to be made by the members and past members of the society respectively to the assets of the society."

Thus the condition precedent to the exercise of jurisdiction by the liquidator is that the person who is directed to contribute should be a member or a past member. If it is disputed, the liquidator would have no jurisdiction to determine the liability, but if there is no question that a person is a member or a past member, the liquidator will have jurisdiction to assess the contribution according to the provisions of the Act. In this case, the plaintiff is admittedly a past member, i.e., he was once a member but has now ceased to be one. The liability of such a past member is determined by section 23 which provides thus :

"The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member."

The liquidator will determine his liability in accordance with the provisions of the section and then assess him for the proper amount of contribution. The scheme of the Act seems to be that the liquidator is expected to deal expeditiously and at comparatively little expense with all questions relating to the assessment of contribution for getting in the assets as speedily as possible and deal with them finally. This is the view taken by BHIDE J. in *Md. Barkat Ali v. Anjuman Imdad Qarni*(1). Mr. Sitarama Rao contends that this view is not sound. His contention is that according to the plain language of section 42 (2) (b) the liquidator will have power to determine only the contribution, i.e., fix the amount when there is no dispute as to liability, but when the liability is disputed he has no jurisdiction to determine it and that the condition precedent to the assumption of jurisdiction is the existence of a

(1) A.I.R. 1935 Lah. 330

VAIKUNTA
BHAT
v.
SARVOTHAMA
RAO.

liability. He relies strongly on the Privy Council ruling in *Secretary of State for India in Council v. Fakamiddannissa Begum*(1). As the matter is not free from doubt and is of some importance, I think it desirable that the question should be decided by a Bench and I accordingly refer the same to a Bench.

ON THE REFERENCE :

T. Krishna Rao for *B. Sitarama Rao* and
K. P. Sarvothama Rao for appellants.

V. Ramadas for respondents.

KING J.

The JUDGMENT of the Court was delivered by KING J.—The appellants in these two appeals were admittedly once members of the Co-operative Rural Credit Society of Uppinangady. A liquidator was appointed to administer the affairs of the society and, under clause 2 (b) of section 42 of the Co-operative Societies Act, it was his duty to determine the contribution to be made by the members and past members of the society to its assets. The case of both the appellants was that five years before the society was dissolved, they had ceased to be members. The liquidator heard this plea and held that they had not established it and accordingly they as existing members were liable to contribute under this sub-section. The contributions were then paid and separate suits filed by the two appellants in the Court of the District Munsif of Puttur claiming refund of this money on the ground that they were not liable to contribute. It was held both by the first Court and by the lower appellate Court that, by virtue of section 42 (6) of the Act, no such suit could be maintained. The question at issue in the two

(1) (1889) I.L.R. 17 Cal. 590 (P.C.).

appeals is whether that decision is right or not. Section 42 (6) runs:

“Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.”

We have been referred to two cases of the Lahore High Court in connection with the powers of the Civil Courts in this matter. In *Mukand Lal v. Liquidator, Malhotra Bank, Hafizabad*(1) the person who was sought to be made liable to contribute maintained that he had never been a member of the society at all and it was held that Civil Courts had power to determine whether this fact was true or not, as an essential preliminary to the attachment of any liability in the liquidation. In *Md. Barkat Ali v. Anjuman Imdad Qarza*(2) the case was of an ex-member, like the present appellants. It was held that, as he had admitted that he had once been a member of the society, he was a “past member” and therefore the liquidator had power to determine what contribution he was liable to pay. It is important, however, to note the extent of the admission in *Md. Barkat Ali v. Anjuman Imdad Qarza*(2). It was an admission that the party had ceased to be a member less than a year before the society fell into liquidation. That party therefore could on no reasonable interpretation of section 23 of the Act, which lays it down that liability ceases two years after membership ceases, have disclaimed liability. In the present case, where the contention is that the appellants ceased to be members five years before the liquidation, we are quite

VAIKUNTA
BHAT
v.
SARVOTHAMA
RAO.
—
KING J.

(1) (1933) I.L.R. 14 Lah. 703.

(2) A.I.R. 1935 Lah. 330.

VAIKUNTA
BHAT
v.
SARVOTHAMA
RAO.
KING J.

unable to hold that merely because they were *once* members they have no right on this contention to ask the Civil Courts to decide whether they are under any liability to contribute at all.

If we now leave the decisions and come to examine the words of section 42 (2) (b) itself, we find no clear statement that the liquidator has power to determine who shall and who shall not be liable to contribute. It seems to us it would have been easy for the Legislature to have made this clear by drafting the clause in some such form as this :

“to determine which members and past members of the society shall contribute to the assets and how much they shall contribute”.

That is not the way the sub-section is worded. We think that in construing the powers of the liquidator, when these powers are to be free from all control by the Civil Courts, we must construe them as strictly as possible. We are unable to find in the Act any clear indication that the liquidator can determine, in such a way that this determination is not subject to be set aside by the Civil Courts, who are liable either as members or as past members of the society to contribute to the assets of the society. We are of opinion therefore that the decision of the lower Courts is wrong and we allow the appeals and remand the suits for decision on their merits. Costs to abide the event. The court-fee on the memorandum of appeal both here and in the lower appellate Court to be refunded if applied for.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Mockett.

VANGURI VEERARAGHAVA RAO (PETITIONER),
PETITIONER,

v.

SRI MIRJA NALLAPPARAJU VENKATANARASIMHA
RAJU GARU (RESPONDENT), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XXXIII,
r. 9 (c)—Agreement contemplated by—Champertous agree-
ments only, if.*

A person cannot sue as a pauper if, at the time of his petition, some other person has under an agreement a subsisting interest in the subject-matter of the suit; the agreement contemplated by Order XXXIII, rule 9 (c), is not necessarily confined to a champertous agreement.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Ellore dated 14th February 1935 and made in Civil Miscellaneous Petition No. 25 of 1935 in Original Suit No. 52 of 1933.

G. Lakshmanna for petitioner.

P. Somasundaram for respondent.

Cur. adv. vult.

JUDGMENT.

This is a civil revision petition against an order of the Additional Subordinate Judge of Ellore rejecting the petition of the sixth defendant praying that the plaintiff may be dispaupered. Order XXXIII, rule 9, Civil

* Civil Revision Petition No. 381 of 1935.

VEERA-
RAGHAVA RAO
v.
VENKATA-
NARASIMHA
RAJU GARU.

Procedure Code, gives a discretion to the Court to dispauper a plaintiff, (a) if he is guilty of vexatious or improper conduct in the course of the suit, (b) if it appears that his means are such that he ought not to continue to sue as a pauper, or (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter. It was argued in the lower Court that, as the plaintiff had admittedly, after he was given leave to sue in *forma pauperis*, executed a mortgage over the properties affected by the suit, the Court should dispauper him under Order XXXIII, rule 9 (c), Civil Procedure Code. Two points of view have been argued before me. Mr. Lakshmanna has argued that any agreement affecting the subject-matter of the suit will be sufficient to enable the Court to act under Order XXXIII, rule 9 (c). Mr. P. Somasundaram has contended that such an agreement should be a champertous agreement and this I gather is the basis of the lower Court's order. Mr. Somasundaram's argument is supported by the decision in *Abdul Jabbar Talukdar v. Sanu Ribi*(1) to this extent that a Bench of the Calcutta High Court there held that Order XXXIII, rule 5 (e), refers to a champertous agreement. The learned Judges in that case rely on *Bai Chandaba v. Kuver Saheb Bapu Saheb*(2) in which the Bombay High Court expresses the same view. Mr. Lakshmanna relies on *Edulji Cowasji v. Dadabhoy*(3) where the Assistant Judicial Commissioner of Sind holds that there is no such

(1) (1934) 38 C.W.N. 1069.

(2) (1893) I.L.R. 18 Bom. 464.

(3) (1913) 21 I.C. 536.

VEERA-
RAGHAVA RAO
v.
VENKATA-
NARASIMHA
RAJU GARU.

limitation by words in Order XXXIII, rule 9. *Manohar Ramchandra v. Lakshman Mahadev*(1), by implication, is in line with the Sind case. The authorities are therefore far from unanimous and no Madras ruling has been cited. It seems to me that Order XXXIII, rule 9 (c), need not necessarily refer to a champertous agreement. The wording of the rule is unqualified and it would seem that it clearly removes, from the pauper category, suits in which other persons are interested in the subject-matter, the notion, I think, being that such persons might pay the necessary court-fee. I do not see why such agreements need be champertous at all. There is no reason for introducing qualifying words into the rule which seems to be clear enough as it is. My construction of Order XXXIII, rule 9 (c), is that a person cannot sue as a pauper if, at the time of the petition, some other person has under an agreement an interest in the subject-matter. I think it must be a subsisting interest at the time of the suit; otherwise, as has been pointed out in argument, the subject-matter of suits which long ago had been concerned in agreements no longer in force would be affected, which I do not think is the intention of the rule. As I have already said, when there is another person interested at the time of the suit, the likelihood is that such a person would pay the court-fee. The authorities assist me to that extent. In view of the above, the order of the lower Court should be set aside. But I think, as there is a discretion in the Court under Order XXXIII, rule 9, that this matter

(1) (1885) I.L.R. 9 Bom. 371.

VEERA-
RAGHAVA RAO
v.
VENKATA-
NARASIMHA
RAJU GARU.

should be sent back to the lower Court to be re-heard, i.e., it will be for that Court to decide whether in its discretion the petitioner should be dispaupered or not. The petitioner will have his costs of this revision petition.

G.R.

APPELLATE CRIMINAL.

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

1936,
February 15.

P. RATNASABAPATHY GOUNDAN (FIRST ACCUSED),
APPELLANT,

v.

THE PUBLIC PROSECUTOR, MADRAS (NIL),
RESPONDENT.*

*Code of Criminal Procedure (Act V of 1898), ss. 423 and 439—
Accused convicted as a result of a verdict of the jury—
Appeal by accused—Revision petition by Crown for en-
hancement of sentence—Right of convicted person, in showing
cause against conviction, to go into the facts of the case—
“Notwithstanding anything contained in this section”, in
sub-sec. (6) of sec. 439 of Code—Meaning of—Trial
Judge—Right of, to express his opinion to the jury—
Limits of.*

An accused person was convicted in a trial by a jury of the offence of robbery and he appealed to the High Court under section 423 of the Code of Criminal Procedure. A criminal revision petition was filed by the Crown for enhancement of sentence under section 439 of the Code. On a submission made on behalf of the accused that, because of the opening words of sub-section (6) of section 439, namely, “not-

* Criminal Appeal No. 400 of 1935 and Criminal Revision Case No. 844 of 1935. (Criminal Revision Petition No. 777 of 1935.)

withstanding anything contained in this section”, which includes section 423, a convicted person is entitled in showing cause against his conviction to go into the facts of the case even though he has been convicted as a result of the verdict of a jury.

Held: (i) A convicted person in showing cause against his conviction under sub-section (6) of section 439 has only the same right as he has when he comes before the Court by way of an appeal under section 423, and his position is not different merely because an enhancement of sentence is sought for by the Crown.

Rhodabuz Haji v. Emperor, (1933) I.L.R. 61 Cal. 6, followed.

(ii) The words, “notwithstanding anything contained in this section”, in sub-section (6) of section 439 of the Code, cannot by implication override the express and imperative provisions of the earlier section, namely, section 423 of the Code.

(iii) A trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to be necessary to do so provided that he warns the jury that his opinion is in no way binding on them and that it is the jury's opinion on the facts of the case alone which matters.

APPEAL against the conviction of and sentence passed by the Court of Session of the Coimbatore Division in Case No. 41 of its Calendar for 1935 and petition under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to enhance the sentence passed on the first accused in Sessions Case No. 41 of 1935 on the file of the Court of Session of the Coimbatore Division.

Nugent Grant, V. L. Ethiraj, T. M. Kasthuri and N. Somasundaram for appellant in criminal appeal.

Public Prosecutor (L. H. Bewes) for the Crown in criminal appeal and criminal revision petition.

RATNASABA-
PATHY
GOUNDAN
v.
PUBLIC
PROSECUTOR,
MADRAS.

RATNASABA-
PATHY
GOUNDAN
v.
PUBLIC
PROSECUTOR,
MADRAS.

N. Somasundaram for respondent in criminal revision petition.

Cur. adv. vult.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—This is an appeal by the first accused in Sessions Case No. 41 of 1935 in the Sessions Court of Coimbatore. The appellant was convicted of an offence punishable under section 392 of the Indian Penal Code, namely, robbery, as a result of the unanimous verdict of the jury. He was sentenced to rigorous imprisonment for two years by the learned Sessions Judge.

Five other accused were charged with the appellant under section 120-B read with section 384 of the Indian Penal Code; and the appellant was also charged with accused 1 to 4 and the sixth accused with extortion, section 384 of the Indian Penal Code, and with the same accused with dacoity, section 395 of the Indian Penal Code. The appellant was acquitted on the other charges by the learned Sessions Judge and all the other accused were acquitted on all the charges.

[Portion of the judgment omitted as not being necessary for this report.]

The learned Sessions Judge took a definite view of the case as his charge to the jury shows. That charge was very strongly favourable to the defence and extremely hostile to the case for the Crown. Indeed he expressed his own opinion very strongly against the zamindar's evidence, his story and the case for the Crown, and left the jury in no doubt whatever about his views of the case. We may pause here and say that a trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to

be necessary to do so, provided that he warns the jury that his opinion is in no way binding upon them and that it is the jury's opinion on the facts of the case alone which matters. This warning the learned Sessions Judge frequently gave to the jury. The jury, however, as they were quite entitled to do, accepted the zamindar's evidence and unanimously found the appellant guilty of robbery. The learned Sessions Judge accepted the verdict. The first accused now appeals; and as he has been convicted by a jury, the provisions of section 423 of the Code of Criminal Procedure apply to this case. Therefore, the appellate Court by reason of sub-section (2) is not authorized to alter or reverse the verdict of the jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. The appellate Court accordingly cannot go into the facts of the case except to see whether there has been any misdirection by the Judge. Mr. Grant for the appellant has found himself in an exceedingly difficult position in view of the fact that the learned Sessions Judge's charge to the jury was so entirely favourable to the appellant as he has from the first frankly admitted. He, however, contended that the appellate Court is entitled to go into the facts of the case and reverse the findings of the jury, because a criminal revision case has been filed by the Crown for enhancement of sentence calling upon the High Court to exercise its powers of revision under section 439 of the Code of Criminal Procedure. By virtue of sub-section (2) of that section no order under the section shall be made

RATNASABA-
PATHY
GOUNDAN
v.
PUBLIC
PROSECUTOR,
MADRAS.
BEASLEY C. J.

RATNASABA-
PATHY
GOUNDAN
v.
PUBLIC
PROSECUTOR,
MADRAS.
BEASLEY C.J.

to the prejudice of the accused unless he has had an opportunity of being heard either personally or by a pleader in his own defence and, under sub-section (6), such convicted person in showing cause shall be entitled also to show cause against his conviction. Under sub-section (1) the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by, *inter alia*, section 423 of the Code. Mr. Grant argued that because of the opening words of sub-section (6), namely, "notwithstanding anything contained in this section", which includes section 423, a convicted person is entitled in showing cause against his conviction to go into the facts of the case, even though he has been convicted as a result of the verdict of a jury. Sub-section (2) of section 423 is imperative and Mr. Grant's contention, therefore, is that by implication sub-section (6) of section 439 of the Criminal Procedure Code overrides the express terms of the former section. We find it impossible to accept such an extreme contention and, had it been intended by the Legislature to override the provisions of an earlier section, such an intention would have been expressly stated. In our view, a convicted person in showing cause against his conviction under sub-section (6) of section 439 of the Code has only the same right as he has when he comes before the Court by way of an appeal under section 423. The same view has been taken in the only reported case in which the same point was considered, namely, *Khodabux Haji v. Emperor*(1). It was there argued that the words "notwithstanding anything contained in this section" obliterated the

plain language of sub-section (1) of section 439 in which is incorporated amongst others section 423. The Calcutta High Court, however, declined—and in our opinion quite rightly—to accept that argument and held that in all cases where the question of enhancement of sentence is before the Court the position is just the same as if the matter had come before the Court by way of appeal or revision at the instance of the convicted person himself. It is indeed difficult to find any reason why the position should be otherwise merely because an enhancement of sentence is sought for; and, as we have already said, the words "notwithstanding anything contained in this section" cannot by implication override the express and imperative provisions of an earlier section. We are therefore against the appellant's contention upon this point.

[Portion of the judgment omitted as not being necessary for this report.]

In our view, the appeal cannot succeed and must be dismissed. With regard to the enhancement of sentence, we can see no reason for increasing it. The criminal revision case must therefore also be dismissed.

G.R.

RATNASABA-
PATHY
GOUNDAN
v.
PUBLIC
PROSECUTOR,
MADRAS.
BEASLEY C.J.

(1) (1933) I.L.R. 61 Cal. 6.

PRIVY COUNCIL.

* J.C.
1936,
April 28.

ZAMINDAR OF POLAVARAM, APPELLANT,

v.

MAHARAJAH OF PITTAPUR, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Transfer of Property Act (IV of 1882), ss. 54 and 55 (4) (b)—
Transfer for a definite sum of money with addition of a
covenant by transferee, whether a sale—Vendor's lien—
Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 15—
Personal covenant by guardian—Liability of minor's estate.

Where a village is transferred for a definite sum of money with a covenant that the purchaser will raise no objection to the auction sale under which his vendor acquired the property and where the parties intend the transfer to be a sale and it is in substance a sale, the transfer is a sale within the definition in section 54 of the Transfer of Property Act, notwithstanding the addition of the covenant by the transferee.

Where a mortgage deed by the guardian of a minor contains a personal covenant and a suit on the deed fails for want of proof of attestation of the deed but succeeds on an alternative claim of a vendor's lien on the suit property, a decree should not be granted against the general assets of the minor.

CONSOLIDATED APPEALS (Nos. 30 of 1932 and 98 of 1933) from a decree of the High Court (May 1, 1930) which varied a decree of the Government Agent, East Godavari (July 6, 1925).

The Judgment of the High Court is reported in (1930) I.L.R. 54 Mad. 163.

The material facts are stated in the judgment of the Judicial Committee.

Sidney Smith for appellant.—The suit on the mortgage fails for want of proof of attestation of the mortgage deed. The claim for a vendor's lien is unsustainable as the transfer

Present : LORD THANKERTON, SIR SHADI LAL and SIR GEORGE RANKIN.

was not a sale within the definition in section 54 of the Transfer of Property Act. "Price" means money; *Madam Pillai v. Badrakali Ammal*(1) and *Turner v. Edgell*(2). Here, in addition to money, there was consideration in the covenant not to raise objections to the auction sale. That takes the transaction out of the definition of sale. Assuming there was a valid transfer, the minor's estate would not be bound by the personal covenant of his guardian; *Waghela Rajsanji v. Shekh Masludin*(3), *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(4), *Indur Chunder Singh v. Radhakishore Ghose*(5), *Ramajogayya v. Jagannadham*(6) and *Venkitaswami Naicker v. Muthuswamy Pillai*(7).

De Gruyther K.C., Subba Row and A. F. Visvanatha Sastri for respondent.—The transfer was made in pursuance of a compromise. No effective steps could be taken to set aside the auction sale. [Reference was made to the Code of Civil Procedure, Order XXI, rules 89 and 90]. A sale certificate could be obtained and it would relate back to the date of the sale; section 65, Code of Civil Procedure and *Bhawani Kuwar v. Mathura Prasad Singh*(8). If the auction sale were set aside, the Maharajah would be entitled to get back the money he paid into Court. The transfer in pursuance of the compromise was a sale within the Act. Reading "price" as money does not alter the case. There can be money and something else; *Ariyaputhira v. Muthukomaraswami*(9). If the transaction is a sale, the plaintiff is entitled to a lien. [Transfer of Property Act, section 100, and Code of Civil Procedure, Order XXXIV, rule 15, were referred to].

Sidney Smith replied.

The JUDGMENT of the Judicial Committee was delivered by SIR SHADI LAL.—The circumstances which led to the action giving rise to these consolidated appeals brought by both the parties,

ZAMINDAR
OF POLAVARA
v.
MAHARAJAH
OF PITTAPUR

SIR
SHADI I

- (1) (1922) I.L.R. 45 Mad. 612 (F.B.). (2) (1837) 6 L.J. (N.S.) Ch. 201.
(3) (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551.
(4) (1856) 6 M.I.A. 393.
(5) (1892) L.R. 19 I.A. 90; I.L.R. 19 Cal. 507.
(6) (1918) I.L.R. 42 Mad. 185 (F.B.). (7) (1917) 34 M.L.J. 177.
(8) (1912) L.R. 39 I.A. 228; I.L.R. 40 Cal. 89.
(9) (1912) I.L.R. 37 Mad. 423.

ZAMINDAR
OF POLAVARAM
v.
MAHARAJAH
OF PITTAPUR.
—
SIR
SHADI LAL.

may be shortly stated. One Krishna Rao, the late Zamindar of Polavaram in the Madras Presidency, borrowed, on different dates, from the Maharajah of Pittapur (to be described hereinafter as the plaintiff) large sums of money, and secured the payment thereof by executing three successive mortgages of his estate in favour of the creditor. The last of these mortgages was granted on 22nd October 1913 as a security for a loan of more than three lakhs of rupees; and it was on the strength of this mortgage that the plaintiff instituted, after the death of the mortgagor, a suit for the recovery of the debt, impleading as defendant the mortgagor's widow. She subsequently adopted a minor boy, Jagannatha Rao, as a son to her deceased husband, and the adopted son was then added as a defendant (to be referred to hereinafter as the defendant). The suit resulted in a decree for more than four lakhs of rupees, to be realized by the sale of the mortgaged property. The decree-holder brought the property to sale, and, on 28th October 1920, he himself purchased it with the leave of the Court for six lakhs of rupees. After deducting from that price the sum due to him under the decree, he deposited the balance, Rs. 1,39,986-1-0, in Court.

It appears that the widow and her son were anxious to retain the village of Polavaram (with its hamlets), which was the ancestral property of the zamindar; and it was, therefore, arranged between the auction-purchaser and the minor's mother that the former should re-convey, for the sum deposited by him in Court, the village to the minor. But that sum was claimed by the puisne mortgagees, and it was then agreed that the

minor's mother, who was his guardian, should pay Rs. 1,39,986-1-0 for purchasing the village in question. Pursuant to this arrangement, the auction-purchaser and the guardian submitted, on 29th November 1920, an application to the Court stating the terms of the compromise and asking it to sanction the compromise as a transaction beneficial to the minor. Thereupon the Court made the following order:

"The sale of the property sold in auction on 28th October 1920 is confirmed, with the exception of the property set out in the compromise petition of 29th November 1920, which the decree-holder has agreed to leave to the minor Zamindar of Polavaram on the terms of the compromise petition.

A sale certificate for the extent of property, the sale of which is confirmed, will be issued to the plaintiff."

The guardian was, however, unable to find the money for payment to the plaintiff, but, as she was anxious to acquire the property for her minor son, she, on his behalf, granted on 14th December 1920 a simple mortgage of the village to the plaintiff as a security for the price, with her personal covenant for the payment thereof. But no payment was made to the mortgagee in satisfaction of the debt, and he brought in May 1924 the present action against the defendant, who had attained majority, and sought to recover the money by sale of the mortgaged property.

To this action various defences were raised, but they were overruled by the trial Judge who granted a decree for sale. On appeal, the High Court held that the transaction could not operate as a mortgage, as the deed had not been attested as contemplated by the definition of the

ZAMINDAR
OF POLAVARAM
v.
MAHARAJAH
OF PITTAPUR.
—
SIR
SHADI LAL.

INDAR
LAVARAM
v.
ARAJAH
PITAPUR.
—
SIR
SHADI LAL.

expression "attested" contained in the Transfer of Property (Amendment) Act (XXVII of 1926). This finding has not been challenged on behalf of the plaintiff, and must be treated as final.

The plaintiff, however, sought the same relief on the strength of his alternative claim to have a vendor's lien for the unpaid purchase price, which constituted a charge on the property sold by him. This claim has been disallowed by the High Court on the ground that the transfer in question was not a sale which would create a lien in favour of the plaintiff. The learned Judges did not, therefore, declare the debt to be a charge on the village, but treating it as an unsecured debt they directed that it should be realized from the "general assets" of the defendant.

The question which their Lordships have to determine is whether the transaction of 29th November 1920 whereby the village in question became the property of the defendant did or did not amount to a sale. That village, along with other mortgaged property, was, as stated, sold to the plaintiff on 28th October 1920; and the period within which the judgment-debtor could apply to the Court for setting aside the sale was thirty days from the date of the sale. During that period no such application was made by him, and the title of the auction-purchaser became unimpeachable. On 29th November 1920, the Court executing the decree made an order confirming the sale in favour of the plaintiff in respect of all the property purchased by him except the Polavaram village. The reason for this exclusion was clear. In accordance with the compromise, which had received the sanction of the Court, this village was to become

the property of the defendant, and it was, therefore, considered to be an act of supererogation first to record a formal order confirming the judicial sale thereof in favour of the auction-purchaser, and then to sanction its sale by him to the defendant. It is obvious that, after the expiry of the statutory period for setting aside the sale, there was no person who could question the title of the auction-purchaser, and a certificate of sale granted by the Court would in such a case be a formal document of title. In the absence of an order setting aside the sale the Court is bound to confirm it, and the law does not prescribe any special period for an application for an order of confirmation.

Moreover, the transferee agreed to accept such right, title and interest as the transferor had acquired by the Court sale; and he cannot be allowed to impugn the character of the transaction which alone enabled him to keep the property.

It is, however, argued that the consideration for the transaction consisted of two parts, viz.: a sum of money, and a promise by the transferee to abstain from raising objections to the auction sale of the mortgaged property; while sale, as defined by section 54 of the Transfer of Property Act (IV of 1882), is a transfer of ownership in exchange for a price. Now, the transfer was made apparently for a definite sum of money, and was described as a sale. It is true that the deed of compromise mentions also the promise in question but, apart from the fact that this promise was valueless, there is hardly any instrument of sale which does not contain some stipulations by the parties; and, if the addition of a covenant by the transferee

ZAMINDAR
OF POLAVARAM
v.
MAHARAJAH
OF PITAPUR.
—
SIR
SHADI LAL.

ZAMINDAR
OF POLAVARAM
v.
MAHARAJAH
OF PITTAPUR.
—
SIR
SHADI LAL.

would change its real character, it would be difficult to find a transaction which could be held to be a sale. For example, a covenant by the purchaser giving the vendor a right of pre-emption does not convert the sale into some other transfer, even though the transferee would, in the absence of such a covenant, have paid a larger price for the property. There can be little doubt that both the parties intended the transfer in question to be a sale, and in substance it was nothing but a sale.

Their Lordships are, therefore, of the opinion that the transfer of the property by the plaintiff to the defendant constituted a sale; and, under section 55 (4) (b) of the Transfer of Property Act, the seller was entitled to a charge upon the property in the hands of the purchaser for the amount of the purchase money and for interest thereon. This charge can be enforced by a sale of the property under section 100 of that Statute and under Order XXXIV, rule 15, of the Civil Procedure Code, as in the case of a simple mortgage.

The learned Judges of the High Court concurred with the trial Court that the plaintiff's claim amounted, on 6th July 1925, to Rs. 2,02,591-9-0, and they awarded interest thereon at six per cent per annum from that date until the date of payment. They also found that, as the defendant was a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt. This finding has not been contested, and, as the claim for the personal liability of the defendant is negatived, the plaintiff is not entitled to recover the money from the "general assets" of the defendant.

The decree granted by the High Court, which makes the entire property of the defendant liable for the debt, cannot be upheld, and ought to be set aside. In lieu of that decree, the plaintiff must get a decree in the following terms:—That, in default of the defendant paying on, or before, 30th September 1936, the sum of Rs. 2,02,591-9-0, with interest thereon at six per cent per annum from 6th July 1925 until the date of payment, the village of Polavaram (with its hamlets as described in the mortgage deed of 14th December 1920) shall be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall be paid into Court and applied in payment of the amount due to the plaintiff.

The appeals preferred by the parties are allowed *pro tanto*, but the defendant, having failed on the main issue, must pay, not only the costs of the Courts below as directed by the High Court, but also the costs incurred by the plaintiff here. Their Lordships will humbly advise His Majesty accordingly.

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

Solicitors for respondents: *Douglas Grant & Dold.*

C.S.S.

ZAMINDAR
OF POLAVARAM
v.
MAHARAJAH
OF PITTAPUR.
—
SIR
SHADI LAL.

APPELLATE CIVIL.

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

1936,
January 31.

OOMER HAJEE AYOOB SAIT (PETITIONER), APPELLANT,

v.

THIRUNAVUKKARASU PANDARAM AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

Foreign Court—Jurisdiction of—Submission to—Attachment before judgment in suit in foreign Court—Letter written by or on behalf of defendant requesting plaintiff to allow payment of portion of attached amount to defendant and stating that the balance might be collected by him—Refusal of request of defendant and defendant allowing suit to be decreed ex parte—Submission to jurisdiction, if—Filing of suits by defendant in foreign Court in cases within its jurisdiction—Inference of submission to jurisdiction from—Permissibility of.

The appellant instituted a suit in a Court in Cochin State for the recovery of money from two minors. At the date of the suit the minors were not residents of Cochin State but were residents of Tinnevely. Pending the suit the appellant attached before judgment an amount due to the minors by a third party. Thereupon the executor of the estate in which the minors had an interest wrote a letter to the appellant which, after referring to the suit and the attachment before judgment, requested the appellant to allow a month's amount of the attached amount to be paid to the minors and stated that the balance could be collected by the appellant. The concession asked for was refused, nevertheless the minors did not appear in the suit and an *ex parte* decree was passed against them.

Held that the said letter amounted to a submission by the minors to the jurisdiction of the Cochin Court and that the Tinnevely Court to which the decree was transferred for execution was wrong in refusing execution on the ground that the Cochin Court had no jurisdiction to pass the decree.

* Appeal against Order No. 358 of 1931.

The letter in question is evidence bearing upon the intention of the minors to remain *ex parte* because the appellant's claim was a just one and there was no objection to the attachment by the foreign Court.

Sheo Tahal Ram v. Binaik Shukul, (1931) I.L.R. 53 All. 747, 757, relied upon.

A person who has filed suits in a Court having jurisdiction to try them cannot thereby by implication be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction.

Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670, relied upon.

Rousillon v. Rousillon, (1880) 14 Ch.D. 351, *Nagoor Meera v. Mahadu Meera*, (1925) 22 L.W. 820, and *Ramanathan Chettiar v. Kalimuthu Pillai*, (1912) I.L.R. 37 Mad. 163, considered.

APPEAL against the order of the District Court of Tinnevely dated 22nd January 1931 in Execution Petition No. 21 of 1930 (Original Suit No. 152 of 1103 M.E. on the file of the District Court of Anjikkaimal, Cochin State).

[On the appeal coming on for hearing the Court made an order remanding the case for a finding on the genuineness of the letter, Exhibit H, dated 11th May 1928. The District Judge of Tinnevely submitted a finding to the effect that Exhibit H was a genuine document.]

The appeal then came on for final hearing.

Ch. Raghava Rao and *K. Venkateswaran* for appellant.

C. S. Venkatachari and *P. N. Appuswami Ayyar* for respondents.

JUDGMENT.

BEASLEY C.J.—The appellant, a merchant residing in Cochin State, obtained in September 1928 an *ex parte* money decree against two minor

AYOOB SAIT
v.
THIRUNAVUKKARASU.

BEASLEY C.J.

AYOOB SAIT
v.
THIRUNAVUKKARASU.
—
BEASLEY C.J.

defendants (the respondents). The Cochin Court, namely, the Court of the District Judge of Anjikaimal, a foreign Court, clearly had no jurisdiction to pass this decree because the defendants at the date of the suit were not residents of Cochin State at all but of Tinnevely. The minor defendants did not at any time appear in the suit. The appellant, the decree-holder, sought to execute the decree which was transferred to the District Court of Tinnevely for execution. The minor defendants, the respondents, opposed execution, the main ground of opposition being that the Cochin Court had no jurisdiction to pass the decree in question. The learned District Judge refused execution upon that ground. The appellant contended that the respondents had submitted to the jurisdiction of the Cochin Court because in some other cases they had done so. This contention was not accepted by the learned District Judge who says :

“ This surely is irrelevant. It is the person who is not resident in a Native State who must determine in each case whether he shall submit to the jurisdiction of the foreign Court or not. If he does so in one case, it does not follow that he is bound to do so in all future cases. No question of estoppel arises.”

The learned District Judge therefore refused execution. The appellant, the petitioner in execution proceedings, produced a letter, Exhibit H, which, he states in an affidavit which is before us, the learned District Judge failed to consider. When this matter was before us on a previous occasion, we were of the opinion that the appellant was entitled to rely upon the letter here but, since its genuineness was disputed, a finding on that question by the District Court was called for.

