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THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

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JUDGES OF THE HIGH COURT

1937

1ST JANUARY TO 31ST DECEMBER.

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1937

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THE INDIAN LAW REPORTS (MADRAS SERIES)

PRIVY COUNCIL.

ALLURI VENKATAPATHI RAJU AND ANOTHER,
APPELLANTS,

J.C.*
1936,
July 17.

v.

DANTULURI VENKATANARASIMHA RAJU AND OTHERS,
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Hindu Law—Mitakshara joint family—Renunciation of interest
in family estate by one member—Status of remaining
members.*

Where a member of a Hindu joint family governed by the Mitakshara law relinquished his interest in the family property, left the ancestral village and settled in another village and where he and his descendants ceased to have anything to do with the other members of the family,

held, that the renunciation merely extinguished the renouncing member's interest in the family estate, but did not affect the status of the remaining members *quoad* the family property and they continued to be coparceners as before.

The only effect of renunciation is to reduce the number of persons to whom shares would be allotted, if, and when, a division of the estate takes place.

Balabux v. Rukhmabai (1903) L.R. 30 I.A. 130; I.L.R. 30 Cal. 725, *Appovier v. Rama Subba Aiyan* (1866) 11 M.I.A. 75, *Amritrao v. Mukundrao* (1919) 15 Nag. L.R. 165; 13 L.W. 112 (P.C.) and *Balkishen Das v. Ram Narain Sahu* (1903) L.R. 30 I.A. 139; I.L.R. 30 Cal. 738, referred to.

* *Present*: Lord ROCHE, Sir SHADI LAL and Sir GEORGE RANKIN.

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CONSOLIDATED APPEALS (Nos. 55 and 56 of 1933) from a decree of the High Court (September 27, 1927) modifying a decree of the Subordinate Judge of Masulipatam (November 9, 1922).

The material facts are stated in the judgment of the Judicial Committee.

Dunne K.O. and Subba Row for appellants.

De Gruyther K.C. and Abdul Majid for respondents.

On the question of the effect of relinquishment by one member of his interest in the family property on the status of the remaining members, the following authorities were referred to in the course of the arguments:—

Bal Krishna v. Ram Krishna(1), *Mayne's Hindu Law*, paragraphs 275, 277 and 496, *Haridas Narayandas v. Devkuvarbai*(2), *Appovier v. Rama Subba Aiyar*(3), *Balkishen Das v. Ram Narain Sahu*(4), *Balabux v. Rukhmabai*(5), *Mst. Jatti v. Banwari Lal*(6), *Rampershad Tewarry v. Sheochurn Doss*(7), *Sudarsanam Maistri v. Narasimhulu Maistri*(8), *Golap Chandar Sarkar Sastri's Hindu Law*, 6th edition, page 493, and cases cited by him.

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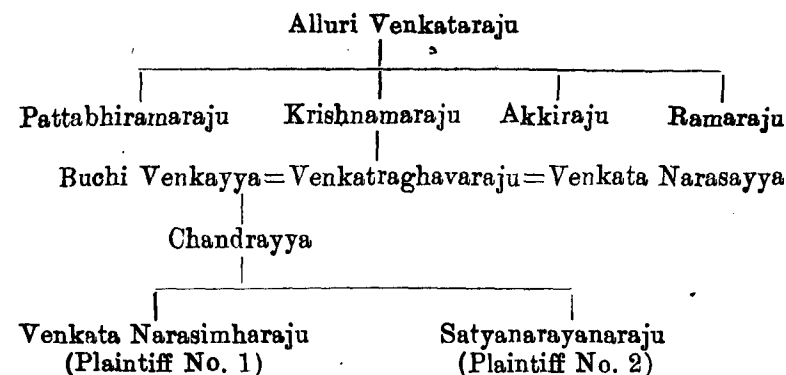
The JUDGMENT of the Judicial Committee was delivered by Sir SHADI LAL.—These are two consolidated appeals from a decree of the High Court of Judicature at Madras, by which that Court set aside a decree of the Subordinate Judge of Masulipatam dismissing the plaintiffs' suit, and granted a declaration that the plaintiffs would be entitled

- (1) (1931) L.R. 58 I.A. 220; I.L.R. 53 All. 300.
(2) (1926) I.L.R. 50 Bom. 443, 446. (3) (1866) 11 M.I.A. 75.
(4) (1903) L.R. 30 I.A. 139; I.L.R. 30 Cal. 788.
(5) (1903) L.R. 30 I.A. 130; I.L.R. 30 Cal. 725.
(6) (1923) L.R. 50 I.A. 192; I.L.R. 4 Lah. 350.
(7) (1866) 10 M.I.A. 490. (8) (1901) I.L.R. 25 Mad. 149.

to succeed, on the death of their mother, to a portion of the estate claimed by them. The principal question, on which elaborate arguments have been advanced by the learned Counsel for the parties, is whether the plaintiffs' maternal grandfather was, or was not, joint in estate with the ancestors of the contesting defendants.

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The relationship of the persons concerned is indicated in the following pedigree:—



The common ancestor of the parties, Alluri Venkataraju, and his four sons constituted a joint Hindu family governed by the Mitakshara school of the Hindu law. They originally resided in Gudimellanka in the Godavari district of the Madras Presidency, but in or about 1839 the eldest son, Pattabhiramaraju, severed his connection with the family and went away to another village to earn his livelihood. After his departure, Venkataraju and his remaining three sons continued to live together, and it seems that they were still living at Gudimellanka when the father died in 1842. Thereafter, the three sons left their ancestral village and moved first to Jangemsavaram, and finally took up their abode at Chintalappalli where they made their home. While they

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were living at that place they started business on a large scale, and acquired valuable properties with the profits of the business.

On 14th July 1882, Krishnamaraju and his son Venkatraghavaraju were drowned in the Godavari river, and the Courts below have concurred in holding that it was the father who died first, and that his son succumbed shortly afterwards on that very day. Venkatraghavaraju left him surviving a widow Narasayya and a daughter Chandrayya by his pre-deceased wife Buchi Venkayya.

After the deaths of Krishnamaraju and his son, Akkiraju and Ramaraju continued to carry on the business, and while they did not recognize the right of Venkatraghavaraju's widow to inherit her husband's share in the estate belonging to the family, they provided ample maintenance, not only for her and her step-daughter Chandrayya, but also for the widow and daughters of Krishnamaraju.

In 1894, Akkiraju died and was succeeded by Ramaraju as the manager of the family estate. After the death of Ramaraju which took place in 1903, there were dissensions between the descendants of the two brothers, which culminated in 1908 in a suit for a partition of the joint estate. To that suit which was brought by Subbaraju, a grandson of Akkiraju, not only were the other male descendants of Akkiraju and Ramaraju impleaded as defendants, but also Venkatraghavaraju's daughter Chandrayya and her two minor sons who are the plaintiffs in the present case. No written statement was filed on behalf of the minors by

their mother who was appointed their guardian *ad litem*; but in the pleas raised by her on her own behalf she claimed the estate on the ground of inheritance from her father who, she said, was separate from his collaterals. This plea gave rise to an issue about the jointness or otherwise of Venkatraghavaraju with Akkiraju and Ramaraju, but no evidence was adduced by the parties on that issue, and the judgment of the trial Court which decreed partition of the estate states that the issue "was given up by the parties". The decree for partition granted by the Court of first instance was affirmed on appeal by the High Court.

The joint property was duly partitioned in accordance with the decree, and it was not until 3rd April 1918 that the suit which has led to these appeals was commenced by Chandrayya's sons against the members of the Alluri family who were in possession of the estate. They alleged that in or about 1839 there was a separation among the four sons of Venkataraju, and that the property which is the subject-matter of the suit was acquired by Krishnamaraju and his son Venkatraghavaraju, and devolved at the death of the latter upon his daughter as his heir under the Hindu law. They urged that the judgment pronounced in the suit of 1908 was not binding upon them, and asked for a declaration of their right to succeed, after the death of their mother, to the property specified in the schedules attached to the plaint which, they said, had belonged to their maternal grandfather. Their claim was resisted by the descendants of Akkiraju and Ramaraju on

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various grounds, including the plea that Krishnamaraju with his son was joint with his brothers, and that on the deaths of the father and the son in 1882 the estate passed to Akkiraju and Ramaraju by survivorship. This plea was upheld by the trial Judge but his judgment has been reversed by the High Court.

Now, the first question which their Lordships have to consider is whether there was a separation of the joint family in the lifetime of Venkataraju. There can be no doubt that the father of a joint family has the power to divide the family at any time during his life without the consent of his sons and, if he makes a division, it has the effect of separating not only the father from the sons but also the sons *inter se*. No evidence has, however, been produced to prove such a division by Venkataraju, and the only circumstance, to which reference has been made in the arguments, is the migration in 1839 of the eldest son Pattabhiramaraju from his ancestral village to another village called Pothumatla where he settled permanently. The family was at that time in straitened circumstances and had no property except a small dwelling house. Not only did Pattabhiramaraju relinquish his interest in that house but, as found by the Courts in India, he severed his connection with the joint family; and after his departure he and his descendants had nothing to do with the other sons of Venkataraju.

What is the effect of this renunciation upon the status of the other members of the family? It is argued that, when one member of a joint family separates from the other members, his separation operates as a separation of all the

members of the family from one another. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other coparceners are or would be entitled to, and in this sense, subject to the question whether these others have agreed to remain united or to reunite, the separation of one is said to be a virtual separation of all, *Balabux v. Rukhmabai*(1). It is a settled rule that when the members of a family hold the family estate in defined shares, they cannot be held to be joint in estate. But no definement of shares need take place when the separating member does not receive any share in the estate but renounces his interest therein. His renunciation merely extinguishes his interest in the estate, but does not affect the status of the remaining members *quoad* the family property, and they continue to be coparceners as before. The only effect of renunciation is to reduce the number of the persons to whom shares would be allotted, if, and when, a division of the estate takes place.

The Courts below have, therefore, rightly held that the departure of the eldest son did not effect a change in the status of Venkataraju and his other sons; and that they continued to be members of the joint family.

It appears that it was after the death of the father that his three sons began to acquire property out of the profits of the business carried on by them. The eldest of them, Krishnamaraju, obtained from Government the monopoly of selling (arrack) liquor in a taluk of the Godavari

(1) (1903) L.R. 30 I.A. 130; I.L.R. 30 Cal. 725.

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district, and his youngest brother got a similar contract for selling another liquor. The third brother, Akkiraju, was engaged in the work of a farmer of Crown lands. They were successful in their ventures, and it is stated that the various properties acquired by them amounted in value to about Rs. 1,50,000 in 1882, when Krishnamaraju and his son were drowned in the river.

The learned Judges of the High Court have agreed with the trial Judge that Venkatraghavaraju died after his father, and the question arises whether, at the time of his death, he was a member of a Hindu coparcenary with Akkiraju and Ramaraju, or whether he was separate from them in estate. On this point, the High Court, dissenting from the Subordinate Judge, holds that though the estate was not partitioned by metes and bounds, there was a severance of the joint status, with the result that they held the estate not as joint tenants but as tenants in common. The learned Counsel for the parties have invited their Lordships' attention to various cases which define the nature of a Hindu coparcenary and the relations of its members *inter se*, and enunciate the principles which should be followed in determining the question of the severance of the joint status. The leading case on the subject is that of *Appovier v. Rama Subba Aiyan*(1), where Lord WESTBURY expounds the law in these terms :

"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go

to the place of the receipt of rent, and claim to take from the collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family."

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After stating that the property ceases to be joint property, if it is held in defined shares, and that an actual partition of the property is not necessary for making the family a divided family, he makes the following observations :

"It is necessary to bear in mind the two-fold application of the word 'division'. There may be a division of right, and there may be a division of property."

Now, it is not suggested that in the present case the brothers ever effected a partition of their estate by metes and bounds. The question is whether there was a division of rights in the estate. Their Lordships are, however, unable to find any document which caused a severance of the joint status in this case. The trial Judge has examined various letters written by the members of the family and their employees engaged in the abkari and other businesses carried on by the brothers, and they show that all the three brothers were jointly interested in the various concerns, and it appears that it was out of the profits thus made by them that they acquired immovable properties.

It cannot be disputed that after the death of Venkatraghavaraju in 1882, Akkiraju and Ramaraju treated all the properties as the estate of the joint family and claimed to be proprietors thereof by survivorship. This would undoubtedly be an interference with the widow's right if her husband had died as a divided member of the family.

(1) (1866) 11 M.I.A. 75, 89, 91.

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It is clear that though she had influential paternal relatives to support her cause, they not only did not put forward her right to succeed to her husband's estate, but recognised that she was entitled only to maintenance, and accepted the arrangement by which she was granted the income of a plot of land in lieu of her maintenance. It is significant that neither the daughter Chandra-ayya, even after attaining majority, nor her sons, took any active steps to repel the attack on their rights of inheritance until 1918 when the sons brought the present action.

The learned Judges of the High Court think that the brothers held the estate as tenants in common and could not, therefore, be joint in status. They observe that

"if there is nothing like Exhibits CC series in the case, the proper inference to draw is that the family is a Hindu joint family, and the question is what is the proper legal inference to be made, keeping Exhibits CC series in consideration, from the other facts appearing in the case."

In view of the importance attached to the documents included in Exhibits CC series, it is necessary to examine them with some care.

It appears that Krishnamaraju had obtained a licence for selling arrack liquor in 1876 in the taluk of Narasapur, and that his brother Ramaraju held a similar licence for selling toddy in the same taluk. Now, rule 5 of the rules governing the "exclusive privilege of vending toddy" prescribes that

"the holder of the licence shall not hold or have any interest in the exclusive privilege of manufacturing and selling arrack in the part of the district to which his licence relates." *vide* Exhibit CC.

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A similar prohibition applied to the holder of a licence for selling arrack. The brothers, however, were licensees for selling toddy and arrack in the same area, and their joint interests in both the licences offended against the rule. This violation of the rule did not escape notice. A complaint was made against them to the Collector of the district who directed the Tahsildar of Narasapur to make an enquiry whether the brothers were interested in both the contracts. It was during the course of this enquiry that Krishnamaraju stated that he and Ramaraju were divided, and that he himself had only the arrack business and had nothing to do with the toddy contract for which Ramaraju alone was responsible, Exhibit CC (2). An exactly similar statement was made by Ramaraju, Exhibit CC (3).

Now, this statement of Krishnamaraju, which runs counter to a subsequent statement made by him in 1882 that the brothers were co-sharers in the estate, has been held by the trial Judge to be false; but the learned Judges of the High Court did not think that the two statements were irreconcilable. They explain that what the brothers intended to say in 1876 was that "they had been divided in status" before 1876, and were, therefore, tenants in common in that year; and that the statement of Krishnamaraju in 1882 also meant that the brothers were interested in all the properties as tenants in common and not as joint tenants. This explanation might remove the objection of inconsistency between the two statements, but it would not satisfy the rule that the holder of a licence for selling one liquor "shall not have any interest" in the licence for

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selling another liquor in the same locality. The brothers, even if they were tenants in common in respect of the liquor contracts, would still be *interested* in the profits and losses resulting from each of those contracts. And this was exactly what was prohibited by the rule.

Their Lordships regret that they are unable to accept the interpretation placed by the High Court upon the statements, and they agree with the trial Judge that the statements made by the two brothers in 1876 were false. It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position ; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.

The vital factor in a case of this kind is the nature of the interest which the members of the family have in the estate. As stated, if there has been a division of their right to, or severance of their interest in, the estate, they must be held to be separate in status, though there has been no physical division of the property, and though there may be no separation in food or dwelling ; *Amritrao v. Mukundrao*(1). If, on the other hand, there has been no such division of right or severance of interest, they continue to be joint in estate, and mere cesser of commensality would not make them separate in estate, as a member may become separate in food or residence for his convenience. A division of right or a severance of the joint status may result, not only from an

agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. If a document clearly shows a division of right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties ; *Balkishen Das v. Ram Narain Sahu*(1).

Having regard to these principles, which are established by the cases cited in the course of the arguments at the Bar, their Lordships concur in the conclusion reached by the trial Judge that Venkatraghavaraju was joint in estate with Akkiraju and Ramaraju when he died in 1882, and that his interest in the estate passed by survivorship to the other coparceners and could not descend to his heirs under the Hindu law. The evidence is strongly in favour of this conclusion, and, apart from Exhibits CC series which have been already discussed, the High Court is in agreement with the trial Judge as to its effect.

In view of the plaintiffs' failure on the merits, their Lordships find it unnecessary to determine the plea that the rule of *res judicata* operates as a bar to the present claim. This plea raises a difficult question, upon which their Lordships do not desire to express any opinion.

The result is that the decree of the trial Judge dismissing the suit should be restored. Their Lordships will, therefore, humbly advise His Majesty that the defendants' appeal should be allowed, and that preferred by the plaintiffs should be dismissed. The plaintiffs must pay the

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(1) (1919) 15 Nag. L.R. 165; 13 L.W. 112 (P.C.).

(1) (1908) L.R. 30 I.A. 139; I.L.R. 30 Cal. 738.

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costs incurred by the defendants here as well as in the High Court.

Solicitors for appellants: *Douglas Grant & Dold.*

Solicitor for respondents: *G. K. Kannepelli.*
C.S.S.

APPELLATE CRIMINAL.

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

1936,
April 29.

IN RE JONNALAGADDA RAMALINGAYYA, PETITIONER. *

Indian Press (Emergency Powers) Act (XXIII of 1931), sec. 2 (1) and (6)—Mutually exclusive, if—Pamphlets coming within former sub-section, if and when will come within latter—Pamphlets coming within sec. 4 (1) (d) of the Act, as amended by Criminal Law Amendment Act of 1932, sec. 16—"News-sheets"; if—Unauthorized distribution of—Conviction under sec. 18 (1) of the Act, for—"Class or section of His Majesty's subjects" in sec. 4 (1)—Meaning of.

Sub-sections 1 and 6 of section 2 of the Indian Press (Emergency Powers) Act, 1931, are not mutually exclusive and pamphlets coming within sub-section 1 will also come within sub-section 6 if they contain any matter described in section 4 (1) of that Act, as amended by the Criminal Law Amendment Act, 1932.

The petitioners, members of the Labour Protection League, were convicted under section 18 (1) of the Indian Press (Emergency Powers) Act, 1931, of the offence of having distributed unauthorized news-sheets, namely, two pamphlets which were part of a series issued by the said league. One of

* Criminal Revision Cases Nos. 926 to 930 of 1935 (Criminal Revision Petitions Nos. 855 to 859 of 1935).

the pamphlets was entitled "Deception practised by the rich and the difficulties they bring upon the poor" and the other was a drama. In the pamphlets the administration of justice was depicted as being on the side of the rich, more definitely referred to therein as zamindars, mill-owners and land-owners, and susceptible to bribes; and Government was charged with aiding the rich, and the rich and the Government were depicted as the two enemies of labour and susceptible of taking bribes. The pamphlets were distributed amongst uneducated readers.