That finding is before us now and it is that the letter is genuine ; and, having regard to the strong reasons given by the learned District Judge in support of this finding, we accept it. The letter is dated 11th May 1928. It is addressed to the appellant, the petitioner in the District Court and the plaintiff in the Cochin Court, and is signed by M. A. Arunachalam Pandaram, the executor of the estate in which the minor defendants had an interest. On the date of this letter, the appellant had attached before judgment in the suit an amount due by one Ruthulsi Kalyanji Sait to the minors. The letter refers to that amount and reads as follows :

“ You know that the right in respect of the amount due by Ruthulsi Kalyanji Sait, carrying on business in the Mattancheri bazaar has been attached before judgment in the suit, Original Suit No. 152 of 1103 M.E. (1927-28) filed by you in the District Court, Anjengo, against the deceased Sundaralinga Pandaram's minor children, Thirunavukkarasu and others. The said minors require a month's amount out of the said amount. I, therefore, request you to send letter through my agent Venkatrama Ayyar, the bearer of this letter, to the effect that you have no objection to the said minors being paid only a month's amount. The balance amount after deducting this one month's amount can be collected by you. Dated 11th May 1928.

(Sd.) M. A. ARUNACHALAM PANDARAM,
Executor of C.V.I.C. estate.”

The appellant contends that this letter amounts to a submission to the jurisdiction of the Cochin Court ; and he also contends that, by reason of some previous suits against other parties in which the respondents were plaintiffs filed in the Cochin Court, an inference is to be drawn that in the present suit the respondents submitted to the jurisdiction of the foreign Court although they did

AYOOB SAIT
v.
THIRUNAVUKKARASU.
—
BEASLEY C.J.

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

not appear in the suit and the decree was passed against them *ex parte*. This argument is based upon a judgment of FRY J. in *Rousillon v. Rousillon*(1), in which he considers a number of English cases in which were considered the principles upon which foreign judgments are enforced by the Courts of England and, after referring to *Schibsby v. Westenholz*(2), observes :

"What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case and to *Copin v. Adamson. Copin v. Strachan*(3), they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued."

It is the last-named position upon which reliance is placed by Mr. Raghava Rao who also relies upon the decision of this Court in *Nagoor Meera v. Mahadu Meera*(4), a judgment of PHILLIPS and RAMESAM JJ. In the course of the judgment on page 822 it is stated:

"There is also an additional circumstance which would possibly give the Ceylon Court jurisdiction and that is the fact that the defendants' firm actually filed a suit in the Ceylon Court and having come in as plaintiffs can hardly be allowed as defendants to deny the jurisdiction which they themselves invoked and in this connection I would refer to the judgment in Second Appeal No. 1492 of 1920 (not reported)."

That was a judgment of AYLING O.C.J. and ODGERS J. in which reference is made to *Rousillon v. Rousillon*(1), already referred to, and it is stated :

"Now here the first defendant swears that he filed and defended suits in the Courts of Trincomali on behalf of the second defendant under his power of attorney (Exhibit I). If then

the second defendant has through her agent selected the Trincomali Court as the forum in which to bring suits, it stands to natural justice that she cannot object to the jurisdiction of the same Court when she is afterwards sued in it. It has been argued that the words of FRY J. quoted above, which, as far as we know, have never been questioned, must be restricted to the same action or cause of action, e.g., *A* brings a suit in a foreign Court against *B* a resident in the foreign country, the Court dismisses *A's* suit and has therefore jurisdiction over him for recovery of costs, etc. The words are certainly wider than this and in our opinion the expression 'in which he is afterwards sued' must be taken as conclusive against such a contention."

Reference is also made in the judgment to *Ramanathan Chettiar v. Kalimuthu Pillai*(1). In the case before AYLING O.C.J. and ODGERS J., the second defendant had given a power of attorney to her agent to transact business on her behalf in Ceylon and had adopted the Ceylon Court as her forum for the trial of suits arising out of those transactions. That, in my opinion, is an important circumstance which does not exist in the present case and I agree with the contention of Mr. C. S. Venkatachari on behalf of the respondents that, as it would appear that the previous suits filed by the present respondents in the Cochin Court were against residents of Cochin State, the Cochin Court had jurisdiction to try those suits. This is an all-important distinction because there was in those cases no submission to the jurisdiction; and a person who has filed suits in a Court having jurisdiction to try them cannot thereby by implication be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction, and

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

(1) (1880) 14 Ch. D. 351.
(3) (1874) L.R. 9 Ex. 345.

(2) (1870) L.R. 6 Q.B. 155.
(4) (1925) 22 L.W. 820.

(1) (1912) I.L.R. 37 Mad. 163.

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

the decision of the Privy Council in *Sirdar, Gurd-
yal Singh v. Rajah of Faridkote*(1) is in point here. There, it was held that an obligation to accept the forum *loci contractus* could not, unless expressed, be implied to found a conditional jurisdiction against the parties in a suit founded on that contract for all future time. In my view, therefore, the earlier suits in which the present respondents were plaintiffs in the Cochin Court have no bearing upon this question.

With regard to Exhibit H, however, the appellant's case rests upon stronger foundation because it is contended that this was a submission to the jurisdiction of the Cochin Court, because it shows that the respondents had knowledge that the suit had been filed against them and also that an amount owing to them had in that suit been attached by that Court and did not dispute the attachment but on the contrary merely asked for a concession and on its refusal did not further contest the matter, and that they must therefore be held to have waived any question of jurisdiction. Mr. Venkatachari, however, contends that, as the respondents were not residents of Cochin State, they can only be bound by the decree passed by that Court without jurisdiction by being brought under the third case, clause (c), stated in Dicey's Conflict of Laws, Fifth Edition, page 399, namely, "by having expressly or impliedly contracted to submit to the jurisdiction of such Courts", and argues that Exhibit H was merely an offer to the appellant (the plaintiff) which offer was rejected by him and therefore there cannot have been any implied contract and that

(1) [1894] A.C. 670.

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

it is only in such cases that the decree would be binding on the defendants, they having remained *ex parte* throughout. This argument excludes any case of waiver by conduct. It is clear of course that a defendant against whom a suit has been filed in a Court which has no jurisdiction is not bound to appear and raise a plea as to the jurisdiction. He can, if he chooses, remain inactive and can thereafter raise that plea. Nevertheless, his conduct, both before the decree is passed and after, may afford evidence as to the defendant's intention in remaining *ex parte*. This aspect of the question has been discussed in *Sheo Tahal Ram v. Binaik Shukul*(1). There a decree had been passed by a Court having no jurisdiction to pass it. The decree was transferred from that Court which was a foreign Court to a Court in British India, namely, the Mirzapur Court, and the judgment-debtor appeared there and deposited Rs. 100 in part-payment and asked for three months time to pay up the balance. No objection as to the want of jurisdiction of the foreign Court to pass the decree was then raised. Later on, when an application was made for attachment of a fresh property, objection was taken that the foreign Court had no jurisdiction to pass the decree, which was a valid objection, and it was held by SULAIMAN A.C.J. that the mere fact that the defendant allowed the suit to be decreed *ex parte* would not amount to his submitting to the jurisdiction of the foreign Court nor would his subsequent conduct in making part-payment and obtaining time in the executing Court be

(1) (1931) I.L.R. 53 All. 747.

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

any evidence to show that he had submitted to the jurisdiction of the trial Court before the decree was passed and that the submission to jurisdiction must be to the foreign Court itself and probably prior to the pronouncement of the judgment in order to make the decree a valid one. NIAMAT-ULLAH J., however, was of the opinion that the subsequent payment made by the judgment-debtor might be an important circumstance indicative of his intention to submit to the jurisdiction of the Court at the time when the suit was pending, that it was only a piece of evidence to be taken into consideration in arriving at a finding on the question of submission and that there is nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act. On page 757, he observes :

“What amounts to a submission to the jurisdiction of a foreign Court is a question of some nicety in many cases. Where in answer to a summons issued by a foreign Court the defendant appears and contests the suit, without raising any question as to jurisdiction, there is no doubt that he submits to the jurisdiction of that Court. Again, where he so appears and repudiates the jurisdiction of a Court without entering into his defence, it is clear that he does not submit to the jurisdiction of that Court. Between these two extremes is the case where on receipt of the summons he puts in no appearance and an *ex parte* decree, otherwise open to no objection, is passed against him. His conduct in such circumstances is accountable on two hypotheses. He might have refrained from putting in an appearance because he was sanguine that the decree, if passed, would be ineffective for want of jurisdiction of the Court passing it; or he might have submitted to the jurisdiction of the Court in the belief that the plaintiff's claim was a just one and he did not object to the decree being passed by the foreign Court. I find nothing in law which makes it necessary that the submission to the jurisdiction can only be by some overt act in Court. If his attitude as regards the

jurisdiction of the Court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the Court, the decree will be binding. Subsequent payment towards part satisfaction of the decree is, in my opinion, an important circumstance from which submission on his part to the jurisdiction of the Court may be inferred. Much, however, will depend on the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. I should not be understood as implying that payment of the decretal amount in part is itself a submission and acts retrospectively. If the decree when passed was a nullity for want of jurisdiction in the Court which passed it, no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may however be an indication of his intention to submit to the jurisdiction of the Court at the time when the suit was pending.”

In the present case, the facts are, in my opinion, stronger. The conduct relied upon as indicating the intention of the respondents is conduct during the pendency of the suit and no question of giving retrospective effect to it arises. That conduct, I agree with NIAMAT-ULLAH J., is evidence to be considered. What does Exhibit H, upon a fair construction of it, mean? It seems to me that it is an acknowledgment of the attachment before judgment by that Court and a request merely for some concession. There is nothing conditional about the request such as Mr. Venkatachari contends there is. The letter does not say that, if the offer is refused, the respondents will contest the matter; and further, when the offer was rejected, they did not contest the matter. In my view, Exhibit H is evidence bearing upon the intention of the respondents to remain *ex parte* because the appellant's claim was a just one and there was no objection to the attachment by the foreign Court. For these reasons, I am satisfied

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.
—
BEASLEY C.J.

AYOOB SAIT
v.
THIRUNA-
VUKKARASU.

that there was a submission to the jurisdiction of the foreign Court and that the learned District Judge was wrong in refusing execution. This appeal must, therefore, be allowed with costs here and in the District Court and execution allowed to proceed.

KING J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936,
March 25.

MUTHAN CHETTIAR AND ANOTHER (PETITIONERS),
PETITIONERS,

v.

VENKITUSWAMI NAICKEN (RESPONDENT-
DECREE-HOLDER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920), ss. 51 (3) and 52—
Executing Court—Interim receiver's application to—Duty
of executing Court in case of—Defiance of provisions of
sec. 52 by it—Sale a nullity, if, in case of—Purchaser
in good faith at sale—Good title, if acquired by—Effect of
sec. 51 (3).*

On an application made to it by the interim receiver the executing Court is, under section 52 of the Provincial Insolvency Act, bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver and to stay the execution sale.

The executing Court's defiance of section 52 has not, however, the effect of making the sale in execution a nullity. Section 51 (3) provides that "a person who in good faith purchases the property of a debtor under a sale in execution shall

* Appeal Against Order No. 37 of 1935 converted into Civil Revision Petition No. 380 of 1936, and Appeal Against Order No. 201 of 1935.

in all cases acquire a good title to it against the receiver". The sub-section means that, although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property against the receiver.

Sivasami Odayar v. Subramania Aiyar, (1931) I.L.R. 55 Mad. 316, dissented from on this point.

Din Dayal v. Gur Saran Lal, (1920) I.L.R. 42 All. 336, referred to.

A purchase made on the faith of a Court's order sanctioning a sale would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone might possibly justify.

Anantharama Iyer v. Kuttimalu Kovilamma, (1916) 30 M.L.J. 611, dissented from.

Malkarjun v. Narhari, (1900) L.R. 27 I.A. 216; I.L.R. 25 Bom. 337, referred to.

Raghunath Das v. Sundar Das Khetri, (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72 explained and distinguished.

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 Trichinopoly, dated 26th September 1934 and made in Execution Application No. 668 of 1934 in Execution Petition No. 44 of 1934 in Original Suit No. 120 of 1932.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 7th March 1935 and made in Execution Application No. 769 of 1934 in Original Suit No. 120 of 1932.

M. S. Vaidyanatha Ayyar and *K. Soundararajan* for petitioners.

K. Bhashyam Ayyangar, *T. R. Srinivasan* and *R. Desikan* for respondent.

Cur. adv. vult.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.

JUDGMENT.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

VENKATASUBBA RAO J.—These appeals raise a question of some importance as to the scope and effect of sections 51 and 52 of the Provincial Insolvency Act. The facts may be briefly stated. The decree in question was obtained on 7th March 1933 and the property was attached in due course. Subsequently on 11th August 1934 the judgment-debtors presented a petition for being adjudicated insolvents. An interim receiver was appointed and on 3rd September 1934 he was directed to take possession of the insolvents' property. In the meantime the executing Court had directed the attached property to be sold. The date fixed for sale was 26th September 1934. On that date the interim receiver and one of the insolvent judgment-debtors presented to the executing Court an application under section 52, which, though strictly not in conformity with that section, we are prepared to treat as falling within it. On 26th September 1934 the learned Subordinate Judge (Mr. Krishna Nambiyar) made an order refusing to stop the sale but directing that the sale proceeds should be paid to the Official Receiver. A sale was accordingly held and a third party, i.e., a stranger to the suit, purchased the property. On 25th October 1934 the same two persons (the Receiver and the insolvent judgment-debtor) applied to the executing Court that the sale should be set aside. The application purports to be under section 151 and Order XXI, rule 90, Civil Procedure Code. That was heard by Mr. R. Rangaswami Ayyangar who, holding that his predecessor had acted in violation of section 52, set aside the sale, declaring it to be

null and void. In the view he took, he considered it unnecessary to go into the question of material irregularity under Order XXI, rule 90.

There are various sections in the Provincial Insolvency Act which affect or control the legal remedies of a creditor against the property or person of the debtor. An insolvency proceeding, it is hardly necessary to observe, commences with the presentation of a petition (section 7). The second stage is reached when the petition is admitted, although from its presentation to its admission it is but a short step (section 18). After the admission a date is fixed for the hearing of the petition, section 19 (1), and the Court may on such hearing either dismiss the petition or make an order of adjudication, which marks the third stage (section 27).

When the Court makes an order admitting the petition, an interim receiver may be appointed, in whom, however, the property does not vest but whose powers are those conferred on a receiver under the Civil Procedure Code (section 20). But when an order of adjudication is made, the insolvent's property immediately vests in the Court or in a receiver (section 28). The Court may appoint a receiver either at the time of the order of adjudication or at any time afterwards (section 56). If there is an interval between the order of adjudication and the appointment of a receiver, the property first vests in the Court and, when a receiver is appointed, it thereupon vests in him (section 56).

As regards the effect of the orders made in insolvency on the creditor's remedies, there are two distinct sets of sections : first, sections 28 and

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

29 dealing with the effect of the order of adjudication and, secondly, sections 51 and 52 dealing with the effect of an order admitting the petition. The distinction between these two sets of provisions it is essential to bear in mind. The effect of section 28 is, when an order of adjudication has been made, to take away the right of a creditor to proceed against the insolvent's property or to commence any suit or other legal proceeding against him except with the leave of the Court and subject to such terms as it may impose. Section 29 relates to pending suits or other proceedings and provides that the Court shall, on proof that an order of adjudication has been made, either stay the proceedings or allow them to continue on such terms as it may impose. Now, turning to the second group, under section 52, the point of time material is not the date of the order of adjudication but the date of the admission of the insolvency petition. The executing Court, it provides, shall, if two conditions are satisfied, direct the insolvent's property, if in its possession, to be delivered to the receiver. Those conditions are: (i) execution has issued against the property but, before its sale, notice is given to the Court that an insolvency petition has been admitted and (ii) an application is made to the executing Court for delivery of the property to the receiver. The point of difference to note is, that, whereas under section 29, on mere proof that an order of adjudication has been made, the executing Court's power is checked, under section 52 no such result automatically follows from the mere fact that notice of the admission of an insolvency petition has been given to the Court;

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

for, in the latter case, coupled with that fact, there must be an application to the Court for delivery. That the Legislature intended this difference there can be no doubt, for the order of adjudication is sometimes a long way off from the admission of the insolvency petition. I am not prepared to agree with Mulla who, after referring to the two conditions mentioned above, observes in his valuable work :

"It does not, however, follow that, if no such application is made, the Court executing the decree can sell the property even if it had such notice as is mentioned above."

(Mulla's Law of Insolvency, 1930 Edn., page 425, paragraph 604).

The learned author's interpretation is opposed to the plain wording of the section which says that the Court shall "on application" direct the property to be delivered. Then comes section 51 which, unlike sections 28, 29 and 52, deals not with procedure but with substantive rights. It enacts that an execution creditor is not entitled to the benefit of the execution against the receiver unless the assets are realised before the admission of the petition. The material date under this provision of law, it must be observed, is the date not of the insolvent's adjudication, but of the admission of the insolvency petition. I may in passing remark that, under the Provincial Insolvency Act of 1907 which the Act in question has replaced, under both the sections corresponding to the present sections 51 and 52, the point of time material was the date of the order of adjudication and not, as under the present Act, the date of the admission of the insolvency petition (sections 34 and 35 of Act III of 1907).

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

I have attempted this analysis of the relevant sections of the Act as it will, I believe, lead to a correct understanding of the points now raised. In the first place, does section 52 exclude an interim receiver on the ground that the insolvent's property does not vest in him? The question has been answered in the affirmative in *Subramania Aiyar v. The Official Receiver, Tanjore*(1), but that view has been dissented from in *Sivasami Odayar v. Subramania Aiyar*(2). As already observed, departing from section 35 of the old Act, the Legislature has substituted, for the date of the order of adjudication, the date of the admission of the petition, which clearly points to the fact that the vesting of the property in the receiver on adjudication can no longer be treated as a necessary condition precedent. *Sivasami Odayar v. Subramania Aiyar*(2), in my opinion, therefore, gives effect to the correct principle, and, with respect, I am unable to agree with the observation of Mulla who seems to think that the word "receiver" in section 52 can only refer to a person appointed after adjudication. The learned author observes :

"The present section provides for an order directing the property to be delivered to the receiver after the admission of an insolvency petition. It is difficult to conceive how such an order can ever be made for no receiver can be appointed until adjudication" (page 426, paragraph 605).

It seems to me, with respect, that this construction does not give full effect to the words of the altered section.

I have therefore no hesitation in holding that on the interim receiver's application the sale

(1) (1925) 50 M.L.J. 664.

(2) (1931) I.L.R. 55 Mad. 316.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

ought to have been stayed and the property delivered to him and that the order of 26th September 1934 is wrong. The result is that Civil Miscellaneous Appeal No. 37 of 1935, which is directed against that order, must be allowed, but we make no order as to costs.

But that does not bring this matter to an end. As already stated, the property has been sold in pursuance of what we now hold to be a wrong order and has been purchased by a third party. The question is, did the sale, held as it was in contravention of the peremptory terms of section 52, convey or not title to the third party purchaser? It is contended for the Official Receiver, on the strength of *Sivasami Odayar v. Subramania Aiyar*(1), already cited, that the sale held in such circumstances is null and void and the purchaser gets no title under it. But the observation in that sense, which no doubt occurs in the judgment, is an *obiter dictum*. The sale had been held to be valid at a previous stage of the same case by the Bench that decided *Subramania Aiyar v. The Official Receiver, Tanjore*(2). The learned Judges therefore could not have been, and were not in fact, asked to set aside that sale, though in their opinion the decision of the former Bench was wrong. The observation therefore to the effect that the sale is absolutely void is, as I have said, *obiter*. The question has really to be decided with reference to section 51, which has not been referred to in that judgment. That section, after saying that an execution creditor is not entitled to the benefit of the execution unless the assets are realised by sale or otherwise before the

(1) (1931) I.L.R. 55 Mad. 316.

(2) (1925) 50 M.L.J. 665.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

admission of the petition, goes on to say in sub-section 3 :

"A person who in *good faith* purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver."

The sale here contemplated must necessarily be that held after the admission of the petition, for, if it be a sale held previous to that, the execution creditor would become entitled even to the sale proceeds and the property would pass to the purchaser, independent of the question of good faith. Sub-section 3 therefore means that, although by reason of the sale being held after the admission of the petition, the decree-holder gets no right to the proceeds, the purchaser in good faith nevertheless acquires a good title to the property. As a matter of construction (although this point does not now arise) it would follow that, even in regard to a sale held after the date of adjudication, a *bona fide* purchaser would under this sub-section be protected. This is the view taken, and in my opinion rightly, in *Ramanatha v. Vijayaraghavalu*(1).

The further question then remains, was the purchase made in *good faith*? It has been contended for the Official Receiver that no purchaser having knowledge of the debtor's insolvency can ever be treated as acting in good faith within the meaning of this section. For this position the learned Counsel relies upon *Anantharama Iyer v. Kuttimalu Kovilamma*(2), but I must most respectfully dissent from it. I think it is unnecessary to enquire whether or not the purchaser here had notice of the debtor's insolvency; for,

(1) A.I.R. 1927 Mad. 983. (2) (1916) 30 M.L.J. 611.

granting that he had notice, could it be said that there was want of good faith on his part when he purchased the property at a sale sanctioned by the Court? Let us look at the facts. The executing Court, though the fact of the insolvency was brought to its notice, refused to stay the sale, presumably on the ground that section 52 was not applicable, that being the view of even a Bench of this Court although it was subsequently dissented from. Why should the purchaser be expected to doubt the correctness of the Court's order? A purchase made on the faith of a Court's order would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone might possibly justify. *Raghunath Das v. Sundar Das Khetri*(1), on which the learned Counsel relies, does not militate against this view. There, after the attachment of the judgment-debtor's property had been effected, he was adjudged an insolvent under the Indian Insolvency Act, 1848, and his estate vested in the Official Assignee. The property was then sold in execution, no notice under Order XXI, rule 22, Civil Procedure Code, having been served on the Official Assignee. It was held by the Privy Council that the sale was null and void. In the Indian Insolvency Act there was no provision corresponding to that contained in section 51 (3) and, that being so, I have no hesitation in holding that the Privy Council ruling does not apply. Section 51 (3) is modelled, as is pointed out by Mulla (see page 167, paragraph 253), upon section 46 (3) of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, section 40 (3)]. True, after the property passes to

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

(1) (1914) L.R. 41 I.A. 251; I.L.R. 42 Cal. 72.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
VENKATA-
SUBBA RAO J.

and vests in the judgment-debtor's representative, it would be wrong to allow the sale to proceed without obtaining an order binding upon him under Order XXI, rule 22, and a sale so held would be a nullity. But the special provision in the Insolvency Act enacted for the protection of *bona fide* purchasers must have the effect of over-riding the general provision contained in the Code of Civil Procedure; for Order XXI, rule 22, is not confined to a receiver in insolvency in whom the property vests, but extends to every kind of legal representative. Therefore the decision of the Judicial Committee is inapplicable.

Lastly, it is necessary, however, to point out that what the section demands is good faith; the existence of it or the want of it may be proved in diverse ways. Because it has been held that knowledge on the purchaser's part of the debtor's insolvency does not, in the circumstances, amount to absence of good faith, it does not necessarily follow that all enquiry into the question whether the purchaser acted in good faith or not is to be excluded. Any collusion or fraud may vitiate the sale. Further, another important point must be borne in mind, that section 51 (3) is of wider range than Order XXI, rule 90, Civil Procedure Code. For one thing, it is unnecessary to prove substantial injury under the former section.

That being so, the lower Court must be directed to dispose of the petition to set aside the sale (Execution Application No. 769 of 1934) in the light of these remarks.

In the result, the lower Court's order is reversed, Civil Miscellaneous Appeal No. 201 of 1935 is allowed with costs and the petition to set aside

the sale is remanded for being disposed of as aforesaid.

MUTHAN
CHETTIAR

v.
VENKITUSWAMI
NAICKEN.

—
VENKATA-
SUBBA RAO J.

In conclusion, I wish to point out that a preliminary objection was taken that Civil Miscellaneous Appeal No. 37 of 1935 was incompetent. We intimated that we did not propose to decide that matter as we were prepared, if necessary, to allow the appeal to be converted into a revision petition.

CORNISH J.—I agree. The difficulty presented by section 52 to the construction of section 51 is due to the circumstance that the former section, as a result of the amendment made by the present Act, is out of place where it stands. It does not belong to the chapter of the Act relating to the "effect of insolvency on antecedent transactions". It relates to the stage prior to adjudication, where the insolvency petition has been admitted. It therefore belongs more properly to the provisions of the Act dealing with that particular stage when, upon the admission of the petition, an interim receiver is appointed to take charge of the debtor's property. The interim receiver is simply the officer of the Court appointed for this purpose and he stands in the same position as a receiver appointed under Order XL of the Civil Procedure Code. Section 52 enables him to get possession of the property of the debtor which is subject to attachment; and it is clear from the language of the section, as well as from authority, that when application is made to it the executing Court is bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver. It follows as a necessary implication that the Court is likewise bound to stay the execution

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
CORNISH J.

sale ; otherwise the peremptory provision of the section will be defeated. I do not think, however, that the executing Court's defiance of section 52 has the effect of making the sale in execution a nullity. It seems to me that the opinion given in *Sivasami Odayar v. Subramania Aiyar*(1), that an auction purchaser can get no title under such a sale against the Official Receiver, who subsequently comes upon the scene after adjudication, goes too far. Section 52 does not say that a sale held in contravention of its provisions shall be void or voidable. So that there is nothing in the section which qualifies the very emphatic language of section 51 (3).

Section 51 contemplates an execution sale of a debtor's property after the admission of his insolvency petition. The only result so far as the executing creditor is concerned is that if the sale takes place after admission of the petition the sale proceeds go to the receiver for the benefit of the creditors generally. But the sale confers title on the purchaser in good faith. Sub-section 1 of section 51 is concerned with the assets of the debtor realised by execution sale, and it provides that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. But sub-section 3 is concerned with the purchaser at an execution sale and says that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver. I think that the plain

(1) (1931) I.L.R. 55 Mad. 316.

MUTHAN
CHETTIAR
v.
VENKITUSWAMI
NAICKEN.
—
CORNISH J.

meaning of this is that in every case of execution sale of a debtor's property, whether before or after admission of the insolvency petition, the *bona fide* purchaser acquires a title to the property which holds good against the Official Receiver. In other words, the right which the Official Receiver gets by relation back from the order of adjudication, to have vested in him all the property which the debtor had at the date of the insolvency petition, will not prevail against the purchaser in good faith at an execution sale prior to the adjudication. This was the rule under section 34 of Act III of 1907 [*Din Dayal v. Gur Saran Lal*(1)] and I think it is equally the rule upon the construction of section 51 (3) of the present Provincial Insolvency Act. There is this reason for the rule in favour of the *bona fide* purchaser that, as observed by their Lordships of the Judicial Committee in *Malkarjun v. Narhari*(2), strangers to a suit are justified in believing that the Court has done that which it ought to do, and no purchaser at a Court sale would be safe if he was bound to inquire into the accuracy of the Court's conduct of its own business. I agree with the order proposed by my brother.

A.S.V.

(1) (1920) I.L.R. 42 All. 336.

(2) (1900) L.R. 27 I.A. 216 ; I.L.R. 25 Bom. 337.

APPELLATE CIVIL.

Before Mr. Justice Cornish and Mr. Justice Varadachariar.

1935,
November 22.

ZEEBUNNISSA BEGUM (PLAINTIFF), APPELLANT,

v.

MRS. H. B. DANAGHER AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Mahomedan law—Minor—Contract of lease of immovable property by guardian on behalf of—Contract beneficial to minor—Contract containing onerous terms—Contract not in excess of powers of guardian under the Guardians and Wards Act (VIII of 1890)—Contract voidable or void—Powers of Mahomedan father acting as guardian to grant leases of minor's property—Covenant for renewal—Nature of—Mutuality of contract—Non-availability of suit for specific performance as regards certain covenants against minor—Effect of, on the character of the lease as being voidable or void—Absence of total failure of consideration—Liability of lessee for rent—Capacity of minor on coming of age to ratify such contract—Government of India Act (1915), sec. 112—Operation of—"Incident of the contract or dealing" in—Meaning of.

A lease of immovable property was purported to be given by a Mahomedan minor, acting by her father and guardian, for a period of five years at a monthly rent of Rs. 1,055 per mensem in favour of H.B.D., a European lady. The due performance of the lease was guaranteed by R.W.M., also a European. The lessee *inter alia* covenanted to pay the rent. The lessor's covenants included stipulations (a) not to construct any building on the vacant land comprised in the demise, (b) to pay all taxes in respect of the premises and to keep the lessee indemnified against any claims thereon, (c) to repair the premises both inside and outside and to keep them in good and habitable state and condition, (d) for quiet enjoyment and (e) to grant a renewal of the lease at the request of the lessee made three months before the expiration of the term for a further term of

not less than five years or more than ten years at a rent to be settled then. ZEEBUNNISSA BEGUM

v.
MRS.
DANAGHER.

A suit was filed for the recovery of the arrears of rent against the lessee and the guarantor. Both the defendants raised the defence that the lease was void and unenforceable as the lessor was at all material times a minor and the lease deed contained onerous covenants on the part of the lessor as essential part of the consideration for the performance by the lessee of her covenants under the lease. The lease did not offend against section 27 of the Guardians and Wards Act. The minor came of age during the pendency of the suit and was willing to stand by the lease. It was found that the lease was as a whole for the minor's benefit.

Held:—(i) Under the Mahomedan Law it is within the powers of a father, as guardian of his minor daughter, to grant a lease of the minor's property if it is for the minor's benefit.

(ii) Under Indian law a minor has no capacity to contract and such contract is therefore void. But when the contract has been entered into by a guardian there is no question of want of "capacity". The minor might not be bound by the contract if it was in excess of the guardian's powers or not beneficial to the minor. But that is not the same thing as saying that it is void in the sense that the other party to the contract can ignore it.

(iii) In the case of a covenant to repair no question of specific performance can arise and in the case of a covenant for renewal it is separable from the demise and as such the unenforceability of that covenant would not of itself invalidate the lease.

(iv) Covenants (a), (c), and (e) could not be enforced against the minor (lessor) and as such no decree for specific performance could be made against her, but the non-availability of the remedy by way of specific performance did not necessarily show that the contract of lease was void. The above-mentioned covenants by the lessor should not be construed as conditions.

(v) The lessee could not escape from her covenants to pay rent unless there had been a total failure of consideration for the lease or unless it was shown that the lease had come to an end, and section 24 of the Indian Contract Act did not in terms apply to the facts of the case.

* Original Side Appeal No. 14 of 1935.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.

(vi) It was open to the minor, after she came of age, to adopt and ratify the lease entered into by the guardian and section 127 of the Transfer of Property Act shows that, when, as part of a transfer of property, obligations are cast on a minor, he might on attaining majority accept the whole transaction including the obligations cast on him.

(vii) The operation of section 112 of the Government of India Act should be restricted to the "incident of the contract or dealing" and it could not have been the intention of Parliament that the capacity of a grantor should be judged, not with reference to his personal law, but by the English law whenever the defendant happened to be an Englishman or English woman.

Waghela Rajsanji v. Shekh Mashudin, (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551, and *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*, (1911) I.L.R. 39 Cal. 232 (P.C.), distinguished.

APPEAL from the judgment of MOCKETT J., dated 2nd April 1935 and made in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 294 of 1933.

M. S. Venkatarama Ayyar for appellant.

C. Brooke Elliot and *C. P. Connel* for *S. Narayana Ayyangar* for first respondent.

C. S. Venkatachari for second respondent.

Cur. adv. vult.

JUDGMENT.

NISH J.

CORNISH J.—The appellant is a Mahomedan lady. She was the plaintiff in the suit, and being then a minor was represented by her father and guardian as next friend. The suit was against the first defendant for rent due by her as lessee upon her covenant, and against the second defendant as guarantor of the due performance of her covenants by the first defendant.

The lease is dated 2nd November 1932. It purports to be given by the plaintiff acting by

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
CORNISH J.

her father and guardian. The lease demises premises known as Megan House to the first defendant for a term of five years at a rent of Rs. 1,055 per mensem; and it contained a number of covenants by lessor and lessee. The lessee covenanted, *inter alia*, to pay the rent. The lessor's covenants included stipulations

(a) not to construct any building on the vacant land comprised in the demise, (b) to pay all taxes in respect of the premises and to keep the lessee indemnified against any claims thereon, (c) to repair the premises both inside and outside and to keep them in good and habitable state and condition, (d) for quiet enjoyment and (e) to grant a renewal of the lease at the request of the lessee made three months before the expiration of the term for a further term of not less than five or more than ten years at a rent to be settled then.

Both the defendants raise the defence that the lease is void. This plea is put as follows in the second paragraph of the first defendant's written statement :

"The defendant submits that the suit lease is void, and that it is unenforceable for the reason that the plaintiff has been at all material times, and now is, a minor; and the lease deed contains onerous covenants on the part of the lessor as essential part of the consideration for the performance by the lessee of her covenants under the lease."

The learned trial Judge has held that the lease is void for the reason that it contains covenants which are not enforceable against the minor lessor.