Held that (i) the pamphlets in question were documents within section 2 (6) of the Indian Press (Emergency Powers) Act, 1931; (ii) the pamphlets tended to bring into hatred and contempt (a) the Government established by law in British India, (b) the administration of justice in British India and (c) a class or section of His Majesty's subjects in British India, within section 4 (1) of the Indian Press (Emergency Powers) Act, 1931, as amended by the Criminal Law Amendment Act, 1932, section 16, and they came within the definition of "news-sheet"; and (iii) the distribution of the pamphlets being unauthorized, the petitioners were rightly convicted.

The rich as more definitely described as zamindars, mill-owners and land-owners formed a sufficiently ascertained class to satisfy the requirements of the Act.

B. Ram Saran v. Emperor, A.I.R. 1934 All. 717, followed. *Emperor v. Maniben Kara*, (1932) L.R. 57 Bom. 253, distinguished. *Jitendralal Banerji v. Emperor*, (1933) I.L.R. 60 Cal. 1089, referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Guntur Division in Criminal Appeals Nos. 57 to 59 of 1935 preferred against the judgment of the District Magistrate of Guntur in Calendar Cases Nos. 4 to 6 of 1935; and PETITIONS under the said sections to revise the judgment of the Court of the Third Presidency Magistrate, Egmore, Madras, in Calendar Cases Nos. 1306 and 1307 of 1935.

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B. Jagannadha Das, T. A. Ananta Ayyar, S. Suryaprakasam, M. C. Srinivasan and J. Krishnamurthi for petitioners.

A. Narasimha Ayyar for the *Public Prosecutor* (*L. H. Bewes*) and *K. V. Ramaseshan* for the *Crown Prosecutor* (*T. S. Anantaraman*) for the Crown.

Cur. adv. vult.

BEASLEY C.J. The ORDER of the Court was pronounced by BEASLEY C.J.—These criminal revision cases arise out of convictions under section 18 (1) of the Indian Press (Emergency Powers) Act, 1931. Criminal Revision Cases Nos. 926, 929 and 930 of 1935 are in respect of the judgment of the Sessions Judge of Guntur dismissing the appeals against the order of conviction by Mr. Strathie, District Magistrate of Guntur; and Criminal Revision Cases Nos. 927 and 928 of 1935 relate to convictions by the Third Presidency Magistrate, Egmore, Madras.

The petitioners were convicted of the offence of having distributed unauthorized news-sheets in Guntur and Madras respectively and were sentenced on conviction to simple imprisonment for six months. The points arising in these cases have been dealt with in one common argument and can be disposed of in one judgment.

The petitioners in all these cases were members of a body known as the Labour Protection League; and, as regards the Guntur prosecution, one of them is the president, another the secretary and the third the joint secretary of that body there, and in Madras the petitioners are members of it. As regards the Guntur cases, the charge was that the petitioners distributed in Guntur two unauthorized news-sheets, namely pamphlets Nos. 6

and 7, and in the Madras case the same pamphlets were distributed by the Madras petitioners.

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The questions for consideration are whether these pamphlets are “news-sheets” within the meaning of the Indian Press (Emergency Powers) Act and whether these pamphlets come within the terms of section 4 (1) (d) of the Act as amended by the Criminal Law Amendment Act, 1932, namely, as tending directly or indirectly to bring into hatred or contempt the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty’s subjects in British India, or to excite disaffection towards His Majesty or the said Government, the publication and distribution of the pamphlets having been proved by the evidence of the prosecution witnesses.

The two pamphlets in question are part of a series issued by the Labour Protection League; and of the pamphlets, the subject of the charges, namely, Nos. 6 and 7, No. 6 is entitled “Deception practised by the rich and the difficulties they bring upon the poor” and No. 7 is a drama. Before any reference is made to the matters set out in these two pamphlets, we have to consider whether they come within the definition in the Act of “news-sheet”. The definition section is section 2 and in sub-section 6 “news-sheet” is defined as follows:

“‘News-sheet’ means any document other than a newspaper containing public news or comments on public news or any matter described in sub-section (1) of section 4.”

It is also necessary to refer to sub-section 1 as the petitioners’ contention is that the pamphlets in question fall within the definition of “book”

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Sub-section 1 reads as follows :

“‘Book’ includes every volume, part or division of a volume, pamphlet and leaflet, in any language, and every sheet of music, map, chart or plan separately printed or lithographed.”

The petitioners’ argument is that these pamphlets are not “news-sheets” as defined in sub-section 6 but are pamphlets or leaflets coming within the definition of “book” in sub-section 1 and that the two sub-sections are mutually exclusive. Turning to sub-section 6, the pamphlets in question certainly are not newspapers but they are clearly documents and, if they contain any matter described in sub-section 1 of section 4 of the Act as amended, they come within the definition of “news-sheet”, that is to say, words, signs or visible representations which have the tendency to which we have already referred. One other sub-section must be referred to and that is sub-section 10 to section 2 which defines “unauthorized news-sheets” as being

“any news-sheet other than a news-sheet published by a person authorized under section 15 to publish it”.

It is beyond question that the authority specified was not obtained in any of the cases. Mr. Jagannadha Das on behalf of the petitioners, in the course of his able and strenuous argument, contended that what is intended by a “news-sheet” is something having some news value ; and in support of his argument he relied upon *Jitendralal Banerji v. Emperor* (1) where it was held that information which concerns matter of public and topical interest as contrasted with purely historical interest is public news and that

information conveyed by photographs of persons in the Chittagong Armoury Raid, though discovered more than two years after the raid, the legal proceedings and emergency measures arising out of it not having terminated, is public news and such photographs are news-sheets within the meaning of the Indian Press (Emergency Powers) Act. PANCKRIDGE J. goes for assistance to the definition of “news” in the Oxford English Dictionary which is as follows :

“Tidings : the report or account of recent events or occurrences brought or coming to one as new information ; new occurrences as a subject of report or talk”

and is of the opinion that the information conveyed by the photographs in question was of that description and that the photographs were “news-sheets” within the meaning of sub-section 6 to section 2. But he further added that it was not necessary to consider whether they were news-sheets as containing matter described in sub-section 1 of section 4. This case, therefore, leaves that important question open though it suggests that they may be. We are of the opinion that the sub-sections 1 and 6 in section 2 are not mutually exclusive and that, although the pamphlets in question come within sub-section 1, they will also come within sub-section 6 if they contain any matter described in section 4 (1) as amended. It is necessary therefore to consider the latter question ; and, before doing so, we refer to the pamphlet No. 9 which sets out in twenty-five clauses the requirements of coolies and also in ten clauses the reasons why a labour union is necessary. They are as follows :

- “ (i) for safeguarding the rights of labourers ;
- (ii) for earning wages commensurate with labour ;

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- (iii) for determining the number of working hours and the wages appropriate to the same ;
- (iv) to end competition between labourers ;
- (v) to settle the internal disputes amongst themselves ;
- (vi) to be educated through journals and books as regards the working of labour unions in other countries ;
- (vii) for improving education and knowledge ;
- (viii) for labourers to become united and to acquire self-respect like others ;
- (ix) to save themselves from the exploitation of rich people and
- (x) to drive away the demon of poverty."

No objection at all can be taken to any of those objects provided that proper means are taken to achieve them. We will now refer to pamphlet No. 6. As before stated, this is headed "Cheating or deceit practised by the wealthy, and the hardships which they inflict", and the following passages are to be discovered in that pamphlet:

"We shall try to know in this pamphlet who is the cause for all the miseries in this world, namely, for ignorance, poverty, adultery resulting therefrom, for famine and for injustice. Wherever you see in this world, unless the labourer works and sweats, either millionaires or multi-millionaires or land-owners or zamindars cannot sit with cross-legs and enjoy happiness. The wealthy have in their hands for their selfish profit the machinery and other implements and use the labourers simply as pawns.

The wealthy divide the labourers, create quarrels between them and get them thrashed to death.

For the fierce wars that take place in this world the wealthy are the cause.

In these times Governments speak only in favour of the fatty-growing and lazy people who earned lakhs and crores. They do not encourage nor even think of those who live by just means undergoing all sorts of difficulties and sweating with work day and night. Governments work in favour of the

wealthy, i.e., moneyed class. Therefore war with other countries is inevitable. All the trade and commerce are in the hands of the rich. If any obstruction is caused by foreign countries to their trade, they cause war by deceitful means. By whom? By innocent coolies and by drunken and drugged army.

The wealthy and their Governments use many stratagems to prevent the poor from revolting.

The rich are responsible for our poverty.

Injustice, deception and devilish deeds are in the rich.

Machinery which prepare all things, factories having machinery, buildings, lands, railways, steamers, aeroplanes, gold, silver, copper, iron and other mines and banks must all come into the control of the coolies.

We have got the power of upsetting the world."

Pamphlet No. 7 is a story or a drama in which the following actors amongst others appear: Sait Lootidas (meaning plunder) Koonilal (murder) a big mill-owner; Goonda Bhai (rowdy); Chori Lal (theft); Karunakara (socialist male cooly); Leelavati (his wife); coolies in the mill and women coolies. This drama opens with a scene on the Swarajya Maidan. A meeting has been held to praise the charitable deeds of the factory owner, Sait Lootidas Koonilal. The socialist agitator interrupts it by singing the necessity for union among coolies and by lecturing on the false charities of Sait Lootidas Koonilal and by exhorting the workers against the rich. He gains over the other coolies and the meeting breaks up. In the second scene, mill-owner, Sait Lootidas Koonilal, discusses with his servants his plans for debauching the wife of Karunakara and other female coolies in the mill. There is an impassioned speech by the wife Lakshmi in which she says: "The rich under the mask of God rob us of our wealth, lives and chastity." She is interrupted

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by cries of "murder". The corpse of another woman cooly Subbamma seduced and murdered by the mill-owner is found and taken over by the police. Lakshmi makes another speech in which she says that the organisers of the political meeting have the support of the Government and rob the wealth, respect (chastity) and life of the poor coolies. The mill-owner and his servants discuss their plans to conceal the murder of the woman Subbamma and the corruption of Lakshmi. The mill-owner says: "If we bribe, the case will go. The Government is ours." The third scene depicts the organisation of a strike, songs by Karunakara in which the rich are referred to as royal highway robbers of innocent people. The Reserve Police come to disperse the strikers. Karunakara argues with them and the mill-owner replies: "Ho, fool, Government is ours. It is intended to safeguard our lives." The fourth scene is in a Court-hall. Karunakara argues with the Judge saying: "You create differences among us and make us kill one another. You are outraging the modesty of my women and committing murders. You speak on behalf of the rich." The Judge threatens Karunakara with a charge of bringing a false accusation. The police proceed to the bungalow of the mill-owner and find Lakshmi wrongfully confined there. Because he is poor, Karunakara can prove nothing. "The mill-owner on account of his riches did as he pleased and people respected him. If the poor want to substantiate, wealth eclipsed justice. Nobody dare put up a case against the Sait." The enquiry however commenced against him. Lakshmi gives her evidence but the Sait is let off

as innocent and Karunakara and other strike leaders are convicted and sentenced to various terms of imprisonment. Karunakara thought: "this is all due to effect of wealth". The following words by Lakshmi are worthy of remark: "Every one bearing false titles, deceiving the people outwardly, pretending to be working against the Government and giving lectures but secretly, with the support of the Government, robbing the wealth, chastity and the lives of the poor."

There is also this statement:

"Even if by chance the matter comes to Court, there is no fear. If money is scattered for bribes, the case will vanish. Is not the Government also ours?"

These are the words of the Sait to his friends. The administration of justice of course is represented by the Judge who conducts the trial in a very prejudiced manner and is depicted as having unjustly acquitted the Sait who had been charged with seduction and wrongful confinement, observing that "he is a very famous person, a leader of the people, a great donor, a pious man and that the crime imputed to him is not satisfactorily proved and that it had been fabricated by his enemies". With the labour strikers the Judge deals very heavily. He convicts them and awards imprisonment of from three to six years each and an additional year to Karunakara for having brought a false case against the Sait which causes Karunakara to think, "the power of money—all this". We may at once say that the administration of justice thus depicted is clearly brought into hatred and contempt. We have to consider

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the class of persons amongst whom these pamphlets were distributed, viz., mill-hands at Guntur and scavengers in Madras. They were all of the cooly class most of whom are entirely uneducated. What effect could this have upon their minds other than arousing feelings of hatred and contempt for the administration of justice which is depicted as being on the side of the rich and susceptible to bribes? On that ground alone we are satisfied that pamphlet No. 7 is a "news-sheet" as defined in section 2(6) of the Indian Press (Emergency Powers) Act as containing matter which tends directly or indirectly to bring into hatred or contempt the administration of justice in British India; and it would not be necessary to consider the questions of whether the words had the tendency to bring into hatred or contempt the Government or any class or section of His Majesty's subjects in British India, but we will nevertheless consider them. The lower Courts have taken the view that the words had that tendency both as regards the Government and a class or section of His Majesty's subjects in British India; and, as regards the former, we are clearly of the view that there has been an attack upon the Government in that the Government is charged with siding the rich and the rich and Government are depicted as the two enemies of labour and susceptible of taking bribes. It is a charge of gross partiality against the Government and, addressed as it is to uneducated persons, it is likely to inspire in them feelings of hatred and contempt towards the Government. The more difficult question is whether there has been an attack upon any definite and ascertainable class of His

Majesty's subjects, and in this connection reference was made to *Emperor v. Maniben Kara* (1) which was a criminal appeal from a conviction by the Chief Presidency Magistrate of Bombay of the appellant under sections 124-A and 153-A of the Indian Penal Code. The words in section 153-A are "between different classes of His Majesty's subjects" whereas the words in question here are "class or section". In that case, in a speech addressed to labourers the appellant had attacked the "capitalists", but it was held by BEAUMONT C.J. and NANAVATI J. that "capitalists" are not a sufficiently defined class and that the description "capitalist" is altogether too vague a phrase to denote a definite and ascertainable class so as to come within section 153-A of the Indian Penal Code. But BEAUMONT C.J. held that the attack upon Government brought the case under section 124-A of the Indian Penal Code. In this case, however, we have not got to deal with an attack upon "capitalists" but upon the rich more definitely referred to in the pamphlets as zamindars, mill-owners and landowners; and in the drama the class attacked is clearly the mill-owning class; and we are informed that in Guntur there are thirty mills and factories employing 7,000 coolies amongst whom the pamphlets were distributed. Upon this point we get assistance from a decision of the Allahabad High Court, viz., *B. Ram Saran v. Emperor* (2). There, a pamphlet definitely referred on the one side to the Kisan labourers in the district of Muttra who labour in the fields and factories and on the other hand to the

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(1) (1932) I.L.R. 57 Bom. 253.

(2) A.I.R. 1934 All. 717.

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BEASLEY C.J. rich persons, zamindars, bankers and petty shop-keepers. BENNET J. held that the classes referred to in the pamphlet were sufficiently well-defined for the purpose of section 16 of the Press (Emergency Powers) Act of 1931 as amended by the Criminal Law Amendment Act of 1932. In this judgment, the decision of the Bombay High Court in *Emperor v. Maniben Kara*(1) is referred to and distinguished. BENNET J. says :

"The word 'capitalist' has not been used in the present pamphlet and therefore the particular difficulty which occurred in the Bombay ruling does not arise. The pamphlet however definitely refers on the one side to the Kisan labourers in the district of Muttra who labour in the fields and factories and on the other hand to the rich persons, the zamindars, the bankers and the petty shop-keepers. I do not think that there is any difficulty in holding that the classes referred to in the pamphlet are sufficiently well-defined for the purpose of the section in question."

This case is also of importance on the question as to whether the pamphlets come within the definition of "news-sheets" in the Act and BENNET J. says :

"If the pamphlet comes within the kind of pamphlet described as promoting feelings of enmity or hatred between different classes, then the pamphlet becomes a news-sheet, and a person who publishes or distributes that news-sheet will be guilty of publishing an unauthorised news-sheet under section 18, and punishable with six months' imprisonment or fine";

and he held that the pamphlet was of such a nature. The view expressed by BENNET J. upon both points is, in our opinion, correct, and therefore the rich as more definitely described as zamindars, mill-owners and land-owners form a

(1) (1932) I.L.R. 57 Bom. 253.

sufficiently ascertained class to satisfy the requirements of the Act. The attack upon this class was clearly one which would tend in the minds of uneducated readers amongst whom the pamphlets were distributed to bring His Majesty's subjects into hatred and contempt. The news-sheets therefore tended to bring into hatred and contempt (i) the Government established by law in British India, (ii) the administration of justice in British India and (iii) a class or section of His Majesty's subjects in British India within section 4(1) of the Indian Press (Emergency Powers) Act of 1931 as amended by the Criminal Law Amendment Act of 1932, section 16. It is conceded that, if these pamphlets come under sub-section (d) of the latter Act, explanation 4 is of no application.

The objects of the league were no doubt quite unobjectionable but those objects could not possibly be advanced by an attack such as is contained in the pamphlets. The language employed is highly inflammatory and the facts are grossly exaggerated and distorted. There is no fair discussion of the coolies' case. It is wholly an attack on Government, the administration of justice and a class.

The petitioners were all rightly convicted. The offence is a very serious one and, when Mr. Jagannadha Das was asked whether his clients or any of them were prepared to express their regret for their conduct, he stated that he had no instructions from them to do so; and this being so, we see no reason whatever for reducing the sentence. The petitions will be dismissed. The petitioners must surrender to their bail.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
Venkataramana Rao.

1936,
April 22.

M. AR. RM. P. M. CHIDAMBARAM CHETTIAR AND
THREE OTHERS, MINORS, BY THEIR MOTHER AND NEXT FRIEND
MEENAKSHI ACHI (PETITIONERS—OBJECTORS),
APPELLANTS,

v.

THE NATIONAL CITY BANK OF NEW YORK
(RESPONDENTS—DECREE-HOLDERS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXX, r. 10—
Applicability—Minor—Business alleged to be carried on by
guardian on behalf of—Case of—Business owned by minors
—Assumed name being name of—Case of—Partnership
firm—Minors, if can be regarded as constituting a.*

A Nattukottai Chetty, who carried on money-lending business under the name of "R. M. P. M. Chettiar Firm", died leaving his undivided sons, the four minor appellants. Their mother continued the business on their behalf with the aid of an agent. In the course of that business money was borrowed from the respondent bank. The respondent bank filed a suit for the recovery of the debt, and obtained a decree, *inter alia*, against the first defendant therein described in the plaint as "R. M. P. M. Chettiar Firm". The question was whether that decree was executable against the four minor appellants or their property. In support of the right to execute the decree against the appellants or their property, it was urged for the respondent bank that the suit should be regarded as in effect having been brought under rule 10 of Order XXX of the Code of Civil Procedure.

Held that the minor appellants were not parties to the suit or to the decree and that the decree was therefore incapable of being executed against them or their property.

* Appeal Against Order No. 214 of 1935 and Civil Revision Petition No. 701 of 1935

The minors cannot be regarded as constituting a partnership firm. Rule 10 of Order XXX, Civil Procedure Code, is applicable only to the case of a single individual and is inapplicable to a case where the so-called assumed name is said to be the name of a business owned by minors. CHIDAMBARAM CHETTIAR v. NATIONAL CITY BANK OF NEW YORK.