There is no doubt that covenants such as (a), (c) and (e) in the suit lease are not enforceable against a minor. Their Lordships of the Judicial Committee have laid it down in *Waghela Rajsanji v. Shekh Mashudin*(1) that it is not competent for a guardian to bind his ward by personal

(1) (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
CORNISH J.

covenants. In that case, a widow, as guardian of her minor son, transferred certain villages, part of a talukdari estate, and in the deed of transfer contracted on behalf of the minor to indemnify the transferee against a Government claim for revenue, the villages having been transferred as rent-free. It was held in a suit by the transferee that he could not enforce the contract of indemnity against the minor, and that the suit, so far as it was founded on the personal liability of the minor, failed. But there was no question of the validity of the transfer, and their Lordships did not decide that the transfer was void by reason of the covenant being unenforceable.

It must be taken that a guardian in the course of his management of a ward's property is competent to grant leases of it. This power is recognised by section 27 of the Guardians and Wards Act; and, even if a guardian in excess of his power under the Act grants a lease for a term beyond that which is permitted to him without the sanction of the Court, the lease is only voidable under section 30 at the instance of any person affected by it. The lease in the present instance was within the guardian's powers under section 27. This distinguishes the case from *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(1) where a guardian contracted to purchase immovable property on behalf of a minor, and it was held that this being something which the guardian was not competent to do, there was no mutuality and accordingly the agreement was incapable of specific performance. There is too, a further

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
CORNISH J.

distinction that in this case a transfer of property has been executed whereas in the other case the contract was executory. Now a lessee cannot escape from his covenant to pay rent unless there has been a total failure of consideration for the lease or unless it is shown that the lease has come to an end; see *Grimsdick v. Sweetman*(1). Has there been such a total failure of consideration in the present case? Obviously not. The lessee has got the premises, of which the demise was at least part of the consideration for the rent. Nor can these covenants by the lessor be construed as conditions. A covenant is a different thing to a condition, and although the failure of a condition may serve to put an end to a term, there is no authority for saying that the failure of a covenant or the impossibility of enforcing a covenant will have that effect. Thus in *Grimsdick v. Sweetman*(1), where premises were demised as a beerhouse and the lease contained a covenant by the lessor for quiet enjoyment and by the lessee to continue the premises as a beerhouse, it was held that the extinction of the beerhouse licence by the Licensing Authority did not put an end to the term and that the lessee remained liable for the rent. It may further be observed that it is neither the law in England nor in India that a failure of a lessor to perform his covenant to repair will put an end to a lease; see Woodfall on Landlord and Tenant, 23rd Edn., page 769, and *Govindasamy Chettiar v. Palaniappa Chettiar*(2).

I therefore think that there can be no doubt that the failure of the lessor's covenants because they are not enforceable will not enable the lessee

(1) (1911) I.L.R. 39 Cal. 232 (P.C.).

(1) [1909] 2 K.B. 740.

(2) (1924) 48 M.L.J. 397.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
CORNISH J.

to avoid the lease. On the other hand it is quite intelligible that a lessor who finds that he has been subjected to covenants in a lease which are not binding on him should have the right to avoid it. But he must elect to avoid the lease as a whole or to adopt it. He cannot approbate and reprobate it; see *Zamindar of Polavaram v. Maharaja of Pittapuram*(1). The plaintiff by suing on the lessee's covenant for rent has chosen to adopt the lease, and in my judgment her suit is maintainable. It follows that the appeal must be allowed, and the appellant will have the costs of the appeal.

Though the question of the counter-claim, which was dismissed, was not before us, the result of this appeal will not affect the defendants' right to raise the counter-claim by way of a defence. Whether anything more is open to the defendants will be considered by the trial Court. The suit is accordingly remanded for retrial.

VARADACHARIAR J.

VARADACHARIAR J.—I agree. In dealing with the preliminary issue, the learned trial Judge has (if I may say so) rightly proceeded on the footing that under the Mahomedan Law it is within the powers of a father, as guardian of his minor daughter, to grant a lease of the minor's property, if it be for the minor's benefit, and that the suit lease is as a whole for the minor's benefit. He was also of opinion that even such of the covenants in the lease as have been relied on in the course of this preliminary discussion are not "out of place in the lease as a whole", though they might be described as onerous and personal. Adverting to the distinction between "executed"

(1) (1930) I.L.R. 54 Mad. 163.

transactions and "executory" contracts, he has applied to the present case the principles applicable to executory contracts, because the lease contains some "unperformed personal covenants". On this last point, I am unable to agree with the learned Judge.

Reference has been made in the judgment of MOCKETT J. to three covenants in particular, those numbered (a), (c) and (e). In dealing with covenant No. (a) the learned Judge has not sufficiently emphasised what we are informed is the true position, namely, that the vacant lands marked B and C in the plan annexed to the lease and in respect of which there is the covenant not to build on or separately sell, lease out, etc., are lands included in the demise. If this be the correct position, that covenant really imposes no additional obligation on the lessor.

With regard to the covenant to repair the premises and keep the same in good and habitable state and condition, I refrain from saying anything on the merits, because its scope and the extent of the obligation imposed thereby will be some of the questions to be considered after the remand. I content myself for the present with saying that I cannot accede to the argument advanced by the learned Counsel for the respondents that the plea raised in paragraph 10 of the written statement filed by the plaintiff in answer to the counter-claim amounts to an election to repudiate the lease or to a total denial of liability under this covenant. Whenever a minor or a minor's estate is concerned, a distinction is well recognized in Indian law between the liability of the minor's person (after he attains majority)

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADACHARIAR J.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

and the liability of the estate. It is sufficient to refer in this connection to section 63 of the Contract Act and the observation of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*(1). See also *Venkitaswami Naicker v. Muthuswami Pillai*(2) and *Ramajogayya v. Jagannadhan*(3). The learned trial Judge has recorded that this plea was explained by Mr. Venkatarama Ayyar as meaning "that a decree can only be obtained against her estate". This is in accordance with the above distinction and cannot be construed as a denial of all liability.

The learned Judge is, of course, right in saying that "no decree for specific performance could be made against the plaintiff". But, as he himself recognizes elsewhere, the non-availability of the remedy by way of specific performance does not necessarily show that a contract is void. Several instances are well known to the law where a Court may feel obliged to refuse specific performance and yet may award damages. This clearly shows that there may be a valid contract though the remedy by way of specific performance may not be available.

Dealing particularly with the refusal of specific performance on the ground of want of mutuality, I may point out that, though it is the rule under the English law that on this ground an infant cannot sustain a suit for the specific performance of a contract, it is not the rule there that there is no valid contract in such a case or that the lessee can avoid the lease on the ground of the lessor's infancy (see Woodfall on Landlord

(1) (1903) I.L.R. 30 Cal. 539, 548 (P.C.). (2) (1917) 34 M.L.J. 177.
(3) (1918) I.L.R. 42 Mad. 185 (F.B.).

and Tenant, page 49). In *Zouch v. Parsons*(1) Lord MANSFIELD quoting from an earlier authority said :

"The lessee can in no case avoid the lease on account of the infancy of the lessor",

which shows it not to be void but voidable only. And it is better for infants that they should have an election. As pointed out by the Master of the Rolls in *Flight v. Bolland*(2), it is more the way the principle of equity was developed and the absence of precedents decreeing specific performance in such cases that led to the establishment in England of the rule that specific performance is not available to or against an infant. The way in which PARKER J. (as he then was) states the position in the opening words of his judgment in *James Jones & Sons, Limited v. Tankerville (Earl)*(3) clearly indicates that a party may be entitled to the remedy by way of damages, even in cases in which want of mutuality may preclude the remedy by way of specific performance.

As some argument was advanced before us in this connection on the basis of the judgment of the Judicial Committee in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(4), I must state with due respect to observations to the contrary in some decisions [cf. *Ramakrishna Reddiar v. Kasivasi Chidambara Swamigal*(5) and *Venkatachalam Pillai v. Sethuram Rao*(6)] that that case is no authority for the proposition that an executory contract entered into by a guardian on behalf of a minor is void in law. It is true that, under the

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

(1) (1765) 3 Burr. 1794 ; 97 E.R. 1103, 1110.
(2) (1828) 4 Russ. 298 ; 38 E.R. 817. (3) [1909] 2 Ch. 440.
(4) (1911) I.L.R. 39 Cal. 232 (P.C.). (5) (1927) 54 M.L.J. 412, 418.
(6) (1932) I.L.R. 56 Mad. 433 (F.B.).

952 THE INDIAN LAW REPORTS [VOL. LIX

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

Indian law, a *minor* has no capacity to contract and his contract is therefore void. But when the contract has been entered into by a *guardian*, there is no question of want of "capacity". The minor may not be bound by the contract if it is in excess of the guardian's powers or not beneficial to the minor. But that is not the same thing as saying that it is void in the sense that the other party to the contract can ignore it.

Mr. Venkatachari laid stress on the fact that in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(1) the suit for specific performance was brought by the minor himself, after he came of age; thereby showing that he was willing to affirm the contract; and he argued that the refusal of specific performance by the Judicial Committee even in such circumstances showed that the contract was in their Lordships' opinion void and accordingly incapable of ratification. The answer to this, it seems to me, is that, as pointed out in paragraph 460 of Fry on Specific Performance, a contract to be specifically enforced must be such that it might, *at the time it was entered into*, have been enforced by either of the parties against the other of them. The same principle is reaffirmed in the opening sentence of paragraph 463 in the following words:

"The mutuality of a contract is, as we have seen, to be judged of, at the time that it is entered into."; and at the end of that paragraph it is observed:

"From the time of the execution of the contract being the time to judge of its mutuality, it further follows that the subsequent performance by one party of terms which could not have been enforced by the other, will not prevent the objection which would arise from the presence of such terms."

(1) (1911) I.L.R. 39 Cal. 232 (P.C.).

Referring to *Flight v. Bolland*(1) (in paragraph 461 of his book), FRY L. J. says:

"An infant cannot sue because he could not be sued for specific performance";

but his observations in the foot-note in relation to the case of *Clayton v. Ashdown*(2) and the remarks in some of the succeeding foot-notes show that even in England there have been differences of opinion in the matter but that the rule as stated in the text is in accordance with the preponderance of authority. Again, paragraphs 468 and 469 show that the objection on the score of want of mutuality may be waived; this indicates that this objection is not identical with a plea that the contract is void. The contradistinction is clearly brought out by the observations in the penultimate paragraph of section 2 of Chapter III, Part II, in Leake on Contracts (7th Edition, page 402) where it is stated that a contract which is voidable by an infant is binding upon the other contracting party until avoided and that the infant may therefore sue the other party, but a Court of Equity will not in general grant specific performance of a contract at the suit of an infant.

In the light of these considerations, it is instructive to note that in *Mir Sarwarjan's case*(3), Lord MACNAGHTEN took care to state the position in the following terms:

"As the minor in the present case was not bound by the contract, there was no mutuality and the minor who has now reached his majority cannot obtain specific performance of the contract."

The earlier observation in the same case that,

"it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a

(1) (1828) 4 Russ. 298; 38 E.R. 817. (2) (1714) 9 Vin. Abr. 393.
(3) (1911) I.L.R. 39 Cal. 232, 237 (P.C.).

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

minor to bind the minor or the minor's estate by a contract for the purchase of immovable property "

may be considered along with their Lordships' observation in *Waghela Rajsanji v. Shekh Mashudin*(1) that

"the guardian exceeded her powers so far as she purported to bind her ward."

These observations must be understood as indicating the limitations on the power of a guardian so as to give the minor the option of saying that he is not bound by such covenants, and not that the covenants are void in the sense that the minor cannot stand by the contract and seek to hold the other party bound by it even for purposes of remedies other than specific performance.

I may observe in passing that the observations of WALLIS C.J. on *Waghela Rajsanji v. Shekh Mashudin*(1) in *Ramajogayya v. Jagannadhan*(2) at page 192 lay undue stress upon the fact that their Lordships "dismissed the suit altogether". It would be sufficient for the present purpose to distinguish *Waghela Rajsanji v. Shekh Mashudin*(1) on the ground that the objection to the guardian's covenant was there taken by the minor and their Lordships' upholding the objection is quite consistent with the view that it is voidable at the instance of the minor. But the view of WALLIS C.J. that that decision precludes not merely the "personal" liability of the ward in the narrow sense but also the liability of his estate ignores the fact that on pages 561 and 562 their Lordships state an argument of Mr. Mayne which however they leave open on the express ground that the

(1) (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551, 561.

(2) (1918) I.L.R. 42 Mad. 185 (F.B.).

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

question before them related only to the liability of the taluqdari estate and that that liability was precluded by the terms of Act VI of 1862. I may add that in nearly all the cases where the decision in *Waghela Rajsanji v. Shekh Mashudin*(1) has been discussed, the objection to the binding character of the covenant was raised by the minor himself. This was certainly the case in *Rarichan v. Manakkal Raman Somayajipad*(2) referred to by MOCKETT J. As pointed out by the Full Bench in *Raghava Chariar v. Srinivasa Raghava Chariar*(3), principles recognized or enacted for the benefit or protection of minors need not necessarily be held to apply to their prejudice.

Before passing on to the next argument, I may also point out that, in respect of the covenant to repair, no question of specific performance can arise; see Woodfall on Landlord and Tenant, page 769. The remedy of the tenant in the event of a breach of the covenant can only be either by way of a deduction from the rent or by way of a claim for damages or reimbursement of moneys spent. As pointed out by my learned brother, the tenant cannot ordinarily treat a breach of this covenant as avoiding the lease or justifying him in throwing up the tenancy. It is unnecessary at this stage and for the purpose of this appeal to examine the argument that the covenant to repair imposes no special burden on the estate, because it may be said to be part of a guardian's duty even apart from the lease to do all things necessary to preserve the property of the minor, and, in the case of a house, preservation may include repair. On

(1) (1887) L.R. 14 I.A. 89; I.L.R. 11 Bom. 551.

(2) (1922) 44 M.L.J. 515.

(3) (1916) I.L.R. 40 Mad. 308 (F.B.).

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

behalf of the respondents, it has been suggested that the covenant here implies much more, but the main argument is based on the fact of its being a "covenant" and not merely an obligation under the personal law.

Proceeding now to the contention based on the covenant for renewal, I feel more free to deal with it in view of the events that have happened during the pendency of these proceedings, because there is no longer any likelihood of that covenant being sought to be enforced. It is true that the normal remedy for its enforcement will be by way of specific performance and, in view of the decision in *Mir Sarwarjan's* case(1), that remedy would not be available as between the parties here. The question nevertheless remains how that circumstance affects the operation of the lease. There is considerable authority in support of the view that the covenant for renewal is separable from the demise [see the cases referred to in *Mahendra Nath Srimani v. Kailash Nath Das*(2)] and it would not therefore follow that the unenforceability of that covenant would of itself invalidate the lease. The learned Counsel for the respondents were accordingly obliged to put their case as one of failure of consideration. It was argued that in return for the promise to pay rent and other covenants entered into by the lessee, the lessor has not merely to put the lessee into possession but has also to carry out his various other covenants including the one for renewal, that the expectation of a renewal of the lease must have formed a substantial part of the advantages which the lessee intended to secure in return for the high rent

(1) (1911) I.L.R. 39 Cal. 232 (P.C.).

(2) (1927) I.L.R. 55 Cal. 841, 851.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

which she undertook to pay and if that advantage could not be secured to her, part of the consideration must be deemed to have failed. Reliance was placed upon section 24 of the Contract Act and it was argued that this was a case where the stipulation for rent was single and indivisible and the Court must either enforce the contract as a whole or set it aside as a whole.

I am unable to accept the argument thus stated. Section 24 of the Contract Act does not in terms apply here because there is no question of any unlawful object [cf. *Dip Narain Singh v. Nageshar Prasad*(1)]. Putting the position at the highest, the respondents' case could only amount to a partial failure of consideration; but such partial failure, whatever other remedies it may give rise to, will not exonerate the lessee from liability to pay the stipulated rent, nor entitle him to treat the lease as void. It will be instructive in this connection to compare sub-clause (e) of section 108 of the Transfer of Property Act with sub-clauses (f) and (g).

On the terms of the covenant for renewal in this case, there is a further answer to the respondents' argument. The lease provides for renewal "at a rent to be settled then". It seems to us more than doubtful if a covenant in these terms can ever be enforced by a specific performance. It is difficult to conceive that a Court can direct a renewal when the document itself does not indicate the rate of rent or even provide data with reference to which the Court can fix what may be called a proper rent [see *Nava Kishore Das v. Madan Mohan Das*(2)]; cf. *Srimati Giribala Dasi v. Kali*

(1) (1929) I.L.R. 52 All. 338 (F.B.).

(2) A.I.R. 1924 Cal. 346.

ZEEBUNNISSA
BEGUM
v.
MRS.
DANAGHER.
—
VARADA-
CHARIAR J.

Das Bhanja(1). The learned trial Judge notes that neither side raised before him the argument that this covenant was bad for uncertainty. But in that connection he refers only to the tenant's option in respect of the period of the renewed lease and does not notice the obvious uncertainty as to the rate of rent. In *Jardine, Skinner & Co. v. Rani Surut Soondari Debi*(2) it was assumed that, having regard to the stipulations in the lease, it would have been possible for the Court to fix a proper rate of rent for the renewed term, but this course does not seem practicable in the present case. In *Secretary of State for India v. Volkart Brothers*(3) it became unnecessary to deal with the question of uncertainty in the view which their Lordships took upon the other question raised in that case. I am on this ground also unable to agree with the learned trial Judge that the unenforceability of the covenant for renewal is a reason for holding the suit lease to be void nor to accept the respondents' contention that it amounts to a failure of consideration to any extent.

In the course of the argument, I put it to Mr. Venkatachari whether it is not open to a minor after he comes of age to adopt and ratify a transaction entered into by a guardian, though it might have been in excess of the guardian's powers and in that sense not binding on the minor. This test is relevant in the present case, not only for the purpose of determining whether the transaction can properly be described as void, but also because we have been informed that the minor plaintiff

(1) (1920) 39 M.L.J. 323 (P.C.).

(2) (1878) L.R. 5 I.A. 164.

(3) (1928) I.L.R. 51 Mad. 885 (P.C.).

ZEEBUNNISSA
BEGUM
v.
MRS. J.
DANAGHER.
—
VARADA-
CHARIAR J.

had come of age during the pendency of the suit and was willing to stand by the lease. If the *quondam* minor adopts the guardian's lease, it can only be on the basis that the minor is willing to abide by all the covenants in the lease according to their natural meaning and effect, because he cannot approbate and reprobate. Mr. Venkatachari answered that, so far as the guardian's transaction is in the nature of a "transfer of property", it is open to the minor to adopt it, though in excess of the guardian's powers, but if it is only a "contract" it is wholly void if in excess of the guardian's powers and therefore incapable of being validated by any principle of ratification. In support of this distinction, he relied on section 2, sub-section (g), of the Indian Contract Act declaring that an agreement not enforceable by law is "void". This is begging the question, because if it is enforceable at the option of the minor but not at the option of the other party, it will only be a "voidable" contract falling under clause (i). Even accepting the distinction suggested by Mr. Venkatachari, I see no reason why the present case should not be held to fall under the first head, namely, a transaction in the nature of a transfer of property. A lease is not the less a transfer of property because it contains or implies covenants and in that sense may be bilateral. *Govinda Kurup v. Chowakkaran Keloth Beekku*(1) is not apposite here, because the transaction was there entered into by the minor himself and not through a guardian and therefore directly fell under section 7 of the Transfer of Property Act. Even in the case of a sale, the sale deed may contain, or the

(1) (1930) 59 M.L.J. 241.

ZEEBUNNISSA
BEGUMv.
MRS.
DANAGHER.VARADA-
CHARIAR J.

law may imply, certain covenants but the transaction does not on that account cease to be a transfer of property.

I may refer in this connection to *Ramajogayya v. Jagannadhan*(1) where it was pointed out that a lease is a transfer of property and is in the nature of an executed contract and that therefore all the considerations which apply to the enforcement of mere contracts do not necessarily apply to it; cf. *Dip Narain Singh v. Nageshar Prasad*(2). As observed by ABDUR RAHIM J. in the course of the arguments in *Ramajogayya v. Jagannadhan*(1), the covenants are in such cases "incidents of the transfer of property". The observations of the LORD CHANCELLOR in *Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co.*(3) (referred to by ABDUR RAHIM J.) may be compared with the remark of Lord CHELMSFORD in *Kamala Naicken v. Pitchacootty Chetty*(4) that a lease is not an executory contract and there is no question of specific performance after the lease had been granted. Section 127 of the Transfer of Property Act shows that where as part of a transfer of property obligations are cast on a minor, he may on attaining majority accept the whole transaction including the obligations thereby cast on him; cf. *Subramania Ayyar v. Sitha Lakshmi*(5).

With reference to the argument advanced by Mr. Brooke Elliot on the language of section 112 of the Government of India Act, MOCKETT J. has observed that it could not have been the intention

ZEEBUNNISSA
BEGUMv.
MRS.
DANAGHERVARADA-
CHARIAR J.

of Parliament that the "capacity" of a grantor should be judged, not with reference to his personal law, but by the English law, wherever the defendant happens to be an Englishman or English woman. I respectfully agree with him. The obscurity of the corresponding provision in section 17 of 21 Geo. III. c. 70 was commented on in *Sarkies v. Prosonomoyee Dossee*(1). Section 112 was adopted from an earlier statute which only dealt with the application of the *personal* laws of "Mahomedans and Gentoos". I venture to doubt whether the expression "personal law or custom" in that context was intended to apply to the English law at all. In any event, it will be legitimate to restrict the operation of that provision to the *incidents* of the contract or dealing.

In the view we have taken as to the enforceability of the lease, it is unnecessary to deal with the application for amendment of the plaint.

Solicitors for second respondent: *Short, Bewes & Co.*

G.R.

(1) (1881) I.L.R. 6 Cal. 794, 806 and 808.

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).

(2) (1929) I.L.R. 52 All. 338 (F.B.).

(3) (1873) L.R. 16 Eq. Cas. 433.

(4) (1865) 10 M.L.A. 386, 396.

(5) (1896) I.L.R. 20 Mad. 147.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

1935,
November 18.MINOR E. R. GURUNATHA CHETTIAR BY NEXT FRIEND
ANGAMMAL—Declared a major (PLAINTIFF), PETITIONER,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF SALEM (DEPENDANT),
RESPONDENT.*

Court Fees Act (VII of 1870), sec. 7 (iv) (c), proviso (added by Madras Act V of 1922)—Applicability—Mittadar whose title to mitta not disputed—Suit by, for declaration of his right to take water from a river in respect of lands in his mitta free of irrigation cess and for refund of money illegally levied from him.

A mittadar sued for a declaration that in respect of certain lands in his mitta he was entitled to take water from a river free of irrigation cess and for refund of a sum of money which, according to him, had been illegally levied from him. There was no dispute about the plaintiff's title to his mitta.

Held that, even if the two prayers in the plaint were read independently, the case did not fall within the proviso added to section 7 (iv) (c) of the Court Fees Act by Madras Act V of 1922.

The amendment provides for a case where "the relief sought is with reference to any immovable property". The *prima facie* interpretation of that expression is that the dispute should in some sense relate to the title to immovable property. The words "the relief sought" in the proviso must be read as relating to the words "consequential relief" in clause (c) of the main Act. In the present suit no relief is sought with reference to immovable property nor does the consequential relief relate to immovable property.

Even if the suit is substantially one for easement, it will fall, not under sub-clause (c) of section 7, but under

sub-clause (e), and the Madras amendment introduces a proviso only to sub-clause (c) and not to sub-clause (e).

In re Venkatakrishna Pathar, (1926) 52 M.L.J. 121, referred to.

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 finding of the Court of the District Munsif of Namakkal in Original Suit No. 672 of 1933.

A. Gopalachariu for petitioner.

N. Srinivasa Ayyangar for Government Pleader
(K. S. Krishnaswami Ayyangar) for respondent.

Cur. adv. vult.

JUDGMENT.

This revision petition raises a question of court-fee. The plaintiff-petitioner, who is a mittadar, brought the suit for a declaration that in respect of certain lands in his mitta he is entitled to take water from the Cauvery free of irrigation cess and for refund of a sum of rupees fifty odd which, according to him, had been illegally levied from him. The Court below has called upon the plaintiff to pay court-fee under section 7, clause (iv) (c), of the Court Fees Act read along with the proviso added by the Madras amendment to that clause. In effect it has held that the plaintiff should value the suit and pay court-fee on the basis of half the value of the plaint mentioned properties calculated under clause (v) of section 7.

In the revision petition it has been contended before me that this is not a correct view. It is not impossible to read the plaint in such a way as to make the prayer for declaration ancillary to the

* Civil Revision Petition No. 204 of 1935.

GURUNATHA
v.
SECRETARY
OF STATE
FOR INDIA.

prayer for refund. But, assuming for the sake of argument that the two prayers have to be read independently, the case will fall, no doubt, under section 7, clause (iv) (c), of the Court Fees Act. The only question is whether the proviso added to that clause by Madras Act V of 1922 applies to the present case. The amendment provides for a case where "the relief sought is with reference to any immovable property". It seems to me that the *prima facie* interpretation of that expression is that the dispute should in some sense relate to the title to immovable property. This is obviously JACKSON J.'s opinion in *In re Venkatakrishna Pathar*(1). The learned Judge points out the difficulties and anomalies to which any other construction will lead. It is true that in that case the lower Court had asked the plaintiff to pay court-fee on the basis of the Madras amendment to section 7, clause (iv) (c). But there was no complaint against it by the plaintiff, and the learned Judge had only to deal with the defendant's contention that the suit must be valued as one for possession.

The way JACKSON J. distinguishes *Vaiyapuri Chetty v. Ramachandra Thevar*(2) shows the inclination of his opinion. The observation of the learned Judge that "inasmuch as the relief sought is the declaration of the right of easement, the relief may be said to be with reference to immovable property" must be understood in the light of the succeeding observation that

"the proviso should be read with the clause, so as to make 'with reference to' mean 'involving the possession of land, houses or gardens'; and then the proviso would not be applicable to easements at all."

(1) (1926) 52 M.L.J. 121.

(2) (1925) 21 L.W. 699.

GURUNATHA
v.
SECRETARY
OF STATE
FOR INDIA.

If the suit is substantially one for easement, it will fall not under sub-clause (c) of section 7 (iv) but under sub-clause (e), and the Madras amendment introduces a proviso only to sub-clause (c) and not to sub-clause (e).

In the present case, there is no dispute about the plaintiff's title to his mittha; nor is he seeking a declaration even in respect of a right of easement in the strict sense. He is merely asking for an immunity from assessment. It seems to me to be putting a very unnatural interpretation on the words of the proviso to say that in the present suit relief is sought with reference to immovable property. I would also point out that the words "the relief sought" in the proviso must be read as relating to the words "consequential relief" in clause (c) of the main Act. If so, the consequential relief in the present case does not relate to immovable property at all, but is only a claim for recovery of money. I am therefore of opinion that the case does not fall within the proviso added by Madras Act V of 1922 and that the suit was properly valued in the first instance.

The order of the lower Court is accordingly set aside. The petitioner will be entitled to his costs in the civil revision petition.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

1935,
October 23.

ATMAKURU BUTCHAYYA CHETTY (DEFENDANT),
PETITIONER,

v.

CHAKRAM KRISHNAMACHARI (PLAINTIFF),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 58 to 63—Applicability—Debt attached in execution—Garnishee's objection denying existence of—Order disallowing—Applicability of r. 58 to—Failure of garnishee to file a suit under r. 63 to set aside that order—Order conclusive, if.

When a garnishee merely denies the existence of a debt sought to be attached in execution of a decree and an order is made disallowing that objection, that order does not come within the purview of rules 58 to 63 of Order XXI of the Code of Civil Procedure.

It is not within the province of an executing Court to decide whether the debt attached is really due or not, and the objection that the debt does not at all exist and orders of the executing Court, if any, consequent on such objection do not, therefore, come within the purview of rules 58 to 63 of Order XXI.

Alwar Aiyangar v. Subramania Dikshathar, (1931) 61 M.L.J. 863, *Maharaja of Benares v. Patraj Kunwar*, (1905) I.L.R. 28 All. 262, and *Ma Saw Yin v. Hockto*, (1926) I.L.R. 4 Rang. 100, followed.

Chidambara Patter v. Ramaswami Patter, (1903) I.L.R. 27 Mad. 67 (F.B.), *Subbier v. Moideen Pitchai*, (1923) 44 M.L.J. 588, *Tayaballi Gulam Husein v. Atmaram Sakharan*, (1914) I.L.R. 38 Bom. 637, and *Piara Ram v. Ganga Ram*, A.I.R. 1924 Lah. 367, distinguished.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the

* Civil Revision Petition No. 1386 of 1932.

Court of the District Munsif of Berhampore in Small Cause Suit No. 1197 of 1930.

P. V. Rajamannar and K. Subba Rao for petitioner.

G. Ranga Rao for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by K. S. MENON J.—This is a petition under section 25 of the Provincial Small Cause Courts Act to set aside the decree of the District Munsif of Berhampore in Small Cause Suit No. 1197 of 1930. The plaintiff filed Small Cause Suit No. 542 of 1929 against one Seshayya. During the pendency of that suit, he applied for attachment of a sum of Rs. 130 out of Rs. 300 alleged to belong to that Seshayya and to be in deposit with the defendant. As the defendant did not appear, the attachment was made absolute (Exhibits B and B-1). After the decree was passed in the said suit, the plaintiff filed Execution Petition No. 501 of 1930, requesting the Court to send for the amount in the hands of the defendant already attached before judgment and to pay the same to him. In spite of the fact that there was already an attachment before judgment, the Court made another order of attachment. When notice was served on the defendant-garnishee, he filed a counter-statement (Exhibit F) denying that he had any amount belonging to the judgment-debtor with him. The Court made an order on 29th July 1930 disallowing the objection and directing the defendant to deposit the amount into Court within a week. As the money was not deposited, the plaintiff got himself appointed receiver (Exhibits D and D-1) for the purpose of collecting the amount, and

BUTCHAYYA
v.
KRISHNA-
MACHARI.

K. S. MENON J.

BUTCHAYYA
v.
KRISHNA-
MACHARI.
K. S. MENON J.

he has filed this suit. The defendant contended that there was no amount belonging to Seshayya with him. The lower Court, holding that, as the defendant had not filed a suit under Order XXI, rule 63, Civil Procedure Code, to set aside the order of 29th July 1930 disallowing his objections to the attachment, he was precluded from agitating the question over again in this suit that no amount belonging to Seshayya was with him, gave a decree as prayed for ; hence this petition.

The only question that arises for decision in this petition is whether, when a garnishee merely denies the existence of a debt sought to be attached in execution of a decree and an order is made disallowing that objection, that order comes within the purview of rules 58 to 63 of Order XXI, Civil Procedure Code.

There are decisions of this Court as well as of the Allahabad and Rangoon High Courts holding that it is not within the province of an executing Court to enquire into the truth or existence of a debt sought to be attached. This question arose directly for decision in the case of *Alwar Aiyangar v. Subramania Dikshathar*(1) and CURGENVEN J., following the decisions reported as *Maharaja of Benares v. Patraj Kunwar*(2) and *Ma Saw Yin v. Hockto*(3), held that it was not for the Court executing a decree to determine whether the debt was actually due or not. The learned Judge went on to say :

"It has to attach the alleged debt and thereafter there are only two courses open to it, either to sell the debt or appoint a receiver to realise it."

(1) (1931) 61 M.L.J. 863.

(2) (1905) I.L.R. 28 All. 262.

(3) (1926) I.L.R. 4 Rang. 100.

No decision of this Court has been brought to our notice in which a contrary view has been expressed. It may also be observed that no rules regarding garnishee proceedings have been framed by this Court for the guidance of the mofussil Courts similar to those existing on the Original Side of this Court and to those framed by the Allahabad, Rangoon and Lahore High Courts. In those High Courts there are additional rules framed to the effect that if a garnishee denies the existence of a debt, the Court may frame and determine an issue relating thereto. In these circumstances, we are of the opinion that it is not for a Court executing a decree to decide whether the debt attached is really due or not.

In support of the position that, when a garnishee merely denies the existence of a debt sought to be attached in execution and an order is made disallowing his objection, that order is conclusive unless he files a suit under Order XXI, rule 63, the decisions in *Chidambara Patter v. Ramasamy Patter*(1), *Subbier v. Moideen Pitchai*(2), *Tayaballi Gulam Husein v. Atmaram Sakharan*(3) and *Piara Ram v. Ganga Ram*(4) are relied on by the petitioner. But in all these cases the existence of the debt attached had been admitted. In the case of *Chidambara Patter v. Ramaswami Patter*(1) it was the assignee from the judgment-debtor in respect of the debt attached who filed the objection at the time of execution and who subsequently filed the suit. The question for decision there was whether, when a debt, not secured by a negotiable instrument, is attached

BUTCHAYYA
v.
KRISHNA-
MACHARI.
K. S. MENON J.

(1) (1903) I.L.R. 27 Mad. 67 (F.B.).
(3) (1914) I.L.R. 38 Bom. 631.

(2) (1923) 44 M.L.J. 588.
(4) A.I.R. 1924 Lah. 367.

BUTCHAYYA
v.
KRISHNA-
MACHARI.
K. S. MENON J.

under section 268, Civil Procedure Code of 1882, a claim can be preferred by a third party and investigated under section 278 of that Code and whether the provisions of section 283 of that Code applied to the orders passed on such claims, and it was answered in the affirmative. The decision in that case is no authority for the position that when the existence of the debt attached is itself denied, the denial of the garnishee can be considered to be a claim or objection under Order XXI, rule 58, or that, when such objection is disallowed, he can file a suit under Order XXI, rule 63. In the case reported as *Subbier v. Moideen Pitchai*(1) also the existence of the debt was admitted by the garnishee and his claim was that the judgment-debtor had assigned it to a third party and that the amount was slightly less. In the case reported as *Tayaballi Gulam Husein v. Atmaram Sakharam*(2) also the garnishee admitted that he had a sum of Rs. 594 of the judgment-debtor, but claimed to have the amount set off against some amount due by him. In the case of *Piara Ram v. Ganga Ram*(3) also the existence of the debt was admitted. It will therefore be seen that in all these cases the existence of the property attached, viz., the debt or the obligation on the part of the garnishee to the judgment-debtor, had been admitted and the garnishee put forward some claim or other in respect of that debt. But in this case there is no such admission; the garnishee totally denied the existence of the debt, and consequently of any obligation on his part to the judgment-debtor. In these circumstances, it is

not explained how, if the Court disallows the objection, he can "institute a suit to establish the right which he claims to the property" under Order XXI, rule 63. According to him the property in dispute, namely, the debt or the obligation on his part, is non-existent. Therefore, it is not possible for him to claim any right to such non-existing property. In these circumstances, we are of the opinion that the objection that the debt does not at all exist and orders of the executing Court, if any, consequent on such objection do not come within the purview of rules 58 to 63 of Order XXI.

The finding of the lower Court that the defendant is precluded from agitating the question that he did not owe any amount to the judgment-debtor by reason of the order made on 29th July 1930 cannot therefore be sustained.

There is no substance in the contention covered by issue 3, viz., that the plaintiff has not been validly appointed receiver, or that he is not entitled to sue for Rs. 130 only.

The petition is therefore allowed; the decree of the lower Court is set aside and the suit is remanded to that Court for trial and disposal according to law. The costs incurred in this petition will abide and follow the result of the suit and will be provided for in the revised decree.

A.S.V.

(1) (1923) 44 M.L.J. 588.

(2) (1914) I.L.R. 38 Bom. 631.

(3) A.I.R. 1924 Lah. 367.

BUTCHAYYA
v.
KRISHNA-
MACHARI.
K. S. MENON

APPELLATE CIVIL.

*Before Mr. Justice Wadsworth.*1935,
December 6.KONGOT PUTHEN VEETIL AMMU *alias*
DEVAKI AMMA (PETITIONER—FOURTH DEFENDANT),
APPELLANT,

v.

KONGOT PUTHEN VEETIL NAGAPPAN NAIR,
KARNAVAN, AND ANOTHER (RESPONDENT—DECREE-
HOLDER AND NIL), RESPONDENTS.**Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), sec. 6 (3)—Decree for eviction of tenant—Award for compensation for improvements embodied in—Date on which amount valued—Decree not stating anything as to—Effect—Re-valuation with reference to increment in value between date of valuation and date of eviction—Power of executing Court as to.*

Where a decree for eviction of a tenant entitled to compensation for improvements under Madras Act I of 1900 embodies an award for compensation for improvements and says nothing about the date on which the amount is valued, the amount awarded for the value of improvements in the decree must be taken to be the decision of the Court as to their value on that date. In such a case the executing Court is not at liberty to go behind the decree and ascertain from the evidence the date on which the valuation was actually made and allow a re-valuation with reference to any increment in value between the date of the valuation and the date of eviction.

Practice to the contrary in vogue in certain Courts in Malabar disapproved.

APPEAL against the appellate order of the Court of the District Judge of South Malabar dated 31st March 1931 and made in Appeal Suit No. 635 of 1930 preferred against the order of the Court of the Subordinate Judge of Ottapalam dated 29th

* Appeal Against Appellate Order No. 234 of 1931.

September 1930 and made in Execution Application No. 581 of 1929—Execution Petition No. 230 of 1929 (Original Suit No. 38 of 1925).

AMMU
v.
NAGAPPAN
NAIR.

K. Kuttikrishna Menon for appellant.

D. A. Krishnan Variar for respondents.

JUDGMENT.

This appeal arises out of orders in execution of a decree passed for eviction of a tenant in possession in Malabar, entitled to compensation for improvements under The Malabar Compensation for Tenants' Improvements Act, Madras Act I of 1900. The main question in the appeal is one of re-valuation with reference to clause 3 of section 6 of that Act. The suit was apparently pending for a number of years and the decree, which was passed in 1929, in fixing the amount of compensation due to the tenant accepted a valuation made by a commissioner in 1926. The tenant was evicted almost immediately after the decree, so that there is no question of any accretion in value between the date of the decree and the date of the eviction.

The argument for the appellant is that because section 6 (3) of the Act refers to the date up to which compensation for improvements has been adjudged in the decree, when no such date is given in the decree, the executing Court is at liberty to go behind the decree and ascertain from the evidence the date on which the valuation was actually made and allow a re-valuation with reference to any increment in value between the date of the valuation and the date of eviction. It is argued that this is the practice which is in vogue in certain Courts in Malabar and I am asked to give sanction to this practice, which to

AMMU
v.
NAGAPPAN
NAIR.

my mind strikes at the root of the principles upon which the decrees of a Court are executed. When a Court's decree for eviction embodies an award for compensation for improvements and says nothing about the date on which those amounts are valued, the natural inference is that the award concludes any claim between the parties on the date of the decree. The mere fact that section 6 (3) of the Act provides for re-valuation does not give to the judgment-debtor a right to go behind the decree and by looking into the evidence to find out when the crop was last valued and re-open the whole matter by having a further valuation made immediately after the decree has been passed. It is of course open to a Court in passing its decree to say that the value of improvements on such and such a date is so much and that any increment in value may be worked out in execution by a re-valuation. But, in the absence of any such provision, the amount awarded for the value of improvements in the decree must be taken to be the decision of the Court as to their value on that date.

[Portion of the judgment omitted as not being necessary for this report.]

In the result the appeal is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Stone and Mr. Justice Pandrang Row.

KASTHURI VARDHANAMMA (PLAINTIFF), APPELLANT,

1935,
December 20

v.

THANAMALA MUNISWAMI REDDI (FIRST DEFENDANT),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XLVII, r. 1—
Plaint—Order rejecting—Review of—Notice to other side
prior to—Necessity—Review granted without notice—
Earliest opportunity to other side to contest propriety of
review—Necessity.*

Where a plaint has been rejected after ample time has been given not merely for the finding of the requisite fee but for putting Counsel in possession of all the relevant facts which he could urge as an excuse for the delay, then, even assuming that an order rejecting a plaint can be reviewed without notice, it would be necessary to give the other side an opportunity at the earliest possible moment of contesting the propriety of the review.

Krishnasami Panikondar v. Ramasami Chettiar, (1917)
I.L.R. 41 Mad. 412 (P.C.), followed.

Quaere whether an order rejecting a plaint can be reviewed without notice.

Surendra Prasad v. Attabuddin, A.I.R. 1922 Cal. 234,
Janaki Nath Hore v. Prabhasini Dasee, (1915) I.L.R. 43 Cal.
178, Abdul Hakim Chowdhury v. Hem Chandra Das, (1914)
I.L.R. 42 Cal. 433, Surajpal Pandey v. Utim Pandey, (1921)
6 P.L.J. 625, and Narayana Chettiar v. Muthu Chettiar,
(1926) I.L.R. 50 Mad. 67, referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Nellore, dated 25th August 1930 and passed in Appeal Suit No. 123 of 1929, presented against the decree of the Court of the

* Second Appeal No. 561 of 1931.

VARDHANAMMA District Munsif of Gudur at Nellore, dated 14th
v. August 1928 and made in Original Suit No. 727 of
MUNISWAMI. 1927.

Ch. Raghava Rao for appellant.

T. V. Muthukrishna Ayyar for respondent.

Cur. adv. vult.

JUDGMENT.

STONE J.

STONE J.—This second appeal raises a short point which has been previously considered in *Surendra Prasad v. Attabuddin*(1) where NEWBOULD J. held that an order passed at a stage of the suit before the plaint is registered can be reviewed without notice to the other party. There is no other case exactly in point, but there are several cases where the question has been considered whether a decree or order can be reviewed after the claim has been registered, for example, in second appeal, and on the question so arising there has been a conflict between *Janaki Nath Hore v. Prabhasini Dasee*(2) on the one hand and *Abdul Hakim Chowdhury v. Hem Chandra Das*(3), *Surajpal Pandey v. Utim Pandey*(4) and *Narayana Chettiar v. Muthu Chettiar*(5) on the other. In my opinion it is not necessary to consider this conflict because, in the view I take, it is not necessary to consider whether or not an order rejecting a plaint can be reviewed without notice, for, following the Privy Council decision in *Krishnasami Panikondar v. Ramasami Chettiar*(6), I am clearly of the opinion that, where a plaint has been rejected, as here, after ample time has been given not

merely for the finding of the requisite fee but for VARDHANAMMA putting Counsel in possession of all the relevant MUNISWAMI facts which he could urge as an excuse for the delay, then, even assuming that an order rejecting a plaint (which under section 2 of the Code is a decree) can be reviewed without notice, as to which I say nothing, it would be necessary to give the other side an opportunity at the earliest possible moment of contesting the propriety of the review. The defendant to this suit took the earliest opportunity to raise the point in his written statement and argued it and the appellate Court held that the plaint ought not to have been restored to file. It is true that the Court based its decision upon the view that in the absence of notice a review cannot be granted. But, when one considers the grounds upon which under Order XLVII, rule 1, Civil Procedure Code, a review can be had and when one considers the facts of this case and bears in mind that the plaint was filed on the last day of limitation with a merely nominal court-fee of four annas thereon, that on 21st June 1927 the deficit of Rs. 127-3-0 was ordered to be paid, ten days time being given, a further ten days on 2nd July 1927 and again another ten days on 15th July 1927, and that the plaint was rejected only on 25th July, it is in my opinion clear that the Court could not have reviewed its order rejecting the plaint, which order is a decree, and could not have so reviewed it quite apart from any question of notice. In arriving at this conclusion, I have borne in mind the reasons now stated for the failure to produce the court-fee in time. None of these facts are facts which could not have been placed before the Court at the time when the plaint was rejected.

(1) A.I.R. 1922 Cal. 234.

(3) (1914) I.L.R. 42 Cal. 433.

(5) (1926) I.L.R. 50 Mad. 67.

(2) (1915) I.L.R. 43 Cal. 178.

(4) (1921) 6 P.L.J. 625.

(6) (1917) I.L.R. 41 Mad. 412 (P.C.)

VARDHANAMMA
v.
MUNISWAMI.
STONE J. They do not constitute new matters since discovered. There is no question of mistake or error apparent on the record.

It appears to me to follow therefore that, assuming (without deciding) that the order rejecting a plaint could without notice have been reviewed, still when the Court came to consider whether it would review and could review under the powers conferred by Order XLVII, rule 1, it would have had to answer the question in the negative and the result would be that the order would not have been reviewed and consequently the rejection of the plaint would stand, from which it follows that the suit ceased to be in existence on 25th July 1927 and the decision of the learned Subordinate Judge of Nellore dismissing the suit is correct. The second appeal is accordingly dismissed with costs.

PANDRANG ROW J.—I concur.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

NAGARETHNA MUDALIAR (FIRST DEFENDANT), APPELLANT, 1935,
December 19.

v.

SAMI PILLAI AND ANOTHER (PLAINTIFF AND SECOND
DEFENDANT), RESPONDENTS.*

Indian Easements Act (V of 1882), sec. 7, ill. (i)—Owner of land of higher level—Right of, to discharge water on to land of lower level—Nature and incidents of—If such right limited to mere rain water falling directly on land of higher level or water flowing in natural stream over that land—Customary right—Doctrine of a lost grant—If available to infer such a right—Essentials of the doctrine—Ryotwari proprietor—If a "capable grantor" as understood in English law—"Time immemorial"—Meaning of, in Indian law.

In a suit for a declaration that the plaintiff is entitled to discharge, not only the rain water, but also the water utilised for irrigation purposes brought on to his land from an adjoining irrigation channel, into the land of the first defendant and for an injunction restraining the first defendant from causing obstruction to the flow,

held: (i) The owner of land on a higher level is entitled to send down water which naturally flows on to his land into lower land whether the said water flows in a defined channel or not. It is a natural right inherent in property. It is an incident of property arising from the relative levels of the respective lands and the strata below. This principle is embodied in illustration (i) to section 7 of the Easements Act.

(ii) Such a right is not limited to mere rain water falling directly on the land or water flowing in a natural stream over the land. It has been extended to spring water on the land and to water which the proprietor might by operations on the

* Second Appeal No. 1282 of 1931.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

land, such as sinking a well or opening a fountain, cause to flow.

(iii) If for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of a lost grant can be invoked in aid of the inference of such a custom.

(iv) To infer the doctrine of a lost grant or a claim based on prescription all that is necessary to be alleged is "long, continual and peaceful possession".

(v) The estate of a ryotwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. His estate is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a "capable grantor" as understood in English law for the application of the doctrine of a lost grant.

The words "time immemorial" have been borrowed from English law in which they have a connotation that cannot be applied to Indian society and circumstances. In India, they must be taken to mean long user from which title may be presumed.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Appeal Suit No. 6 of 1930 preferred against the decree of the Court of the District Munsif of Tiruvarur in Original Suit No. 262 of 1927.

T. M. Krishnaswami Ayyar for *K. Swaminatha Ayyar* for appellant.

K. Rajah Ayyar and *R. Sundaralingam* for respondents.

JUDGMENT.

The plaintiff is the owner of Survey No. 148 and a portion of Survey No. 147 in the village of Amoor. The second defendant is the owner of the

rest of Survey No. 147. The first defendant is the owner of Survey No. 158 which is adjacent to Survey No. 147 and east of it but situate in the village of Overkudi. The suit is for a declaration that the plaintiff is entitled to discharge not only the rain water but also the water utilised for irrigation purposes brought on to his land from an adjoining irrigation channel into the land of the first defendant through Survey No. 147 and for an injunction restraining the first defendant from causing obstruction to the flow.

The plaintiff's case is that the lands, Survey Nos. 148 and 147, are high level lands and Survey No. 158 is land on a lower level, that for a long time the water which fell on the plaintiff's land always used to be drained through Survey No. 147, then into Survey No. 158 through a madai in a bund which divided the field No. 147 from No. 158 and then emptied itself into what is called Vadigal Odai which finally emptied itself into the river Vettar, that the first defendant who purchased Survey No. 158 recently began to obstruct the flow which has been enjoyed from time immemorial, that originally the lands were rainfed but subsequently in 1891 they became ordinary irrigated wet lands by an arrangement with the owners of the neighbouring village Poolangudi to get water through their irrigation channel and that for nearly a period of thirty years up to the date of obstruction in 1923 he has been irrigating the said lands and discharging the water through Survey No. 158 and there is no other outlet for the flow. The claim as laid in the plaint is as follows:

"From time immemorial the waters in Survey Nos. 148 and 147 used to drain themselves through

NAGARETHNA
MUDALIAR

SA

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

the lands of the second defendant in the north-eastern portion of Survey No. 147 into Survey No. 158 and these waters will ultimately drain themselves through a channel lying between Survey Nos. 158 and 157 into Vadigal Odai also shown in the plan. This kind of drainage has been going on from time immemorial and the plaintiff and his predecessors in title have been enjoying such right of drainage from before the remote memory of man as a right continuously and without interruption. The plaintiff and his ancestors have thus acquired an easement right to drain the waters in Survey Nos. 148 and 147 as above indicated into the lands of the defendants.

Moreover, the geographical configuration of the lands and the relative position of the lands is such that the above lands of the plaintiff could not and did not drain themselves in any other manner. On the north of the plaintiff's lands there is the poramboke footpath (hayan karai), a very high embankment; on the west and south of the plaintiff's lands, the lands are higher in level than the plaintiff's lands."

The prayer is that it be declared that the plaintiff has got an easement right to drain the waters of his lands in Survey Nos. 148 and 147 in the village of Amoor into Survey No. 158 of Overkudi village through the lands of the second defendant in the north-eastern portion of Survey No. 147.

The defence is that the plaintiff never had any right to drain the water in the manner contended for nor was such right exercised as is alleged in the plaint, that the geographical configuration is

not as alleged by the plaintiff, and that he has always been draining the water through an escape sluice into the Vettar along the north-west of Survey No. 148.

The learned District Munsif dismissed the plaintiff's suit but the learned Subordinate Judge gave a decree for the plaintiff.

The geographical configuration of the land has been found to be as described by the plaintiff. Survey Nos. 148 and 147 are admittedly on a higher level than Survey No. 158. The general slope of the lands is from west to east. All the said lands are south of the river Vettar and there is a high embankment on the north of Survey Nos. 148 and 147. The western boundary of Survey No. 148 is on a higher level. It is also found that the water from the plaintiff's lands drains itself eastward into the first defendant's field and empties itself into the Vadigal Odai. The Vadigal Odai starts from Survey No. 158 and goes in a northerly direction, joining the Vettar in the east after passing through Survey Nos. 154 and 157. Survey Nos. 148 and 147 were till 1891 admittedly manavari and they were not irrigated by any irrigation channel. In 1891 an agreement was entered into between the mirasidars of Poolangudi, the adjoining village on the west, and the predecessors of the plaintiff by which water from Poolangudi channel was taken to irrigate the plaintiff lands. It may also be noticed that Poolangudi irrigation channel is shown in the diglot register as an irrigation source for Survey No. 148. At the time of the agreement with the Poolangudi mirasidars there was no other course for the water to drain itself from the plaintiff lands than by

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

passing through the village of Overkudi. It has also been found by the learned Subordinate Judge that until 1921 even the drainage water from the fields of Poolangudi passed through the plaintiff lands in an easterly direction and then to the village of Overkudi to the land of the first defendant and then emptied itself into the Manjadi Odappu, a breach in the Vettar, and when that Odappu was closed the Poolangudi mirasidars by approaching the Government had a portion of the bund cut on the northern side of that village at the northern extremity of Survey No. 148 and had a sluice built for the water to escape through it, and it is also found by the learned Subordinate Judge that the drainage water from the plaintiff's lands cannot pass through the sluice which the Poolangudi mirasidars have provided for themselves as the escape lies in a westerly direction. The learned Subordinate Judge also found that from 1891 to 1923 all the water on the plaintiff's lands, both rain water as well as water brought on for irrigation purposes, was being sent down through the lands of the first defendant openly and without interruption. On these findings the learned Subordinate Judge was of opinion that the right of easement as claimed by the plaintiff was proved. He held that the enjoyment for thirty years gave rise to an easement, that the enjoyment had been as of right and that such rights have been generally recognized as customary rights and were not governed by section 15 of the Easements Act. Mr. T. M. Krishnaswami Ayyar for the first defendant raised the following contentions: (i) Though the plaintiff might have a natural right to drain rain water which fell on his land, he had no right

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

to discharge water brought on to his land for irrigation purposes. (ii) The inference of a customary right by user for thirty years should not have been drawn as no lost grant or custom was pleaded in the plaint and in the absence of such pleading it would be practically making out a new case for the plaintiff. (iii) Such a customary right based on a lost grant cannot in law be inferred having regard to the fact that the lands in suit are ryotwari lands.

It is settled law that the owner of land on a higher level is entitled to send down water which naturally flows on to his land into lower land whether the said water flows in a defined channel or not. It is a natural right inherent in property and, as described by LORD WATSON in *John Young & Co. v. Bankier Distillery Company*(1):

"It is an incident of property arising from the relative levels of their respective lands and the strata below."

This principle is embodied in illustration (i) to section 7 of the Easements Act, which runs thus:

"The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto."

This right is not limited to mere rain water falling directly on the land or water flowing in a natural stream over the land. It has been extended to spring water on the land and to water which the proprietor might by operations on the land, such as sinking a well or opening a fountain, cause to flow. In *Ramasawmy v. Rasi* (2) the following passage from Kerr on

(1) [1893] A.C. 691.

(2) (1913) I.L.R. 38 Mad. 149, 150.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI

Injunctions was cited to show the extent of the right as understood in English law:

"The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations, such as by deep ploughing, from land on a higher level."

SADASIVA AYYAR J. in *Doraiswami Muthiriyar v. Namtiappa Muthiriyar*(1) was inclined to extend this right even to water brought on to the land for irrigation purposes. He observed:

"I think also that even if the water is brought according to the custom and usages of the country along irrigation channels upon the land, the right to pass it on to a land of a lower level may be spoken of as a 'natural right' without much violence to language."

Of course, in this view PHILLIPS J. did not concur because he was of opinion that the words "natural right" could not be extended to water brought on to the land for irrigation purposes. The learned Judge's view is in accordance with the principle laid down in the English cases noticed in *Sheik Hussain Sahib v. Subbayya*(2). As stated by LORD WATSON in *John Young & Co. v. Bankier Distillery Company*(3):

"The lower heritor is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means."

Whether this doctrine should be strictly applied to an agricultural country like India is a matter for consideration. In fact the observations of SADASIVA AYYAR J. must be deemed to have been made with reference to the conditions of this country. In *Kasia Pillai v. Kumaraswami Pillai*(4) MADHAVAN NAIR J., after referring to the dictum of SADASIVA AYYAR J., observed that except

this dictum there is no authority to support the view that the natural right can be applied to water coming on to the upper land for agricultural operations. But he nevertheless laid down:

"It appears to us that, in India, the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully."

Thus MADHAVAN NAIR J., though he was not inclined to support the right as a natural right, would do so on the basis of custom, having regard to the conditions of this country. No doubt in that case custom was pleaded. But the learned Judge enunciated the principle as a matter of general application. In my opinion, if for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of a lost grant can be invoked in aid of the inference of such a custom. An illustration of a case where a customary right was inferred by the application of the doctrine of a lost grant is *Derry v. Sanders*(1), where a right of way was asserted by one copyholder against the land owned by another copyholder, both holding under the same lord of the manor. In that case, BANKES L.J. observed as follows:

"In view of the rule that a legal origin must be presumed, if such an origin is possible, I think that the length of user in the present case of the disputed way is sufficient to found the

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI

(1) 1918 M.W.N. 167.
(3) [1893] A.C. 691.

(2) (1925) I.L.R. 49 Mad. 441 (F.B.).
(4) (1928) I.L.R. 52 Mad. 426.

(1) [1919] 1 K.B. 223.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

presumption that the necessary custom existed in the manor of Longdon."

The principle upon which the doctrine of a lost grant is based is explained by CHANNELL J. in *East Stonehouse Urban Council v. Willoughby Brothers, Limited*(1) thus :

"I should be glad to be able to decide the case by the doctrine commonly referred to as that of a lost grant, that is, the rule which says that on long continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the Court. This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly. It is, in my opinion, a most useful doctrine and enables the Court to avoid interfering with user and possession in cases not covered by the statutes of prescription and limitation, though within the mischief these statutes were intended to remedy."

To invoke the doctrine of a lost grant, no length of time is necessary. In *Chintamanrao Appasaheb v. Ramchandra Govind*(2) it was presumed from user extending over a period between 1886 and 1910. In *Kunjammal v. Rathinam Pillai*(3) and *Muthu Goundan v. Anantha Goundan*(4) twenty years' user was held sufficient. In *Rambhai Dabhai v. Vallabhbhai Jhaverbhai*(5) SHAH J. observed :

"It has been suggested in the course of the argument before us that immemorial user or ancient right cannot be inferred from user extending over a period of thirty-five years, but no case has been cited to us in which the minimum limit of time, which would justify the inference as to immemorial user, has been laid down. It would appear from the observations in the case of *Rajrup Koer v. Abul Hossein*(6) that their Lordships did not lay any particular emphasis upon the number of years so long as it was in excess of twenty years."

(1) [1902] 2 K.B. 318, 332.

(3) (1921) I.L.R. 45 Mad. 633.

(5) (1920) I.L.R. 45 Bom. 1027, 1034.

(2) (1931) I.L.R. 56 Bom. 82.

(4) (1915) 31 I.C. 528.

(6) (1880) I.L.R. 6 Cal. 394 (P.C.).

CRUMP J. in the same case observed at page 1037 :

"With reference to the ancient user which the District Judge has held established, he came to the conclusion that from the evidence in the case, which shows an user of at least thirty-five years, as also from the situation of the property considered in the light of the plaintiff's admitted right to use water from the well, the inference was that when the well was built, the persons using the well, of whom the plaintiff's ancestor was admittedly one, agreed between themselves that the plaintiff should take water by the shortest route to his land. That appears to me to be a finding of fact and I do not see that in arriving at that finding the learned District Judge has fallen into an error of law."

In this case, having regard to the plaintiff's admitted right by reason of the situation of the property to discharge water falling on his land on to the land of the first defendant, it may well be said that, when the plaintiff by reason of the agreement with the Poolangudi mirasidars brought on the water from the Poolangudi channel for agricultural purposes and let down the water, the first defendant's predecessor in title agreed that such water can be discharged in accordance with the mamool which existed in regard to the rain water. The learned Subordinate Judge found as a fact user for nearly thirty years. As CRUMP J. said in the Bombay case, the Subordinate Judge here in arriving at this finding has not fallen into any error of law.

In this connection I have to notice two main arguments of Mr. T. M. Krishnaswami Ayyar. One is that there is no pleading of any customary right or a right based on a lost grant. I do not agree with him in this view. He has also contended that what was alleged in the plaint is only immemorial user which can only mean user to let

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

down rain water and not water which in 1891 by arrangement with the neighbouring landowners was brought on to the land by artificial means. No doubt, in so many words a lost grant or customary user is not mentioned in the plaint. The distinction between water brought on to the land by artificial means and water naturally falling on the land was also not made. But the necessary allegations to found such a right are there. To infer the doctrine of a lost grant or a claim based on prescription, all that is necessary to be alleged is "long, continual and peaceful possession". Where these incidents are found the Court will, if possible, presume a grant of the right in question.

The contention of Mr. T. M. Krishnaswami Ayyar based on the use of the words "time immemorial" as referring only to discharge of rain water is again not tenable because you cannot give a literal interpretation to the words "time immemorial". They are words borrowed from English law and, as explained in *Chintamanrao Appasaheb v. Ramchandra Govind*(1) by TYABJI J.,

"they have a connotation that obviously cannot be applicable to Indian society and circumstances."

They must be taken to mean long user from which title may be presumed.

The other argument of Mr. T. M. Krishnaswami Ayyar based on the fact that the land is ryotwari land requires some notice. His argument is that all the lands are held under the Government, a common landlord, and no title by prescription or a lost grant can be acquired by one tenant

(1) (1931) I.L.R. 56 Bom. 82, 88.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

against another, as prescription or a lost grant presupposes a grant by an owner in fee and an acquisition by an owner in fee. He relied very strongly for this proposition on *Wheaton v. Maple & Co.*(1), *Kilgour v. Gaddes*(2) and also *Chinnasami Goundan v. Balasundara Mudaliar*(3). He relied upon the following passage of LORD LINDLEY L.J. in *Wheaton v. Maple & Co.*(1):

"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee",

and that of LOPES L.J. in the same case at page 68:

"It must be such an easement as absolutely binds the fee in the land."

Wheaton v. Maple & Co.(1) is a case upon the English Prescription Act under which, in the words of A. L. SMITH L.J. at page 72,

"a person cannot obtain an absolute and indefeasible right within the meaning of the statute unless by the user he can get a right against all. If he does not, he gets no absolute and indefeasible rights within the section."

Under English law, the three legal methods by which prescriptive rights can be claimed are: (i) prescription at common law; (ii) claims based on a lost grant; and (iii) prescription under the Prescription Act, 1832. As regards prescription at common law, the time prescribed by law is "time whereof there is no memory of man to the contrary". Later it was cut down by statutes but, as it was found in practice that a claim by prescription at common law could often be defeated by showing that the grant originated since 1189, what is called the doctrine of a lost modern grant was resorted to. The Prescription Act was also

(1) [1893] 3 Ch. 48.

(2) [1904] 1 K.B. 457.

(3) (1934) 67 M.L.J. 262.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

passed to lessen the period of prescription. As stated in Halsbury's Laws of England, Vol. II, page 300 :

"The doctrine of a lost modern grant is in general only used as ancillary to a claim to prescription at common law, and is resorted to in cases where for some reason prescription at common law or under the provisions of the Prescription Act of 1832 cannot be adopted."

Prescription under the statute was only one of the modes by which a person could lay claim to his title and it did not preclude a person from claiming acquisition of an easement by any other mode. In English law there seems to be a difference of view as to whether the acquisition of an easement by prescription or a lost grant should only be by an owner in fee, i.e., whether the presumed grant must be an absolute one. That it should be so seems to have been the view taken in *Wheaton v. Maple & Co.*(1) and *Kilgour v. Gaddes*(2). But there is also authority for the view that it need not be absolute. In fact, in *Bright v. Walker*(3) PARKE B. observes :

"Before the Prescription Act this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence",

though under the statute it must be absolute and valid against all. The same view was taken in *East Stonehouse Urban Council v. Willoughby Brothers, Limited*(4) by CHANNELL J.:

"It can be applied between termors when there is a difficulty in applying the statutes owing to the freeholder not being bound."

(1) [1893] 3 Ch. 48.

(2) [1904] 1 K.B. 457.

(3) (1834) 1 C. M. & R. 211, 221; 149 E.R. 1057, 1061.

(4) [1902] 2 K.B. 318, 332.

But even in English law, where the nature of the interest is such that it can be practically assimilated to that of an owner in fee though not strictly an interest in fee, such a presumption can be made. In *Derry v. Sanders*(1), where the question arose with reference to a copyholder acquiring a right of easement against another copyholder holding under the same lord of the manor, BANKES L.J., after referring to the rule that a tenant for years or for life could not make a grant of a right of way over land in his occupation by virtue of his interest as such tenant, was inclined to the view that the same may not be applicable to a case of a copyholder. He observes :

"One question, however, in the present case is whether a tenant by the copyhold is in the same position. . . . In *Eardley v. Granville*(2) JESSEL M.R. states the position of the copyholder thus: 'The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout The possession is in the copyholder; the property is in the lord.' I think that there is considerable ground for saying that a tenant by the copyhold where by the custom of the manor his estate is an estate of inheritance has a sufficient estate to support a grant by him of a right of way over his copyhold lands."

The known methods of acquiring an easement, by prescription under the Indian law are : (i) prescription under the Easements Act where it is applicable, (ii) prescription under sections 26 and 27 of the Indian Limitation Act, and (iii) claim founded on a lost grant. Prescription at common law as understood in England cannot be availed of in this country. Before the Limitation Act of 1871, the Courts were requiring twenty or thirty years' user following the English precedents. As

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

(1) [1919] 1 K.B. 223, 231.

(2) (1876) 3 Ch. D. 826, 832.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

the Privy Council, referring to prescription under the statute, observed in *Rajrup Koer v. Abul Hessein*(1):

"The statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easement."

There is thus nothing to prevent a claim to title by a lost grant being made under the Indian law apart from section 15 of the Easements Act and no claim is founded on section 15 of the Act in this case and Mr. Rajah Ayyar conceded that he is not setting up any claim under the section. The question therefore is whether the strict principle of English law that only where an absolute grant is possible you should invoke the doctrine of a lost grant should be applied to India. I may say at once that in *Koyyammu v. Kuttiam-moo*(2) divergent views have been taken, ABDUR RAHIM J. holding that English law should be applied and PHILLIPS J. holding that, having regard to section 8 and other sections of the Easements Act, the strict theory of English law is not applicable. Whichever view is correct, in my opinion, the principle applied by BANKES L.J. to the case of a copyhold can legitimately be applied to the case of a ryotwari proprietor. Though a copyhold is not a freehold, BANKES L.J. stated a copyholder has sufficient estate to make a grant of easement for making the theory of a lost grant applicable. It may equally be said that the estate of a ryotwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. The estate of a

(1) (1886) I.L.R. 6 Cal. 394, 403 (P.C.). (2) (1919) I.L.R. 42 Mad. 567.

NAGARETHNA
MUDALIAR
v.
SAMI PILLAI.

ryotwari proprietor is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a "capable grantor" as understood in English law for the application of the doctrine of a lost grant. Therefore in this view it is unnecessary to consider in this case the correctness or otherwise of the interpretation placed by VARADACHARIAR J. on section 15 of the Easements Act in *Chinnasami Goundan v. Bala-sundara Mudaliar*(1). I am therefore of opinion that on the findings in this case the view of the learned Subordinate Judge, that the enjoyment having been for more than thirty years it should be deemed to be of right and the plaintiff's claim should be upheld, is correct; *vide also Kunjammal v. Rathinam Pillai*(2).

In the result the second appeal fails and is dismissed with costs.

G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE ABDUL GANI SAHEB (ACCUSED), APPELLANT.*

1936,
August 20.

*Indian Penal Code (Act XLV of 1860), sec. 75—Old offender—
Sentence to be passed on.*

There is no rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous.

(1) (1934) 67 M.L.J. 262.

(2) (1921) I.L.R. 45 Mad. 633, 639.

* Criminal Appeal No. 352 of 1936.

ABDUL GANI,
In re. APPEAL against the order of the Court of Session of the South Arcot Division in Case No. 16 of the Calendar for 1936.

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

JUDGMENT.