Quaere: whether rule 10 of Order XXX can apply to a minor at all, when what is alleged is that the business is carried on on his behalf by a guardian.

APPEAL against the order of the Court of the Principal Subordinate Judge of Coimbatore dated 9th April 1935 and made in Execution Application No. 377 of 1935, in Execution Petition Register No. 40 of 1935 (in Civil Register No. 149 of 1934 on the file of the High Court, Rangoon).

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Principal Subordinate Judge of Coimbatore dated 9th April 1935 and made in Execution Application No. 377 of 1935 in Execution Petition Register No. 40 of 1935 (in Civil Register No. 149 of 1934 on the file of the High Court, Rangoon).

B. Sitarama Rao, V. Ramaswami Ayyar and N. G. Krishna Ayyangar for appellants.

K. Rajah Ayyar and L. A. Gopalakrishna Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This appeal raises a question of some importance. The plaintiffs—the National City Bank of New York—obtained a decree on 19th June 1934 in the High Court at Rangoon for about Rs. 25,000 against two defendants, with the first of whom alone we are concerned. The first defendant is described in the plaint as "R. M. P. M. Chettiar firm, carrying

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on business at No. 84, Mogul Street, Rangoon". In execution of the decree, the plaintiff bank attached certain properties, which on their own showing belong to the four minors (the appellants before us) constituting a joint undivided Hindu family. The Subordinate Judge of Coimbatore, in which Court the decree was being executed, disallowed the objections preferred on behalf of the minors and made an order allowing execution. The objection, which is material for the present purpose, has been raised in the following form :

"The suit and the proceedings that ended in the said *ex parte* decree and the proceedings in the execution taken out after the decree are wholly incompetent and the attachment effected of the properties is wholly illegal."

Further on it is stated :

"The firm has no legal entity and there can be no decree against a firm without any agent or partner being represented. Further, all the proprietors of the said firm are minors and there is no adult proprietor and a decree obtained without any representation on behalf of the minor proprietors is wholly void and it is a nullity."

It will be seen that it is here assumed that the suit has been filed under the procedure applicable to suits against firms, which, under Order XXX, rules 1 to 9, may be instituted in the names of the firms. The plaintiff bank replied that, although the first defendant in the suit was described as a firm as already stated, they (the bank) did not intend to adopt the procedure applicable to firms, but the provision of law under which the suit was brought, was Order XXX, rule 10, applicable to actions against persons carrying on business in assumed names. In order to make the contentions of the parties clear, we may briefly set forth what appear to be undisputed facts. One Muthuveerappa Chetty, a member of the Nattukottai Chetty

community, was carrying on money-lending business under the name of "R.M.P.M. Chettiar Firm". He died in 1931, leaving his undivided sons (the appellants) all four of whom were and have been minors. Their mother, one Meenakshi Achi, continued the business on their behalf with the aid of an agent, by name Veerappa Chetty, and the suit debt was incurred in December 1932 in the course of that business. The suit was then filed and, attempts made to effect personal service of the summons on the agent having proved unsuccessful, an order for substituted service was obtained, copies of the summons were affixed and the decree as mentioned above was made.

The first question is, does the procedure prescribed by Order XXX in regard to suits against firms in the firm name apply? In the first place, it is impossible to regard the minors as constituting a partnership firm. In the Indian Partnership Act, 1932, "partnership" is described as the relation between persons who have agreed to share the profits of a business (section 4). The next section goes on to say that the relation of partnership arises from contract and not from status. It follows that a minor, who is incapable of contracting, cannot be a partner. Further, it is incomprehensible that four persons, who were all minors, can agree with each other to form a partnership. Then, turning to section 30, it enacts that a minor can never be a partner, although "he may be admitted to the benefits of partnership". Under the section, the adult partners, by a contract between themselves, can agree to confer this benefit upon a minor; in other words, the relation of partnership is the result of contract;

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and where any benefit is reserved to a minor, that arises not from a contract with the minor but between the adult partners. From this the necessary inference is that there must be at least two adult partners who are capable of contracting before a minor is entitled to the benefits of partnership. The language of section 30 is perfectly clear and it expressly enacts that, even where some benefit is reserved to a minor, he is not a partner, the only partners composing the firm being the adult members. If therefore a suit is brought, under the procedure laid down in Order XXX, against a partnership firm where a minor has been admitted to some kind of benefit, to such a suit the minor can in no sense be regarded as a party. Order XXI, rule 50, Civil Procedure Code, provides that where a decree has been passed against a firm, execution may be granted against any property of the partnership; the reason for making the partnership property liable is, not that the minor has been sued, but that under the law the partnership property is liable for the debts of the firm. As Lord HERSHELL L.C. observes in *Lovell & Christmas v. Beauchamp*(1):

"The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership and that until these are provided for, no part of it shall be received by the infant partner."

In English law there is nothing to prevent an infant becoming a partner, but even there it has been held, in the case just cited, that when a suit is brought against a firm under Order XLVIII (a) (corresponding to Order XXX of our Code), the

judgment to be passed should be against the firm *other than the minor partner*: but that cannot affect execution against the partnership property [see also *Harris v. Beauchamp Brothers*(1)]. For the position that under the Indian law a decree against a partnership firm cannot be regarded as a decree against the minor who has been admitted to some benefit, it is unnecessary to rely upon the decision, already mentioned, of the House of Lords; for section 30 of the Indian Partnership Act places the matter beyond doubt. We may in this connection also mention that under the Code, as under the English law, when a decree has been obtained against a firm in the firm name, execution may be levied against the partnership property, notwithstanding the fact that a minor possesses some interest. It is unnecessary to pursue this matter, as Mr. Rajah Ayyar, the respondents' learned Counsel, urges that the suit should be regarded as in effect having been brought under rule 10 of Order XXX. The whole of the Order is a reproduction, almost verbatim, of the rules comprised in Order XLVIII (a) of the English Rules. Rule 10 of Order XXX is modelled on Order XLVIII (a), rule 11, the corresponding English provision. That rule applies, it has been held in England, to a single individual who carries on business under an assumed or trading name [The Annual Practice (1936), page 891; *St. Gobain Chauny and Cirey Company v. Hoyer mann's Agency*(2) and *MacIver v. G. & J. Burns*(3)]. Rule 10 of Order XXX stands in marked contrast with rule 1. The latter rule applies to "any two

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(1) [1893] 2 Q.B. 534.

(2) [1893] 2 Q.B. 96.

(3) [1895] 2 Ch. 630.

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or more persons", whereas rule 10 refers to "any person carrying on business". There is no reason to depart from the view taken in the English cases and we must hold that rule 10 is applicable only to the case of a single individual. In this case, the so-called assumed name is said to be the name of the business owned by the four minors and the rule is, in our opinion, utterly inapplicable. It is further open to doubt whether the rule can apply to a minor at all, when what is alleged is that the business is carried on on his behalf by a guardian. The rule contemplates "any person carrying on business" and, as we have said, it is doubtful whether a minor alleged to be trading through his guardian answers this description.

We must therefore hold that there was no decree passed against the minors in question, in other words, the minors were not parties to the decree. The same idea may be expressed by stating that, by the description adopted in the plaint, the minors were not brought before the Court at all. The question as to what might have been the effect of their not having been represented by a guardian *ad litem* does not arise; the defect is something more fundamental, namely, that they were not even parties to the suit or to the decree that was passed. The decree is therefore incapable of being executed against them or their property and we must accordingly allow the appeal with costs.

Mr. Rajah Ayyar says that the minors have been wrongly described and the case is one of misdescription. That is not a matter with which we are concerned in execution; it is enough for our purpose to say that the decree on its face is

not against the minors and cannot be executed against them. But we wish to make it perfectly plain that nothing we have said is to prejudice in any manner the plaintiffs' right to apply to the Rangoon High Court for the amendment of the plaint or of the decree, or to obtain any other similar relief.

No order is necessary in the civil revision petition.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

KAMBALA VENKANNA (PURCHASER), APPELLANT,

v.

GOTETI VEERARAJU AND ANOTHER (SECOND DEFENDANT
AND PLAINTIFF), RESPONDENTS.*

*Interest—Contribution—Amount claimed by way of—Interest
on—Rate of, and time from which it should be awarded—
Discretion of Court as to.*

Though the awarding of interest on the amount claimed by way of contribution does not come under any specific provision of law, yet general equitable considerations justify the award of the same and as such the Court has a discretion to decide, on the facts and the circumstances of each case, the rate of interest and the time from which it should be awarded.

APPEAL against the decree of the Court of the Subordinate Judge of Narasapur in Appeal Suit No. 48 of 1928 preferred against the decree of the Court of the District Munsif of Narasapur in Original Suit No. 173 of 1925.

* Second Appeal No. 1881 of 1931.

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P. Somasundaram for appellant.*V. Suryanarayana* for respondents.*Cur. adv. vult.*

JUDGMENT.

The purchaser from the plaintiff who was made a supplemental respondent in the lower appellate Court is the appellant in this second appeal.

The facts of the case are stated clearly in the judgments of the Courts below and need not be re-stated in detail. For the purposes of this second appeal which raises only one point, the only facts relevant are these: The plaintiff sued for contribution from the third item of the property, the owner of which is the second defendant who had purchased it from the first defendant. Items 1 and 2, along with the third and some other items, were subject to a first mortgage. Some of these items were subject to a second mortgage also. We are not concerned with the second mortgage or with items other than items 1, 2 and 3 in this second appeal. Plaintiff's father became the purchaser of items 1 and 2 in execution of a small cause decree in Small Cause Suit No. 84 of 1902 and after him the plaintiff came into possession of the same. The first defendant had become the owner of the third item and had sold it to the second defendant. The first mortgagee's son filed Original Suit No. 54 of 1910 in the Ellore Sub-Court impleading the first defendant also, among others, and obtained a decree and in execution thereof brought items 1 and 2 for sale on 30th June 1913 and from the proceeds realised his decree amount. The third item which was also

subject to the first mortgage was not proceeded against in execution. The plaintiff instituted the suit, out of which this second appeal arises, on 30th June 1925 for contribution from item 3 also rateably according to its value since it was included in the original mortgage. The defendants denied the plaintiff's right to contribution.

The District Munsif granted the plaintiff a decree on 30th September 1927 for contribution from the third item. It was held by him that this item was liable to contribute Rs. 316-4-0 towards the decree debt (see issue 17). It was also held (see issue 15) that the plaintiff was entitled to claim interest on the amount from the date of the registered notice, Exhibit F, dated 20th February 1917, issued by him claiming the amount and interest. On appeal by the second defendant, the lower Court's decree was confirmed with regard to the amount decreed but the learned Judge disallowed the interest which had been allowed from the date of notice till the date of the lower Court's decree.

In this second appeal, Mr. Somasundaram on behalf of the appellant claims that he is entitled to a larger sum than Rs. 316-4-0 for contribution and that he is also entitled to interest on that amount. He claims interest from the date of payment of the decree amount by the appellant's predecessor, i.e., 30th June 1913. If this plea is not accepted, he argues that he is entitled to interest at least from the date of notice as awarded by the first Court.

As regards the amount of contribution claimed, it is agreed between the parties that the proper amount to which the appellant is entitled should be Rs. 344-0-2 and not Rs. 316-4-0. If the

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appellant is entitled to interest, he is entitled to it on this amount. Thus the only question that remains to be determined in this second appeal is whether the appellant can claim interest on the amount which he is entitled to get by way of contribution from the respondent (the second defendant) and from what date.

The question is purely one of law ; but no decisions directly bearing on the point, either English or Indian, have been brought to my notice. Of the various cases cited, the following may be referred to as somewhat relevant. In *Raushan Ali Khan Chowdhury v. Kali Mohan Moitra*(1) it was assumed that the person claiming contribution was entitled to interest on the amount ; but it was disputed whether he should be allowed interest at twelve per cent per annum as the lower Court had granted or whether he should get only six per cent as provided for in the original mortgage decree. On this point, in coming to the conclusion that the plaintiffs are entitled to the interest allowed by the lower Court, the learned Judges said:

"We think that it would not be right and proper to refuse to the plaintiffs the ordinary rate of interest which in a case like this the Court does allow."

The right to claim interest was obviously put by the learned Judges on equitable considerations. The question whether the plaintiffs are entitled to claim interest at all was not discussed as the point was not disputed. *Hari Raj Singh v. Ahmad-ud-din Khan*(2) is another case where also the right to claim interest on the contribution amount was assumed ; but the circumstances of the case were taken into consideration in refusing interest prior to the date

(1) (1906) 4 C.L.J. 79.

(2) (1897) I.L.R. 19 All. 545.

of the institution of the suit. In Second Appeal No. 1544 of 1931 (unreported) VENKATARAMANA RAO J. said :

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"The plaintiff is certainly entitled to interest on the amount decreed to him from the date of payment by him and also to a charge for the amount allowed."

Krishnaswami Pillai v. Janakalaxmi Ammal(1) is another case which may also be referred to in this connection. In *Ahmad Wali Khan v. Shamsh-ul-jahan Begam*(2), strongly relied on by the respondent, the plaintiff, who was treated by the Privy Council as a co-mortgagor along with the respondents and had paid off the whole of the joint debt due on the mortgage, was given a proportionate share of that amount with interest from the date of the institution of the suit. Payment of the debt was made by him in 1896. Before the Privy Council it was argued that, treating him as a co-mortgagor, he was entitled to get one-third share of the debt together with interest, obviously from the date of payment. Though the point was thus raised in the course of the arguments, nothing was said about it in the judgment of the Privy Council, and so it cannot be said to be a decision against the appellant. In the first Court, treating him as a surety, the plaintiff was awarded the full amount including the interest claimed by him. This judgment was set aside by the High Court. The Privy Council discharged the decrees of the two Courts in the manner indicated above. In the circumstances this decision cannot be understood as one holding that a person claiming contribution is not entitled to claim interest on the amount claimed. The

(1) (1933) 66 M.L.J. 308.

(2) (1906) I.L.R. 28 All. 482 (P.C.).

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passages cited from Fisher on Mortgages, 6th Edition, page 909, paragraphs 1805 and 1810; Coote on Mortgages, Vol. I, page 801; and the decision in *Ashworth v. Munn*(1) do not directly bear on the point. Section 82 of the Transfer of Property Act, which explains "contribution", has been relied on by both sides in support of their respective contentions. It is said on the one side that "mortgage debt" used in the section refers only to the exact amount of the mortgage, while on the other side it is said that it means the mortgage money, which would include the principal money and interest; [see section 58 (a)].

This being the position with regard to the authorities, I think the point has to be decided with reference to principle. I do not see why on principle the plaintiff, who had paid off the entire decree amount and saved the property of the defendant from being proceeded against in execution, should be deprived of interest on the money paid in so far as it refers to the amount payable by the defendant. As mentioned in *Raushan Ali Khan Chowdhury v. Kali Mohan Moitra*(2), I think, in the circumstances, it would not be "right and proper" to refuse to the plaintiff interest on the amount claimed by him from the defendant. Even if the payment of interest does not come under any specific provision of law, still, if general equitable considerations justify the award of the same, that it is quite open to the Courts to award it, is a principle which cannot be disputed. In my opinion, equitable considerations require in a case like the present that interest should be awarded to the plaintiff on the contribution

(1) (1886) 34 Ch. D. 391.

(2) (1906) 4 C.L.J. 79.

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amount. The claim being founded in equity, it is left to the Court to decide the rate of interest that should be awarded and the time from which it should be awarded. No doubt, logically speaking, the interest should be awarded from the date of payment of the decree amount, 30th June 1913. The plaintiff could have asked for the amount as well as the interest soon after the payment made by him. But he did not do so. The suit was instituted on 30th June 1925. By his delay in asking for the amount, the amount of interest has become necessarily enhanced. I do not see why the plaintiff should be given the indulgence of being allowed to claim a larger amount of interest by his delay in taking proceedings. But this plea cannot be urged against him if he is allowed to claim it from the date of demand by him, which was 28th February 1917 (see Exhibit F). This is the date from which interest was allowed by the first Court in his favour. The defendant knew on that date that interest was going to be claimed and he could have averted the enhancement of the amount by paying it promptly. I do not think it will be inequitable in the circumstances to award interest on the contribution amount allowed in favour of the appellant, that is, Rs. 344-0-2, from 28th February 1917 at the rate of six per cent per annum. In the result, in modification of the lower Court's decree, I hold that the appellant is entitled to recover Rs. 344-0-2 with interest at the rate of six per cent per annum from the date of the registered notice, 28th February 1917, interest on the aggregate sum being allowed at the same rate till the date of payment. The parties will pay and receive proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

1936,
March 31.

M. SUBBAYYA THEVAR, ZAMINDAR OF UTTUMALAI
(DEPENDANT), APPELLANT,

v.

SIVAGNANA MARUDAPPA PANDIAN (PLAINTIFF),
RESPONDENT.*

Hindu Law—Maintenance—Impartible estate—Adult son of holder of—Maintenance from impartible estate in hands of father—Son's right to—Estate separate property of father.

In the absence of proof of a custom conferring upon him such a right, an adult son of the holder of an impartible zamindari has no right to claim maintenance from the impartible zamindari in the hands of the father when it is the separate property of the father.

Case-law bearing on the point reviewed.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Tinnevely in Original Suit No. 94 of 1930.

S. Ramaswami Ayyar and T. P. Gopalakrishna Ayyar for appellant.

B. Somayya for R. Krishnaswami for respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal by the defendant who has been directed by the decree of the lower Court to pay certain sums of money to the plaintiff, his son, towards maintenance. The plaintiff is an adult and is not under the Hindu law ordinarily entitled to enforce payment of

maintenance as a "personal" obligation of the father. Where the father is in possession of joint family property, the adult son is entitled to be maintained from out of the income of the joint family property, but it is doubtful if he can maintain a suit for maintenance against the father when he could as well sue for partition. Where the property in the father's possession is impartible, the son would not, even if the impartible estate be joint family property, be entitled to sue for partition and in such cases a suit for maintenance has been permitted.

In the present case, the plaintiff proceeded on the footing that the defendant was in possession of the Uttumalai Zamindari in some character other than that of separate property. The plaintiff also alleged that there was an immemorial and well-known custom prevalent in the Uttumalai Zamindari and all other zamindaris according to which a person in the position of the plaintiff was entitled to maintenance. The defendant denied that the plaintiff was entitled to maintenance. He asserted that the Uttumalai Zamindari must be regarded as separate property in his hands and not as joint family property out of which the plaintiff can claim maintenance. He also denied the existence of the custom alleged in the plaint; and, in paragraph 2 of the additional statement filed on 17th December 1930, it was distinctly asserted:

"No such custom has hitherto been recognised in judicial decisions at any rate when the impartible estate is the self-acquired property of the holder."

In the rejoinder filed by the plaintiff in answer to this statement no new information was

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vouchsafed, but it was asserted that the Uttumalai Zamindari was in no sense the self-acquired property of the defendant.