This is a jail appeal in which notice has been ordered to issue by my brother BURN J. on the ground that the sentence appeared to be excessive. The appellant was convicted as a result of the unanimous verdict of the jury to the effect that he was guilty of theft, after a trial conducted before the Sessions Judge of South Arcot.

[Portion of the judgment omitted as not being necessary for this report.]

As regards the question of sentence, the learned Judge does not give any particular reason for imposing a sentence of six years' rigorous imprisonment under section 379 read with section 75, Indian Penal Code. The prosecution case is that the property stolen in this case was a cow worth about Rs. 50. For an offence of this nature, if committed by a casual offender for the first time, the ordinary sentence would certainly not exceed six months' imprisonment. The question is whether an old offender, whose previous conviction was in 1929 and whose previous sentence was five years' rigorous imprisonment should now necessarily be given six years' imprisonment. There seems to be an idea prevalent in the minds of some Judges that there is a rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous. This so-called rule cannot be supported

by any good reason. It may be an excellent rule of thumb, but I do not think, in imposing sentences, such a rule can be safely followed in the interests of the proper administration of criminal justice. While the sentences imposed on criminals should be adequate to the offence, there is every reason why they should not be excessive. Apart from the injustice to the offender which an excessive sentence entails, such a sentence tends to undermine public confidence in the administration of criminal justice. In the absence of any reasons for imposing a sentence of six years' rigorous imprisonment in this case, and in view of the nature and value of the stolen property, I am of opinion that the sentence imposed by the learned Sessions Judge is far too severe. The sentence is therefore reduced to three years' rigorous imprisonment. The order directing the appellant to give information of his residence and change of residence to the police for a period of three years after the expiration of the sentence will stand. The conviction is confirmed and the substantive sentence is reduced to three years' rigorous imprisonment.

ABDUL GANI
In re.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

KAMMULA VENKATARAMAYYA AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

YILLAPANI PULLAYYA AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Fraudulent transaction—Party to—Plea of his own fraud by—
Maintainability of—Mere fraudulent intention evidenced
by transaction—Sufficiency of, to preclude him from setting
up plea—Intended fraud being effected or substantial part
performance of intention to defraud—Necessary, if.*

In order to prevent a person who has been a party to a fraudulent transaction from pleading his own fraud, the intended fraud must have been effected, or there must have been a substantial part performance of the intention to defraud. The mere fraudulent intention evidenced by the transaction is not sufficient.

Petherpermal Chetty v. Muniandy Servai, (1908) I.L.R. 35 Cal. 551 (P.C.), followed.

Muthuraman Chetty v. Krishna Pillai, (1905) I.L.R. 29 Mad. 72, referred to.

The plaintiffs, the sons of B, sued for recovery of possession of certain lands which had been conveyed in the name of B by her father, the first defendant. The first defendant set up the defence that the sale in favour of B (deceased) was a benami transaction entered into by him to cheat his son, the second defendant, of his share in the property. The question was whether it was open to the first defendant to plead his own fraud in defence to the plaintiffs' claim for possession.

Subsequent to the sale deed the first defendant sued his son, the second defendant, for partition of the joint family property. The property covered by the sale deed was originally not included in that suit as one of the items of the joint

* Second Appeal No. 1419 of 1931.

family property, but, on objection taken by the second defendant to its exclusion, the first defendant agreed to its being included in the suit and asked that it might be allotted to his share. The suit was subsequently compromised and the property covered by the sale deed was included in the partition and allotted to the share of the first defendant. He got possession of the property from the second defendant who was then in possession of it. The first defendant subsequently executed a will wherein he omitted to dispose of that property.

Held that it was open to the first defendant to plead his own fraud in defence to the plaintiffs' claim for possession.

The first defendant no doubt intended to defraud and entered into the transaction with that object in view and in pursuance of the deed excluded the property from the schedule in his suit for partition. After that he did nothing more to carry out his original fraudulent intention. On the contrary, he compromised the matter and agreed to the inclusion of the property and no damage resulted to anybody.

Case law on the point reviewed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Ellore in Appeal Suit No. 178 of 1929 presented against the decree of the Court of the District Munsif of Kovvur in Original Suit No. 282 of 1927.

The second appeal came on for hearing before VENKATARAMANA RAO J. when his Lordship made the following

ORDER:—

This second appeal arises out of a suit instituted by a minor plaintiff by his father and next friend and his brother for recovery of possession of the suit lands which were conveyed in the name of their deceased mother Bangaramma by her father the first defendant. The second defendant is the son of the first defendant. Exhibit B is the sale deed, dated 11th October 1916. The defence is that it was a nominal transaction executed by the first defendant to cheat his son, the second defendant, with a view to deprive him of getting a

VENKATA-
RAMAYYA
v.
PULLAYYA.

VENKATA-
RAMAYYA
v.
PULLAYYA.

share in the property and that the consideration mentioned in the said document was not paid and was not true. The plea is set out in paragraph 4 of the written statement thus: "It is true that the first defendant executed a sale deed in favour of plaintiffs' mother Bangaramma on 11th October 1916. Previous to the execution of the sale deed the first defendant's wife died. There were quarrels between this defendant and the second defendant and the first defendant was very old. This defendant was living in his daughter Bangaramma's house. All the properties owned by the first and second defendants including also the plaint scheduled property used to be cultivated and managed by the second defendant. This defendant filed a partition suit (Original Suit No. 946 of 1918) against the second defendant in this Honourable Court. Previous to that suit, in order to cause loss to the second defendant and to screen some of the family properties from the second defendant, at the instigation of his son-in-law, the plaintiffs' father, this defendant executed nominal and benami sale deeds conveying the suit properties and other properties in the name of his daughter Bangaramma and the plaintiffs' father respectively. But these sale deeds were not supported by consideration and they were never intended to be given effect to." The case of the plaintiffs is that the consideration of Rs. 400 mentioned in the document was provided by the plaintiffs' father in that, at the time of the marriage of the said Bangaramma, the plaintiffs' father entrusted to the first defendant a sum of Rs. 400 for making jewels for her but the said jewels were not made and the money remained with the first defendant, and that the transaction was always intended to be given effect to and not a nominal one. The plaintiffs also relied on the conduct of the first defendant subsequent to the sale deed. The first defendant filed Original Suit No. 946 of 1918 on the file of the District Munsif of Kovvur against the second defendant, his son, for a partition of the joint family property. He did not include the suit property as one of the items of the joint family property. Objection was taken by the second defendant to the non-inclusion of the said property. In reply thereto the first defendant filed an affidavit wherein he seemed to have stated that the suit properties were sold by him to his daughter Bangaramma but that nevertheless he had no objection to include them in the suit and that the said properties might be allotted to his share at the partition. He

VENKATA-
RAMAYYA
v.
PULLAYYA.

also filed a petition for amendment, wherein for the reasons mentioned in the affidavit he prayed that the suit properties might be allotted to his share. There was subsequently a rajinama between the first defendant and the second defendant and the suit properties were included in the partition but allotted to the share of the first defendant as desired by him and he recovered possession of the suit properties from the second defendant who was then in possession of the same. After the recovery of the said properties, the first defendant subsequently appears to have executed a will, Exhibit A, in the year 1923 wherein he omitted to dispose of the said property. On these facts the learned District Munsif came to the conclusion that the sale deed was a genuine transaction intended to be given effect to and further that it was not open to the first defendant to plead his own fraud and resist the claim of the plaintiffs. The learned Subordinate Judge reversed the decision holding that no consideration was paid for the sale deed, that it was executed nominally and not with the object of creating any title in favour of Bangaramma and that therefore the plaintiffs were not entitled to get possession of the suit lands from the first defendant.

Before me two points have been raised on behalf of the plaintiffs: (i) the finding of the learned Judge on the question of benami is wrong, and (ii) the learned Judge has omitted to record a finding as to whether it is open to the first defendant to plead his own fraud in defence to the claim of the plaintiffs for possession. An affidavit of the Vakil who argued the case in the lower appellate Court has been filed before me to the effect that this second point was argued and that the learned Judge did not give a finding and I accordingly allowed this point to be argued, having also regard to the fact that it is a question of law which arises from the plea raised in the written statement and it was argued before the learned District Munsif who recorded a finding on it. With reference to the first point as regards the finding on the question of benami, it is contended that the learned Judge's inference is wrong and reliance is placed on the decision of VENKATASUBBA RAO J. in *Thulasi v. Official Receiver, Coimbatore*(1) wherein the learned Judge observed that the source where the purchase-money came from is not the sole and conclusive criterion but, under section 82

(1) A.I.R. 1934 Mad. 671.

1002 THE INDIAN LAW REPORTS [VOL. LIX

VENKATA-
RAMAYYA
v.
PULLAYYA.

of the Indian Trusts Act, it must appear that the person who provided the consideration did not intend to do so for the transferee. But in this case the learned Judge on the evidence drew the inference that no consideration passed and that it was not intended to create any title in Bangaramma. It seems to me that this finding cannot be disturbed in second appeal.

The next question relating to the fraud of the first defendant requires some consideration. There are two well recognized principles in English law, viz., (i) no man can allege his own fraud in order to invalidate his own deed, the principle being that "no man can set up his own iniquity as a defence any more than as a cause of action". This principle was laid down very early in *Doe, dem. Roberts v. Roberts*(1). In that case, a brother conveyed his property to another brother to enable the latter to get a qualification to kill game and to get rid of an information then pending against him and delivered the deed to him. BAYLEY J. said: "By the production of the deed, the plaintiff established a *prima facie* title; and we cannot allow the defendant to be heard in a Court of justice to say that his own deed is to be avoided by his own fraud." (ii) *Restitutio in integrum* is excluded in respect of all acts of parties to contracts void for illegality. An exception is engrafted to this rule by allowing a *locus penitentiae* to one or both of the parties, in consideration of the fact that the illegal purpose of the contract has not yet been fulfilled. But where the illegal purpose has been partly fulfilled no relief is given. *Pether-permal Chetty v. Muniandy Servai*(2) is a case which illustrates this exception. In that case, in order to get rid of an equitable mortgage subsisting on the property, it was conveyed by a benami sale deed; but in a suit on the equitable mortgage it was found that the purchaser had notice of the equitable mortgage and was bound by it and the equitable mortgagee was paid. When the vendor sued to recover the property from the purchaser the defence was raised that as the object of the transaction was to perpetrate a fraud the plaintiff could not recover, but the defence was negatived and the plaintiff was held entitled to recover. Their Lordships of the Privy Council observed: "The plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as

they were in before that transaction was determined upon. . . . Further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. . . . To enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with." I may point out that this principle has been given statutory recognition by the Indian Legislature in section 84 of the Trusts Act which states that "where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, . . . the transferee must hold the property for the benefit of the transferor." This question came up for consideration after the said decision of the Privy Council in *Kamayya v. Mamayya*(1). In that case, the defendant was held to be precluded from setting up the benami character of the transaction in answer to a suit for possession where the fraud had been effected. And COURTS TROTTER J. made the following observations: "I do not think that there is any conflict between *Doe, dem. Roberts v. Roberts*(2) and *Prole v. Wiggins*(3). The distinction between the two cases is indicated by TINDAL C.J. in the latter, and the principle I gather from it is this: if the plaintiff can set up a case consistent with the terms on the face of the document or with what I may call the face import of the transaction on which he bases his claim, then the defendant cannot defeat that claim by alleging a fraud that implicates himself and showing that because of that fraud the document or the transaction is not what it appears to be. That is *Doe, dem. Roberts v. Roberts*(2). If, on the other hand, the plaintiff cannot make a case on the document or transaction on its face but has to go behind it and allege some other transaction which involves implicating himself in a fraud with the defendant, then the defendant must succeed. That is the case of *Prole v. Wiggins*(3). In other words, that party fails who first has to allege the fraud in

VENKATA-
RAMAYYA
v.
PULLAYYA.

(1) (1916) 32 M.L.J. 484.

(2) (1819) 3 B. & Ald. 367; 20 R.R. 477.

(3) (1836) 3 Bing. (N.C.) 230; 132 E.R. 398.

(1) (1819) 2 B. & Ald. 367; 20 R.R. 477. (2) (1908) I.L.R. 35 Cal. 551 (P.C.).

VENKATA-
RAMAYYA
v.
PULLAYYA.

which he participated." Courts TROTTER C.J. in a later case in *Subbaraya Chetty v. Subbaraya Chetty*(1) observed: "As I understand the law, a party cannot set up his own fraud whether it proved fruitful or not and, if he entered into a transaction the object of which was to defraud his creditors, he is debarred from relying upon that transaction and setting up his own fraud whether the fraud did in fact prove infructuous or not."; and, in regard to the decision in *Kamayya v. Mamayya*(2), he remarked thus: "I should like to point out that as at present advised I see no justification for the words that have got into the headnote of the case of *Kamayya v. Mamayya*(2) in which the late Chief Justice Sir JOHN WALLIS and myself gave judgment. The words introduced are 'where the fraud has been effected'. If that means merely that the fraudulent thing has been done, namely, the execution of a document with the intention to defraud creditors, I have no further criticism to make, but, if it means that the fraud must not only have been carried out in the sense of the transaction entered into with the parties but that the fraud must have *de facto* resulted in defeating the creditors' rights and causing loss to them, I am of opinion that that headnote is not warranted by that decision." He also expressed the same view sitting in a Bench with RAMESAM J. in *Ramaswami Naicker v. Alamelu Ammal*(3). In *Suryanarayana Nayakaram v. Butchaiah Naidu*(4), a distinction seems to have been made between a case where the transaction is in fraud of creditors and the case where the transaction was to deprive another person of specific property. In that case, to prevent his brother getting a share in a particular property, the plaintiff alienated that property in favour of his near relation. Subsequent to the alienation a partition was effected between the brothers. The brother coming to know of the fraud sued the relation and his brother and got possession of half the property. Then the plaintiff sued to recover the remaining half share. It was held that he was disentitled to recover. ABDUR RAHIM J. made the following observations: "The cases on this subject are almost all cases where a debtor seeks to defraud his creditor by nominal or fraudulent conveyances of his property. In those cases, ordinarily the conveyance by the debtor of his property would be

VENKATA-
RAMAYYA
v.
PULLAYYA.

merely an attempt to defraud and, if the creditor in fact recovers his dues from the other properties of the debtor, it cannot be said that the object, i.e., defeating him, though contemplated by the debtor, was accomplished. Thus in those cases it was necessary to show that the creditor as a matter of fact was unable to recover his dues by reason of the fraudulent transfer. But the present, to my mind, is a case which stands on a different footing. There is no ruling that has been brought to our notice in which the object of the fraudulent transfer was to deprive another person of specific property. In a case like this I should say that the object of the fraud is *accomplished when the transfer is effected and everything is done to give effect to that transfer.*" This seems to accord with the view expressed by Courts TROTTER C.J. The learned Judge also inclined to the view that, as the property was even kept out for some time from the possession of the brother by not bringing it into hotchpot at the time of the partition, the fraud must be deemed to have been accomplished though ultimately no loss was sustained. In *Ariyaputra Naicker v. Muthu Chettiar*(1) the learned Judges, after referring to *Petherpermal Chetty v. Muniandy Serrai*(2), observe: "We do not think that there is anything in the case cited to support the view that, where a party by fraudulent means averts a probable or possible adverse decision, he is not disqualified from pleading his own fraud. The Privy Council case in fact belongs to the special class of admitted frauds upon creditors and, as pointed out by ABDUR RAHIM J. in *Suryanarayana Nayakaram v. Butchaiah Naidu*(3), if the creditor recovers his dues from some other source, it cannot be said that he was successfully defeated. Different considerations arise in a case of the present kind." Thus the observations of ABDUR RAHIM J. in *Suryanarayana Nayakaram v. Butchaiah Naidu*(3) are approved in this case. In *Kotayya v. Mahalakshamma*(4) this question came up for decision. There, the fraud was effected and a person who conveyed the property benami to another was held disentitled to set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. MADHAVAN NAIR J., referring to *Kamayya v. Mamayya*(5), made this observation:

(1) (1926) 24 L.W. 500.

(2) (1916) 32 M.L.J. 484.

(3) (1923) 46 M.L.J. 298.

(4) (1915) 3 L.W. 111.

(1) 1931 M.W.N. 470.

(2) (1908) I.L.R. 35 Cal. 551 (P.C.).

(3) (1915) 3 L.W. 111.

(4) (1933) I.L.R. 56 Mad. 646.

(5) (1916) 32 M.L.J. 484.

VENKATA-
RAMAYYA
v.
PULLAYYA.

"But in *Kamayya v. Mamayya*(1) it has been held that, even though the plaintiff may have been a party to the fraud, the defendant will not be permitted to plead his own fraud as a defence to an action against him. The test given in the case is that the party must fail who first has to allege the fraud in which he participated. It is clear, if we apply this test in this case, the appellant must fail." It may be noticed that this was the test which COURTS TROTTER J. laid down in *Kamayya v. Mamayya*(1) citing *Doe, dem. Roberts v. Roberts*(2). This case seems to suggest that the observations of COURTS TROTTER J. with reference to *Doe, dem. Roberts v. Roberts*(2) are correct. Further, the learned Judge towards the concluding portion of the judgment observes as follows: "The decision in *Kamayya v. Mamayya*(1) by the then Chief Justice and himself was followed by COURTS TROTTER J. after he became Chief Justice in *Subbaraya Chetty v. Subbaraya Chetty*(3)." It may be noticed that in *Subbaraya Chetty v. Subbaraya Chetty*(3) COURTS TROTTER C.J. explained what is meant by "fraud has been effected" as already stated above. There are three judgments of single Judges who have dissented from the view expressed by COURTS TROTTER J. in *Kamayya v. Mamayya*(1) as interpreted by him in *Subbaraya Chetty v. Subbaraya Chetty*(3). In *Venkataratnam v. Venkataswami*(4) ANANTA-KRISHNA AYYAR J., at page 810, dissents from the view of COURTS TROTTER J. and observes: "The Privy Council decision in *Petherpermal Chetty v. Muniandy Serrai*(5) was not evidently brought to the notice of the Court in *Subbaraya Chetty v. Subbaraya Chetty*(3). Unless the intended fraud on the Vuyyur Zamindar was carried out, it is open to the defendants to raise the plea set forth above." But in fairness to COURTS TROTTER J. it must be observed the learned Judge referred to *Kamayya v. Mamayya*(1) which distinctly refers to *Petherpermal Chetty v. Muniandy Serrai*(5). So it cannot be said that the Privy Council decision was not before the mind of the learned Judge. I understand that the decision of ANANTA-KRISHNA AYYAR J. has since been affirmed in Letters Patent Appeal No. 91 of 1929 where there was no discussion on this matter. In *Subbaraya Naicker v. Venkatesa Naicker*(6)

(1) (1916) 32 M.L.J. 484.

(2) (1819) 2 B. & Ald. 367; 20 R.R. 477.

(3) (1926) 24 L.W. 500.

(4) A.I.R. 1929 Mad. 807.

(5) (1908) I.L.R. 35 Cal. 551 (P.C.).

VENKATA-
RAMAYYA
v.
PULLAYYA.

SUNDARAM CHETTI J. was inclined to the view that the observation of COURTS TROTTER C.J. in *Subbaraya Chetty v. Subbaraya Chetty*(1) is inconsistent with the pronouncement of the Privy Council in *Petherpermal Chetty v. Muniandy Serrai*(2) and observed: "In order to constitute fraud there must be an intention to deceive, there must always be damage to the party deceived, and fraud without damage gives no cause of action." Apparently he is inclined to the view that unless a person is deprived of his property there could be no question of damage and hence the party is not precluded from setting up the benami character of the transaction so long as there was no deprivation of the property. In the latest case, *Venkata Krishnayya v. Venkataratnam*(3), VARADACHARIAS J. observed: "With due respect I may also state that the view expressed by COURTS TROTTER C.J. in more than one judgment of his, cf. *Subbaraya Chetty v. Subbaraya Chetty*(1) and *Kamayya v. Mamayya*(4), goes much farther than the Privy Council decision." After referring to the Privy Council decision, he remarked: "This would seem to justify the view of SUNDARAM CHETTI J. in *Subbaraya Naicker v. Venkatesa Naicker*(5) that the mere fact of the creditor having been delayed in obtaining satisfaction will not preclude the transferor from pleading the benami character of the transaction as against his transferee. See also *Bai Dermani v. Ravishankar Oghadbhai*(6). Much less will the mere intention to effect an illegal object, when the assignment was executed [per LORD ROMILLY in *Symes v. Hughes*. *Symes v. Hughes*(7)] preclude the true owner from asserting his rights." In so far as the learned Judge says that delay would not be enough, it is not reconcilable with the observation in *Surya-narayana Nayakaram v. Butchaiah Naidu*(8) that even mere delay can be taken as a partial accomplishment of the object. In *Taylor v. Bowers*(9) MELLISH L.J., at page 300, states: "To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were in before the illegal transaction was determined upon, and before the parties took any steps to carry it out." This observation seems to suggest that, if some step is

(1) (1926) 24 L.W. 500.

(3) (1935) 42 L.W. 452, 457.

(6) (1928) I.L.R. 53 Bom. 321.

(8) (1915) 3 L.W. 111.

(2) (1908) I.L.R. 35 Cal. 551 (P.C.).

(4) (1916) 32 M.L.J. 484.

(5) (1933) 39 L.W. 357.

(7) (1870) L.R. 9 Eq. 475, 479.

(9) (1876) 1 Q.B.D. 291, 380.

1008 THE INDIAN LAW REPORTS, [VOL. LIX

VENKATA-
RAMAYYA
v.
PULLAYYA.

taken to carry out the illegal transaction, even then the property could not be recovered. Therefore, if the view propounded by Courts Trotter C.J. or Abdur Rahim J. were to prevail, the plaintiffs would have to succeed, but, if the view should be that, unless there was actual deprivation of property to the party intended to be defrauded, the fraud could not be deemed to have been effected, the defendant would have to succeed as the suit property was taken into consideration at the time of the partition. However, in view of this divergence of opinion, I think it desirable that this matter should be disposed of by a Bench. I accordingly refer this case to a Bench.

The second appeal coming on for hearing in pursuance of the aforesaid order, the Court (The CHIEF JUSTICE and KING J.) ordered it to be posted before a Bench of three Judges.

ON THE REFERENCE :

K. Subba Rao (with him, S. Kanakam) for appellants.—A person cannot allege his own fraud in order to invalidate his own deed, the principle being that “no man can set up his own iniquity as a defence any more than as a cause of action”. According to the Madras view the party who has first to allege fraud must fail. A *locus penitentiae* is, however, allowed to one or both of the parties in consideration of the fact that the illegal purpose of the contract has not yet been fulfilled, that is the intended fraud has not been effected. As to the meaning of the expression “fraud is effected” in this connection, see *Petherpermal Chetty v. Muniandy Servai*(1), *Suryanarayana Nayakaram v. Butchaiah Naidu*(2), *Muthuraman Chetty v. Krishna Pillai*(3), *Ramaswami Naicker v. Alamelu Ammal*(4), *Kotayya v. Mahalakshamma*(5), *Subbaraya Chetty v. Subbaraya Chetty*(6) and *Ariyaputra Naicker v. Muthu Chettiar*(7). *Petherpermal Chetty v. Muniandy Servai*(1) is authority for the position that unless the contemplated fraud is effected a party will not be disentitled to recover and that the mere execution of a document does not amount to a carrying out of

the fraud. *Suryanarayana Nayakaram v. Butchaiah Naidu*(1) draws a distinction between the case of a fraud on a creditor and the case of a fraud on another person. In the case of a creditor, the execution of a deed is merely an attempt to defraud him, merely an intention to defraud, while, in the case of a transfer of property, the transfer of property itself is the carrying out of the fraud. The principle of that decision is that the fraud must be either partly carried out or the party intended to be defrauded must be ultimately deprived of the property. The decision is authority for the position that ultimate frustration of the fraud is immaterial, that no loss is necessary and that execution of the sale deed and delivery of possession under it are sufficient. The carrying out of the scheme of fraud, in whole or in part, is enough, even if no damage has been caused to anybody and the fraud has been ultimately frustrated. In the present case, the deed was executed and the first defendant was able to secure the property for himself. The fraudulent object was to exclude the property in question from partition. The father sued for partition excluding the property in question but the son pleaded that it was joint family property and should be brought into the hotchpot. Issues were raised and ultimately a compromise was entered into by which the property in question was allotted to the share of the father. The fraud was no doubt ultimately frustrated but the fraudulent object was in part carried out, viz., the object of securing the property in question to the father himself.

[At the most there was a claim to the exclusion of the property in question from the partition but that claim was not persisted in and nobody was damaged. So no fraud has been effected.—The CHIEF JUSTICE.]

[The fraudulent object was abandoned and nobody has been damaged.—KING J.]

The partition suit by the father was itself instituted for the purpose of carrying out the fraud.

[*Taylor v. Bowers*(2), *Herman v. Jeuchner*(3), *Kearley v. Thomson*(4) and *Symes v. Hughes*. *Symes v. Hughes*(5) referred to.]

VENKATA-
RAMAYYA
v.
PULLAYYA.

(1) (1908) I.L.R. 35 Cal. 551 (P.C.). (2) (1915) 3 L.W. 111.
(3) (1905) I.L.R. 29 Mad. 72. (4) (1923) 46 M.L.J. 298.
(5) (1933) I.L.R. 56 Mad. 646. (6) (1926) 24 L.W. 500.
(7) 1931 M.W.N. 470.

(1) (1915) 3 L.W. 111.
(2) (1876) 1 Q.B.D. 291, 300. (3) (1885) 15 Q.B.D. 561.
(4) (1890) 24 Q.B.D. 742. (5) (1870) L.R. 9 Eq. 475, 479.

VENKATA-
• RAMAYYA
v.
PULLAYYA.

P. Satyanarayana Rao and G. Satyanarayana Raju for second respondent were not called upon.

Civ. adv. vult.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—This second appeal has been referred to a Bench by VENKATARAMANA RAO J. because the views expressed by COUTTS TROTTER C.J. in *Kamayya v. Mamayya*(1) and *Subbaraya Chetty v. Subbaraya Chetty*(2) and with RAMESAM J. in *Ramaswami Naicker v. Alamelu Ammal*(3) and by ABDUR RAHIM J. in *Suryanarayana Nayakaram v. Butchaiah Naidu*(4) appear to be in conflict with other decisions of this High Court and of the Privy Council in *Petherpermäl Chetty v. Muniandy Servai*(5) and other cases.

The suit out of which this second appeal arises was one instituted by a minor plaintiff by his father and next friend and his brother for recovery of possession of the suit lands which were conveyed in the name of their deceased mother Bangaramma by her father the first defendant. The second defendant is the son of the first defendant. The sale deed in question is dated 11th October 1916. The defence set up is that it was a benami transaction entered into by the first defendant to cheat his son, the second defendant, in order to deprive him of a share in the property and that the consideration mentioned in the sale deed was not paid and was not true; in other words, that the transfer was for the purpose of excluding the property from partition. Subsequent to the sale deed, the first defendant filed

(1) (1916) 32 M.L.J. 484.

(3) (1923) 46 M.L.J. 298.

(2) (1926) 24 L.W. 500.

(4) (1915) 3 L.W. 111.

(5) (1908) I.L.R. 35 Cal. 551 (P.C.).

Original Suit No. 946 of 1918 in the District Munsif's Court of Kovvur against his son, the second defendant, for partition of the joint family property. In the schedule he did not include the suit property as one of the items of the joint family property. The second defendant objected to the exclusion of the property. In reply to this objection the first defendant filed an affidavit wherein he stated that the suit properties were sold by him to his daughter Bangaramma but nevertheless he had no objection to include them in the suit but said that the properties should be allotted to his share at the partition. He also filed a petition for amendment wherein for the reasons mentioned in the affidavit he asked that the suit properties might be allotted to his share. Subsequently, there was a compromise deed between the first defendant and the second defendant and the suit properties were included in the partition but allotted to the share of the first defendant as desired by him and he got possession of the properties from the second defendant who at that time was in possession of them. After the recovery of these properties, the first defendant appears to have executed a will, Exhibit A, in 1923 wherein he omitted to dispose of the property. The learned District Munsif found that the sale deed was a genuine transaction and further that it was not open to the first defendant to plead his own fraud and resist the claim of the plaintiffs. The Subordinate Judge, however, held that the transfer was benami and that the plaintiffs were not entitled to get possession of the suit lands from the first defendant. The finding of the learned

VENKATA-
RAMAYYA
v.
PULLAYYA.
BEASLEY C.J.

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

Judge on the question of benami is a finding of fact and must therefore be accepted.

The question before us is whether it is open to the first defendant to plead his own fraud in defence to the claim of the plaintiffs for possession. No finding upon this question was given by the learned Subordinate Judge, but, as it was clear that this point was argued before him, VENKATA-RAMANA RAO J. allowed it to be argued.

As our learned brother points out, there are two well recognized principles in English law: (i) that no man can set up his own iniquity as a defence any more than as a cause of action—this principle was laid down in *Doe, dem. Roberts v. Roberts*(1)—and (ii) *restitutio in integrum* is excluded in respect of all acts of parties to contracts void for illegality. An exception is engrafted to this rule by allowing a *locus penitentie* to one or both of the parties in consideration of the fact that the illegal purpose of the contract has not yet been fulfilled. But where the illegal purpose has been partly fulfilled, no relief is given.

In *Kamayya v. Mamayya*(2) the fraud had been effected and the defendant was held precluded from setting up that fraud in answer to a suit for possession. COUTTS TROTTER J. as he then was, stated:

“I do not think that there is any conflict between *Doe, dem. Roberts v. Roberts*(1) and *Prole v. Wiggins*(3). The distinction between the two cases is indicated by TINDAL C.J. in the latter and the principle I gather from it is this: if the plaintiff can set up a case consistent with the terms on the face of the document or with what I may call the face import of the transaction on which he bases his claim, then the defendant

(1) (1819) 2 B. & Ald. 367; 20 R.R. 477.

(2) (1916) 32 M.L.J. 484.

(3) (1836) 2 Bing. (N.C.) 230; 132 E.R. 398.

cannot defeat that claim by alleging a fraud that implicates himself and showing that because of that fraud the document or the transaction is not what it appears to be. That is *Doe, dem. Roberts v. Roberts*(1). If, on the other hand, the plaintiff cannot make a case on the document or transaction on its face but has to go behind it and allege some other transaction which involves implicating himself in a fraud with the defendant, then the defendant must succeed. That is the case of *Prole v. Wiggins*(2). In other words, that party fails who first has to allege the fraud in which he participated.”

In *Subbaraya Chetty v. Subbaraya Chetty*(3), COUTTS TROTTER C.J. stated:

“As I understand the law, a party cannot set up his own fraud whether it proved fruitful or not and, if he entered into a transaction the object of which was to defraud his creditors, he is debarred from relying upon that transaction and setting up his own fraud whether the fraud did in fact prove infructuous or not”;

and, in regard to the decision in *Kamayya v. Mamayya*(4), he stated:

“I should like to point out that as at present advised I see no justification for the words that have got into the headnote of the case of *Kamayya v. Mamayya*(4) in which the late Chief Justice, SIR JOHN WALLIS and myself gave judgment. The words introduced are, ‘where the fraud has been effected’. If that means merely that the fraudulent thing has been done, namely, the execution of a document with the intention to defraud creditors, I have no further criticism to make, but, if it means that the fraud must not only have been carried out in the sense of the transaction entered into with the parties but that the fraud must have *de facto* resulted in defeating the creditors’ rights and causing loss to them, I am of opinion that that headnote is not warranted by that decision.”

As before stated, he expressed the same opinion sitting with RAMESAM J. in *Ramaswami Naicker v. Alamelu Ammal*(5).

(1) (1819) 2 B. & Ald. 367; 20 R.R. 477.

(2) (1836) 3 Bing. (N.C.) 230; 132 E.R. 398.

(3) (1926) 24 L.W. 500.

(4) (1916) 32 M.L.J. 484.

(5) (1923) 46 M.L.J. 298.

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

The question to be considered in this case is whether a fraud need have been effected in order to prevent a person who has been a party to it pleading his own fraud, or whether the mere fraudulent intention evidenced by the transaction is sufficient. If the former, the question is whether in fact a fraud has been effected by the fraudulent agreement or, as was stated by SUBRAMANIA AYYAR O.C.J. and SANKARAN NAIR J. in *Muthuraman Chetty v. Krishna Pillai*(1), whether there has been part performance of a substantial character of such an agreement. In *Suryanarayana Nayakaram v. Butchaiah Naidu*(2) the plaintiff and the fourth defendant were two undivided brothers. During the absence of the fourth defendant, the younger brother, the plaintiff, who had just then attained majority and who was then living with his father-in-law (the first defendant) and his brother-in-law, alienated in 1900 a portion of the family properties including his brother's share in favour of his brother-in-law (the second defendant). In 1906, there was a division of family properties between the plaintiff and his brother and the property so alienated was excluded therefrom. Later on, the fourth defendant, having discovered that the sale of 1900 was benami and not real and was intended to deprive him of his share in the property so alienated, brought a suit in 1911 against the second defendant and obtained a decree for his half share of the property. During the pendency of that suit, the plaintiff instituted a suit for the recovery of his half share in the properties sold to the second

(1) (1905) I.L.R. 29 Mad. 72.

(2) (1915) 3 L.W. 111.

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

defendant substantially on the same allegations as those made by the fourth defendant. It was held that, the sale to the second defendant having originally been intended to defraud the fourth defendant and that intention having been fully carried into effect either when possession was given in pursuance of the sale or at any rate at the time of the partition in 1906, it was not competent to the plaintiff to go behind the arrangement and sue to recover the property. ABDUR RAHIM J. said :

"The real test which is laid down here is what I have stated, namely, the plaintiff can sue so long as his fraud has not been carried out, but not after it has been carried out wholly or partially. Here I may point out that the fourth defendant was kept out of his property for a number of years. When he recovered the property by a suit, it is likely that he only recovered mesne profits for three years. That would go to show that he was not restored exactly to the same position as he was in before this fraud was perpetrated."

AYLING J. said :

"It cannot be said in this case that the fraud was not at least partially successful. Its immediate object was attained when partition was effected without the inclusion of this property."

This case certainly does not support the view expressed by COUTTS TROTTER C.J. and, as it appears that the fraud was to a substantial extent carried out, any opinion which may seem to have been expressed in another part of the judgment indicating that it is immaterial whether the fraud was wholly or partially carried out is *obiter*. But the before-stated test applied by ABDUR RAHIM J. does definitely enable the plaintiff to sue so long as the fraud has not been carried out. In *Kotayya v. Mahalakshamma*(1) a person conveyed property

(1) (1933) I.L.R. 56 Mad. 646.

VENKATA-
RAMAYYA
v.
PULLAYYA,
—
BEASLEY C.J.

benami to another for the purpose of effecting a fraud on his creditors; and such fraud had been effected; and it was held that he was incapable of setting up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. In this case, *Kamayya v. Mamayya*(1) was considered and followed. But ANANTAKRISHNA AYYAR J., SUNDARAM CHETTI J. and VARADACHARIAR J. have each questioned the correctness of the view expressed by COUTTS, TROTTER C.J. In *Venkataratnam v. Venkataswami*(2) ANANTAKRISHNA AYYAR J. held that to enable a fraudulent confederate to retain property transferred to him the contemplated fraud must be effected and that then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with, and followed the Privy Council decision in *Petherpermal Chetty v. Muniandy Servai*(3) and dissented from *Kamayya v. Mamayya*(1). SUNDARAM CHETTI J. in *Subbaraya Naicker v. Venkatesa Naicker*(4) took the view that the observations of COUTTS TROTTER C.J. in *Subbaraya Chetty v. Subtaraya Chetty*(5) are inconsistent with the pronouncement of the Privy Council in *Petherpermal Chetty v. Muniandy Servai*(3); and VARADACHARIAR J. in *Venkata Krishnayya v. Venkataratnam*(6) observed that the view expressed by COUTTS TROTTER C.J. in more than one decision of his went farther than the Privy Council decision. The view expressed in the English case of *Taylor v. Bowers*(7) is opposed

(1) (1916) 32 M.L.J. 484.

(2) A.I.R. 1929 Mad. 807.

(3) (1908) I.L.R. 35 Cal. 551 (P.C.).

(4) (1933) 39 L.W. 357.

(5) (1926) 24 L.W. 500.

(6) (1935) 42 L.W. 452

(7) (1876) 1 Q.B.D. 291, 300.

to that of COUTTS TROTTER J. in *Kamayya v. Mamayya*(1). MELLISH L.J., on page 300, says:

"Nevertheless, if the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it wholly came to an end. To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were in before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

Taylor v. Bowers(2) was one of the authorities relied upon in the judgment of the Privy Council in *Petherpermal Chetty v. Muniandy Servai*(3). The facts of the latter case are as follows: In order to defeat the claim of an equitable mortgagee of certain property, the predecessor in title of the respondent, and co-member with him of a joint Hindu family, executed on 11th June 1895 what purported to be a deed of sale of the property in favour of the predecessor in title of the appellant. The claim, however, was decreed, the Court finding that the vendee under the alleged deed of sale was aware of the equitable mortgage when the deed was executed and the decree was satisfied by money raised on the security of the property by the vendee. In a suit by the respondent against the appellant to have it declared that the deed of 11th June 1895 was merely a benami transaction,

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

(1) (1916) 32 M.L.J. 484.

(2) (1876) 1 Q.B.D. 291, 300.

(3) (1908) I.L.R. 35 Cal. 551 (P.C.).

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

and to recover possession of the property, it was found on the facts that the deed was benami and fraudulent and inoperative as against the plaintiff. It was held that the purpose of the fraud not having been effected there was nothing to prevent the plaintiff from repudiating the transaction as being benami and recovering possession of the property. Lord ATKINSON on page 558 stated that the plaintiff in suing to recover possession of his property was not carrying out the illegal transaction but was seeking to put everyone as far as possible in the same position as they were in before that transaction was determined upon, and added :

"It is the defendant who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor v. Bowers*(1) and the authorities upon which that decision is based, clearly establish this. *Symes v. Hughes*. *Symes v. Hughes*(2) and *In re Great Berlin Steamboat Company*(3) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of FRY L.J. in *Kearley v. Thomson*(4)."

In *Kearley v. Thomson*(4) it was held by the Court of Appeal that where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back. FRY L.J. on page 746 criticises the view

(1) (1876) 1 Q.B.D. 291.
(3) (1884) 26 Ch. D. 616.

(2) (1870) L.R. 9 Eq. 475, 479.
(4) (1890) 24 Q.B.D. 742.

of MELLISH L.J. in *Taylor v. Bowers*(1), already referred to, and says :

"It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor v. Bowers*(1) which occurred in 1867 and, notwithstanding the very high authority of the learned Judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal."

In view of the judgment of the Privy Council, it must be taken that it is not in agreement with what was stated by FRY L.J. in *Kearley v. Thomson*(2), in criticism of *Taylor v. Bowers*(1). No useful purpose will be served by a further citation of authorities. It is sufficient to say that *Peetherpermal Chetty v. Muniandy Servai*(3) lays down the law upon this point and was rightly followed by ANANTAKRISHNA AYYAR J., SUNDARAM CHETTI J. and VARADACHARIAR J.

There remains to be considered the further question whether the fraud was effected, partially effected, or there was a substantial part performance of the intention to defraud. In the present case, the first defendant no doubt intended to defraud and entered into the transaction with that object in view and in pursuance of the deed excluded the property from the schedule in his suit for partition. After that he did nothing more to carry out his original fraudulent intention. On the contrary, he compromised the matter and agreed to the inclusion of the property and no damage resulted to anybody. That being

(1) (1876) 1 Q.B.D. 291.

(2) (1890) 24 Q.B.D. 742.

(3) (1908) I.L.R. 35 Cal. 551 (P.C.).

VENKATA-
RAMAYYA
v.
PULLAYYA.
—
BEASLEY C.J.

VENKATA-
RAMAYYA
v.
FULLAYYA.

so, applying *Petherpermal Chetty v. Muniandy Servai*(1), the first defendant was entitled to set up that defence and to succeed in the suit. It follows, therefore, that this second appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

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

1936,
March 19.

G. V. MUTHUSWAMI CHETTY, APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AS THE
ASSIGNEE OF THE ESTATE AND EFFECTS OF S. A.
ANANTHANARAYANA CHETTY, RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), ss. 7 and 36—Application under sec. 7—Suit for purposes of sec. 3 of Indian Limitation Act (IX of 1908), if—Mortgage with possession by insolvent set aside on application by Official Assignee under sec. 55 of Presidency-towns Insolvency Act—Subsequent application under ss. 7 and 36 of that Act by Official Assignee for recovery of mesne profits from mortgagee—Period for which such profits recoverable—Art. 109 of Indian Limitation Act—Applicability of.

A person, who had usufructually mortgaged his property in April 1923, was adjudicated insolvent in February 1925. On an application made by the Official Assignee in March 1931 under section 55 of the Presidency-towns Insolvency Act, the mortgage deed was set aside by an order passed in February 1932. In December 1934 the Official Assignee made a further application under sections 7 and 36 of the said Act to call

(1) (1908) I.L.R. 35 Cal. 551 (P.C.).
* Original Side Appeal No. 2 of 1936.

upon the mortgagee to account for the rents and profits which he had received from the mortgaged property.

Held that the mortgagee was liable for mesne profits only for the period of three years immediately preceding the Official Assignee's application.

Re Mansell; Ex parte Norton, (1892) 66 L.T. 245, followed.

An application under section 7 of the Presidency-towns Insolvency Act is equivalent to a suit and equivalent to a suit for the purposes of section 3 of the Indian Limitation Act which applies the articles of the Act to all suits.

In claiming by the application to recover the rents and profits in question the Official Assignee was claiming as representing the insolvent's estate, and was not putting forward any claim hostile to the insolvent.

Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited, (1916) I.L.R. 38 All. 347, distinguished.

APPEAL from the order of MOCKETT J. dated 2nd December 1935 and made in the exercise of the insolvency jurisdiction of the High Court in Application No. 438 of 1934 in Insolvency Petition No. 71 of 1925 (in the matter of S. A. Ananthanarayana Chetty, an insolvent).

S. Panchapagesa Sastri (with him, *P. S. Ramaswami Ayyangar*) for appellant. The Presidency-towns Insolvency Act is not, as regards limitation, a self-contained Act. The provisions as to limitation contained in that Act and relied upon by MOCKETT J. refer to cases where the Official Assignee claims under a right higher than that of the insolvent. They are inapplicable to cases where the Assignee claims in right of the insolvent and there is no provision in the Act as regards limitation applicable to such cases. *Re Mansell; Ex parte Norton*(1) was a case of rents and profits. As to the practice in England, see *Williams on Bankruptcy*, 14th edition, page 414. Applications like the one in the present case are of the nature of complaints and the rules of limitation applicable to suits apply to such applications.

(1) (1892) 66 L.T. 245.

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.

The decision of the Privy Council in the case of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1) may be relied upon for the position that the application cannot be regarded as a suit, but their Lordships themselves hold that the defence of limitation will be open on such applications (see page 1078). Whether the Indian Limitation Act in terms applies to the notice of motion in the present case or not and whether the notice of motion can or cannot be regarded as a plaint, as the section conferring jurisdiction on the Insolvency Court does not create a new right, the defence of limitation is, on the authority of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1), open on such an application. The right sought to be enforced by the application in the present case is not one created by the Act. Where the Official Assignee could in a suit get only rents or mesne profits for three years, he could not, by an application under section 7, get more. Even if the application is not a plaint and the proceeding started by it is not a suit, the discretionary power under section 7 will be exercised in favour of the Official Assignee only subject to the defence of limitation. Section 7 is only a transfer of jurisdiction from the ordinary Court to the Insolvency Court and the power conferred upon the Insolvency Court by the section is a discretionary power. On the principle of the ruling in *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1), the Court will say that it will exercise the discretionary power only subject to the defence of limitation. *Official Assignee, Madras v. Narasimha Mudaliar*(2) does not deal with the question of limitation but lays down that the power under section 7 is a discretionary power. [*Kancherla Krishna Rao, In re*(3) and Mulla's Law of Insolvency, page 50, referred to.]

A. C. Sampath Ayyangar for respondent.—If the Indian Limitation Act applies to the case at all, the article applicable would be article 120. Article 109 cannot apply because the insolvent himself cannot get mesne profits, he himself having transferred the property. In such a case, the Official Assignee does not sue in right of the insolvent because the insolvent himself has no right to sue. By the

(1) (1932) I.L.R. 54 All. 1067 (P.C.). (2) (1929) I.L.R. 52 Mad. 717 (F.B.).
(3) (1927) I.L.R. 51 Mad. 540 (F.B.).

avoidance of the transfer the Official Assignee gets a fresh right. Section 51 of the Presidency-towns Insolvency Act gives a fresh title to the Official Assignee and, if it is held that he has the same period of limitation for a suit for mesne profits as the insolvent, the Assignee might be barred long before his right accrues. When the Assignee does not impugn the transfer by the insolvent and sues for a relief which the insolvent himself could have claimed, then it may be that the same period of limitation will apply to a suit by the Assignee as to one by the insolvent. If in the present case, the Official Assignee, admitting the usufructuary mortgage, had sued for redemption of the same, he might have had the same period of limitation. Where, however, the Official Assignee avoids a transfer by the insolvent and sues for rents and profits from the transferee, the suit is for a relief which the insolvent himself could not have claimed and is in virtue of a new right created in the Assignee by reason of the avoidance of the transfer. Cases where a new right is created are excepted in *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Company*(1); see page 1078. The Official Assignee gets the right by virtue of the Act. [*Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2), *In the matter of the Dehra Dun—Mussoorie Electric Tramway Company, Limited*(3) and *Vaidiswara Ayyar v. Siva Subramania Mudaliar*(4), referred to.]

S. Panchapagesa Sastri replied.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—Part of the property of one S. A. Ananthanarayana Chetty consisted of two stables in Madura. These stables were usufructuarily mortgaged by him to his son-in-law on 11th April 1923. On 11th February 1925, S. A. Ananthanarayana Chetty was adjudicated insolvent. In March 1931, the Official Assignee applied under section 55 of the Presidency-towns Insolvency Act to have the mortgage deed set aside and an order was

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.

KING J.

(1) (1932) I.L.R. 54 All. 1067 (P.C.). (2) (1916) I.L.R. 38 All. 347.
(3) (1927) I.L.R. 50 All. 476. (4) (1907) I.L.R. 31 Mad. 66.

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.
KING J.

duly passed in his favour in February 1932. Having thus had the mortgage deed annulled, the Official Assignee made a further application under sections 7 and 36 of the Act in December 1934 to call upon the mortgagee to account for the rents and profits which he had received from the mortgaged property. Our learned brother, MOCKETT J., who heard this application has held, under section 7, that the mortgagee is liable to account for the whole of the rents and profits which he has received since the mortgage was effected. Against this order the mortgagee appeals, contending in his memorandum of appeal that he is not liable to account at all.

At the hearing of the appeal this extreme contention was abandoned, and the only argument advanced was that the appellant was liable for mesne profits only for the period of three years immediately preceding the Official Assignee's application, i.e., from December 1931. This argument, we think, is a sound one and must prevail.

The authority upon which this argument was based is an English decision, *Re Mansell ; Ex parte Norton*(1). In that case, a trustee in bankruptcy applied under section 72 of the Bankruptcy Act of 1869 to recover certain rents from one Norton more than six years after Norton should have paid them. Norton pleaded the Statute of Limitations and it was held by all the three learned Judges (Lord Esher M.R., FRY L.J. and LOPES L.J.) that this plea was a good one, the reason being that the application was equivalent to an

action. The exact words of Lord Esher M.R. are :

"A motion in bankruptcy such as this is equivalent to an action."

And what FRY L.J. says is this :

"It is plain that, when the Legislature by section 72 of the Bankruptcy Act gave power to the Court of Bankruptcy to decide all questions, whether of law or fact, arising in any case of bankruptcy, that transference of jurisdiction was not intended to alter the liabilities and rights of persons proceeding in the Court of Bankruptcy. This case therefore is just the same as if the trustee were suing in an ordinary Court of law"

Now this decision was duly brought to the notice of MOCKETT J. but he held that it afforded him no assistance, and that, "as the law of limitation in India is contained within the four walls of an Act, unless it is possible to place a particular proceeding within one of the articles of that Act, the Act does not apply". With respect we are unable to see why the decision should not be followed in the present case. Section 7 of the Presidency-towns Insolvency Act is admittedly the equivalent in India of section 72 of the Bankruptcy Act in England. We are therefore, we think, justified in holding that an application under section 7 is equivalent to a suit and equivalent to a suit for the purposes of section 3 of the Limitation Act which applies the articles of the Act to all suits. After all, as has been pointed out in the Full Bench ruling in *Official Assignee, Madras v. Narasimha Mudaliar*(1), a claim for money under section 7 against a stranger to the insolvency is only an alternative to a suit, and an alternative which the Insolvency Court should

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.
KING J.

(1) (1892) 66 L.T. 245.

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.
KING J.

not permit except in simple cases capable of easy and speedy proof (*see* page 731). It would indeed be an anomaly, if the Insolvency Court by granting this permission should automatically confer upon the Official Assignee power to claim debts which would be irrecoverable by suit.

We need not, however, pursue this particular point any further as Mr. Sampath Ayyangar, who appeared for the Official Assignee before us, abandoned any contention that the Limitation Act did not apply merely because this was a proceeding in insolvency. He attempted instead to distinguish *Re Mansell ; Ex parte Norton*(1) from the present case on the ground that the Official Assignee did not here represent the insolvent at all but was applying on the strength of a right higher than any the insolvent would have had. In arguing so Mr. Sampath Ayyangar appeared to be obsessed by the fact that, as a preliminary to the present application, the Official Assignee had had to have the mortgage transaction set aside and that the former application was one which the insolvent himself could never have made. No doubt that is so, but the two applications must nevertheless be very clearly distinguished. When the mortgage has been set aside, what is the result? It surely is that, in spite of the mortgage, the ownership of the mortgaged property and the right to receive its rents and profits have in law remained throughout part of the insolvent's estate. When the insolvent's estate became vested in the Official Assignee by reason of the insolvency, the right to receive these rents and profits must be deemed to have vested in him. It is to us clear,

(1) (1892) 66 L.T. 245.

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.
KING J.

beyond all argument, that in claiming by this application to recover these rents and profits the Official Assignee is claiming as representing the insolvent's estate, and is not putting forward any claim hostile to the insolvent. We consider accordingly that Mr. Sampath Ayyangar's argument on this point provides no sound reason to induce us not to follow *Re Mansell ; Ex parte Norton*(1).

Only a brief final reference is necessary to a ruling reported as *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) to which our attention has been drawn by Mr. Sampath Ayyangar. That decision shows that in certain circumstances a liquidator can recover from the shareholders of a company in liquidation unpaid calls the right to which would be barred by limitation if the company itself were to file a suit to recover them. But this is no true analogy to the present case. The decision in *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) turned upon the interpretation of specific provisions in the Companies Act which defined the shareholders' liabilities. There are no such provisions in the Presidency-towns Insolvency Act which can be used against the appellant. And it is further made clear in *Jagannath Prasad v. The U.P. Flour and Oil Mills Company, Limited*(2) that, but for these specific provisions, the liquidator would have had no higher right to resist the bar of limitation than the company itself. In the present case, as we have already pointed out, the Official Assignee makes

(1) (1892) 66 L.T. 245.

(2) (1916) I.L.R. 38 All. 347.

MUTHUSWAMI
v.
OFFICIAL
ASSIGNEE,
MADRAS.

his application as representing the insolvent's estate and in that capacity only.

In the result then this appeal must be allowed in part with costs throughout and the appellant's liability to account be reduced to the period of three years immediately preceding the Official Assignee's application.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

MEGRAJ ISWARADAS (PETITIONER), APPELLANT,

v.

THE CORPORATION OF MADRAS (RESPONDENT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 63—Applicability—Decrees of same Court against same defendant but in favour of different persons—Transmission for execution of, to Courts of different grades—Sale in execution held earlier by Court of inferior grade and purchase by holder of the decree executed by that Court—Applicability of sec. 63 to case of—Order to be made in such a case—Sec. 63 exception to rule in sec. 73, if.

Decrees were passed by the High Court on its Original Side, some in favour of the respondent and one in favour of the appellant. The decrees in favour of the respondent were sent to the Sub-Court, Chingleput, for execution; that in favour of the appellant to the District Court, Chingleput. In pursuance of the respondent's decrees, the properties were attached by the Sub-Court in January 1932 and the sale was held on 28th September 1932. The respondent obtained leave to bid and was allowed to set off the purchase price against the decree amount which exceeded the amount of his bid. In the

* Appeal Against Order No. 256 of 1934 and Civil Revision Petition No. 898 of 1933.

meantime, the appellant got the same properties attached in November 1931 in the District Court and an order was made fixing 19th October 1932 as the date of sale. Each decree-holder acted so far in ignorance of the proceedings taken by the other. The appellant, then becoming aware of the sale that had already been effected, applied to the District Court under section 63 of the Code of Civil Procedure to call for the proceeds of the sale from the Sub-Court and distribute them rateably.

Held that section 63 of the Code applied to the case notwithstanding that the decrees were all passed by one and the same Court, and that the respondent must elect to have a resale or to pay into Court so much of the price as might become due on rateable distribution to the rival decree-holder, the appellant.

The words "of more Courts than one" in section 63 must be read as qualifying the word "attachment" and not the word "decrees".

Madden v. Chappani, (1887) I.L.R. 11 Mad. 356, followed.

Narasimhachariar v. Krishnamachariar, (1914) 26 M.L.J. 406, referred to.

Murugappa v. Ramasami, A.I.R. 1935 Mad. 893, applied.

Dhirendrarao Krishnarao v. Virbhadrappa, (1934) I.L.R. 59 Bom. 310, relied upon.

APPEAL against the order of the Court of the Subordinate Judge of Chingleput dated 7th October 1933 and made in Miscellaneous Petition No. 640 of 1933.

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 Chingleput, dated 7th October 1933 and made in Miscellaneous Petition No. 640 of 1933.

N. Srinivasa Ayyangar for appellant.

T. M. Krishnaswami Ayyar for respondent.

The JUDGMENT of the Court was delivered by
VENKATASUBBA RAO J.—This appeal raises a point

ISWARADAS
v.
CORPORATION
OF
MADRAS.

VENKATASUBBA
RAO J.

ISWARADAS
v.
CORPORATION
OF
MADRAS.
VENKATASUBBA
RAO J.

not covered by authority ; before dealing with it, we shall first dispose of certain other matters which have been argued.

The first question to be decided is this. Section 73, Civil Procedure Code, provides that those decree-holders alone are entitled to rateable distribution who have applied for execution *to the Court by which the assets are held*. Mr. T. M. Krishnaswami Ayyar's contention is, in effect, that this is a self-contained rule and is not to be read as controlled by, or being subject to, the provision embodied in section 63. To accept this contention would be to defeat and render nugatory the last-mentioned section. Section 63 must be treated as constituting an exception to section 73 in this respect. Although the decree-holder claiming rateable distribution should *ordinarily*, as prescribed by section 73, have applied for execution to the Court by which the assets are held, section 63, recognizing an exception, lays down when and to what extent this rule may be departed from. Where, as is stated in section 63, the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in section 73 are fulfilled, the right to rateable distribution arises. By adopting this construction alone, we can give full effect to both the sections mentioned. In *Narasimhachariar v. Krishnamachariar*(1) the facts are thus stated in the judgment of WALLIS J., as he then was :

"In the present case, a debt due to the judgment-debtor by the Public Works Department and attached in execution of several decrees against the judgment-debtor in several Courts has been paid into this Court under section 63 and Order XXI,

(1) (1914) 26 M.L.J. 406.

ISWARADAS
v.
CORPORATION
OF
MADRAS.
VENKATASUBBA
RAO J.

rule 36, Civil Procedure Code, by the Executive Engineer who has at the same time forwarded a list of the attachments served on him up to that time, one of which was prior in date to the attachment by this Court. The case then came before me sitting alone, when the prior attaching creditor, who has not transferred his decree to this Court, claimed to be paid in priority to the decree-holder in this Court, or at least to be entitled to rateable distribution ; and, in view of the importance of the question and the conflict of decisions, I directed the case to be posted before a Bench and notice to be served upon all the creditors mentioned by the Executive Engineer as having attached before payment into this Court ; and they have now appeared and preferred their claim to rateable distribution."

It was held by WALLIS and BAKEWELL JJ. that the decree-holders in the other Courts were entitled to rateable distribution. It will be seen that the Court which held the assets was the High Court ; nevertheless, all the creditors, who had attached the debt in the several Courts, were held entitled. There, the Court that held the assets was a Court of higher grade ; but the position may be reversed, for that would make no difference in principle.

Then, the effect of clause (2) of section 63 has to be considered. That clause provides :

"Nothing in the section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees."

Does this merely prevent the sale from being invalid ; or does it have the further effect of taking away the right of the rival decree-holders to rateable distribution ? As to the effect of section 285 of the Code of 1882 there was a conflict of opinion. Where a sale was held, for instance, by a Court of lower grade when it ought to have been held by a Court of higher grade, the view taken by the Calcutta, Bombay and Madras Courts was, that the rule being one of procedure

ISWARADAS
v.
CORPORATION
OF
MADRAS.
VENKATASUBBA
RAO J.

the sale was not invalid ; but, according to the Allahabad decisions, the sale was absolutely null and void, as one made without jurisdiction. It was on account of this conflict that sub-section 2 was introduced by the Code of 1908, and it gives effect to the view taken by the Calcutta, Bombay and Madras Courts ; see Mulla's Code of Civil Procedure, 10th Edn., page 229. That being so, it is no longer possible to maintain that the sale by one of the executing Courts is null and void ; it is incumbent on the Court of the higher grade to accept the sale and to call for the proceeds for the purpose of distributing them rateably amongst all the decree-holders. A contrary view would lead to the negation of the very rights intended to be preserved and of the very powers which sub-section 1 confers on the Court of the higher grade. In this connection, another question arises, namely, whether the fact that the decree-holder purchased the property with the leave of the Court that held the sale and was allowed to set off the purchase price against the decree amount, ousts the power, conferred by section 63 on the Court of the higher grade, to call for the proceeds and rateably distribute them. In *Murugappa v. Ramasami*(1), where the question was not complicated by there being more than one Court, it was pointed out that, as the purchaser's right under Order XXI, rule 72, is subject to the provisions of section 73, his right to set off is controlled by that section in this way, namely, that he is bound to bring into Court such sums as may be found due to those decree-holders whose applications for execution were pending on the date of the sale ; the reason for fixing the

date of the sale as the material date being that, where there has been a set off, the assets must be deemed to have been realized *eo instanti* the sale is made. The fact that execution may be pending in more than one Court under section 63 can make no difference and the principle of that decision holds good. Now, turning to section 63 (2), if the decree-holder purchaser is called upon to bring back the proceeds (as in our opinion he should be), what is the "proceeding" that can be said to be thereby invalidated ? As already stated, the purchase by the decree-holder does not confer upon him an unqualified right, but is subject to the terms of section 73 ; in other words, as Mr. N. Srinivasa Ayyangar for the appellant rightly contends, the very order of the Court, that is, the "proceeding", did cast upon the decree-holder the duty to bring back any part of the proceeds when so required. Our view receives support from *Dhirendrarao Krishnarao v. Virbhadrappa*(1) where the effect of section 63 (2) has been fully dealt with.

It now remains to consider the point to which we adverted at the outset. For making that point clear, we must set out briefly the facts of the present case. The decrees in favour of the respondent (the Madras Corporation) were passed by the High Court on its Original Side ; so was the decree in favour of the appellant. The former decrees were sent to the Sub-Court, Chingleput, for execution ; the latter to the District Court, Chingleput. In pursuance of the respondent's decrees, the properties were attached by the Sub-Court in

ISWARADA
v.
CORPORATION
OF
MADRAS.
VENKATASUB
RAO J.

(1) A.I.R. 1935 Mad. 893.

(1) (1934) I.L.R. 59 Bom. 310.

ISWARADAS
v.
CORPORATION
OF
MADRAS.
VENKATASUBBA
RAO J.

January 1932 and the sale was held on 28th September 1932. The Corporation obtained leave to bid and was allowed to set off the purchase price against the decree amount. As the amount due to it exceeded the amount of its bid, it did not have to bring any sum into Court. In the meantime, the appellant, another decree-holder, got the same properties attached in November 1931 in the District Court. An order was made fixing 19th October 1932 as the date of sale. We may take it that so far each decree-holder acted in ignorance of the proceedings taken by the other. The appellant, now becoming aware of the sale that had already been effected, applied to the District Court under section 63 to call for the proceeds of the sale from the Sub-Court and distribute them rateably. The difficulty arises thus. The decrees passed here are not decrees "of more Courts than one"; they were all passed, as we have just said, by one and the same Court, namely, the High Court, Madras. That being so, does section 63 apply? In our opinion it does. There are two modes of arriving at this result: first, by reading the words "of more Courts than one" in section 63 as qualifying the word "attachment" and not the word "decrees"; secondly, by calling in aid section 42 which says that the Court executing the decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.

We are prepared to rest our judgment upon the first of these grounds. The object of section 63 is to deal with several attachments, no matter whether the decrees passed are by the same Court or by different Courts. By which Court the

decrees have been passed, is an immaterial detail-- the emphasis is upon the word "attachment" and not upon the word "decrees". In other words, the phrase "in execution of decrees" is explanatory of the word "attachment" and may well have been left out without affecting the sense. The words "by more Courts" in the place of "of more Courts" would have made the meaning plain and put the matter beyond doubt.

The question then is, what is the proper order to make? As held in *Madden v. Chappani*(1), the purchaser must be allowed to make his choice; either he may elect to have a resale or to pay into Court so much of the price as may become due on rateable distribution to the rival decree-holder, the appellant.

The lower Court's order is reversed and the appeal is allowed with costs; the Advocate's fee is fixed at Rs. 75.

There will be no order in the civil revision petition.

A.S.V.

(1) (1887) I.L.R. 11 Mad. 356.

ISWARADAS
v.
CORPORATION
OF
MADRAS.
VENKATASUBBA
RAO J.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936,
March 13.

MUDENUR NAGAPPA (PETITIONER), APPELLANT,

v.

FIRM OF BHAGAVANJI RASAJI, BOMBAY, BY THE
MANAGING PARTNER, PHULCHAND, AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

*Indian Contract Act (IX of 1872), ss. 251, 253 (5) and 263—
Partner—Apparent or ostensible authority of—Act within
scope of—Decree in favour of firm—Assignment of, to a
third party, assignment being really a compounding of the
claim—Authority as to—Binding nature of assignment on
other partners—Dissolution of firm earlier—Approval of
assignment subsequently by majority of partners—Effect.*

A firm of money-lenders and commission agents obtained a decree for about Rs. 4,000. That decree was assigned first by one of the partners to one person for Rs. 1,300 and then by another of the partners to another person for Rs. 1,701. The assignments were not justified by the existence of any special or extraordinary circumstances, and neither of the sums was brought into the partnership assets for the common benefit of the partners.

Held that the assignment in neither case was within the scope of the apparent or ostensible authority of the partner and that the circumstance that the firm had become dissolved before either assignment made no difference.

Held further that the fact that one of the assignments was subsequently approved of and supported by the majority of the partners did not render it valid.

Section 253 (5) of the Indian Contract Act does not mean that an *ex post facto* confirmation can give validity to a transaction initially invalid. The section presupposes that a decision was taken, the question having been raised and debated.

* Appeals Against Orders Nos. 189 and 319 of 1933.

APPEALS against the orders of the District Court of Bellary, dated 30th January 1933 and made in Execution Petitions Nos. 90 and 57 respectively of 1932 in Summary Original Suit No. 70 of 1931.

K. Srinivasa Rao for appellant.

M. S. Ramachandra Rao for *B. Somayya* for respondents.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—These appeals raise the question of the extent of the authority of a partner to bind by his acts the partnership of which he is a member. A firm by name Bhagavanji Rasaji consisting of seven partners obtained a decree for about Rs. 4,000. Two persons, (i) Sakalchand and (ii) Nagappa, putting forward rival claims to the decree in question, applied to the lower Court for its execution as transferee decree-holders. Sakalchand alleged an assignment in his favour, dated 8th September 1932, by Jesraj one of the seven partners; Nagappa's claim was based on a similar assignment made on 24th September 1932 by another partner Javarmul Bhagavanji. The learned District Judge having rejected both the applications, the assignees have filed the appeals in question.

The assignment in favour of Sakalchand was for Rs. 1,300 and that in favour of Nagappa for Rs. 1,701. It is not alleged that either of the sums has been brought into the partnership assets for the common benefit of the partners; the question that arises therefore is, was the transfer in either case within the scope of the apparent or ostensible authority of the partner? The case, it is common ground, is governed by Chapter XI of the Indian Contract Act, which has

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.

VENKATASUBBA
RAO J.

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.
—
VENKATASUBBA
RAO J.

since been repealed by the Indian Partnership Act, 1932. The relevant part of section 251 runs thus:

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose."

"The only necessity",
observe Pollock & Mulla,

"which the English authorities recognize as conferring authority is the necessity of carrying on the business in the usual way. Extraordinary occasions will not confer extraordinary power on a partner or manager."

The learned authors go on to observe that the words of the present section,

"necessary for . . . carrying on the business of such a partnership as that of which he is a member", may be read, and it seems the more natural reading, as including what is necessary in the circumstances of the special occasion, and not as confined to what is necessary in the usual course of business (*see* their Commentaries on section 251). In other words, under the English law,

"power to do what is usual does not include a power to do what is unusual, however urgent".