On these allegations, issues were framed, of which it is sufficient to refer to issues 2, 3 and 4. Issue 2 raised the question whether the Uttumalai Zamindari was the joint family property of the parties or the sole property of the defendant. The lower Court rightly found that the property was the separate property of the defendant because he got it by inheritance from his sister's adopted son. This finding has not been attacked before us and it is unnecessary to say more on this issue.

The fourth issue was to the effect, "Is that custom true?". It is to be regretted that the issue was framed in a form which did not bring out the nature of the custom pleaded or required for the purposes of the case. The point really in controversy between the parties on the question of custom was whether there was a custom to pay maintenance even when the property is not held by the holder for the time being as joint family property; if it was joint family property, the right of the first generation of descendants to maintenance has not been disputed. This way of framing issue No. 4 has led to an obvious mistake in the treatment of the case in the lower Court as we shall presently show.

The third issue ran as follows :

"If the second issue is found for the defendant, is the plaintiff entitled to have that zamindari taken into consideration in the fixing of the maintenance allowance to be awarded to him assuming the custom alleged by him to be true?"

Issues 1 to 3 were heard as preliminary issues. On the third issue, the learned Subordinate Judge curiously enough said that the defendant had made no distinction in his additional written statement as between zamindaris which are held as joint family properties and zamindaris which are self-acquisitions so far as the allegation as to the custom was concerned. He forgot that the plaintiff itself made very little differentiation between judicial decision and custom and the written statement accordingly followed the same lines. It is however obvious from the paragraph which we have already quoted from the additional written statement that the defendant did insist that the plaintiff was not entitled to maintenance if the Court should hold that the zamindari in his hands was not joint family property.

The learned Subordinate Judge disposed of issue 3 in two sentences which we have had great difficulty in understanding. He said :

"Their Lordships of the Privy Council have referred in *Protap Chandra Deo v. Jagadish Chandra Deo*(1) to the expression of opinion in *Rama Rao v. Rajah of Pittapur*(2), though that expression of opinion has been stated in *Bajinath Prasad Singh v. Tej Bali Singh*(3) to be *obiter*. Consequently I have to find the issue for the plaintiff."

The learned Counsel who appeared for the respondent before us has explained this judgment of the learned Subordinate Judge to mean that, according to the observations of their Lordships in *Rama Rao v. Rajah of Pittapur*(2), the son of the holder of an impartible estate has been

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(1) (1927) I.L.R. 54 Cal. 955, 968 (P.C.).

(2) (1918) I.L.R. 41 Mad. 778 (P.C.). (3) (1921) I.L.R. 43 All. 228 (P.C.).

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recognised to be entitled to maintenance without the necessity of proving the custom in each case and, as that decision proceeds upon the footing that in an impartible estate there are neither coparcenary rights nor any of the incidents relating to joint family property, the observations justify the award of maintenance to the son irrespective of the question whether the impartible estate in the possession of the father is joint family property or separate property. The learned Judge, however, recognised that Lord DUNEDIN himself in *Bajinath Prasad Singh v. Tej Bali Singh*(1) stated that many of the observations in *Rama Rao v. Rajah of Pittapur*(2) might have to be regarded as *obiter*. But, as reference has been made in *Protap Chandra Deo v. Jagadish Chandra Deo*(3) to *Rama Rao v. Rajah of Pittapur*(2), he thought he must follow the dictum in that case.

When the case came on before another Judge for the trial of the other issues in the case, the learned Counsel for the defendant asked for a separate trial and finding in respect of issue No. 4. But the then Judge felt himself precluded from dealing with the question because of what he considered to be the implication of the finding already recorded by his predecessor on the third issue. He was good enough, however, in justice to the defendant, as he says, to refer to some of the contentions raised before him, but refrained from giving a finding on the point. Feeling himself precluded from dealing with the question of

(1) (1921) I.L.R. 43 All. 228, 243, 244 (P.C.).
(2) (1918) I.L.R. 41 Mad. 778 (P.C.).
(3) (1927) I.L.R. 54 Cal. 955, 968 (P.C.).

the plaintiff's *right* to maintenance, the new Subordinate Judge practically confined himself to the question of the amount of maintenance and other incidental matters.

In the course of the argument before us, Mr. Somayya has drawn our attention to the relevant decisions of the Judicial Committee and of all the Courts in India. More than one recent judgment of their Lordships has attempted to state with precision the result of the cases relating to impartible estates; it is therefore not necessary for us to refer to earlier decisions. Taken out of its context, the observation in *Rama Rao v. Rajah of Pittapur*(1) is no doubt capable of being understood in the way that the learned Subordinate Judge understood it. But a perusal of the whole judgment and a consideration of their Lordships' later judgments will show that that view is not correct.

It is unnecessary for the purposes of this case to discuss the exact basis of the decision in *Rama Rao v. Rajah of Pittapur*(1), because in the later decisions in *Bajinath Prasad Singh v. Tej Bali Singh*(2) and *Collector of Gorakhpur v. Ram Sundar Mal*(3) their Lordships have themselves attempted to state the position with the necessary qualifications. It is sufficient to refer to the observation in *Collector of Gorakhpur v. Ram Sundar Mal*(3) that it has been clearly shown

“ that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Chellapalli* case, *Raja Yarlagadda Mallikarjuna Prasada*

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(1) (1918) I.L.R. 41 Mad. 778 (P.C.).
(2) (1921) I.L.R. 43 All. 228, 243, 244 (P.C.).
(3) (1934) I.L.R. 56 All. 468 (P.C.).

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Nayudu v. Raja Yarlagadda Durga Prasada Nayudu(1), which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family''.

We may also add that the observation in *Rama Rao v. Rajah of Pittapur*(2), that has been relied on by the learned Subordinate Judge and by the learned Counsel for the respondent before us, does not itself purport to declare the right to maintenance but merely refers to the basis on which the right recognised in the earlier cases in respect of maintenance might be based, the suggestion being that custom rather than joint family right might be regarded as the basis. It was obviously not the effect or the intention of the sentence to recognise the right to maintenance in cases where no such right has been recognised in the earlier cases. Mr. Somayya admitted before us that in none of the earlier cases relating to impartible zamindari has the Court recognised a right in an adult son to claim maintenance from the impartible zamindari in the hands of the father even when it was not joint family property.

We may refer in this connection to an observation in Sir D. F. Mulla's book on Hindu Law, 8th edition, page 611, where a sentence from *Rama Rao v. Rajah of Pittapur*(2) is reproduced without the context in which it occurs. As it stands, the statement in the book is capable of being misread as supporting a general right to maintenance in favour of the son irrespective of the question whether the impartible estate in the father's hands is joint family property or not. In

(1) (1900) I.L.R. 24 Mad. 147 (P.C.).
(2) (1918) I.L.R. 41 Mad. 778 (P.C.).

Commissioner of Income-tax v. Zamindar of Chemudu(1) a Full Bench of this Court affirmed the principle that the right to maintenance which the son of the holder of an impartible zamindari possesses is only an incident attaching to its character as joint family property.

The observations in *Nilmony Singh Deo v. Hingoo Lall Singh Deo*(2) are likewise capable of being misunderstood if the context is ignored. The antithesis drawn in that judgment was between claims by the younger sons against their elder brother on the one hand and claims by the descendants of the younger brother against their uncle. The son's claim against the father was not then before the Court. It is obvious that, when one of three brothers inherits an impartible estate from the father, it would be an estate where the younger brothers had lost their right of succession only by reason of its impartibility. In such circumstances the Court thought that the younger sons would be entitled to maintenance without proof of special custom, but they added that, as regards members belonging to a lower generation, there must be definite proof of custom.

We may refer in passing to the way in which the matter has been dealt with in a recent enactment of the Madras Legislature. In Madras Act XII of 1934, which attempted to declare the law as it has been understood even prior to the decision in *Rama Rao v. Rajah of Pittapur*(3) and in conformity with the latest pronouncements of their Lordships as regards the true character of impartible estates, the second section which proposes to

(1) (1934) I.L.R. 57 Mad. 1023. (2) (1879) I.L.R. 5 Cal. 256.
(3) (1918) I.L.R. 41 Mad. 778 (P.C.).

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add section 9 to the Impartible Estates Act of 1904 is limited to cases where the estate has for the purpose of succession to be regarded as the property of the joint family. There is accordingly no warrant for Mr. Somayya's suggestion that there is a kind of consciousness in this presidency that a zamindar's son should be entitled to maintenance from his father irrespective of the question whether in the father's hands the zamindari is joint family property or not. It is not suggested that the evidence in this case establishes any custom to that effect. The decision of the lower Court in favour of the plaintiff is accordingly unsustainable.

Mr. Somayya suggested two other grounds in favour of the plaintiff's claim, one based on an arrangement under which a third party agreed to finance the defendant at the time when the defendant had to conduct a litigation for the recovery of the zamindari, and the other based on the offer made at the end of paragraph 12 of the written statement. As regards the first ground, it is sufficient to say that the agreement makes no provision for the defendant maintaining the plaintiff. The fact that the plaintiff thought it worth his while to join in an arrangement made by the father for raising a loan for the recovery of the zamindari may be due to various reasons, but that will not of itself convert the estate into joint family property because the suit was decreed on the basis of a right of inheritance in the present defendant as heir to his sister's son; nor can that circumstance confer on the plaintiff any rights not expressly provided for in the agreement.

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The offer in the written statement is more in the nature of a voluntary undertaking and does not amount to any admission of a legal right; that undertaking is coupled with conditions which no Court of law can enforce, namely, that the plaintiff should behave in a particular way and be amenable to the defendant. No decree could be founded on such an offer.

The appeal must accordingly be allowed and the suit dismissed with costs both here and in the Court below.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row.

SHAIKH ISMAIL SAHIB (PLAINTIFF), APPELLANT,

v.

NIRCHINDA VENKATANARASIMHULU IYAH,
(DEFENDANT), RESPONDENT.*

1936,
April 30.

*Nuisance—Actionable nuisance—Act, whether or not an—Test—
Noise by loud and discordant instruments—Making of, long
after hour when people ordinarily go to sleep—Actionable
nuisance, if.*

Where an act is alleged to amount to an actionable nuisance, the Court must decide whether in view of the ordinary standard of comfort prevailing among ordinary people living in the locality the act is one which would amount to a serious invasion of the right of a person to comfortable dwelling in his own house. No doubt the question is one of degree and, in applying the law to any particular case, the Court must be

* City Civil Court Appeal No. 71 of 1935.

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guided to a great extent by commonsense and the ordinary standard of comfort prevailing in the neighbourhood. But this does not mean that it is left entirely to the neighbourhood to decide which is an actionable nuisance and which is not.

Colls v. Home and Colonial Stores, Limited, [1904] A.C. 179, and *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 188, 165, referred to.

Where the act complained of was that, during the performance of the ceremony known as Skanda Shashti, noise was produced by loud and discordant instruments like the tom-tom, cymbals, etc., and that such noise was made long after the hour when people would ordinarily go to sleep,

held that the act amounted to an actionable nuisance.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 768 of 1934.

K. Bhashyam Ayyangar and T. R. Srinivasan for appellant.

T. M. Krishnaswami Ayyar for *Ponnuswami Ayyar* and *Narayanaswami Ayyar* for respondent.

Cur. adv. vult.

JUDGMENT.

This is an appeal from the decree of the City Civil Judge, Madras, dated 8th May 1935 in Original Suit No. 768 of 1934, a suit for an injunction restraining the defendant, his servants and agents from beating tom-tom and from producing loud music in his house, No. 29, Ramanuja Ayyar Street, Old Washermanpet. The plaintiff is the owner and resident of the adjoining house No. 30. Both the houses are situated in a residential locality and the defendant's house was also used purely for residential purposes till 1932 when the downstairs portion of it was set apart by the defendant for what he considered to be a charitable purpose, namely, to allow anybody who

wanted to use it temporarily for performing marriage ceremonies, pujas, etc., free of rent. The convenience of getting a building for such purposes was apparently appreciated by many people after this "charity" was established, for the defendant's own account shows that in 1933 it was used for these pujas and ceremonies for 93 days and in 1934 the number of days rose to 122, and it would indeed appear that there is every likelihood of the "charity" becoming more and more popular and the house being more and more frequently resorted to in future. The defendant's main contest was that there was no actionable nuisance as a result of the noise and the only point decided by the trial Court was whether the act complained of, that is, the production of loud music and noise in connection with ceremonies and pujas carried on in the defendant's house, amounts to an actionable nuisance.

There is really no doubt as regards the facts, and there can be no doubt that for most of the time when the defendant's downstairs is occupied for the purpose of performing ceremonies and pujas, the noise produced during night especially is a source of great suffering to the neighbours who are unable on account of the noise to get proper sleep. The learned trial Judge was prepared to believe that at least during the performance of the ceremony known as Skanda Shashti there is terrible noise during night which is sufficient to disturb the sleep of the neighbours for at least six nights. He dealt with this question as follows :

"Can we direct that during the occasion of Skanda Shashti there should not be more than a certain amount of

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ISMAIL SAHIB noise or that the noise should not go beyond a certain period? I am of opinion that in our present state of society it is not possible to issue an injunction in such cases."

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The reason given by the learned Judge is that people are superstitious and they believe that this ceremony should be performed and that shouting as loudly as possible is an essential part of the ceremony, and that Courts could not dictate to those who want to perform such a ceremony that they should not perform it in that manner. As regards the other ceremonies, especially marriages, the learned trial Judge does not doubt that there was too much music in connection with the marriages but that as marriages are performed during special months, the noise caused in connection with marriages would not be such as to amount to an actionable nuisance especially as it is only in three or four days in a month that there is such a noise. The law which the learned Judge applied to the facts of the present case appears to be contained in the following observation :

"In order that an act may be an actionable nuisance, it must be something which the society does not tolerate."

In other words, according to the learned trial Judge, the law is to be found in the opinion of the people in general about the act which is alleged to be an actionable nuisance. Applying this statement of the law to the facts of the case, the learned Judge was of opinion that there was no actionable nuisance and he accordingly dismissed the suit but without costs. The plaintiff appeals.

In this appeal by the plaintiff, objection has been taken to the statement of the law on the subject of actionable nuisance by the learned

trial Judge and I think the objection is well-founded. It is not quite correct to say that an act will be an actionable nuisance only if society does not tolerate it. No doubt the question is one of degree and in applying the law to any particular case, one must be guided to a great extent by commonsense and the ordinary standard of comfort prevailing in the neighbourhood. But this does not mean that it is left entirely to the neighbourhood to decide which is an actionable nuisance and which is not. It is the Court that has to decide whether, in view of the ordinary standard of comfort prevailing among ordinary people living in the locality, the act is one which would amount to a serious invasion of the right of a person to comfortable dwelling in his own house. As stated by Lord HALSBURY in *Colls v. Home and Colonial Stores, Limited*(1) :

"A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance, which will give a right of action."

That is a question of fact to be decided by the Court in each case. It is enough to refer to the latest case on the subject, *Vanderpant v. Mayfair Hotel Co.*(2), where the law on the subject is stated thus :

"Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthful enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered

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(1) [1904] A.C. 179.

(2) [1930] 1 Ch. 138, 165.

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The only change in this statement of the law which is required to make it applicable to this country is to substitute the word "Indian" for "English". In the particular case before us, it is clear that the noise is so much that it prevents people in the neighbourhood from having proper sleep during nights. Sleep is not the luxury of a few but is a necessity of mankind generally, and repeated disturbance of natural sleep must necessarily cause a great deal of discomfort and even suffering. I can quite believe the plaintiff when he says in his evidence that as a result of this noise a child of his died in the house. It is almost a torture to prevent a sleeper from sleeping, and when this torture is repeated, it is quite probable that there may be danger to health and even to life. Sleep is human nature's daily medicine, and disturbance to sleep is not a matter of complaint only to people of refined susceptibility, but to everyone, whether in Tondiarpet or elsewhere. There can be no doubt that the noise in the present case is not produced by ordinary music but by loud and discordant instruments like the tom-tom, cymbals, and so on, and when such noise is made long after the hour when people ordinarily go to sleep, it must necessarily amount to an actionable nuisance.

The present case is moreover one in which we are not dealing with the ordinary user by a man of his dwelling house or the performance of ceremonies

therein on his own behalf or by himself. This is a case in which the defendant has caused to be concentrated in his house the noise that would otherwise be distributed among many houses. This concentration of noise must necessarily be a very great affliction to his neighbours, and in my opinion it is no answer to say that it is all done for the sake of charity. Charity which involves so much suffering to one's neighbours does not seem to deserve much encouragement, and certainly it is not a defence to an action for injunction in respect of an actionable nuisance. The defendant himself has stated in his evidence that he does not want any noise to be made between 11 p.m. and 3 a.m., and so this is not a case in which he would be personally inconvenienced in any way if loud music is prohibited at least between 11 p.m. and 3 a.m. This interval is however in my opinion too short. The interval should be at least six hours. The defendant however prefers that the six hour interval during which loud music or noise should be prohibited should be between 10 p.m. and 4 a.m. instead of 11 p.m. and 5 a.m. On the whole, I do not see any reason why in this matter his preference should not be accepted. It is not unreasonable, and there is no particular reason why the hours of sleep should not be put one hour earlier, for even according to the plaintiff the people in this locality generally go to bed by 8 or 9 p.m., and if noise is prohibited after 10 p.m., it would be more convenient in my opinion to the people in the neighbourhood, even though the plaintiff personally for reasons of his own would prefer the prohibition to be between 11 p.m. and 5 a.m.

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I am of opinion that the learned trial Judge was wrong in coming to the conclusion that the plaintiff had not established an actionable nuisance. The acts complained of have been fully proved and they certainly amount to an actionable nuisance, and the only remedy in such a case is to grant an injunction. The injunction will be in the following terms: that the defendant, his servants and agents be hereby prohibited from producing any loud noise or loud music such as would disturb the sleep of the neighbours at any time between the hours of 10 p.m. and 4 a.m. There will be a decree accordingly and the decree appealed from will be set aside. The plaintiff will be entitled to get the costs of his appeal from the defendant (respondent). There will be no order as to costs in the trial Court.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

CHINNAMMAL (PLAINTIFF-PETITIONER), APPELLANT,

1936,
March 12.

v.

CHIDAMBARA KOTHANAR (SINCE ALLEGED TO HAVE BECOME INSANE AND CAUSED TO BE REPRESENTED BY G. RAGHAVA KOTHANAR AS HIS GUARDIAN *ad litem* (RESPONDENT—DEFENDANT), RESPONDENT.*

Set off—Equitable set off—Applicability of doctrine of—Specific performance—Decree for—Amount to be deposited into Court by plaintiff under, as condition of getting deed of conveyance—Costs payable by defendant to plaintiff under decree—Deposit of amount directed to be paid by plaintiff less amount of costs awarded to him—Sufficiency of—Applicability of doctrine of equitable set off—Code of Civil Procedure (Act V of 1908), O. XXI, r. 19—Applicability of.

A decree for specific performance provided that, on the plaintiff depositing into Court Rs. 500 within the time mentioned there, the defendant was to execute, and get registered, a deed of conveyance in the plaintiff's favour. The decree further provided that the defendant was to pay the plaintiff a certain amount by way of costs.