But under section 251 it is open to argument that the powers of a partner are somewhat more extensive than under the English law. With this possible distinction, however, we must at once point out, we are not here concerned. No attempt has been made to show—indeed no argument has been put forward—that the transactions in question are justified by the existence of any special or extraordinary circumstances. The question therefore reduces itself to this: was the making of the assignment within the scope of the

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.
—
VENKATASUBBA
RAO J.

apparent or ostensible authority of the partner? The principle of apparent authority may be thus stated:—Every partner is, in contemplation of law, the general and accredited agent of the partnership and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership, provided that his acts, done in violation of his duty to the firm, will not bind it, when the other party to the transaction is cognizant of, or co-operates in, such breach of duty. [Story on Partnership and Agency, quoted with approval by the Judicial Committee in *Bank of Australasia v. Breillat*(1)]. As regards the nature of this firm's business, it is described as a firm of money-lenders and commission agents and nothing further appears. The decree for about Rs. 4,000 has been transferred in one case for Rs. 1,300, in the other for Rs. 1,700 odd. The transaction in each case amounts in fact to the compounding of the claim although it has taken the form of an assignment; if the arrangement was with the judgment-debtor directly, it would have been, without question, nothing short of a compromise of the debt. The intervention of a third party would in principle make no difference and we should therefore proceed upon the footing that the debt has been compounded, a large part of the claim being surrendered. As a general proposition, an authority to give discharge for a debt on payment does not include a power to compromise or settle it in any way a partner likes [Lindley on Partnership, 10th Edn. (1935), pages 190 and 191]. We may mention

(1) (1847) 6 Moo. P.C. 152, 193, 194.

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.
—
VENKATASUBBA
RAO J.

that this principle has now received statutory recognition [Section 19 (c) of the Indian Partnership Act, 1932.]

It is said that the firm became dissolved on 5th November 1931, but that circumstance in our opinion makes no difference. Section 263 of the Indian Contract Act runs thus :

“After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.”

No new rights accrue to the partners on dissolution as the word “continue” clearly shows ; for it implies that the rights previously possessed remain in existence. Far from enlarging, the section limits those powers, as the authority of the partners continues “in all things necessary for winding up the business of the partnership”, in other words, only so far as may be necessary to wind up its affairs (cf. section 47 of the Indian Partnership Act, 1932.)

No further question arises in the appeal filed by Sakalchand and, although the learned District Judge has not given cogent reasons for his conclusion, we must hold that his order is right and dismiss Civil Miscellaneous Appeal No. 319 of 1933. It is accordingly dismissed but without costs.

In the appeal of Nagappa (Civil Miscellaneous Appeal No. 189 of 1933), a further contention has been raised based upon section 253 (5) of the Contract Act. What happened was that in the lower Court all the partners except Jesraj approved of and supported the assignment made in the appellant's favour. It is therefore urged that

under section 253 (5) the opinion of the majority should prevail. That section says :

“When differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners.”

This surely does not mean that an *ex post facto* confirmation can give validity to a transaction initially invalid. The section presupposes that a decision was taken, the question having been raised and debated. The power, though not in itself of a judicial kind, is subject to the rule (natural justice requires it) that every partner must have an opportunity of being heard, and the decision must be made in good faith with a view to the collective interest of the firm [See Pollock & Mulla's Commentaries on section 253 (5)].

There remains a further point. Our attention has been drawn to an affidavit, dated 30th January 1933, filed by the six partners. It is claimed there that the assignment in favour of the appellant can be justified by the terms of the dissolution of the partnership ; under those terms it is stated that the capitalist partners, including the assignor, Javarmul Bhagavanji, are entitled to all the assets and outstandings of the firm. Paragraph 4 of the affidavit then goes on to say :

“Javarmul Bhagavanji, the capitalist, is therefore entitled to collect the amount and the other partners of the firm noted above have no objection to the recognition of the transfer executed by him in favour of the petitioner Mudenur Nagappa.”

It is likely that this was not pointedly brought to the notice of the lower Court. Further, it is to be observed that the previous affidavits filed on behalf of the appellant contain no such assertion. However, we think that this is a question of fact

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.
—
VENKATASUBBA
RAO J.

NAGAPPA
v.
BHAGAVANJI
RASAJI FIRM.

into which the lower Court should go. Had the affidavit been filed for the first time here, we should not have allowed the question to be raised; but, as already stated, the affidavit was before the Court below and we think that this matter should be enquired into. The order under appeal is therefore reversed and the lower Court is directed to re-hear the application of Nagappa with reference to the question of fact referred to above and dispose of it. The lower Court will expedite the hearing. We make no order as to costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice K. S. Menon.

1936,
February 15.

ARUMUGA BATHAN AND TWO OTHERS
(PLAINTIFFS 1, 3 AND 4), APPELLANTS,

v.

SEMBA GOUNDAN (DEAD) AND FIVE OTHERS
(SECOND DEFENDANT, SECOND PLAINTIFF,
DEFENDANTS 1 AND 3 AND NIL), RESPONDENTS.*

Mortgage—Subrogation—Purchaser of property subject to prior simple and later usufructuary mortgages—Discharge of simple mortgage by—Subrogation to rights of simple mortgagee—Purchaser's right to, as against usufructuary mortgagee—Suit by purchaser to enforce that right—Maintainability of—Transfer of Property Act (IV of 1882), sec. 101 as it stood in 1920—Effect of.

The owner of land, which was subject to a simple mortgage in favour of one person and to two later usufructuary mortgages in favour of another, sold it to the first plaintiff's mother without apparently disclosing the existence of the usufructuary mortgages. By virtue of a lease deed of even date

* Second Appeal No. 535 of 1932.

with the second of the usufructuary mortgages the owner himself remained in possession of the land. The first plaintiff's mother discharged the simple mortgage. Subsequently the usufructuary mortgagee filed a suit upon the lease deed, obtained a decree and in execution entered into possession of the land. Thereupon, the plaintiffs, as heirs of the first plaintiff's mother, filed a suit against the mortgagor, the usufructuary mortgagee and the simple mortgagee claiming to enforce the simple mortgage by sale of the mortgaged property.

Held that the suit was maintainable.

Section 101 of the Transfer of Property Act as it stood in 1920 is not a bar to the suit. The first plaintiff's mother must be deemed to be the assignee in law of the mortgagee whose mortgage she paid off. The principle of the ruling in *Venkatasami Chettiar v. Sankaranarayana Chettiar*, (1934) 69 M.L.J. 566, equally applies to a case where the purchase is made privately.

Venkat Reddy v. Kunjappa Goundan, (1923) I.L.R. 47 Mad. 551, referred to.

Polayya Dora v. Anantha Patro, (1935) I.L.R. 59 Mad. 44, is an answer to the contention that, even if the plaintiffs have any right of subrogation, they can avail themselves of it only in defending a suit, and not as the foundation of a plaint.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 94 of 1929 (Appeal Suit No. 51 of 1929, District Court) preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in Original Suit No. 520 of 1928 (Original Suit No. 1071 of 1927, District Munsif's Court, Salem).

B. Sitarama Rao for appellants.

C. S. Venkatachari and *D. Ramaswami Ayyangar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—The land which forms the subject-matter of this appeal was in 1917 in the possession

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.

KING J

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

of the first defendant. He mortgaged it in that year by Exhibit B—a simple mortgage deed—to the third defendant. In October 1919, the first defendant mortgaged this property amongst other items to the second defendant's father by two usufructuary mortgage deeds (Exhibits I and II), but by virtue of Exhibit III, a lease deed of the same date as Exhibit II, he himself remained in possession of the land. In March 1920, the first defendant sold the land to the first plaintiff's mother (Exhibit A) without apparently disclosing the existence of the usufructuary mortgages and, in June 1920, the first plaintiff's mother discharged the simple mortgage, Exhibit B. In 1925, the second defendant filed a suit upon the lease deed, Exhibit III, obtained a decree, and in execution entered into possession of the land in 1926. In 1927, the plaintiffs, as heirs of the first plaintiff's mother, filed the present suit, impleading the three defendants, in which they claimed to enforce the mortgage, Exhibit B, by sale of the mortgaged property. The learned District Munsif of Sankaridrug gave the plaintiffs a decree for the amount of the mortgage as claimed, less deduction of interest for the period from March 1920 to April 1926. On appeal the learned Subordinate Judge of Salem dismissed the plaintiffs' suit holding that the first plaintiff's mother, not being a charge-holder, had no right of subrogation, and that the plaintiffs could not bring a suit of this nature when they were themselves the owners of the equity of redemption. The only character they can be said to possess is that of vendees, and not that of mortgagees.

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

In second appeal, the plaintiffs claim that they should be given a decree for the full amount of the mortgage as it stood on the date of their plaint. The appeal is resisted by the second defendant, the usufructuary mortgagee, who contends that the suit is not maintainable. Whether the suit is maintainable or not is the main point for decision.

The first, and extreme, position taken up by the second defendant is that the plaintiffs are vendees, and vendees only, and acquire no rights whatever in virtue of their discharge of Exhibit B. In support of this argument, we have been referred to three decisions in which a vendee who had discharged a mortgage claimed after the discharge to sue as mortgagee and it was held that he could not do so. In the first of these, *Arumugasundara Maharajah Pillay v. Narasimha Iyer*(1), a mortgagee purchased the equity of redemption in the mortgaged property and some years later purported to sell the equity of redemption alone and reserve the mortgagee's rights in himself. When he sued on this mortgage right it was held that on the date when he purchased the equity of redemption his mortgage was extinguished. In *Bhawani Kuwar v. Mathura Prasad Singh*(2), a decision of the Privy Council, the respondent, a mortgagee, purchased certain villages in execution of his mortgage decree which were subsequently sold for arrears of revenue. He claimed to be paid the mortgage money, but it was held that the mortgage was extinguished on the date of the purchase. The

(1) (1915) 29 M.L.J. 583.

(2) (1912) I.L.R. 40 Cal. 89 (P.C.).

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

last case is *Daso Polai v. Narayana Patro*(1) where a mortgagee purchased the equity of redemption in the mortgaged property and in the next year filed a claim petition on the strength of his sale deed. The petition was dismissed and the order of dismissal became final. The purchaser then sued on the footing of his mortgage. Here too it was held that the mortgage was extinguished on the date of his purchase.

It was easy, however, for Mr. Sitarama Rao for the appellants to point out that these three decisions are, for our present purpose, wholly irrelevant. In none of them was there any question of the existence of a subsequent mortgagee, and therefore the situation with which we have now to deal, and the question of the right of subrogation which involves the existence of two mortgages, the earlier of which has been discharged, could not possibly arise. And this distinction is made quite clear in the judgment of the Privy Council in *Bhawani Kuwar v. Mathura Prasad Singh*(2) at page 103.

Another argument on behalf of the respondent that, even if the plaintiffs have any right of subrogation, they can avail themselves of it only in defending a suit, and not as the foundation of a plaint, does not require much discussion as it has been answered only recently by a Bench of this Court in *Polayya Dora v. Anantha Patro*(3). It is there pointed out that, though there are *obiter dicta* to be found here and there in support of the argument, it has never been made the basis of any decision, and it is accordingly repelled by

(1) (1933) I.L.R. 57 Mad. 195.
(2) (1912) I.L.R. 40 Cal. 89 (P.C.). (3) (1935) I.L.R. 59 Mad. 44.

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

the learned Judges. Nor is this the only case in which a suit has been permitted to be filed upon a discharged mortgage. [See *Mulla Vittil Seethi v. Achuthan Nair*(1), *Suthi Kutti v. Achutan Nair*(2), *Rama Rao v. Mandachalugai*(3), *Venkat Reddy v. Kunjappa Goundan*(4), *Venkatasami Chettiar v. Sankaranarayana Chettiar*(5) and *Mangtupal Bagaria v. Upendra Mohan Pal Chaudhuri*(6).]

The next argument against the maintainability of the suit is that by the terms of section 101 of the Transfer of Property Act, as that section stood in 1920, the first plaintiff's mother, not being at any time a mortgagee or charge-holder in respect of this land, could acquire no right of subrogation. This is no doubt so, but the question here is whether the first plaintiff's mother cannot be deemed to be the assignee in law of the mortgagee whose mortgage she paid off. In *Venkat Reddy v. Kunjappa Goundan*(4) and *Venkatasami Chettiar v. Sankaranarayana Chettiar*(5) which followed it, the plaintiffs who were permitted to file suits were not the mortgagees themselves, but purchasers of the mortgaged property at sales held in execution of the mortgage decrees, and these purchasers were deemed to be assignees of the mortgagee decree-holders. In *Venkat Reddy v. Kunjappa Goundan*(4), no doubt, there was no question of a subsequent mortgage, but in *Venkatasami Chettiar v. Sankaranarayana Chettiar*(5) the contest was directly between the purchaser at the sale held in execution of the first mortgage and the purchaser at the sale held in execution of the subsequent

(1) (1911) 21 M.L.J. 213 (F.B.).
(3) (1918) 35 M.L.J. 467.
(5) (1934) 69 M.L.J. 566.

(2) (1911) 21 M.L.J. 475.
(4) (1923) I.L.R. 47 Mad. 551.
(6) (1929) I.L.R. 57 Cal. 82.

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

mortgage. In this latter case, therefore, it can be said that the plaintiff, though he discharged the first mortgage by his Court-auction purchase, and was never himself a party to it, was permitted to avail himself of a right of subrogation and sue upon it. In our present case, there have been no mortgage decrees and therefore no purchaser through the agency of the Court, but we can see no legal principle which prevents us from extending the same right of suit to a purchaser by private treaty. Whether the purchase is made through Court or privately the principle is the same. The purchaser discharges what he thinks is the only mortgage and then discovers that a later mortgage interest still subsists. If in the case of a Court-auction purchase the purchaser is in these circumstances permitted to sue upon the mortgage which he has discharged, we do not see why the private purchaser should be placed in any inferior position. We therefore hold that the language of section 101 of the Transfer of Property Act is not a bar to the present suit.

Finally it was argued for the respondent that this suit cannot be maintained because the plaintiffs are themselves the owners of the equity of redemption. We see no force in this argument which was not supported by any authority in circumstances in which there is also a second mortgagee to be considered. Order XXXIV, rule 1, Civil Procedure Code, does not lay it down that in a suit on a mortgage the owner of the equity of redemption must always fill the role of defendant. It is enough if all the interests in the property are represented in the suit, as they undoubtedly are here. Nor can we see any practical

difficulties at all in conducting a suit like the present one, in granting a decree, and in executing it.

We are therefore of opinion that all objections to the maintainability of this suit have failed.

This appeal will therefore be allowed to the extent of setting aside the decree of the lower appellate Court which should restore the appeal to its file and dispose of it and the memorandum of cross-objections on the remaining issues. The sixth respondent must pay the appellants' costs in second appeal. Otherwise costs to abide the event. Court-fee to be refunded to the appellants.

A.S.V.

ARUMUGA
BATHAN
v.
SEMBA
GOUNDAN.
KING J.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

BANAKAR BASAPPA *alias* DODDA, BASAPPA AND
ANOTHER (PETITIONERS), APPELLANTS,

1935,
December 17.

v.

HANSAJI GULABCHAND FIRM (RESPONDENTS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 75 (3)—Order made by District Court in appeal—Meaning of—Appeal—Ex parte order of District Court in—Order of that Court refusing to set aside—Order in appeal, if—Appeal from—Competency of.

An order of a District Court refusing to set aside an *ex parte* order in appeal is not itself an order in appeal within the meaning of section 75 (3) of the Provincial Insolvency Act. An appeal from such an order is therefore competent.

* Appeal Against Order No. 321 of 1934 and Civil Revision
Petition No. 1106 of 1934.

BASAPPA
v.
HANSAJI
GULABCHAND
FIRM.

A proceeding under Order IX, rule 13, of the Code of Civil Procedure to set aside an *ex parte* decree in appeal is not a proceeding in the appeal, the appeal itself having terminated.

Venkata Narasimha Rao v. Suryantarayana, (1925) 23 L.W. 409, and *Salar Beg Saheb v. Karumanchi Kotayya*, (1925) 23 L.W. 538, applied.

APPEAL against and petition to revise the order of the District Court of Bellary, dated 16th October 1933 and made in Interlocutory Application No. 438 of 1933 in Civil Miscellaneous Appeal No. 15 of 1933 preferred against the order dated 31st January 1933 and made in Insolvency Petition No. 58 of 1932 on the file of the Court of the Temporary Subordinate Judge of Bellary.

V. S. Narasimhachar for appellants.

A. Gopalacharlu for respondents.

JUDGMENT.

The appellants in the civil miscellaneous appeal, who are the petitioners in the civil revision petition, attack an order refusing to set aside another order adjudicating the first appellant as an insolvent, the second appellant being one of the alienees in whose favour the alienations challenged in the insolvency are made. The adjudication was made by the learned District Judge in appeal reversing an order of the Subordinate Judge who dismissed the petition.

It is argued that no appeal lies from an order under Order IX, rule 13, Civil Procedure Code, read with section 75 of the Provincial Insolvency Act, on the ground that the order now under appeal is really itself an appellate order of the District Judge. It seems to me that this contention is not

BASAPPA
v.
HANSAJI
GULABCHAND
FIRM.

tenable. Sub-section 3 of section 75 of the Provincial Insolvency Act reads :

"Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a Subordinate Court may appeal to the High Court by leave of the District Court or of the High Court"

It may possibly have been the intention underlying this provision that it should apply only to orders of the District Court in the exercise of its original jurisdiction, but that is not what the section says. I do not think it can be contended that the order refusing to set aside an *ex parte* order in appeal is itself an order in appeal, though it might be contended that it is an order passed in the exercise of the appellate jurisdiction of the District Court. I have been referred to two decisions, *Venkata Narasimha Rao v. Suryanarayana*(1) and *Salar Beg Saheb v. Karumanchi Kotayya*(2), to the effect that a proceeding under Order IX, rule 13, is not a proceeding in the suit but quite independent of the suit, the suit itself having been disposed of. On the analogy of these rulings it must be held that a proceeding under Order IX, rule 13, to set aside an *ex parte* decree in appeal is not a proceeding in the appeal, the appeal itself having terminated. I therefore hold that an appeal does lie.

[His Lordship then discussed the merits of the case and held that the District Judge would have been well advised to have set aside the *ex parte* order and given the appellants an opportunity of stating their case, and proceeded :—]

In the result therefore the appeal is allowed and the *ex parte* order is set aside and the

(1) (1925) 23 L.W. 409.

(2) (1925) 23 L.W. 538.

BASAPPA
v.
HANSAJI
GULABCHAND
FIRM.

District Judge is directed to restore the appeal to his file and dispose of it on its merits. The respondents will pay the costs of the appellants here and in the Court below.

No orders are necessary on the connected civil revision petition.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1935,
December 17.

DESU REDDIAR AND ANOTHER (DEFENDANTS 4 AND 7),
APPELLANTS,

SRINIVASA REDDI (MINOR), BY NEXT FRIEND, SUBBA
REDDIAR, AND SIX OTHERS (PLAINTIFF AND DEFENDANTS
1, 2, 3, 5, 6 AND 8), RESPONDENTS. *

*Hindu Law—Presumptive reversioner—Declaratory suit by—
Who are proper parties to and what reliefs can be
granted in.*

On a question as to who are proper parties to a declaratory suit by a presumptive reversioner and what reliefs can be granted in the same,

held, in dealing with suits by reversioners a distinction has to be drawn between reliefs in respect of the individual or personal title of the particular reversioner (plaintiff) and reliefs claimed for the benefit of the body of reversioners represented by the presumptive reversioner; reliefs of the former kind have generally been refused on the ground that an anticipatory declaration of the kind might be rendered valueless by future events, but reliefs of the latter kind are not open to the same objection especially after the recognition of the representative character of a reversioner's suit and of the consequent applicability of the rule of *res judicata* even in favour of, or as against, the actual reversioner who might not have been a party to the presumptive reversioner's suit.

* Appeal No. 43 of 1934.

APPEAL against the decree of the Court of the DESU REDDIAR
Subordinate Judge of Cuddalore in Original Suit SRINIVASA
No. 40 of 1933 (Original Suit No. 25 of 1930 on the REDDI.
file of the District Court of South Arcot).

T. M. Krishnaswami Ayyar and A. Balasubramanid Ayyar for appellants.

M. Patanjali Sastri and K. R. R. Sastry for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal by defendants 4 and 7 and the principal contention urged before us on their behalf is that defendants 4 to 7 should not have been impleaded in this suit nor any declaration made to their prejudice. The question arises under the following circumstances.

One Bapu Reddi, who admittedly owned most of the suit properties, died on 28th July 1922, leaving him surviving two widows, Ammalu Ammal and Narasammal, and a daughter by the former, named Balambal. The two widows seem to have divided the property between themselves a few months after Bapu Reddi's death and Narasammal died in May 1930. Ammalu Ammal and Balambal are defendants 2 and 3 in this suit.

Defendants 4 to 7 are gnatis who would inherit the estate of Bapu Reddi after Balambal, should she happen to die sonless, but in September 1926 Balambal adopted the plaintiff and this event practically defeated the chances of defendants 4 to 7 succeeding to the estate. The plaint suggests that defendants 4 to 7 have accordingly been putting it forward that Bapu Reddi was not the last male holder and that a posthumous son was born to him on 31st July 1922 and died a few hours

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

after birth. If this is true, it might exclude the second and third defendants as also the plaintiff from succession and let in defendants 4 to 7 as persons entitled to possession immediately on Narasammal's death. This version had been put forward by the present fourth defendant in a written statement (Exhibit V) filed by him on 12th March 1927 in Original Suit No. 73 of 1927 on the file of the Tirukkoyilur Munsif's Court.

Narasammal herself was putting forward a claim of absolute right to the properties which she took in the division between herself and her co-widow and she based that claim on a will alleged to have been left by Bapu Reddi. She executed a mortgage of some of these properties in favour of the eighth defendant, a relation of hers, on 12th August 1926, and on 25th July 1928 she executed a registered will devising to her brother, the first defendant, all the properties that she had obtained in the division.

This suit was filed by the plaintiff on 15th August 1930 asking in the first instance for a declaration that the will in favour of the first defendant and the mortgage in favour of the eighth defendant were not binding on the plaintiff as reversioner. Defendants 4 to 7 were impleaded on the strength of a general allegation in paragraph 10 of the plaint that they were the junior paternal uncle's sons of the deceased and were proper and necessary parties to this suit. No reference was then made to the claim put forward on behalf of defendants 4 to 7 that Bapu Reddi was not the last male holder, and that they themselves were entitled to succeed to the estate on Narasammal's death.

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

In the written statement filed by defendants 4, 5 and 7 it was alleged in paragraph 4 that on Narasammal's death defendants 4 to 7 had become heirs, and the plaintiff had no cause of action to sustain the suit. Reference was made in paragraph 5 to Bapu Reddi's son being the last male owner. In paragraph 10 it was also averred :

"To the suit as conceived, these defendants are unnecessary parties. They are not even proper parties. The plaintiff's suit is designed to shut out the title of defendants 4 to 7, though it is ostensibly for getting a declaration in plaintiff's favour. . . This suit is caused to be filed by a remote reversioner without sufficient reasons. The suit is thus liable to be dismissed."

As regards the will and the mortgage relied on by defendants 1 and 8, defendants 4 to 7 supported the plaintiff in the contention that the transactions were not binding on the estate. In paragraph 5 the fourth defendant set up his own title to some of the suit properties.

By an amendment of the plaint the D schedule properties were brought into the suit, the plaintiff claiming that they too belonged to Bapu Reddi's estate, while the fourth defendant claimed independent title to them and also pleaded adverse possession. By a further amendment made on 31st August 1933 without any objection from the defendants, the plaintiff was allowed to add paragraph 10 (a) to the plaint, referring to the version of defendants 4 to 7 that Bapu Reddi's alleged posthumous son was the last male owner and that defendants 4 to 7 had therefore become entitled to the possession of the estate on Narasammal's death. The prayer was also amended by adding a declaration that Bapu Reddi was the last male holder of the suit properties, that no posthumous

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

son was born to him, and that the plaintiff was the nearest male reversioner to the estate.

The learned Subordinate Judge has found that no posthumous son was born to Bapu Reddi, that defendants 4 to 7 are not therefore entitled to succeed to the estate, and that the plaintiff is the presumptive reversioner entitled to succeed to the estate after the death of defendants 2 and 3. The dispute as between the plaintiff and defendants 1 and 8 was compromised under an arrangement whereby part of Narasammal's properties was retained by these defendants and the other part was given up to the plaintiff. The decree of the lower Court embodied this compromise, and, as between the plaintiff and defendants 4 to 7, it declared that "the birth and the death of a posthumous son to Bapu Reddi is not true and that the plaintiff is the presumptive reversioner to the estate of Bapu Reddi".

Founding himself on the observations of the Judicial Committee in *Kathama Natchiar v. Dorasinga Tever*(1) and *Sheoparsan Singh v. Ramnandan Prasad Singh*(2), Mr. Krishnaswami Ayyar contends that the kind of declaratory suit permitted to a Hindu reversioner is only of a very limited scope, intended to call into question transactions improperly entered into by the widow, that the question in such suits is solely between the reversioner and the widow and that the reversioner cannot by bringing such a suit get as between him and a third party an adjudication of title which he could not get without it. In dealing with this contention, we must repeat, what has frequently been pointed out before, that

(1) (1875) L.R. 2 I.A. 163. (2) (1916) I.L.R. 43 Cal. 694 (P.C.).

observations regarding the scope or maintainability of declaratory suits contained in judgments pronounced before 1877 should not be taken literally after the enactment of section 42 of the Specific Relief Act. It must also be remembered that even section 42 of the Specific Relief Act has been declared not to be exhaustive of the circumstances in which a person may ask for declaratory relief. The illustrations appended to that section no doubt refer to certain well-known classes of suits; but there is no justification for limiting the scope of the section by reference to the illustrations. An examination of the more recent pronouncements of the Judicial Committee and of the Indian High Courts will show that, in dealing with declaratory suits, the Courts have in recent years laid stress not so much on the question of their maintainability as on that of the propriety and utility of granting relief by way of declaration; cf. *Bobba Padmanabhudu v. Bobba Buchamma*(1), *Surayya v. Annapurnamma*(2) and *Muthukumarasami Mudaliar v. Hariharayana Mudaliar*(3).

In dealing with suits by reversioners, a distinction has been drawn between relief in respect of the individual or personal title of the particular plaintiff and relief claimed for the benefit of the body of reversioners represented by the presumptive reversioner. Relief of the former kind has generally been refused on the ground that an anticipatory declaration of the kind may be rendered valueless by future events; but relief of the latter kind is not open to the same objection.

(1) (1918) 35 M.L.J. 144.

(2) (1919) I.L.R. 42 Mad. 699.

(3) (1927) 53 M.L.J. 601.

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

especially after the recognition of the representative character of a reversioner's suit and of the consequent applicability of the rule of *res judicata* even in favour of, or as against, the actual reversioner, who might not have been a party to the presumptive reversioner's suit. If this distinction is borne in mind, there will be little difficulty in reconciling the apparent conflict of cases or in deciding which line of authority governs the present case.

In *Janaki Ammal v. Narayanasami Aiyer*(1) there was, on the findings, nothing but the plaintiff's individual right that could be declared in his favour. In *Sheoparsan Singh v. Ramnandan Prasad Singh*(2) there was no reversionary interest at all to furnish the basis for a suit, because a Probate Court had declared that the last male owner had left a will. The other observations in the judgment must be understood as only warning the Courts against the possible abuse of the provisions relating to declaratory relief. On the other hand, it will be noticed that in *Saudagar Singh v. Pardip Narayan Singh*(3) the suit was only *in form* directed against an act of the widow. The substantial question decided in the case was whether the propositus was related by full blood or only by half blood to the plaintiff's ancestor; on the answer to this question depended the determination of the issue, whether the contesting defendant alone was the reversioner or the plaintiffs also were reversioners. Their Lordships saw no objection to the *real* question in dispute

between the parties being adjudicated on in that litigation; they say

"that must always be the case . . . because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made."

The present case is very similar. The plaintiff undoubtedly had a cause of action to sue for a declaration that the mortgage deed and the will executed by Narasammal should not affect the interests of the reversioners; the fact that the plaintiff subsequently settled the dispute with the first and the eighth defendants does not seem to us to justify the suggestion of the appellants that that portion of the suit was a sham fight merely intended to give the plaintiff a semblance of a cause of action. No such suggestion was made in the written statement. Narasammal left a registered will and she had put forward a claim to an absolute estate as early as 1927. The suit was therefore rightly laid. In such a suit the plaintiff could always be called upon to establish his status as a reversioner and the defendants could set up the title of another claimant by way of *jus tertii*. An issue relating to the plaintiff's status is therefore a proper and indeed a necessary issue in such cases. The question is whether such an issue should have been tried only as between the plaintiff and defendants 1, 2, 3, and 8, or could the defendants 4 to 7, whose title is the alternative title, have also been impleaded in the suit. If in the first instance these defendants had contented themselves with the objection to their inclusion in the suit, the Court might have removed them from the record; but when they set

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

(1) (1916) I.L.R. 39 Mad. 634 (P.C.). (2) (1916) I.L.R. 43 Cal. 694 (P.C.).
(3) (1917) I.L.R. 45 Cal. 510 (P.C.).

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

up a positive plea that they had become owners of the suit property on Narasammal's death, the Court could not reasonably evade the issue as to plaintiff's status as a reversioner, and there can be little doubt as to the advantage of trying it in the presence of defendants 4 to 7. The joinder of a prayer for relief against them may be open to a possible objection on the ground of misjoinder; but the terms of Order I, rule 4, Civil Procedure Code, are now so wide that there will be little substance in the objection to the joinder. Hence it is that the appellants take the objection that the plaintiff has no right to claim any relief against defendants 4 to 7.

It may be conceded that the decision in *Greeman Singh v. Wahari Lall Singh*(1) supports the appellant's contention, but the wide language employed by MITTER J. in that case has been dissented from in *Gangayya v. Mahalakshmi*(2) and *Manmatha Nath Biswas v. Rohilli Moni Dasi*(3). The distinction relevant to the application of section 42 of the Specific Relief Act is, not that between vested and contingent rights (as suggested by MITTER J.), but that between a suit for a declaration of the reversionary title of the plaintiff and a suit for the protection and preservation of the reversionary estate; see *Balmakund Lal v. Musammāt Sohano Kueri*(4). It was pointed out in *Puttanna alias Keshava Bhatta v. Ramakrishna Sastri*(5) that such protection or preservation is not limited to protection against acts of the widow, and the same principle was

applied in *Balmakund Lal v. Musammāt Sohano Kueri*(1). In *Puttanna alias Keshava Bhatta v. Ramakrishna Sastri*(2) SUBRAMANYA AYYAR and BENSON JJ. held that a presumptive reversioner could sue for a declaration against devisees claiming under an alleged will of the last male owner. In *Balmakund Lal v. Musammāt Sohano Kueri*(1) the learned Judges held that in a presumptive reversioner's suit the Court could legitimately decide the question whether the propositus died divided or undivided from his coparceners. They observed:

"Although the Court ought not to declare that the plaintiffs will be entitled to succeed . . . the Court may properly declare that Nandkumar was separate from his nephews and that he left an estate capable of being inherited by his heirs."

This is substantially what has been done in the present case by the learned Subordinate Judge. In *Ram Pershad Chowdry v. Jokhoo Roy*(3) the question in dispute between the parties was very similar to that raised in the present case, viz., as to who should be deemed to be the last holder, though there was the added feature in that case that the limited owner put the real claimant in possession and supported his claim. The decision in *Rama Rao v. The Raja of Pittapur*(4) dealt with the case on the footing that "the only declaration asked for was "that the plaintiffs and not the Raja are the next reversioners of the deceased". Even in such a case WALLIS C.J. based his decision only on the ground of the futility of the declaration and on the rule of practice against making such a declaration. SESHAGIRI AYYAR J.

DESU REDDIAR
v.
SRINIVASA
REDDI.
—
VARADA-
CHARIAR J.

(1) (1881) I.L.R. 8 Cal. 12. (2) (1886) I.L.R. 10 Mad. 90.
(3) (1904) I.L.R. 27 All. 406. (4) (1928) I.L.R. 8 Pat. 153, 159.
(5) (1906) I.L.R. 30 Mad. 195.

(1) (1928) I.L.R. 8 Pat. 153, 159. (2) (1906) I.L.R. 30 Mad. 195.
(3) (1884) I.L.R. 10 Cal. 1003. (4) (1918) I.L.R. 42 Mad. 219.

DESU REDDIAR v. SRINIVASA REDDI.
VARADACHARIAR J.

emphasised the distinction between the plaintiff's "individual right or legal character in his own right" and his "right as representing the entire body of reversioners". In *Surayya v. Subbamma*(1) NAPIER J. (with whose judgment on this point SADASIVA AYYAR J. concurred) expanded the view that a presumptive reversioner, when looked at in the character of a representative of the body of reversioners, has a "legal character" within the meaning of section 42 of the Specific Relief Act; and, if that character is disputed or denied by another, there is no reason why the case should not be held to fall within the section. The decision in *Latchamma v. Appanna*(2) is the logical result of the application of the above principle and the true *ratio* of the decision should not be allowed to be obscured by the fact that in that case the dispute as to the plaintiff's status was raised by the limited owner herself. In the words of PHILLIPS J., the suit will be maintainable whenever it is one

"to establish the identity of the last male holder and thereby to ascertain in which family are to be found the general body of reversioners".

On the question of fact as to whether a posthumous son was born to Bapu Reddi, we see no reason to differ from the conclusion of the learned Subordinate Judge. Even if the matter rested only on conflicting oral evidence, we should be slow to differ from the learned Subordinate Judge's appreciation of the evidence. In this case the documentary evidence and the probabilities are decidedly in favour of the plaintiff's version. It would appear from Exhibit D that within a

(1) (1919) I.L.R. 43 Mad. 4.