The plaintiff deposited into Court within the time limited Rs. 157-15-0, that is to say, Rs. 500 less (i) the costs awarded to her by the decree, (ii) a further sum representing certain other costs which she was entitled to recover by way of restitution under section 144, Civil Procedure Code, and (iii) the interest on certain items of costs.

Held that the plaintiff must be deemed to have carried out the direction in the decree in regard to the deposit of money into Court.

Even if Order XXI, rule 19, of the Code of Civil Procedure was inapplicable, the plaintiff, in availing herself of the set off and deducting the costs, did not exceed her right under the

* Appeal Against Appellate Order No. 134 of 1929.

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general law. The claims were in the nature of cross-demands arising out of the same transaction and the doctrine of equitable set off allowed by Courts of Equity holds good.

Ishri v. Gopal Saran, (1884) I.L.R. 6 All. 351, *Ram Lagan Pande v. Mohammad Ishay Khan*, (1919) 18 A.L.J. 162, *Umrao Singh v. Kanwal*, (1932) 141 I.C. 15, *Hemendra Nath v. Tulshi Singh*, A.I.R. 1930 All. 413, *Brijnath Dass v. Juggernath Dass*, (1879) I.L.R. 4 Cal. 742, and *Krishnachandra Bhowmik v. Pabna Dhanabhandar Co., Ltd. (in Liquidation)*, (1934) I.L.R. 62 Cal. 298, followed.

APPEAL against the decree of the District Court of Trichinopoly in Appeal Suit No. 205 of 1928 preferred against the order of the Court of the District Munsif of Trichinopoly dated 1st March 1928 and made in Execution Petition No. 182 of 1928 in Original Suit No. 124 of 1918.

K. G. Srinivasa Ayyar for appellant.

M. S. Vaidyanatha Ayyar for respondent.

VENKATASUBBA
RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This case has had a long history. It was commenced in 1918 and, what we hope is the final order, we are now pronouncing in 1936.

Before dealing with the appeal we must advert to a certain matter that has happened. The appellant filed an affidavit and persuaded the Office to treat the respondent as a lunatic without notice to his Counsel on the record. Some person was appointed as his guardian *ad litem*, whose name was entered in the cause-list in the place of the respondent's Counsel. The respondent was not a lunatic so found by inquisition and the procedure adopted, we need hardly point out, is extremely irregular. At the request of Mr. Vaidyanatha Ayyar, the respondent's Counsel, we directed that his name should appear in this

day's list and, whether the respondent is a lunatic or not, he has now had the benefit of being represented by his Counsel on the record. His guardian *ad litem*, we may observe, did neither appear in Court, nor was he represented.

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The question argued in the appeal is whether the plaintiff can be deemed to have carried out the direction in the decree in question in regard to the deposit of money into Court. That decree was passed by the High Court on 17th January 1928, and it provided that, on the plaintiff depositing into Court Rs. 500 within the time mentioned there, the defendant was to execute, and get registered, a deed of conveyance in her (the plaintiff's) favour; the decree further provided that the defendant was to pay the plaintiff a certain amount by way of costs.

The plaintiff deposited into Court within the time limited Rs. 157-15-0, that is to say, Rs. 500 less (i) the costs awarded to her by the decree, (ii) a further sum representing certain other costs which she was entitled to recover by way of restitution under section 144, Civil Procedure Code, and (iii) the interest on certain items of costs.

It is contended for the defendant-respondent that there was a duty cast by the decree upon the plaintiff to deposit the full amount of Rs. 500 and that she, having committed default, was not entitled to the reconveyance. Mr. Vaidyanatha Ayyar has strongly urged that Order XXI, rule 19, Civil Procedure Code, is inapplicable and that therefore the plaintiff was not entitled to deduct from the purchase money the costs awarded to her. The decree, as worded, gives the plaintiff the

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right to demand that the property shall be conveyed to her on her depositing the purchase money, but it does not confer upon the defendant a corresponding right, that is, he cannot, on tendering the conveyance, claim the purchase money from the plaintiff. It may therefore be argued that, as, under the decree by its own force, the defendant is not entitled to recover a sum of money, Order XXI, rule 19, which refers to two parties "entitled to recover sums of money from each other", is inapplicable. Whether independent of the decree the defendant can on tendering a proper conveyance demand the purchase money is a question which it is unnecessary for the present purpose to decide. Assuming, however, that Order XXI, rule 19, is inapplicable, the question arises, did the plaintiff, in availing herself of the set off and deducting the costs, exceed her right under the general law? There is a strong body of authority in favour of the view that the kind of right which the plaintiff claims exists apart from the provisions of the Code. The point has been very fully considered by a Bench of the Allahabad High Court consisting of STRAIGHT Ag. C.J. and MAHMOOD J. in *Ishri v. Gopal Saran*(1). The decree there was made in a pre-emption suit and very closely resembles the decree in question. There also it was provided that the plaintiff was to obtain possession on payment of the purchase money and that he was to get a sum by way of costs. The plaintiff deposited the purchase money with the exception of a sum less than the amount of costs awarded to him, and it was held that the principle underlying sections 221 and 247 of the

(1) (1884) I.L.R. 6 All. 851.

Code of 1882 (corresponding to Order XX, rule 6, and Order XXI, rule 19, of the present Code) applied and that the plaintiff was entitled to deduct the costs. MAHMOOD J. points out very forcibly that when under the same decree both the plaintiff's right and the defendant's liability are declared, it would be idle to drive the former to a separate proceeding to recover the costs. Referring to the argument advanced in that case on behalf of the defendant, the learned Judge makes the following trenchant observations :

"The argument, though plausible, has no force. It seems to aim at giving to mere formality the significance of a substantive effect. For it seems to us to involve a very untenable proposition, that for a pre-emptor decree-holder the only way to enforce his decree is to come into Court with the full purchase money in the one hand, offering it to the judgment-debtors, and to stretch out the other hand asking them to give him the costs which the very decree, under which he is depositing the purchase money, awards him. The argument also involves the contingency that a pre-emptor should pay up the purchase money to the judgment-debtors in ready cash, and may have to wait possibly for years before recovering from them the costs awarded to him by the Court, and it is conceivable that he may never be able to recover them at all. We cannot regard such results as consonant with the principles of justice, equity and good conscience, which we are bound to administer in such cases; and holding these views, we cannot adopt the reasoning upon which the judgment of the lower appellate Court proceeds, nor the argument urged before us in support of that judgment by the learned pleader for the respondents. The effect of our views is to apply, by analogy of sections 221 and 247, the doctrine of set off to the case before us—a course which is consonant in principle with that followed by JACKSON J. in the case of *Jugo Mohun Bukshee v. Soorendronath Roy Chowdry*(1), long after the Legislature formulated the rules contained in the two sections just referred to."

(1) (1870) 13 W.R. 106.

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To the same effect are the cases of *Ram Lagan Pande v. Mohammad Ishaq Khan*(1) and *Umrao Singh v. Kanwal*(2), which also deal with pre-emption decrees.

The decree with which we are concerned is one directing specific performance, but in principle, for the present purpose, there can be no difference between such a decree and a decree in a pre-emption suit. In *Hemendra Nath v. Tulshi Singh*(3) the principle was extended to a decree for possession. In that case, the plaintiff was under the decree to get possession on depositing a particular sum and it was held that he was entitled to set off the costs against the amount he was directed to deposit. In *Brijnath Dass v. Juggernath Dass*(4) the right to set off the costs due to the plaintiff against the amount due by him was recognised in a redemption suit. In that case, it was held that the plaintiff was entitled to redemption on paying the amount directed less the costs awarded to him. The same principle was extended even further by a Bench of the Calcutta High Court in *Krishnachandra Bhowmik v. Pabna Dhanabhandar Co., Ltd. (in Liquidation)*(5). The facts were that the Subordinate Judge's order under which the appellant had paid certain costs to the opposite party was subsequently reversed. Under a later order of the Judicial Committee in the same suit, an amount representing costs was payable by him (the appellant) to his opponent. When that order was sought to be executed, he claimed to deduct from the sum due the amount

(1) (1919) 18 A.L.J. 162.

(3) A.I.R. 1930 All. 413.

(2) (1932) 141 I.C. 15.

(4) (1879) I.L.R. 4 Cal. 742.

(5) (1934) I.L.R. 62 Cal. 298.

payable to himself. It was held that, independent of Order XXI, rule 19, on general principles and in the exercise of the Court's inherent power, it could give effect to such a claim.

These cases in our opinion proceed on a correct principle and we are prepared to follow them. First, as to the costs expressly payable to the appellant under the decree, the matter stands thus: she could have brought into Court the full amount of Rs. 500 and simultaneously attached a portion of that sum for realising the costs due to herself. That would be a needless and idle formality to observe. Secondly, in regard to the costs due to her by way of restitution, the right to recover those costs also accrued to her in virtue of the same decree of the High Court. In short, the claims are in the nature of cross-demands arising out of the same transaction and the doctrine of equitable set off allowed by Courts of Equity holds good.

Mr. Vaidyanatha Ayyar next contends that under the High Court's decree the plaintiff was not justified in deducting interest on the costs incurred in the first Court. We think the expression "full costs", in the circumstances, includes the interest that had already been awarded to her by the lower Court. As regards the interest deducted on the costs due by way of restitution, we see no reason to think that the plaintiff acted wrongly. She calculated interest at six per cent and had an application been made under section 144, Civil Procedure Code, interest at that rate would have been granted to her.

In the result, we hold that the plaintiff has deposited the proper amount into Court. The

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appeal is allowed; the lower Court's order is reversed and the order of the Court of first instance is restored. The defendant shall pay the plaintiff's costs in the two Courts below; in this Court we make no order as to costs.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

MORAVANENI VEERAYYA AND NINE OTHERS
(DEFENDANTS 1 to 5 AND 7 TO 9 AND NIL),
APPELLANTS,

v.

SREE RAJA BOMMADEVARA VENKATA BHASHYA-
KARLA RAO BAHADUR, MINOR REPRESENTED BY
MR. M. V. RAMA RAO NAIDU GARU,
(PLAINTIFF), RESPONDENT.*

Hindu Law—Father—Patta by, granting occupancy rights in homefarm lands—Binding nature of, against minor son, as alienation by manager or guardian or as conversion of homefarm lands into ryoti lands by "landholder" within meaning of Madras Estates Land Act (I of 1908)—Partition suit by son against father—Preliminary and final decrees in—Grant of patta between dates of—Village in which lands situated—Allotment of, to son's share, by final decree—Ss. 3 (5), 46 and 181 of Madras Estates Land Act—Declaration of invalidity of patta and recovery of mesne profits—Suit by son for—Decree for son in—Payment by him of amount realised under patta and utilised in payment of debt binding upon him condition of, if—Indian Contract Act (IX of 1872), ss. 64 and 65—Specific Relief Act (I of 1877), sec. 41—Effect of—Past profits—Son's right to.

A suit for partition instituted on behalf of a minor Hindu son against his father was compromised and a preliminary

* Appeal No. 25 of 1932.

decree in terms of the compromise was passed on 3rd March 1921; an application for final decree was made on 8th April 1922 and a final decree was in fact passed on 7th July 1924. In the interval, i.e., on 31st October 1923, the plaintiff's father granted to the defendants a patta whereby the father granted permanent occupancy rights to the defendants in lands which till then were homefarm lands of the estate. Under the final decree the village in which those lands lay was allotted to the plaintiff's share. Within about three years after the passing of the final decree the plaintiff instituted the suit out of which the appeal arose for possession of the said lands and for mesne profits alleging that the patta granted by his father in favour of the defendants was not binding upon him.

The compromise decree made provision for the discharge of certain debts which were admitted to be binding upon both the father and the son. Clause 2 of the decree relating to those debts provided that they should be discharged completely by the sale of some of the estate villages; that in thus disposing of the villages the plaintiff's next friend and the defendant should consult each other and sell only such of the villages as both were willing to dispose of; that necessary documents therefor should be executed by the plaintiff's next friend and the defendant; that, if in connection with such sale there should arise difference of opinion between the plaintiff's next friend and the defendant, the matter should be referred to a third party; and that both should abide by his decision, sell and execute the documents in accordance therewith. Clause 3 of the decree distinctly prohibited the father from contracting any further debts except in consultation with the plaintiff's next friend in circumstances of necessity. The clause provided that if the father alone contracted any debts, such debts should not bind the minor plaintiff. Clause 5 of the decree provided "that if during the minority of the plaintiff the father contracts any debts or does anything tending to cause any loss to the estate in the management of its affairs or effects improper and collusive sales, the plaintiff be immediately entitled to get his half share by partition". The clause went on to provide for the management of such divided share in two ways, viz., that if the father on demand by the plaintiff's next friend agreed to set apart the properties for the plaintiff's half share, he should manage the same on behalf of the plaintiff and maintain accounts separately, but if the father did not effect a partition

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and allot a separate share to the plaintiff, a petition was to be filed in Court for a final decree for partition and the Court should determine who should manage the plaintiff's half share when separated.

Held that, in view of the terms of the compromise decree and the circumstances of the family at the time, the patta could not be held to be a transaction within the powers of the father either as manager or guardian or as a landholder within the meaning of the Madras Estates Land Act, and that it was not therefore binding upon the plaintiff.

The transaction under the patta could not bind the plaintiff as an alienation made by a manager or guardian because it was not justified by necessity. It could not be upheld as a conversion of homefarm lands into ryoti lands by a landholder within the meaning of the Madras Estates Land Act because neither the condition of the lands nor the circumstances attending their cultivation necessitated the conversion.

Narayanaswami Nayudu v. Subramanyam, (1915) I.L.R. 39 Mad. 683, *Kallalagar Devasthanam v. Anthony Moopan*, (1924) 48 M.L.J. 147, and *Mullai Thayammal v. Subbriyyan Pillai*, (1922) 16 L.W. 802, referred to.

Held further that, notwithstanding that a portion of the amount realised under the patta was utilised by the father in discharging a debt binding upon the plaintiff under the compromise decree, the defendants were not entitled to be reimbursed the portion of the amount so utilised under section 64 or 65 of the Indian Contract Act, or section 41 of the Specific Relief Act, or on the principle recognised in *Bannatyne v. MacIver*, [1906] 1 K.B. 103, because even at the date of the patta the defendants had knowledge of the terms of the compromise decree and of the definite prohibition therein on the plaintiff's father executing any documents or contracting any debts in such a way as to bind the plaintiff and the father had been in possession of other funds and had practically deprived the plaintiff for several years of the whole income from the estate.

Ram Tuhul Singh v. Bisswar Lall Sahoo, (1875) L.R. 2 I.A. 181, *Ammani Ammal v. Ramaswami Naidu*, (1918) 37 M.L.J. 118, and *Limbaji Rautji v. Bahi*, (1925) I.L.R. 49 Bom. 576, referred to.

Held also that the plaintiff was entitled to past profits as he was not guilty of any such conduct as would disentitle him to such profits.

Satgur Prasad v. Har Narain Das, (1932) I.L.R. 7 Luck. 64 (P.C.), relied upon.

Subba Goundan v. Krishnamachari, (1921) I.L.R. 45 Mad. 449, and *Ramasami Aiyar v. Venkatarama Ayyar*, (1923) I.L.R. 46 Mad. 815, referred to.

A co-sharer landholder is not entitled to convert homefarm land into ryoti land prejudicially to the interests of the other co-sharers.

Midnapore Zamindary Company, Ltd. v. Naresb Narayan Roy, (1924) I.L.R. 51 Cal. 631 (P.C.), referred to.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Ellore in Original Suit No. 17 of 1930.

S. Srinivasa Ayyangar and *V. Rangachari* for appellants.

K. Kuttikrishna Menon for respondent.

JUDGMENT.

VARADACHARIAR J.—This is an appeal by the defendants against a decree which directed them to hand over possession to the plaintiff of the suit lands and pay mesne profits. The defendants' right to possession rests upon Exhibit K, a patta dated 31st October 1923, granted to them by the plaintiff's father. The plaintiff contends that the suit lands have been allotted to him at a partition between himself and his father and that the patta whereby, after the preliminary decree in the partition suit, the father has granted permanent occupancy rights to the defendants in what till then were homefarm lands of the estate is not binding on him. It is therefore necessary to investigate the circumstances under which this patta was granted.

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Plaintiff's father was the Zamindar of South Valloor and in 1920 a suit for partition was instituted against the father by the plaintiff's mother acting as next friend. Allegations of gross mismanagement were made against the father and were more than justified. A preliminary decree was passed on 3rd March 1921 (Exhibit J). It was the result of a compromise and its terms show that the persons who brought it about were anxious as far as possible not to affect unnecessarily the dignity of the father's position but at the same time to effectively safeguard the plaintiff's rights and prevent the father from causing any further loss to his minor son. It is in evidence that the father was even by that date heavily in debt and the evidence also shows that, during the pendency of the partition suit and even between the date of the preliminary decree and the final decree, the father wasted all the income that he received from the estate and went on borrowing recklessly to the extent of some lakhs. Fully alive to this tendency of the father, the persons responsible for the compromise decree made provision for the discharge of the debts which it was thought fit to admit as binding upon both the father and the son. These debts were specified in a schedule to that decree and totalled Rs. 6,92,000. Of these, it is necessary for the purpose of this appeal to refer only to item No. 3, a sum of Rs. 40,000 due to one Pyda Venkatachalapathi under the decree obtained by him against the father in Original Suit No. 15 of 1920 on the file of the Ellore Sub-Court. Clause 2 of Exhibit J provided that the debts specified in the schedule thereto

"be discharged completely by the sale of some of the estate villages; that in thus disposing of the villages the plaintiff's

next friend and defendant do consult each other and sell only such of the villages as both are willing to dispose of; that necessary documents therefor be executed by the plaintiff's next friend and defendant; that if in connection with such sale there should arise difference of opinion between plaintiff's next friend and defendant, the matter be referred to M.R.Ry. S. Hanumantha Rao Pantulu Garu, that both do abide by his decision, sell and execute the documents in accordance therewith, etc."

Clause 3 distinctly prohibited the father contracting any further debts except in consultation with the plaintiff's next friend in circumstances of necessity. And it was added that if the defendant, i.e., the father, alone contracted any debts such debts should not bind the minor plaintiff.

There can be little doubt that, both on general principles now well established as to the effect of the institution of a suit for partition on behalf of a minor, and especially when a decree for partition is passed therein, and also according to the express terms of the compromise decree passed in the plaintiff's partition suit, the plaintiff and his father became divided in status and that after the date of Exhibit J the father could no longer have the powers which he would have as the head of an undivided Hindu family. It has no doubt been laid down in *Jagannatha Rao v. Viswesam*(1) and by a majority of the Judges in *Subramania Ayyar v. Sabapathy Aiyar*(2) that notwithstanding the partition the son will continue to be liable for the debts of the father contracted before partition, but these very cases adopt the view laid down in earlier cases that under such circumstances the father would have no power to dispose of the son's interest in

(1) (1924) I.L.R. 47 Mad. 621. (2) (1927) I.L.R. 51 Mad. 361 (F.B.).