(2) (1921) 41 M.L.J. 386.

few days of Bapu Reddi's death it was stated that his younger wife was then only four months pregnant. It is impossible to accept the appellants' present story in the face of this statement.

As to the form of the decree, we have considered whether it is necessary or worthwhile to retain in the decree itself a reference to the question of the alleged birth of a posthumous son to Bapu Reddi. It is true, as pointed out in *Veerammal v. Kamu Ammal*(1), that it is not usual to embody a decision on such points in the decree. But in the particular circumstances of this case, it seems to us to be better on the whole to leave the decree as it is. The appeal fails and is dismissed with costs of the plaintiff, first respondent.

G.R.

(1) (1915) 2 L.W. 850.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Burn.

1936,
January 8.

V. K. R. N. S. M. SUBRAMANIAN CHETTIAR
(DEFENDANT), APPELLANT,

V. K. R. N. P. S. S. M. SOMASUNDARAM CHETTIAR
(PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption—Nattukottai Chetti community—Religious motive—Presence of—Distinction between them and Jains in the matter of adoptions—Muri—Execution of—Importance of—Formalities, such as feasting and making presents, if necessary ingredients—Orphan—Adoption of—Validity of—Distinction, if any, between such an adopted son and a Dattaka son—Custom assimilating such son to a Dattaka son—Validity of—Property vesting in daughter-in-law—Mother-in-law making adoption—Daughter-in-law not party to suit between mother-in-law and reversioners—Validity of such adoption inter partes.

P, a Nattukottai Chetti, died in 1911 leaving a widow V, who adopted in 1916 a boy A. A died in 1930 leaving behind him a widow E. In 1931 V adopted S, an orphan aged about 27 years. There was no giving of S by elders but he gave himself to V. V went through whatever was, according to the custom of the community, necessary to constitute the ceremony of adoption, and in particular a *muri* was executed which was attested by the nearest pangali. This attestation by the nearest pangali, according to Chetti usage, not merely signified proof of the execution of the document (as in the ordinary acceptance of the word "attested") but also associated him with the act of adoption as the nearest pangali in the adoptive family. About a month after the adoption, S was married and the nearest pangali played the role which according to the custom of the community is assigned to the nearest pangali kinsman in that function. S filed a suit as the adopted son of P against the nearest pangali claiming a division and

possession of a half share in the properties alleged to belong to the latter and P in common. The nearest pangali disputed the validity of the adoption and contended, *inter alia*, that, if at all, it was E who was entitled to adopt and not V.

Held: (i) In the Nattukottai Chetti community the religious motive for adoption is not absent and adoptions amongst them should not be assimilated to adoptions amongst communities like the Jains where the religious motive has no place. In the said community very great importance is attached to the execution of an adoption *muri*, and feasting and making presents are optional and their absence does not constitute a defect in the necessary ceremonial.

(ii) It is a well established custom in the said community to take orphan boys in adoption. Such an adoption cannot satisfy the definition of a Dattaka adoption, and such an adopted boy cannot as a matter of law (apart from proof of custom, when necessary) acquire all rights which under the general Hindu law are recognized in favour of a Dattaka son.

(iii) In the circumstances of the case, the adoption of S by V (mother-in-law), notwithstanding the existence of E (daughter-in-law) in whom the estate of A had vested, is a valid and proper one as between the parties, and it would have the effect of entitling S to the half share to which P and A were entitled in the common properties belonging to this branch and the branch of the nearest pangali, mentioned above.

E not being a party to the suit, the rights of S, if any, as against her or against any son that she might take in adoption were left open.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottah in Original Suit No. 27 of 1932.

T. M. Krishnaswami Ayyar for V. Rajagopala Ayyar and T. V. Ramiah for appellant.

M. Patanjali Sastri and T. K. Sundararaman for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal raises some

SUBRAMANIAN
v.
SOMA-
SUNDARAM.

* Appeal No. 272 of 1933.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

questions of law and custom relating to adoption in the Nattukottai Chetti community. They arise in the following circumstances:—

There were two brothers Pichappa and Somasundara. The defendant is Somasundara's adopted son; Pichappa left a son named Pichaikkutti. The two branches had become divided but continued to hold some immovable properties in common, according to the plaintiff's case.

Pichaikkutti died in 1911 leaving a widow Valliammai who, in 1916, adopted one Arunachala. Arunachala enjoyed Pichaikkutti's properties—whatever they were—married one Egammai and died in June 1930 leaving Egammai surviving him. On 7th June 1931 Valliammai adopted the plaintiff who was admittedly an orphan aged about 27 years at the time. As usual amongst Chettis, a *muri* (Exhibit A) was executed at the time of the adoption and it is attested by the defendant, a circumstance which according to Chetti usage not merely signifies proof of the execution of the document (as in the ordinary acceptance of the word "attested") but associates the defendant with the act of adoption as the nearest pangali in the adoptive family. Exhibit A recited that the plaintiff had become the son of Pichaikkutti and "shall, as son, hold and enjoy" all Pichaikkutti's properties. On the same day, the defendant signed Exhibit DD (though it is dated the previous day) which purports to be a decision of certain panchayatdars (of whom the defendant was one) to the following effect:

"Within a period of ten years from this day, the son that may be born to Lakshmanan (plaintiff) who is now adopted to Pichaikkutti shall be got adopted to Egammai, the wife of Arunachala or a son from the outside shall be adopted. The

said adopted son of Egammai and Pichaikkutti's son, Lakshmana, shall enjoy in equal halves all the properties."

Since the adoption the plaintiff has been living with Valliammai and Egammai in a portion of the family house, the other portion being in defendant's occupation. About a month after the adoption, the plaintiff was married, the defendant playing the role which, according to the custom of the community, is assigned to the nearest agnatic kinsman in that function, particularly the attestation of a document called "esaik-kudimanam" (Exhibit B in this case). Egammai does not appear to have yet taken anybody in adoption.

The plaintiff has filed this suit claiming a division and possession of a half share in the properties of which he alleges he is in possession as a "tenant in common" with the defendant and which according to him belong in common to the defendant's branch and to Pichaikkutti's branch. The defendant disputes the validity of the plaintiff's adoption and contends that at all events it is Egammai that is entitled to Arunachala's share. The plaintiff relies on custom to validate the adoption and give him a title to the property.

The pleadings are open to the criticism that the custom relied on by the plaintiff was never clearly or definitely formulated. Even issue 13 does not make any reference to the results of the adoption, assuming it to be valid. The points at issue between the parties as they finally emerged are: (i) whether the adoption of an orphan boy is permitted by the custom of the community; (ii) whether custom permits a mother-in-law to make

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

an adoption notwithstanding the existence of a daughter-in-law in whom the son's estate had vested at his death, and (iii) if the first two questions are answered in the affirmative, what exactly is the status and what are the rights of the boy so adopted. The second question was raised before this Court on a previous occasion (in Appeal Suits Nos. 158 of 1932 and 374 of 1933) but the learned Judges gave no finding on it, as they found it possible to dispose of the case on another ground. It may however be mentioned that in that case the lower Court gave a finding in favour of the existence of the custom. In the present instance also, another Subordinate Judge has come to an affirmative conclusion on the first and second of the points above set out.

On behalf of the appellant, Mr. T. M. Krishnaswami Ayyar raised before us a contention that in this case there was no proof at all of the plaintiff having been taken in adoption, because nothing was spoken to by the witnesses beyond the execution of a *muri*. We do not think it right to allow such a contention to be raised at this stage. The plaintiff's adoption as a fact was not disputed in the written statement or in the course of the evidence. The plaintiff's witnesses no doubt speak prominently to the execution of the *muri* and to the part that the defendant took in that connection, but that is apparently because the defendant attempted to minimise the importance of the part he then took. The defendant was admittedly present at the time; he admits that a number of relatives who had assembled for another function also attended the plaintiff's adoption. The defendant throughout speaks of

the adoption as an accomplished fact and has nowhere suggested that any particular act which according to the custom of the community was necessary to constitute an adoption was absent in this case. There was of course no "giving" of the boy by elders—as plaintiff says, he gave himself—but that is a matter to be discussed when dealing with the first of the questions above set out, viz., as to the validity of the adoption of an orphan. It is clear that in the Chetti community very great importance is attached to the execution of the adoption *muri*, and it has not been suggested that Exhibit A was brought into existence with a view to a contemplated adoption which did not in fact take place. We have therefore decided to deal with the case on the footing that the plaintiff went through whatever was according to the custom of the community necessary to constitute the ceremony of adoption. Feasting and making presents are optional and their absence cannot constitute a defect in the necessary ceremonial.

The practice of taking orphan boys in adoption may well be said to be established by the evidence in the case. The instances spoken to are no doubt comparatively recent, but that is a limitation arising from the very nature of oral evidence. The evidence on the point is all one way and no witness has been called on the side of the defendant either to deny the existence of the practice or even to suggest that such adoptions are looked upon with disfavour in the community. The title of such boys to the properties of their adoptive parents seems to have been admitted in all cases as a matter of course. The conduct of the defendant himself in connection with Exhibit A

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

and Exhibit DD and the conduct of the other panchayatdars who took part in Exhibit DD are also not without significance in this connection; see the observation of the Privy Council in *Ramkishore v. Jainarayan*(1). We therefore see no reason to differ from the conclusion of the learned Subordinate Judge that the plaintiff's adoption cannot be held to be invalid merely on the ground that he was an orphan at the time of the adoption. We are, however, not prepared to go so far as his statement would seem to imply when he says that in the Chetti community the motive that operates in connection with adoptions is secular. In other sections of the Hindu community also, the secular motive is not without importance; and even amongst Chettis the religious motive is not absent. We cannot agree that the case could or should be assimilated, for instance, to adoptions amongst communities like Jains where the religious motive has no place.

The evidence does not however establish what exactly are the rights of an orphan boy taken in adoption. The witnesses speak only to his enjoyment of the properties of his adoptive parents. The adoption will not satisfy the definition of a Dattaka adoption and we do not wish to be understood as deciding that, in this community, an orphan boy when adopted will as a matter of law (apart from proof of custom—when necessary) acquire all the rights which under the general Hindu law are recognised in favour of a Dattaka son. It must not be forgotten that when and in so far as Hindu usage

(1) (1921) I.L.R. 49 Cal. 120, 131 (P.C.).

recognised other forms of adoption or affiliation besides the Dattaka, it did not always accord to persons so adopted all the rights given to a Dattaka, nor impose on him the same disabilities; cf. *Jiwan Mal v. Jamna Das*(1), *Tirath Ram v. Mst. Kahan Devi*(2) and *Kanhaiya Lal Sahu v. Mussamat Suga Kuer*(3).

On the second of the points above set out, the evidence establishes eight or nine instances. Out of these, in all except two, adoptions were said to have been made both by the daughter-in-law and by the mother-in-law; and by arrangement between the parties both the adopted boys are said to have shared the estate. Mr. Krishnaswami Ayyar has advanced four contentions in this connection. He pointed out that none of the instances spoken to by the witnesses relate to the Illuppakkudi sub-division of the Chetti community to which the parties to this suit belong and he also contended that the instances were after all too few and recent to establish a custom for the whole community. We do not feel that there is much force in the first objection. No distinction on this ground seems to have been suggested in the course of the trial and it does not appear that there is any marked difference in practice between this and the other sub-divisions of the community. The second objection has greater force and we should have hesitated to accept the conclusion of the lower Court on this part but for the fact that we find it possible in the circumstances of this case to limit our decision to one between the parties. This

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

(1) (1910) 10 I.G. 822.

(2) (1920) I.L.R. 1 Lah. 588.

(3) (1925) I.L.R. 4 Pat. 824.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

course has been adopted by the Privy Council in some instances; even when questions of custom were raised; see *Rup Chand v. Jambu Prasad*(1), *Chiman Lal v. Hari Chand*(2) and *Parshottam Ganpat v. Venichand Ganpat*(3). As pointed out by Mr. Golap Chandra Sarkar Sastri (Law of Adoption, Lecture V) when discussing *Rungama v. Atchama*(4), Hindu opinion has long been divided on the question of multiple adoptions, and where there are more widows than one—whether co-widows or daughter-in-law and mother-in-law—the sentiment in favour of each having a boy adopted by herself, though in theory to her husband, has been pretty strong in the Hindu community. Amongst the instances spoken to in this case, we find one or two where a person adopted a boy even after the daughter-in-law had adopted a son, whereas under the Hindu law there could be no adoption when there is a grandson by adoption. The language employed by Lord KINGSDOWN in *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(5) seems to suggest that it is against the policy of the law generally to permit an adoption by the mother-in-law after the estate had vested in the daughter-in-law. In this view, it might be said that a custom, even if established, would be invalid as opposed to public policy. But as recent cases have not reaffirmed this ground but have based the termination of the mother's power on religious grounds, the possible objection based on public policy need not be examined.

(1) [1910] I.L.R. 32 All. 247 (P.C.). (2) [1913] I.L.R. 40 Cal. 879 (P.C.).
(3) [1920] I.L.R. 45 Bom. 754. (4) [1846] 4 M.L.A. 1.
(5) [1865] 10 M.L.A. 279, 310.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

Mr. Krishnaswami Ayyar's third contention is based on the fact that in all the instances spoken to by the witnesses the rights of the parties were regulated by family settlement. He drew our attention to the observation of the Judicial Committee in *Abdul Hussein Khan v. Sona Dero*(1) to the effect that arrangements resting upon such agreements, far from proving a custom binding of its own force, destroy the custom. We do not agree that their Lordships' observation could be taken out of its context and made to support a general proposition in the form put forward by Mr. Krishnaswami Ayyar. There was a body of respectable evidence in that case denying the existence of the custom pleaded and it was in appraising the value of the conflicting testimony that the Judicial Committee made the above observation. This is shown by their concluding observation on page 468 that,

"although there is much reason in history for the custom alleged and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Muhammadan law to a devolution determined by family custom".

On the other hand, in *Palaniappa Chettiar v. Alagan Chetti*(2), where they were dealing with a custom alleged to exist in the Chetti community, their Lordships note a similar argument on page 750 and answer it by pointing out that the witnesses who spoke to those documents or arrangements also gave oral evidence in favour of the custom. The evidence in the present case is of the same kind.

(1) [1917] I.L.R. 45 Cal. 450, 467 (P.C.).
(2) [1921] I.L.R. 44 Mad. 740 (P.C.).

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

The appellant's last contention is based upon the fact already noticed that, in most of the instances spoken to in the evidence, two adoptions are said to have been made, one by the mother-in-law and the other by the daughter-in-law. This may be more fully discussed when dealing with the third question as to the rights of boys thus adopted. At this stage we will only observe that, so far as the prevalence of the practice is concerned, it seems to us to make no difference on the question of fact that an adoption in such cases is also made by the daughter-in-law. Mr. Patanjali Sastri insisted that a differentiation on this ground was not suggested in the course of the trial and contended that if it had been so suggested it might have been possible for his client to adduce evidence of a large number of instances where adoption was made by the mother-in-law. He also relied strongly on Exhibits A and DD as showing the consciousness of the defendant and of those who took part in them that an adoption might be made by the mother-in-law independently of, and long before, an adoption by the daughter-in-law, because Exhibit DD contemplates an adoption by the daughter-in-law only some years later, while, Exhibit A proceeds on the footing that the son adopted by the mother-in-law will immediately get the property. It cannot be denied that this last contention is well founded, at any rate, as against the defendant. Mr. Krishnaswami Ayyar argued that Exhibit A merely contemplates the acquisition by the plaintiff of such property as might be regarded as Pichaikkutti's even at the date of the plaintiff's adoption and net of the property of Arunachala. We are

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

unable to put such a construction upon Exhibit A. Arunachala must on his adoption have inherited the whole estate of Pichaikkutti and it will be meaningless to suggest that the parties to Exhibit A contemplated some property of Pichaikkutti, other than what had vested in Arunachala, being still available for the plaintiff.

The last question, viz., that relating to the rights flowing from such adoption, has caused us greater difficulty. Mr. Patanjali Sastri maintained that, once custom is invoked to validate an adoption by the mother-in-law even when there is a daughter-in-law, it would follow as a matter of law that a son thus adopted by the mother-in-law would divest even the daughter-in-law of the estate vested in her as heir to her husband. We are not able to accept this contention. It seems to us in the first place doubtful whether it would be proper to attach to an adoption which, *ex hypothesi*, is opposed to the general Hindu law but is only sought to be validated by custom, all the legal consequences which the general law would attach to an adoption valid under the general law. We do not however pursue this point, because, we are not satisfied that, under the general law itself, an adoption like that of the plaintiff (assuming it to be valid) will have the effect of divesting the daughter-in-law of the estate which she had taken as her husband's heir. We may refer in this connection to the judgment of the Calcutta High Court in *Padmakumari's case*(1), where the learned Judges interpreted the decision of the Privy Council in

(1) (1881) I.L.R. 8 Cal. 302 (P.C.).

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

Bhoobun Moyee's case (1) as not invalidating the adoption by the mother-in-law but only as precluding the divesting of the estate vested in the daughter-in-law. This decision of the Calcutta High Court was reversed by the Privy Council in *Padmakumari Debi Chowdhurani v. Court of Wards* (2), where their Lordships declared that the effect of the decision in *Bhoobun Moyee's case* (1) was also to invalidate the adoption on the footing that the mother-in-law's power of adoption had come to an end on the vesting of the estate in the daughter-in-law. But the High Court's judgment at least shows that the assumption of the validity of the adoption by the mother-in-law will not necessarily involve the conclusion that the estate of the daughter-in-law must be divested; cf. the opinion of REILLY J. in *Sukdevdoss Ramprasad v. Musamat Choti Bai* (3). Mr. Patanjali Sastri pointed out that the judgments in *Amarendra Mansingh v. Sanatan Singh* (4) and *Vijaysingji v. Shivsangji* (5) have greatly limited the effect of their Lordships' observations in *Bhoobun Moyee's case* (1). It is true that the recent decisions have to some extent dissociated the question of the termination of a widow's power to adopt from that relating to the vesting and divesting of the estate. But it does not seem to us to follow that the conclusion in favour of the continuance of the widow's power of adoption will necessarily justify the conclusion that the person so adopted will, regardless of other considerations, also divest everybody who might in the

interval have taken the estate which once belonged to the adoptive father.

The basis on which a son adopted by a mother succeeding as heir to her son could divest the mother herself of the estate so inherited by her has been the subject of some discussion [see *Rai Jatindra Nath Chaudhuri v. Amirta Lal Bagchi* (1)], and it was till recently assumed that, in cases where the adoption is not to the last male holder, the adopted son can only divest the estate vested in the adopting mother. The Bombay High Court sometimes added an exception based on the consent of the persons in whom the estate was for the time being vested; cf. *Payapa v. Appanna* (2). The decisions of the Privy Council in *Amarendra Mansingh v. Sanatan Singh* (3) and *Vijaysingji v. Shivsangji* (4) seem however to assume that even the estate vested in a collateral on the death of the son may be divested by a son adopted by the mother. The question nevertheless remains, how far these two decisions can be held to overrule the principle enunciated by Lord KINGSDOWN in *Bhoobun Moyee's case* (5) that under the Hindu law "a person to succeed must be the heir of the last full owner". In the present case, as in *Bhoobun Moyee's case* (5), the first adopted son was the last full owner and the inheritance must be traced to him. The nearest heir on that footing will be his widow and not the plaintiff, even if by a fiction of law the plaintiff could be assumed to have become a member of this family at the moment of Arunachala's death. On the other hand, in

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

(1) (1865) 10 M.I.A. 279.
(2) (1881) I.L.R. 8 Cal. 302 (P.C.). (3) (1927) 27 L.W. 135.
(4) (1933) I.L.R. 12 Pat. 642 (P.C.). (5) (1935) I.L.R. 59 Bom. 360 (P.C.).

(1) (1900) 5 C.W.N. 20.
(2) (1898) I.L.R. 23 Bom. 327. (3) (1933) I.L.R. 12 Pat. 642 (P.C.).
(4) (1935) I.L.R. 59 Bom. 360 (P.C.). (5) (1865) 10 M.I.A. 279, 311.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

Amarendra Mansingh v. Sqnatan Singh(1), and *Vijaysingji v. Shirsangji*(2) the estate had temporarily vested in a distant collateral who would only be a remoter heir, if by fiction the adopted son could be deemed to have been in existence as such at the moment of the first son's death or civil death. How far the doctrine of relation back of the adopted son's title can be carried, in cases where inheritance is not to be traced directly to the adoptive father, can by no means be regarded as settled; cf. *Bhubaneswari Devi v. Nilcomul Lahiri*(3) and *Veeranna v. Sayamma*(4). Mr. Patanjali Sastri suggested that the fiction of the plaintiff's existence as Pichaikkutti's son must be carried back to the date of Pichaikkutti's death (and not merely to the date of Arunachala's death); and, if on this assumption the plaintiff and Arunachala could be regarded as undivided coparceners, he said, the plaintiff would take the property of Arunachala by survivorship even in preference to Arunachala's widow. But even a fiction cannot be carried to illogical limits; and, in this case, it seems unreasonable to postulate the legal existence of the plaintiff's title as that of a coparcener of Arunachala, because, as long as Arunachala was alive, his existence would itself be a bar to any adoption by his mother, and the plaintiff could not have become Pichaikkutti's son during Arunachala's lifetime.

Mr. Patanjali Sastri next contended, in the alternative, that even as a matter of custom the evidence establishes that the son adopted by the mother-in-law in such circumstances divests

(1) (1933) I.L.R. 12 Pat. 642 (P.C.). (2) (1935) I.L.R. 59 Bom. 360 (P.C.).
(3) (1885) I.L.R. 12 Cal. 18 (P.C.). (4) (1928) I.L.R. 52 Mad. 398.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

the daughter-in-law. It is in this connection that Mr. Krishnaswami Ayyar's argument becomes important, that, where the daughter-in-law also makes an adoption, the boy adopted by her would undoubtedly divest her and arrangements entered into by or on behalf of that boy, whereby some property is given to the boy adopted by the mother-in-law, cannot prove that the latter is in his own right entitled to divest the daughter-in-law. As stated already, there are only two instances referred to in the evidence of adoptions by the mother-in-law alone. Mr. Papanjali Sastri was therefore obliged to rely on Exhibits A and DD and the subsequent conduct of the defendant (including his part in Exhibit B and Exhibit Y) as sufficient to establish the plaintiff's right, as against the defendant, to possession of Pichaikkutti's share. He referred us in this connection to the observations in *Ramalinga Pillai v. Sadasiva Pillai*(1) and *Sooratha Singa v. Kanaka Singa*(2). In the former case, the plaintiff's adoption was sought to be invalidated on two grounds; (i) that the adoptive father was in pollution at the time of the alleged adoption and (ii) that the plaintiff was his sister's son. After referring to the several occasions on which the plaintiff was styled as adopted son by the defendant's father, their Lordships observed on page 515:

"If there were no adoption at all or if the actual adoption were for any reason legally invalid, the respondent would of course not be entitled to that designation. They amount therefore to a complete admission of the whole title of the respondent both in fact and in law and show that the objections which have been urged to his claim, in the opinion of the

(1) (1864) 9 M.I.A. 506.

(2) (1920) I.L.R. 43 Mad. 867.

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

appellant's father, who probably was well acquainted with all the circumstances and may be assumed to have known the Hindu laws and customs, had no foundation."

In *Sooratha Singa v. Kanaka Singa*(1), where the question related to the existence of a custom permitting the adoption of a brother's daughter's son, SADASIVA AYYAR J. referred to an admission made by the objector and, on the authority of the decision in *Ramalinga Pillai v. Sadasiva Pillai*(2), observed that

"it was an admission both of the fact and of the validity of the defendant's adoption. The burden of proving that it was not valid was therefore shifted."

An admission could of course be explained away, but the defendant has not seriously attempted to do so in the present case. Again, on a mere point of law an admission may not be of much significance, but where the question raised is one of custom, the position is different. Finally, as observed in *Bhoobun Moyee's case*(3), where the person whose conduct is relied on could hardly have distinguished "between an adoption in fact and a legal adoption" and the facts ascertained in the case disprove the adoption, presumptions arising from conduct may not be of any value; but it was recognized in the same passage that "upon a question which depended upon the preponderance of evidence", acts of acquiescence would be important. We accordingly accept the lower Court's conclusion to this extent, that, as against the defendant, the evidence is sufficient to establish that the plaintiff was entitled to the half share which Pichaikkutti and Arunachala were entitled to in the common properties of the two branches.

(1) (1920) I.L.R. 43 Mad. 867.

(2) (1864) 9 M.I.A. 506.

(3) (1865) 10 M.I.A. 279.

Egammal is not a party to this suit nor has she even been examined as a witness in the case. The evidence does not show whether she was a party to Exhibit DD or consented to plaintiff's adoption. We do not therefore wish to be understood as expressing any opinion in respect of the plaintiff's rights as against Egammal or as against any son that she may take in adoption.

The plea of estoppel (raised by issue 12) was not pressed before us. But we think it right to point out that the decision in *Dhanraj Joharmal v. Soni Bai*(1) does not preclude a plea of estoppel, as between certain parties, even on a question of adoption; there can of course be no estoppel arising out of representation on a mere point of law. In the case before their Lordships, the decision turned on the distinction (which they emphasise on page 495) between an ordinary Agarwalla adoption "and the regular Hindu or Brahminical adoption", on the assumption that rights of collateral succession arise only in the latter case. On this footing, the Board held that "the representation and acts of Ramdhan" only related to a secular or Agarwalla adoption.

The decree of the lower Court in this case, may, it seems to us, also be supported on another ground. The defendant is admittedly entitled only to a half share in whatever may be found to be the common property of the two branches. As regards the other half, his plea is really one in the nature of *jus tertii*. Such a plea may be available in an action in ejectment, i.e., where the plaintiff is not in possession, see *Chandrika Bakhsh Singh*

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR

(1) (1925) I.L.R. 52 Cal. 482 (P.C.).

SUBRAMANIAN
v.
SOMA-
SUNDARAM.
—
VARADA-
CHARIAR J.

Indar Bilram Singh(1); but the evidence in this case establishes that the plaintiff is in legal possession of the properties along with the defendant, having been so admitted to possession by the defendant himself on the assumption that the plaintiff was entitled thereto. Valliammai and Egammai are living with the plaintiff and Egammai has not so far disputed the plaintiff's right or title. In these circumstances it seems to us proper to allow the plaintiff to convert his "common" possession of the whole into separate possession of a half share as against the defendant and leave it to Egammai, if she so chooses, to assert her rights, if any, as against the plaintiff in due course. We are unable to accept Mr. Krishnaswami Ayyar's contention that the defendant can treat the plaintiff as a trespasser on property held by the defendant and Egammai as tenants in common.

[Portion of the judgment omitted as not being necessary for this report.]

The appeal accordingly fails and is dismissed with costs.

G.R.

(1) (1916) I.L.R. 38 All. 440, 445 (P.C.).

APPELLATE CRIMINAL.

Before Mr. Justice King.

IN RE MUTHUVELU KUDUMBURAN AND ANOTHER (ACCUSED
IN P.R.C. No. 18 OF 1935 ON THE FILE OF THE COURT OF THE
STATIONARY SECOND-CLASS MAGISTRATE OF TANJORE.)*

1936,
May 6.

Criminal Procedure Code (Act V of 1898), sec. 195—Some facts in a complaint disclosing a minor offence under sec. 182, Indian Penal Code—Entire facts disclosing primarily an offence under sec. 211, Indian Penal Code—Former requiring complaint from public servant, latter not in the circumstances—Complaint by a private person under sec. 211, Indian Penal Code—Competency of Court to try.

When a complaint is made, there must be no splitting up of the facts, and the Court is not entitled to disregard some of the facts and try or convict an accused person for an offence which the remaining facts disclose, but the Court must consider the facts as a whole, and if these facts disclose an offence for which a special complaint is necessary under the provisions of section 195 of the Code of Criminal Procedure, a Court cannot take cognizance of the case at all unless that special complaint has been filed.

Where, when all the facts of a complaint were considered, it was clear that the only section which was appropriate and which must be applied was section 211 of the Indian Penal Code, and a complaint under that section could in the circumstances of the case be made by a private person,

he'd, accordingly, that the Court must regard the complaint as being one under section 211 of the Penal Code primarily and that it was not debarred from trying the case under that section simply because the complaint also disclosed a minor offence under section 182 of the Indian Penal Code for which a written complaint from a public servant was necessary.

Ravanappa Reddi, In re, (1931) I.L.R. 55 Mad. 343, explained and applied.

* Criminal Revision Case No. 224 of 1936.

1004 THE INDIAN LAW REPORTS [VOL. LIX]

MUTHUVELU
KUDUMBURAN,
In re.

CASE REFERRED for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of West Tanjore Division in his order, dated 24th February 1936, in Criminal Revision Petition No. 2 of 1936.

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

A. Narasimha Ayyar and S. Suryanarayana for complainant.

V. Viswanatha Sastri for first and second accused.

ORDER.

This reference from the learned Sessions Judge of West Tanjore raises an interesting point of law. The facts are that on 25th September 1935, the wife of one Samiyya Kudumburan died in the village of Avarampatti. Information was given to the Village Munsif of that village that the death had been due to beating by her husband. The Village Munsif went to the nearest police station and gave a report incorporating this information. The result of the police investigation was reported to the Sub-Magistrate to the effect that the complaint was not true and that the death was due to natural causes, and the Sub-Magistrate passed orders treating the case in this light and directing its removal from the police file. Then Samiyya Kudumburan, the husband of the deceased woman, filed a private complaint before the Sub-Magistrate against the Village Munsif and also against his informant, accusing them of having given false information to the police with a view to prosecute him on a charge of murder. The complaint was taken on file by the Sub-Magistrate under section 182, Indian Penal Code, and he held

an enquiry under section 202, Criminal Procedure Code. At the conclusion of the enquiry the Magistrate filed the case no longer under section 182, but under section 211, Indian Penal Code. When the trial of the case was about to begin the Village Munsif, one of the accused, took a preliminary objection that on the facts of the case the complaint disclosed an offence under section 182, Indian Penal Code, and that under section 195, Criminal Procedure Code, no complaint could be entertained by the Magistrate of an offence under section 182, Indian Penal Code, except upon the written complaint of the Sub-Inspector of Police. The Magistrate overruled this objection but the learned Sessions Judge is of opinion that it is a valid one and has submitted the case for the orders of the High Court.

There is no doubt that in this case both section 182 and section 211, Indian Penal Code, can be applied to the facts alleged in the complaint. The learned Sessions Judge considers that he is bound by the ruling in *Ravanappa Reddi, In re* (1). That is a case in which a private person made a complaint of forgery and a conviction was had under sections 467 and 109, Indian Penal Code. But it was found that on the facts of the complaint the intention of the person who abetted the forgery was clearly that the forged document should be used in a judicial proceeding and, therefore, what he did constituted also an offence under section 193, Indian Penal Code. It was held by the learned Judges who decided that case that the provisions of section 195 of the Criminal

MUTHUVELU
KUDUMBURAN,
In re.

(1) (1931) I.L.R. 55 Mad. 348.

MUTHUVELU
KUDUMBURAN,
In re.

Procedure Code could not be evaded by ignoring those elements of the offence which brought it under section 193, Indian Penal Code, and by the Court confining its attention to the other elements of the offence which alone were necessary to prove the applicability of section 467, Indian Penal Code. It will be seen, therefore, on a careful analysis of this case, that the principle involved is this: that when a complaint is made there must be no splitting up of the facts, and the Court is not entitled to disregard some of the facts and try or convict an accused person for an offence which the remaining facts disclose, but the Court must consider the facts as a whole, and if these facts disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code, a Court cannot take cognizance of the case at all unless that special complaint has been filed. It will now be clear that, when the present case is examined, what the learned Sessions Judge recommends should be done is the exact opposite of this procedure. There is no doubt that section 182, Indian Penal Code, which is a general section relating to false information of a general kind given with the intention of making a public servant do what he would not otherwise have done or cause injury to any other person, can be made to apply to the facts of this case. But if all the facts are considered, it is quite clear that the move of the Village Munsif and the co-accused was to induce the public servant not merely to do what he would not otherwise have done but to take the specific action of investigating the offence and prosecuting the person complained against. It is

MUTHUVELU
KUDUMBURAN,
In re.

therefore clear that, if the whole of the facts in this case are examined, the only section which is appropriate and which must be applied is section 211, Indian Penal Code, and it would be obviously anomalous and in every respect undesirable if the law were that simply because an offence under section 182, Indian Penal Code, was also disclosed and because for the trial of such an offence a written complaint from a public servant is necessary, the Court should be debarred from enquiring into the real nature of the offence which comes within section 211, Indian Penal Code. In the present case, it is quite clear that a complaint under section 211, Indian Penal Code, can be made by a private person. If we, therefore, follow the principle of *Ravanappa Reddi, In re*(1), it leads us to this position, that in this case the Court must regard this complaint as being one under section 211, Indian Penal Code, primarily, and, as I have just said, it cannot be prevented from trying the case under section 211 because the Sub-Inspector has not filed a written complaint of the minor offence under section 182, Indian Penal Code. I am accordingly of opinion that the order of the learned Magistrate refusing to accept the preliminary objection of the Village Munsif in this case was right. The records will be returned to him and he is directed to proceed with the trial of the case under section 211, Indian Penal Code, and dispose of it according to law.

V V C