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the family property even for the purpose of discharging such debts. Nor can a creditor who has only obtained a decree against the father bring to sale in execution family property so as to affect the interests of the son who had in the meanwhile become divided. If matters remained there, there could be no doubt that the plaintiff's father would have had no power to make any disposition of family property even if it be for the discharge of antecedent debts so as to affect the son's interests in such property.

In the circumstances of the present case, the father was under a disability in the matter of making alienations as the result of another rule as well, viz., the rule of *lis pendens*. The partition suit as stated already had been filed in 1920; the preliminary decree had been passed on 3rd March 1921; the application for final decree was made on 8th April 1922 and the final decree was in fact passed on 7th July 1924. It is in the interval, i.e., on 31st October 1923, that the plaintiff's father granted to the defendants the patta, Exhibit K. Under the final decree the village in which the suit lands lie was allotted to the plaintiff's share. It might have been possible for the defendants to have applied to be made parties to the partition suit and requested the Court to allot the suit lands to the father's share. It is not for us to say whether the equities between the parties would have enabled the Court to grant this request or not; but under the Hindu law that was the only course open to these defendants. For some reason that course was not adopted and the result of the rule of *lis pendens* will be that, if Exhibit K is to be viewed as an alienation by the father, it

cannot prevail against the decree in the suit nor affect the properties allotted to the son under that decree.

In the lower Court, contentions were put forward seeking to justify the alienation on the footing that it was an alienation by a manager for purposes of necessity. This argument was apparently rested upon the provisions of clause 5 of Exhibit J though from the discussion in the judgment it is not by any means clear whether the argument was sufficiently dissociated from the joint character of the family. Clause 5 of Exhibit J provides

"that, if during the minority of the plaintiff the father contracts any debts or does anything tending to cause any loss to the estate in the management of its affairs or effects improper and collusive sales, the plaintiff be immediately entitled to get his half share by partition".

It then goes on to provide for the management of such divided share in two ways, viz., that, if the father on demand by the plaintiff's next friend agreed to set apart the properties for the plaintiff's half share, he should manage the same on behalf of the plaintiff and maintain accounts separately, but, if the father did not effect a partition and allot a separate share to the plaintiff, a petition was to be filed in Court for a final decree for partition and the Court should determine who should manage the plaintiff's half share when separated. On these provisions, it was urged that, notwithstanding the division of status brought about by Exhibit J, the father retained the powers of management of the whole estate, including the son's share. It was also contended that notwithstanding the division in status the father was

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under the Hindu law the guardian of the property and person of his minor son and that for both these reasons the father had all the powers which a guardian would have to deal with the plaintiff's estate. I must, however, say that any argument based on clause 5 or even on the general powers of the father as the son's guardian cannot overlook the express provisions contained in the other clauses of Exhibit J imposing limitations upon the father's powers of alienation. Clause 2, which has already been set out, makes specific provision for discharge of debts and there is no justification for treating the concurrence of the plaintiff's mother in alienations for that purpose as a mere formality and assuming that the father nevertheless continued to have independent power to dispose of the son's share for the discharge of debts. As already stated, the application for final decree had been made on 8th April 1922 and the father undoubtedly opposed it; the further question will therefore arise whether even under the terms of clause 5 the father's powers of management did not cease by the time that the suit transaction was entered into, viz., on 31st October 1923. Again, if the father's powers are to be assimilated to those of a guardian, any alienation made by him could be justified only on grounds of *necessity*. The Court below has found that judged by that test the transaction under Exhibit K cannot be supported. The father was in possession of an annual income of some lakhs and at the time of the institution of the partition suit he was in possession also of considerable cash and movables. He wasted them all and went on borrowing several lakhs during the pendency of the partition suit.

If, having brought himself and the estate to that condition, he makes alienations for the purpose of discharging debts, it cannot be said that, judged by tests applicable to a guardian's alienation as distinguished from a father's alienation, the suit alienation must be upheld. Further, it cannot be held that the alienation was necessary in the interests of the minor because, as already pointed out, the decree of Pyda Venkatachalapathi had been obtained only against the father, and the proceedings which he was conducting in execution could not according to a long line of authorities in this Court have affected the son's interest, because the son had by reason of Exhibit J become divided in status. It was no doubt open to Pyda Venkatachalapathi to institute a suit against the son for the debt but, even if such a suit had been instituted, steps might have been taken on behalf of the minor son to discharge the debt by means other than an alienation of property, as, for instance, by the appointment of a receiver for the minor's share of the estate whose income the father was wasting. The learned Judge was therefore right in holding that even as an alienation made by a manager or guardian the transaction under Exhibit K cannot bind the plaintiff.

A different line of argument was accordingly urged before us by the learned Counsel for the appellants. He contended that Exhibit K should not be viewed as an alienation at all, that what really happened was that homefarm land of the zamindar was converted into ryoti land, that such conversion is within the powers of any

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zamindar or landholder, and that once such conversion is made the ryots who were admitted into possession in due course acquire occupancy rights under the Madras Estates Land Act and not under any alienation made by the zamindar. Apart from the fact that such was not the line of argument taken before the lower Court, it is difficult to accede to this argument. The true position after Exhibit J was that the zamindar and his son were in the position of co-sharers and, as held by the Privy Council in *Midnapore Zamindary Company, Ltd. v. Naresh Narayan Roy*(1), it would not ordinarily be within the power of any co-sharer to do anything which would amount to the creation of permanent rights of occupancy in favour of another in any portion of the joint estate. Mr. Srinivasa Ayyangar accordingly sought to escape that difficulty by relying on the doctrine of conversion from homefarm to ryoti. But there is no authority or justification for assuming that a co-sharer landholder has inherent in him the right to make the conversion without any regard to the rights of the other co-sharers. Assuming for the sake of argument that the father during the time that he was in *de facto* management of the whole estate might be regarded as a "landholder" within the meaning of the definition in section 3, clause 5, of the Estates Land Act, that definition must only be held applicable to acts done and powers exercised by the landholder as contemplated in the several provisions of the Act. It may be that a person admitted to possession of ryoti land

(1) (1924) I.L.R. 51 Cal. 631 (P.C.).

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by such landholder may acquire occupancy rights under section 6; or again, it may be even that such landholder may be compelled to receive payment under section 46 of the Estates Land Act from a non-occupancy ryot, with the result that permanent rights of occupancy might arise therefrom. But on matters where the Act makes no specific provision, the mere circumstance that the plaintiff's father might be regarded as a landholder within the meaning of that term in the Estates Land Act will not make him absolute owner of the estate for all purposes so as to prejudice the rights of other persons interested in the estate. Mr. Srinivasa Ayyangar relied upon section 181 of the Estates Land Act as amounting to a statutory authorisation enabling a landholder to convert homefarm land into ryoti land. This is certainly not a legitimate interpretation of the proviso to that section. It is merely a proviso inserted by way of abundant caution and only says that nothing contained in the main part of the section "shall prevent a landholder from converting his private land into ryoti land". Whether he has power so to convert or not must be decided with reference to other branches of the law. Reliance was also placed in this connection upon two or three decisions of this Court. *Narayanaswami Nayudu v. Subramanyam*(1) and *Kallalagar Devasthanam v. Anthony Moopan*(2) do not bear upon the question now under consideration. They only hold that a person may be a landholder within the meaning of that term in the Estates Land Act even though he may not be

(1) (1915) I.L.R. 39 Mad. 683. (2) (1924) 48 M.L.J. 147.

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the beneficial owner. *Mullai Thayammal v. Subbayyan Pillai*(1) no doubt adverted to the question of conversion of homefarm land into ryoti land but the learned Judges did not lay down that a landholder had absolute power to make such conversion in disregard of other persons' rights. They only said that the successor of the landlord who did so convert could not avoid the transaction by merely issuing notice to quit or by any alteration in his own registers. A conversion of this kind could not always be regarded as an act done in the ordinary course of management. The true test will be whether such conversion was necessitated or justified by circumstances relating to the condition of the land or the continuance of its being cultivated as homefarm land. Where the zamindar merely in consideration of a substantial money payment brings about such conversion, the transaction must in effect be viewed as an alienation. If, on the other hand, he discontinues private cultivation because he is unable to carry on private cultivation, other consequences may follow. In the present case, no attempt has been made to suggest that the condition of the land or the circumstances attending its cultivation necessitated the conversion. On the other hand, it was obviously a device to raise money to meet the needs of the extravagant zamindar.

I am therefore of opinion that Exhibit K cannot be held to be a transaction within the powers of the father either as manager or guardian or as a landholder having regard to the terms of Exhibit J and the circumstances of the family at the

(1) (1922) 16 L.W. 802.

time. The plaintiff is therefore entitled to a decree for possession of the suit lands.

It was next argued that the plaintiff should not be permitted to take possession except on condition of restoring to the defendants the benefit which he has received under the transaction. This argument was founded on the fact that a portion of the money realised by the zamindar under Exhibit K was utilised to pay off the debt due to Pyda Venkatachalapathi. It would appear that a sum of Rs. 30,000 was received by the zamindar as nazarana under Exhibit K. The learned Subordinate Judge has found that out of this sum, Rs. 20,000 was paid towards that decree. Before us Mr. Srinivasa Ayyangar contended that not merely Rs. 20,000 but Rs. 25,000 should be held to have been so paid. This argument was based upon a statement in the accounts that on a day prior to Exhibit K a sum of Rs. 8,000 odd was paid to Pyda Venkatachalapathi out of which Rs. 3,000 odd came from the estate treasury and Rs. 5,000 is stated to have been received from one Govindachari in connection with a proposal to give him a permanent jeroiyati right in the suit lands. So far as can be gathered from the evidence, the defendants put forward a story that there was an auction sale of the occupancy rights proposed to be created in the suit lands and that Govindachari was one of the bidders, the defendants being another set of bidders. From this point of view Govindachari could not in any sense be considered as defendants' agent because he was a rival bidder. It was however stated that Govindachari who was the bidder for the highest amount was unable to find the money to make the deposit as

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per his bid, that he accordingly entered into some understanding with the defendants to advance him Rs. 5,000 to make the deposit and that by some arrangement Govindachari agreed to give up in favour of the defendants his right under his bid. Govindachari himself has not been examined and the learned Subordinate Judge has disbelieved the whole story about this auction. It is therefore not possible to arrive at the exact truth as to this payment of Rs. 5,000 and to connect it with the defendants. I must therefore proceed on the footing that the learned Subordinate Judge has rightly found that only Rs. 20,000 out of the amount received under Exhibit K went in discharge of Pyda Venkatachala-
pathi's decree. Taking this to be so, what is the ground on which the plaintiff can be directed to pay to the defendants the whole or any portion of this sum?

In the Court below, the right to reimbursement seems to have been claimed on the strength of sections 69 and 70 of the Indian Contract Act. They are obviously inapplicable and the learned Counsel for the appellants in this Court has not put forward that contention. He sought however to invoke the benefit of sections 64 and 65 of the Contract Act. Section 64 deals with voidable contracts and with the liability of the party who rescinds a voidable contract to restore the benefits derived by him thereunder. It has accordingly been argued that the plaintiff must be treated as a person who is a party to Exhibit K though not specifically named therein because, it is said, he must be held to have been represented by his father. The analogy of sales by Court guardians

without the sanction of the Court has been relied on and reference has been made to *Sinaya Pillai v. Munisami Ayyan*(1). I am unable to accept this argument. It is one thing to say that a person who purports to convey property must be held to convey all the quantum of interest which he could convey in several capacities held by him whether they are expressly referred to in the document or not but it is another thing to say that in circumstances like those of the present case he must be deemed to have acted on behalf of persons not mentioned in the document—indeed of a person whose rights he was doing everything in his power to injure. It does not therefore seem to me reasonable to hold that the plaintiff was a party to Exhibit K and that he is avoiding it as a person entitled to rescind the contract in the sense contemplated by section 64.

Reliance has next been placed upon section 65 and upon an observation of Messrs. Pollock and Mulla at page 378 of their Commentary on the Indian Contract Act (6th Edn.) to the effect that an obligation under this section to restore the advantage received under an agreement is not confined to the parties to the agreement but extends to any person that may have received that advantage. This observation is based upon *Girraj Bakhsh v. Kazi Hamid Ali*(2). On the facts, that case is very similar to *Sinaya Pillai v. Munisami Ayyan*(1) and the decision might well have been based on section 64. I need not however take exception to the rule as stated by Messrs. Pollock and Mulla; for even that statement of the

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(1) (1899) I.L.R. 22 Mad. 289.

(2) (1886) I.L.R. 9 All. 340.

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rule cannot be taken as of indefinite application, because it was laid down by the Privy Council as early as in *Ram Tuhul Singh v. Biseswar Lall Sahoo*(1) that it cannot be postulated that every person who has received an advantage from some transaction is under an obligation to reimburse another who has been put to loss or expense in that connection. The decision of this Court in *Ammani Ammal v. Ramaswami Naidu*(2) indicates the limitations to which a claim for reimbursement in similar circumstances must be held to be subject.

Further, if the reference in section 65 of the Contract Act to "advantage" is to be construed as contemplating a real advantage and not merely the money received not by him but by some other person, the Court must be satisfied that the person who is called upon to reimburse has really enjoyed that advantage. In this manner at least a distinction must be recognised between a party to the contract who has received an advantage and a person not a party to the contract who is said to have received an advantage. In the present case, it is not the plaintiff who received the money from the defendants. The father received the money. The advantage which the plaintiff is said to have derived is that a debt which was recognised as binding upon the plaintiff as well as his father under the terms of the decree was in part discharged out of this money. But, when it is remembered that the father was in possession of other funds and practically deprived the plaintiff for several years of the whole income from the estate, it is not easy to say

(1) (1875) L.R. 2 I.A. 131.

(2) (1918) 37 M.L.J. 113.

that by the mere fact of the father having utilised a portion of the money received under Exhibit K for the discharge of Pyda Venkatachalapathi's decree the plaintiff must be deemed to have derived an advantage.

Reliance was next placed upon *Limbaji Ravji v. Rahi* (1) where the learned Judges referred to the possibility of justice being done under section 41 of the Specific Relief Act. That provision leaves the matter largely in the discretion of the Court and, for the reasons I have above set out, it is difficult to say that there is any justice in asking the plaintiff in the present case to repay any amount to the defendants.

Finally, an appeal was made to the principle laid down by the Court of Appeal in England in *Bannatyne v. MacIver*(2) to the effect that, even when an agent borrows money in excess of his authority, the principal may be held liable to make it good to the extent to which the money has been applied for the principal's benefit. But the Master of the Rolls as well as ROMER L.J. laid stress in that case upon the circumstance that the lender was not aware that the agent was acting in excess of his authority and that he believed that the agent was acting within the extent of his authority. In the present case, the only defendant who has gone into the box is obliged to admit that he had knowledge, even at the time of Exhibit K, of the terms of the compromise decree. The other defendants have not gone into the box to swear what their belief or extent of knowledge was. In these circumstances, there appears to be

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(1) (1925) I.L.R. 49 Bom. 576.

(2) [1906] 1 K.B. 103.

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no justification for applying to the present case the principle recognised in *Bannatyne v. Mac Iver*(1).

It has been argued on behalf of the appellants that, as found by the lower Court, they have paid full consideration for the transaction and agreed to pay a fair rent and there is no reason to hold that the transaction is not one entered into in good faith. But I do not think the mere payment of consideration concludes the matter. The defendants were the mokhasadars of a neighbouring village and they were apparently anxious to acquire permanent rights in the suit lands in the adjoining village. It is one thing to say that the transaction might not be *mala fide*, but it is a different thing to hold that the defendants paid money in circumstances which would entitle them to claim reimbursement from the plaintiff when the transaction is held unavailing as against him.

It has next been argued that the plaintiff should not be given mesne profits for any period prior to date of suit. It was said that the transaction under Exhibit K was only in the nature of a voidable arrangement, and that where a person is in possession under a voidable arrangement he should not be called upon to pay mesne profits before the person entitled to avoid the transaction institutes a suit for the purpose or otherwise intimates his intention to avoid the transaction. It does not clearly appear that this point was taken before the lower Court. In paragraph 8 of the plaint it is asserted that the plaintiff gave a registered notice to the defendants to vacate the lands and surrender them to him and they refused

(1) [1906] 1 K.B. 103.

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to do so. Paragraph 12 of the written statement denies that any such notice was served on the defendants. The plaintiff has not produced any evidence bearing upon the alleged notice, but it is explained before us that this was not done because the issue as framed raised only the question of the quantum of mesne profits and not the right to mesne profits. Our attention was invited to some of the decisions of this Court [cf. *Subba Goundan v. Krishnamachari*(1) and *Ramasami Aiyar v. Venkatarama Ayyar* (2)] laying down in general terms that in respect of voidable transactions there is no right to claim mesne profits prior to date of suit. After the decision of the Privy Council in *Satgur Prasad v. Har Narain Das*(3) no such general proposition can be advanced. It must depend upon the circumstances of each case whether the plaintiff has been guilty of such conduct as to disentitle him to past profits. The plaintiff in the present suit was a minor and his estate was under the management of the Court of Wards. The suit was instituted within about three years after the passing of the final decree whereby the suit village was allotted to the plaintiff's share. In these circumstances there is nothing to disentitle the plaintiff to past profits. If I had held that the defendants were entitled to be reimbursed by the plaintiff in any substantial sum, it might be a question whether it would not be appropriate to set off the interest on such amount against the mesne profits, but no such question now arises.

(1) (1921) I.L.R. 45 Mad. 449.

(2) (1923) I.L.R. 46 Mad. 815.

(3) (1932) I.L.R. 7 Luck. 64 (P.C.).

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It was next argued that the amount awarded by the Court below by way of mesne profits was excessive. It was also said that the defendants had been misled into the belief that the Court would postpone the enquiry into the mesne profits to a later stage as provided for in Order XX, rule 12, Civil Procedure Code, and that the defendants had not accordingly led evidence on the point. So far at any rate as mesne profits prior to suit are concerned, there is nothing in the Code to compel the Court to put off the determination of the question to a later date. Such a course is no doubt sometimes adopted by consent of parties but it does not appear that there was any such understanding in the present case. Witness after witness on the plaintiff's side has been asked questions bearing upon the quantum of mesne profits and it does not appear that any exception was taken to this course on the ground that it was expected that the question of mesne profits would be reserved for a future enquiry. As regards future profits, the Code no doubt contemplates a separate enquiry, but, seeing that in the present case the defendants gave up possession soon after the date of the lower Court's decree, the mesne profits decreed practically cover only the period up to the date of the decree. The matters that had happened up to that date, in so far as they had any bearing on the question of mesne profits, could easily have been brought to the notice of the Court in the course of the enquiry in the suit itself. I see no reason to think that the defendants have been substantially prejudiced by the course adopted by the lower Court.

[Portion of the judgment omitted as not being necessary for the purpose of this report.]

Both the appeal and the memorandum of objections are accordingly dismissed with costs.

We are informed that pending this appeal the lower Court has made certain amendments in its decree. Our decision is of course without prejudice to the amendments thus made.

MOCKETT J.—I agree. I desire to add a few words with regard to two matters with which this appeal is concerned. An argument was addressed to us relating to section 181 of the Madras Estates Land Act. Mr. S. Srinivasa Ayyangar appeared to contend for the following position: that by reason of the proviso therein which is to the effect that nothing contained in that section should prevent a landholder from converting his private land into ryoti land, a landholder was enabled to convert his private land into ryoti land prejudicially to the interests of a co-owner. That that is not so is, I think, clear from the observations of the Judicial Committee in *Midnapore Zamindari Company, Ltd. v. Naresh Narayan Roy*(1) and I think that it is only an argument which requires to be stated to carry with it its own refutation. In my view, the proviso to section 181 in no way adds to or detracts from the existing law relating to the powers of the landholder to convert his private land into ryoti land and, if that proviso had not been contained in the Act, I do not think the position of anybody would be affected.

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The other point on which I desire to record something more than a formal concurrence relates to the argument that the defendants in this case should be reimbursed by the plaintiff for the sum which they have paid under Exhibit K. Mr. Srinivasa Ayyangar invoked section 41 of the Specific Relief Act and he was entitled to do so because the plaint contains a prayer for a declaration that Exhibit K is void. A large number of cases have been cited to us but no facts identical with the present appear to have come under consideration in any of the authorities. In this case, there is a clear finding by the lower Court that by the date of Exhibit K, the defendants knew of the existence of Exhibit J. Indeed one of them, the second defendant (D.W. 8), has stated that he took advice about it. Now, if that is so, the defendants took possession of this property under Exhibit K with full knowledge that Exhibit J contained a definite prohibition on the plaintiff's father executing any documents or contracting any debts in such a way as to bind the plaintiff. I think therefore that they entered into this transaction with their eyes wide open and I am inclined to think that they were prepared to take the chance of its being profitable. It must be remembered that the doctrine on which the defendants relied to be reimbursed in this case is an equitable doctrine and it seems to me that the general principle governing it has been stated by ROMER L.J. in the case of *Bannatyne v. MacIver*(1) to which allusion has been made by my learned brother. It is there said—and it must be remembered in this connection that

(1) [1906] 1 K.B. 103.

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the joint status of the plaintiff and his father had been severed at the time of Exhibit K—that where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. It must be remembered that in this case the appellant is relying on the position of the plaintiff's father being that of a manager and has argued on the notion of an agency between them.

The Judicial Committee in *Ram Tuhul Singh v. Biseswar Lall Sahoo* (1) in dealing with this equitable doctrine state :

“It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay.”

Applying those principles, it seems to me on the evidence in the case, viz., the fact that the defendants entered into this contract with full knowledge of the circumstances and of the risks all of which are clearly indicated in Exhibit J, that all the necessary ingredients to enable them to invoke the equitable doctrine in their favour are negatived. It must be remembered that there is a

(1) (1875) L.R. 2 I.A. 131, 143.

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discretion in the Court under section 41, a discretion of course to be exercised judicially in accordance with the equitable doctrine laid down. I have not heard nor has any reference been made to cases where that doctrine has been invoked in aid of a party whose conduct can in any way be compared to that of the defendants herein. It is not impossible that their position may be one of misfortune. In my judgment, any misfortune they have suffered was entirely their own fault. I generally agree with all the conclusions at which my learned brother has arrived and with the result of those conclusions.

A.S.V.

INSOLVENCY JURISDICTION.

Before Mr. Justice Wadsworth.

IN THE MATTER OF S. YAHIA, AN INSOLVENT.
AMATURRUB GHOSUNNISSA BEGUM *alias*
AMIR BEGUM—APPLICANT.*.

Presidency-towns Insolvency Act (III of 1909), sec. 46(8)—
"Debt"—Arrears of maintenance payable under sec. 488,
Criminal Procedure Code (Act V of 1898)—Whether
constitute "debt".

Arrears of maintenance payable under a magisterial order under section 488 of the Code of Criminal Procedure are a debt provable in insolvency within the purview of sub-section (8) of section 46 of the Presidency-towns Insolvency Act, and in respect of such arrears a protection order can be given.

*Application No. 160 of 1936, in Petition No. 176 of 1936.

In the matter of Tokee Bibee v. Abdool Khan, (1879) I.L.R. 5 Cal. 536, followed.

Halfhide v. Halfhide, (1923) I.L.R. 50 Cal. 867, and *Victor v. Victor*, [1912] 1 K.B. 247, referred to.

Linton v. Linton, (1885) 15 Q.B.D. 239; *Kerr v. Kerr*, [1897] 2 Q.B. 439; and *In re Hawkins Ex parte Hawkins*, [1894] 1 Q.B. 25, distinguished.

APPLICATION of Amaturrub Ghousunnissa Begum *alias* Amir Begum praying to set aside the order of the Master made in Application No. 1054 of 1936 and dated 23rd April 1936 making protection of the insolvent absolute and to confine the protection to the dower debt disclosed in the schedule.

M. A. Kirmani for applicant.

P. R. Ramakrishna Ayyar for insolvent.

Cur. adv. vult.

JUDGMENT.

This is an appeal against an order of the Master granting protection in insolvency. The appellant is a Mahomedan wife whose husband has been required by a magisterial order under section 488 of the Code of Criminal Procedure to pay her maintenance. The maintenance has not been paid regularly, and it was in respect of the debt for arrears of maintenance that the protection order in insolvency was granted.

It is argued for the appellant that such arrears do not constitute a debt provable in insolvency with reference to section 46 of the Presidency-towns Insolvency Act. There is nothing in the terms of section 46 which very obviously excludes such a debt. The exclusion of the debt could only be by virtue of its being not a "debt or liability, certain or contingent", to use the words

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of sub-section 3 of the section. There is express authority in a very old Calcutta case, *In the matter of Tokee Bibee v. Abdool Khan*(1), for the view that arrears of maintenance under a magisterial order can be a debt or liability provable in insolvency, in respect of which a valid protection order may be issued. But since this decision, there has been a line of English cases which have held that a liability to alimony under an order of the Divorce Court is not a debt provable in insolvency, vide *Linton v. Linton*(2), the reason being that the payment may be varied from time to time by the Court and may at any time be put an end to by resumption of cohabitation ; and the English Courts have even gone so far as to hold that the liability for arrears of alimony, whether accrued before or after the order of adjudication, cannot be proved in insolvency, vide *Kerr v. Kerr*(3) and *In re Hawkins. Ex parte Hawkins*(4). The *ratio decidendi* of these cases appears to be the same as in the case of *Linton v. Linton*(2), viz., that the Divorce Court can and will, wholly or partially, relieve a husband of payment of arrears, if it is just to do so. It may at once be pointed out that no such power lies under section 489 of the Code of Criminal Procedure and it is well established that any reduction in the rate of maintenance by a Magistrate can only affect payments accruing due after the date of the order. There are also English cases, e.g., *Victor v. Victor*(5), in which it has been held that an annuity payable to a wife under a separation deed stands on a different footing from alimony which is

(1) (1879) I.L.R. 5 Cal. 536.

(2) (1885) 15 Q.B.D. 239.

(3) [1897] 2 Q.B. 439.

(4) [1894] 1 Q.B. 25.

(5) [1912] 1 K.B. 247.

variable by the Court and that, even though such an annuity is terminable on the resumption of cohabitation, it can be proved in bankruptcy. A more recent decision of the Calcutta High Court, *Halfhide v. Halfhide*(1), though not precisely on this point, seems to assume that arrears of maintenance can be proved in insolvency. Having in view the fact that the power given under section 489 of the Code of Criminal Procedure to a Magistrate to vary an order for maintenance does not include the power to make such variation retrospective so as to cover arrears already accrued due, it seems to me not possible to contend on the strength of the English decisions regarding alimony that such a debt is not a present certain debt or that such debt does not come within the purview of sub-section (3) of section 46 of the Presidency-towns Insolvency Act.

I therefore hold that the learned Master was right in deciding that the arrears of maintenance are a debt provable in insolvency and in respect of which a protection order can be given. The appeal is therefore dismissed with costs.

v.v.c.

(1) (1923) I.L.R. 50 Cal. 867.

PRIVY COUNCIL.

MURUGESAM PILLAI, APPELLANT,

v.

MINAKSHISUNDARA AMMAL, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS]

Indian Limitation Act (IX of 1908), sec. 17 (1)—Death of minor before right of action accrued—Date from which limitation runs against legal representative.

Under the terms of a decree made on a compromise and dated 20th March 1919, the plaintiff, a minor, was entitled to recover by execution a sum of money on executing and registering a receipt within six months of attaining his majority.

The minor died on 11th July 1925. If he had survived he would have attained his majority on 30th September 1926. On 20th November 1928, his mother as his legal representative applied for execution of the decree.

On the objection that the case fell within section 17 (1) of the Limitation Act and the application was barred,

held (i) The intention of section 17 (1) of the Limitation Act is to limit the time during which an action may be brought and not to take away the rights of a person who is a possible defendant to an action, and it does not accelerate any right of action against such person.

(ii) The right to sue had not accrued when the plaintiff died and the section, not having the effect of accelerating the right, had no effect as causing time to run from that date and the application was not barred.

APPEAL (No. 81 of 1935) from an order of the High Court (August 22, 1934) which affirmed an order of the Subordinate Judge of Cuddalore (August 22, 1930).

* Present: LORD MAUGHAM, LORD ROCHE and SIR GEORGE RANKIN.

The material facts are stated in the judgment of the Judicial Committee.

The Subordinate Judge held that limitation began to run from 30th September 1926 and the High Court, affirming his finding, held that, though in law the right of the plaintiff accrued to his legal representative on his death, enforcement of it could not be had till the date on which he would have attained his majority, that is 30th September 1926, and that the case fell within article 182, clause 7, of Schedule I of the Limitation Act.

Parikh for appellant.

The respondent was not represented.

The JUDGMENT of the Judicial Committee was delivered by LORD MAUGHAM.—This is an appeal from an order of the High Court of Judicature at Madras dated 22nd August 1934 affirming the order of the Court of the Subordinate Judge of Cuddalore dated 22nd August 1930. The orders were made in proceedings for the execution of a compromise decree dated 20th March 1919, on a petition presented by the legal representative of one Muthukumara Pillai, deceased, which was dated 20th November 1928. The respondent does not appear and Mr. Parikh, for the appellant, has said everything that can properly be said in support of the appeal, but their Lordships are unable to accept the view that the judgments of the Courts in India are incorrect.

The facts are comparatively simple. In or about the year 1912, one Narayana Pillai and his two minor sons, whose first names were Murugesam and Muthukumara, formed a Hindu joint

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family. On 26th February 1912, the father, Narayana, partitioned the joint family properties amongst the three coparceners, namely, himself and his two infant sons, and he executed a deed of partition which was registered. Shortly afterwards, namely, on 15th March 1912, he made a will disposing of his share of those properties and two days later he died. He left surviving him his two minor sons and two widows. The mother of the younger son, Muthukumara, was named Minakshisundara Ammal, and she is the respondent to the present appeal. On 27th April 1915, the minor and younger son, Muthukumara, by his next friend, his mother, just mentioned, instituted a suit in the Temporary Subordinate Judge's Court at Cuddalore, which was afterwards transferred to the Court of the Subordinate Judge at Cuddalore. There were six defendants to that suit including the present appellant, the elder of the two sons. In the suit a declaration was sought that the partition deed and the will were invalid and not binding upon the plaintiff. The suit was contested, but was eventually compromised and the Subordinate Judge in his decree stated that it was in his opinion a fit and proper compromise and was for the benefit of the minor plaintiff. This decree, dated 20th March 1919, is the decree on the true construction of which the present question arises. The material terms are as follows:

"That both the parties shall admit that the registered partition deed, dated 26th February 1912, and the registered deed of will, dated 15th March 1912, executed by the plaintiff-mentioned Narayana Pillai are genuine and valid; that they shall take unto themselves with all rights the properties set apart respectively for them in the said partition deed; that from

this day, the plaintiff's next friend shall execute and get registered a security bond for Rs. 6,000 in respect of some adequate immovable properties and file it in Court to the satisfaction of the Court; that, thereupon, the plaintiff's next friend for and on behalf of the plaintiff shall take out execution proceedings through Court and obtain delivery of possession of the plaintiff's share of properties referred to in the suit and marked C in the said registered partition deed."

That was duly done:

"That, in the matter of the first defendant"—that is the present appellant—"and the fourth defendant as guardians having been in enjoyment of the said properties marked C to this day, an account was taken in the presence of the mediators, and the amount found due to the plaintiff is Rs. 4,500; that, out of this sum of rupees four thousand and five hundred, deducting the sum of Rs. 1,500, which has this day been paid by the first defendant to the plaintiff's next friend, for the expenses in the matter of her having protected the minor till now, the balance is Rs. 3,000; that since some more properties have come down to the first defendant from his maternal grandfather Arumugam Pillai, some mediators"—including some persons who need not be mentioned—"requested that some amount may be given to the plaintiff."

Now come the material words:

"That thereupon, the first defendant agreed, out of grace and affection, to pay to the plaintiff Rs. 12,000; that, regarding the amount of Rs. 15,000 made up of this sum of rupees twelve thousand and the aforesaid mesne profits of Rs. 3,000, together with the interest accruing due thereon at the rate of eight annas (half a rupee) per cent per mensem from this day, the plaintiff shall, within about six months after his attaining majority, that is to say, before 31st March 1927, execute and get registered a receipt in favour of the first defendant"—(that is the present appellant)—"to the effect that the arrears of mesne profits have been discharged, without the plaintiff having any claim to a share in so far as the first defendant is concerned; that the plaintiff shall in person or through Court deliver it to the first defendant; that, thereafter the plaintiff shall, by means of a process of Court, recover the aforesaid amount (Rs. 15,000 and interest) by proceeding against the first defendant, the share of properties mentioned in the suit and belonging to him, and the other

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properties devolved upon him by means of the settlement deed, dated 2nd June 1904."

Then come these words :

"That till the said amount is realised, the same shall be a charge upon the said properties. So long as the plaintiff does not execute an acquittance receipt, as aforesaid, in favour of the first defendant, within the aforesaid time, the plaintiff is not entitled to recover the above amount in the aforesaid manner."

Their Lordships follow in the last sentence the translation of the words appearing both in the judgment of the Subordinate Court and in the judgment of the High Court of Madras. There are some other provisions in the decree which it is not material to state.

On 11th July 1925 the plaintiff Muthukumara died unmarried, leaving him surviving his mother, the present respondent, as his heiress. The appellant is his next reversioner. The infant plaintiff, had he survived, would have attained the age of twenty-one on 30th September 1926, and six months after that date would have elapsed on 31st March 1927, and that, according to the terms of the decree, was the date before which he ought to have executed the acquittance receipt referred to in the decree.

The respondent, on 20th November 1928, presented a petition, to which reference has already been made. By that petition she prayed that she might be brought on the record as the legal representative of the original plaintiff, Muthukumara Pillai, her son, and that she might recover the amount to which her son would have been entitled under the decree had he survived.

Various objections to this relief were raised by the first defendant before the Subordinate Court

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and before the High Court of Madras. Before their Lordships two objections were presented and urged by Mr. Parikh. They may be stated thus: that according to the true construction of the decree, the right of Muthukumara to recover the sum of Rs. 15,000 and interest was a personal right and was contingent on his attaining the age of majority and then performing the condition, as it is said, of his giving the receipt or acquittance within the stipulated time; and secondly, that the proceeding by petition to which reference has been made was not commenced within the period of limitation, which was said to be found in section 17, sub-section (1), of the Limitation Act (IX of 1908), which will have to be referred to later in more detail.

Dealing first with the question of construction, their Lordships think it right to bear in mind the warning given by their Lordships in the case of *Bhagabati Barmanya v. Kalicharan Singh*(1) :

"Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied."

It does not seem to their Lordships that the English cases afford in this case any guide to their decision. The question, whether the words alleged to form a condition precedent point to such a condition, must largely depend upon the nature of the thing to be done in relation to the context, and the first consideration which arises in the present case is that the provision for the execution by the original plaintiff of an acquittance receipt in favour of the first defendant was a provision

(1) (1911) I.L.R. 38 Cal. 468, 474 (P.C.).

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which the law would have required if the plaintiff desired to receive the Rs. 15,000 and interest. It seems to their Lordships that the provision is only of the nature of a direction inserted *ex abundanti cautela* to prevent its being thought that the plaintiff on attaining his majority was entitled both to receive the Rs. 15,000 and interest and to take proceedings to set aside the compromise.

The second consideration is this : it seems very unlikely that the compromise would have been framed in such a form that the Rs. 3,000 which were given as representing the balance of the mesne profits to which the plaintiff was beyond doubt entitled, whether the compromise agreement was set aside or not, were to be paid only if the plaintiff attained his majority and were in a sense to constitute a free gift to the first defendant, the present appellant, if the plaintiff unhappily died before attaining twenty-one. Inasmuch as under the compromise decree the fate of the Rs. 12,000 and of the Rs. 3,000 is, so to speak, joined together and the right of the petitioner, the present respondent, must be the same with regard to the Rs. 12,000 as it is with regard to the Rs. 3,000, that again seems to their Lordships to constitute a strong reason for holding that the payment of these sums was not subject to a condition precedent that the plaintiff in the action should attain the age of twenty-one. The respondent as a Hindu mother represents the estate of her deceased son for all purposes, and a release receipt executed by her will be as valid as if it had been executed by the original plaintiff, Muthukumara Pillai.

In the opinion of their Lordships the decisions of the two Courts in India on this matter were perfectly correct, and their Lordships are unable to take the view that the condition expressed was a condition precedent or that the right of the original plaintiff was a purely personal right which came to an end upon his death.

There remains the question of the Limitation Act (IX of 1908). The High Court of Madras has held that the relevant section under which a limitation arises is clause 7 of article 182 of Schedule I of the Act. If that view is correct, it would seem to follow that inasmuch as the petition was filed within three years after 30th September 1926, the date when the original plaintiff would have attained twenty-one, if he had survived, the application is not barred by time.

It is, however, contended on behalf of the appellant that this conclusion is excluded by the effect of section 17, sub-section (1), of the Limitation Act. That sub-section is in these terms :

“Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.”

The argument is that the time from which the period began to run as the result of this section was the death of the original plaintiff and, that time having elapsed before the petition was presented by the respondent, it is said that the application is barred. Their Lordships think that this argument is ill-founded. The intention of section 17 is to limit the time during which an action may be brought and not to take away the

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rights of a person who is a possible defendant to an action, and it was not intended to accelerate any right of action against such a person. If the plaintiff had attained the age of twenty-one, he would doubtless have had at that time a right to recover the Rs. 15,000 upon executing the document to which reference has been made; but the first defendant, the present appellant, would have been quite entitled to say that no action could be brought against him to recover the Rs. 15,000 until 30th September 1926, the date when the plaintiff would have attained twenty-one. The right to sue therefore in this case had not accrued at the time when the plaintiff died and, accordingly, the section, not having the effect of accelerating the right against the appellant, has no effect as causing time to run from that date. Their Lordships are of opinion that the decision of the High Court of Madras in that respect also was correct.

It follows that the appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *G. K. Rannepalli.*

C.S.S.

APPELLATE CIVIL.

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

THE BUCKINGHAM AND CARNATIC CO., LTD.,
APPELLANTS,

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v.

THE OFFICIAL ASSIGNEE OF MADRAS,
RESPONDENT.*

*Presidency-towns Insolvency Act (III of 1909), sec. 60 (2)—
“Salary or income”—Meaning of—Piece-work labourer
paid daily wages calculated on quantity of his work, wages,
however, being paid once a month—Earnings of, “salary
or income”, if—Attachable under sec. 60 (2), if—Attach-
ment of labourer’s earnings—Order of, made with his
consent—Binding nature on employer of—Locus standi of
latter to object to attachability of earnings.*

An insolvent was a daily piece-work labourer in the Carnatic Mills belonging to the appellants and his daily wages were calculated on the quantity of work turned out by him. His average daily earnings as a piece-worker amounted to Rs. 1-11-1, though for purposes of convenience he was paid once a month. His wages accordingly varied from month to month according to the number of days he worked and the amount of work he turned out. His services were liable to be terminated on a month’s notice. He earned no wages on the days he was absent with leave and he could not be compelled to work against his will.

Held that the earnings of the insolvent were not “salary or income” within the meaning of, and were not attachable under, section 60 (2) of the Presidency-towns Insolvency Act.

A salary means something in the shape of an yearly or other periodical method of calculation for payment for services, and it must be some definite annual amount which is coming to the insolvent. The earnings in the present case do not satisfy either of these tests.

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In re Jones. Ex parte Lloyd, [1891] 2 Q.B. 231, followed.
In re Rogers. Ex parte Collins, [1894] 1 Q.B. 425, 431,
and *Ex parte Benwell. In re Hutton*, (1884) 14 Q.B.D. 301,
referred to.

As a condition for his getting the protection of the Court from arrest, the insolvent consented to a part of his earnings being paid to the Official Assignee, and an order was accordingly made by the Insolvency Court upon the appellants requiring them to withhold monthly a sum of Rs. 6 from the earnings of the insolvent and to remit the same to the Official Assignee. The appellants were not given any notice of the proceedings in the Insolvency Court in which the insolvent consented to the arrangement in question and were never heard in opposition to it.

Held that the appellants were not bound by the said proceedings and that, on being served with the garnishee notice, they had a *locus standi* to object to the legality of the order made upon them.

APPEAL against the judgment and order of WADSWORTH J. dated 23rd January 1936 and made in the exercise of the insolvency jurisdiction of the High Court in Applications Nos. 440 of 1935, 2545 of 1935 and 1892 of 1935 in Insolvency Petition No. 382 of 1933.

O. T. G. Nambiyar for appellants.

T. S. Venkatesa Ayyar for respondent.

Cur. adv. vult.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—One E. Balasundara Mudaliar, an insolvent, was employed by the appellants, Messrs. Binny & Co., in their mills and the insolvent having agreed to pay an allocation to the Official Assignee in order to get protection, on 15th August 1935, an order was made by the Insolvency Court upon the appellants requiring them to withhold monthly a sum of Rs. 6 from the salary of the insolvent and immediately to remit it to

the Official Assignee until further or other order of the Court. On 24th September 1935, the appellants took out an application before the Master in chambers praying that the garnishee order before mentioned should be vacated. The Master dismissed the application and from his order of dismissal the appellants appealed to the Insolvency Judge who dismissed the appeal.

The Master, on the objection of the Official Assignee, held that the appellants had no *locus standi* to object to the order of attachment of the insolvent's earnings in their hands and also that these earnings were "income" *ejusdem generis* with "salary" in section 60 (2) of the Presidency-towns Insolvency Act and therefore liable to attachment. WADSWORTH J. ruled in favour of the appellants on the first point but against them on the second. Hence this appeal.

These two questions have now to be considered. Although there is no appeal on the first point by the Official Assignee, he is entitled to uphold the trial Judge's decision upon any ground that is open to him. This point was not argued by the appellants since it had been decided in their favour by the trial Judge. For the Official Assignee, Mr. Venkatesa Ayyar contends that the proceedings were entirely between the Official Assignee and the insolvent, that what was in question was the pay of the insolvent, that, since he was willing that a part of it should be paid to the Official Assignee as a condition for his getting the protection of the Court from arrest, the appellants have no right to be heard to the contrary and that the insolvent having consented to this arrangement, such arrangement is binding

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upon the appellants. It is very difficult to understand this contention. The appellants were not given any notice of the proceedings in the Insolvency Court in which the insolvent consented to the arrangement in question and were never at that stage heard in opposition to it; nor do we think that at that stage it was necessary for them to be heard. They, however, were not bound by those proceedings at all. As a result of such proceedings this attachment was made and they were served with the garnishoe notice. It is argued on behalf of the Official Assignee that it is not open to them to raise any objection whatever to this direction upon them but they have merely to obey it, but no authority is cited in support of this contention. A refusal to obey the Court's direction would subject the appellants to unpleasant consequences. Are they not to be heard to say that the order made upon them was an illegal order in that the earnings, the subject of the order, were not attachable under section 60 of the Act? Is a person upon whom an order, which appears to him to be illegal, has been made not to be allowed to state his objection thereto? If the insolvent's earnings are not attachable under section 60 (2), then clearly the order upon the appellants is an illegal one and ought never to have been made and the appellants have the right to show that it ought never to have been made upon them. We agree with WADSWORTH J. on this point.

The next question is whether these earnings come within the words "salary or income" which appear in section 60 (2) of the Presidency-towns Insolvency Act; and here some facts are necessary.

The insolvent is a daily piece-work labourer in the Carnatic Mills belonging to the appellants and his daily wages are calculated on the quantity of work turned out by him. His average daily earnings as a piece-worker amount to Rs. 1-11-1, though for purposes of convenience he is paid once a month. His wages accordingly vary from month to month according to the number of days he works and the amount of work he turns out. The insolvent joined the service of Binny & Co. in 1926; and his services are liable to be terminated on a month's notice. He earns no wages on the days he is absent with leave and, from the third paragraph of the second affidavit of Mr. Barlow, it appears that he cannot be compelled to work against his will. Those being the facts, the decisions under the corresponding section of the English Bankruptcy Act are of assistance to us. The first of these is *Ex parte Benwell. In re Hutton*(1). There, it was held that the word "income" in section 90 of the Bankruptcy Act of 1869 applies only to an "income" *ejusdem generis* with a "salary" and does not enable the Court to set aside for the benefit of the creditors of a professional man who is an undischarged bankrupt any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. BRETT M.R. on page 306 says:

"Section 89 deals with cases in which the bankrupt is entitled, either by the bounty of the Crown or under some Act of Parliament, to some 'pay, half-pay, salary, emolument or pension'. He is entitled to one of these things, though he has not got it actually in possession, but he is certain to have it if things go on as they are. And the Court is empowered to deal with matters of this kind, though they are not comprised

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in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession. Section 90 goes further still and enables the Court to deal with 'a salary or income other than as aforesaid' of which the bankrupt is in the receipt. What is the meaning of the word 'salary' in the section? It must be a salary of the same kind as those things which have been already mentioned though it is not paid in respect of similar services. Then there is the general word 'income'. The rule is that general words added to particular words do not include everything which would come within them according to the literal meaning of the English language but are to be limited to things *ejusdem generis* with those things which have been previously mentioned. 'Income' therefore must mean 'income' in the nature of a salary."

In a recent case, *In re Landau. Ex parte Trustee*(1), ROMER L.J. refers to *Ex parte Benwell. In re Hutton*(2) and says:

"It is true that Lord ~~ESHER~~ in *Ex parte Benwell* (2) said that income in the old section, corresponding to section 51, subsection (2), was income *ejusdem generis* with salary; but with all respect to that learned Judge, I do not think such a statement assists us very much unless the statement goes on to tell us to what genus the salary payment belongs. He did not do so."

With all respect to ROMER L.J., BRETT M.R. in *Ex parte Benwell. In re Hutton*(2) did state to what genus salary belonged because he says salary must be of the same kind as "pay, half-pay, salary, emolument or pension" set out in section 89 of the Act.

COTTON L.J. in *Ex parte Benwell. In re Hutton*(2) says:

"In my opinion section 90 points to some definite annual amount which is coming to the bankrupt and in such a case a part of it can be set aside for the benefit of his creditors."

Next is *In re Shine. Ex parte Shine*(3). There, the bankrupt had entered into an agreement with

(1) [1934] 1 Ch. 549.

(2) (1884) 14 Q.B.D. 301, 308.

(3) [1892] 1 Q.B. 522.

the management of a theatre to act for a term of two years at a salary of thirty pounds a week payable weekly. The salary was to be subject to a proportionate reduction in respect of any night upon which the theatre should not be open. It was held that the payment to the bankrupt for his service under the agreement was "salary or income" within the meaning of section 53, subsection (2), of the Bankruptcy Act of 1883. Lord Esher M.R. in his judgment referred to *Ex parte Benwell. In re Hutton*(1) and said that, the payments being made under a contract, the rules laid down there did not apply. In *In re Shine. Ex parte Shine*(2) there was a definite contract for a stated period and the amount to be paid was a definite amount; and BOWEN L.J. in the same case says:

"I am of opinion, having regard to the contract, that it is a salary. 'Salary', I think, must mean a definite payment for personal services arising under some contract and (to borrow an expression of my brother Fry) computed by time."

In the case before us, no doubt the money is paid to the insolvent under a contract of service but it is not a definite payment; it is indefinite in amount, the amount being dependent upon the quantity of work done and the number of days worked by the insolvent. It is no doubt for personal services. In *In re Rogers. Ex parte Collins*(3) VAUGHAN WILLIAMS J. on page 431 says:

"It seemed to be rather assumed in argument that because money was personal earnings it could not be within the 53rd section. I do not agree. If you happen to receive your personal earnings under a contract, so that your personal earnings are not daily earnings, but take the shape of yearly or other periodical salary, I conceive that, subject to the rule of

(1) (1884) 14 Q.B.D. 301, 308.

(2) [1892] 1 Q.B. 522.

(3) [1894] 1 Q.B. 425.

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not depriving the bankrupt of the means of livelihood, if it be shewn that after providing fairly and liberally for the support of the bankrupt there will be a balance of salary, that balance of salary, even though the salary is a salary for personal exertions, might be made the subject of an order under the 53rd section."

Therefore, in the view of VAUGHAN WILLIAMS J. a salary means something in the shape of a yearly or other periodical method of calculation for payment for services and, as before stated by COTTON L.J. in *Ex parte Benwell*. In *re Hutton*(1), "salary" must be some definite annual amount which is coming to the bankrupt. The earnings in this case do not satisfy either of these tests.

We now come to a case which seems to us to be directly in point, namely, *In re Jones*. *Ex parte Lloyd*(2). In that case, *Ex parte Benwell*. In *re Hutton*(1) was followed and it was held that wages earned by a workman employed in a colliery are not "salary or income" within the meaning of section 53, sub-section (2), of the Bankruptcy Act of 1883. The workman there was earning wages which averaged twenty-five to thirty shillings a week. We know that colliers are paid on a piece-work basis and their earnings therefore vary from day to day; and CAVE J. could not distinguish between the case of the collier before him and the case of the debtor in *Ex parte Benwell*. In *re Hutton*(1), stating that in the latter case, although the debtor was making large sums of money amounting to more than £1,000 a year, yet, inasmuch as he was not entitled to receive that money with respect to any particular period such as a year or some part of a year irrespective of the amount of work he did, the money so received

(1) (1884) 14 Q.B.D. 301.

(2) [1891] 2 Q.B. 231.

was not "income" *ejusdem generis* with "salary". With regard to the case before him, he said that, as in *Ex parte Benwell*. In *re Hutton*(1) it was impossible to compel the debtor to go on working and earning money, in the same way in the case before him if the debtor did not choose to go to work, he would earn nothing. WADSWORTH J. at first was inclined to think that the ruling in *In re Jones*. *Ex parte Lloyd*(2) would govern the present case but on further consideration was of the contrary opinion, saying :

"The case of the collier was, so far as the information available goes, regarded as the case of a more or less casual employee paid for the job, though the wages were paid weekly for convenience. The insolvent in the present case is not a casual employee but a permanent employee whose conditions of service are governed by rules and who is entitled to a month's notice before his services are terminated, and, though perhaps in theory he may have the option of staying away from work without any action for damages lying against him, in fact the rules of the company appear to hold out such inducements as to make his employment as regular as that of any salaried worker."

With all respect to WADSWORTH J., we are unable to see any difference between the insolvent in this case and the collier in *In re Jones*. *Ex parte Lloyd*(2). WADSWORTH J., in our view, was in error in regarding the collier as a more or less casual employee paid for the job. That is not so. There is no reason for supposing that the collier in question was differently employed to other colliers. There is a contract of service; they are paid for convenience weekly and are paid on a piece-work basis, as it is obvious that collier was in that case, and are entitled to notice; and their

(1) (1884) 14 Q.B.D. 301.

(2) [1891] 2 Q.B. 231.

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wages vary according to the number of days they work and the amount of work they do. A collier so employed has never been regarded as a casual labourer in our experience. We are quite unable to distinguish this case from that case which in our view, having regard to the other cases referred to and the tests laid down, was correctly decided.

Applying that case to this, we allow the appeal and give the appellants their costs throughout.

Solicitors for appellants: *King and Partridge.*

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

R. T. KESAVULOO (SECOND RESPONDENT—SECOND JUDGMENT-DEBTOR), APPELLANT,

v.

THE OFFICIAL RECEIVER, WEST TANJORE AT TANJORE, AND ANOTHER (PETITIONER AND FIRST RESPONDENT—FIRST JUDGMENT-DEBTOR), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5) as amended by Act IX of 1927—"Final order"—Meaning of—Order returning execution petition for amendment—"Final order", if.

The expression "final order" in clause 5 of article 182 of the Indian Limitation Act of 1908 as amended by Act IX of 1927 does not mean "the last order in point of time". The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

* Appeal Against Order No. 488 of 1934.

An order returning an execution petition for amendment does not deal judicially with the matter of the petition and cannot therefore be regarded as final within the meaning of clause 5 of article 182 as amended. Such an order contemplates a final order to be passed at a subsequent stage, when the defects are remedied and the petition is re-presented.

Civil Miscellaneous Second Appeal No. 173 of 1932, (1936 M.W.N., 547) disapproved.

Batuk Nath v. Munni Dei, (1914) I.L.R. 36 All. 284 (P.C.), *Abdul Majid v. Jawahir Lal*, (1914) I.L.R. 36 All. 350 (P.C.), *Husain Abdulla Asghar Ali v. Ramditta Mal*, (1932) I.L.R. 60 Cal. 662 (P.C.), *Abdul Kadir v. Samipandia Tevar*, (1920) I.L.R. 43 Mad. 835, and *Kadiressan v. Maung San Ya*, A.I.R. 1938 Rang. 87, relied upon.

APPEAL against the order of the Court of the Subordinate Judge of Nilgiris, Ootacamund, dated 13th October 1934 and made in Execution Petition Register No. 132 of 1934 in Original Suit No. 170 of 1921.

M. Appa Rao for appellant.

K. S. Desikan for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This is an appeal from an order allowing execution. The execution petition with which we are concerned was filed on 15th January 1934. The question is whether or not it was barred by limitation. The judgment-debtor attacks the view of the lower Court that it was filed in time.

The decree was passed on 24th January 1922 and nine execution petitions preceded the present petition. The petitions and the orders made thereon are given below :

- i. Execution petition filed on Order dated 23rd February 1922. "Batta not paid. Dismissed."

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- ii. Execution petition filed on 3rd March 1922 praying for the transfer of the decree to the Madras Small Cause Court. Order dated 11th March 1922. "Transfer."
 - iii. Execution petition dated 29th April 1924. Order dated 30th April 1924. "Returned" (for satisfying certain conditions).
 - iv. Execution petition filed on 24th October 1924. Order dated 30th October 1924. "Returned" (for satisfying certain conditions).
 - v. Execution petition filed on 8th April 1926. Order dated 12th April 1926. "Returned" (for satisfying certain conditions).
 - vi. Execution petition filed on 3rd September 1926. Order dated 7th September 1926. "Returned" (for satisfying certain conditions).
 - vii. Execution petition filed on 25th March 1927. Order dated 8th April 1927. "Returned" (for satisfying certain conditions).
 - viii. Execution petition filed on 27th July 1929. Order dated 9th August 1929. "Returned" (for satisfying certain conditions).
 - ix. Execution petition filed on 6th March 1931. Order dated 27th June 1931. "Returned" (for satisfying certain conditions).

The present application (the tenth) was, as already stated, filed on 15th January 1934.

Under clause 5 of article 182 of the Limitation Act (Act IX of 1908) as amended by Act IX of 1927, the limitation runs from the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree. The present clause 5 was substituted by Act IX of 1927 for clauses 5 and 6 of the Act of 1908. Under clause 5 as it stood, the

statute ran from the date of applying for execution, etc., but under the amended clause, the *terminus a quo* is the date of the final order. Clause 6 in the Act of 1908, which referred to cases where notice was issued to the judgment-debtor, has been altogether omitted. The question that is to be decided is, what is the meaning of the expression "final order" as it occurs in the amended clause?

We may state at the outset that of the nine petitions, excepting the first two, the rest were returned, as shown above, for some defect or other to be remedied, but none of them was re-presented to the Court. If the clause had not been amended, the date of any of these petitions might furnish the starting point, as it seems to be settled law that failure to re-present a petition does not affect the rule that the statute runs from the filing of the petition; *Narayanaswami Naidu v. Gantayya*(1), *Kamakshi Ammal v. Pitchu Aiyar*(2), *Seshayya v. Venkata Subbarayadu* (3), *Gopiseti Narayanaswami v. Muthyala Venkataratnam*(4) and *Thirupathi Ayyangar v. Yegnammal*(5). As the clause now stands, the question is, what is the final order in the case from which the time runs? For the decree-holder, it is contended that the order on each petition returning it for amendment amounts to a final order. If that contention is right, the present petition would be in time, filed as it was on 15th January 1934, that is, within three years from 27th June 1931, the date of the order on the ninth petition; similarly,

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(1) 1915 M.W.N. 865.

(2) (1916) 31 M.L.J. 561.

(3) (1915) 2 L.W. 540.

(4) (1915) 2 L.W. 1207.

(5) (1932) 38 L.W. 224.

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petitions 4 to 9 would also be in time. The decree-holder has had to contend, to sustain this position, that the expression "the final order" means "the last order in point of time". We are not prepared to agree with this contention. The word "final" occurs not only in clause 5 but also in clauses 2 and 6. The meaning of the word "final" in clause 2 has had to be considered in several cases. In *Batuk Nath v. Munni Dei*(1) the question arose whether the dismissal for want of prosecution of the appeal to His Majesty in Council, was a final decree or order made in the appeal. The question was answered in the negative and the application for execution, having been made more than three years after the decree of the High Court, was held barred by lapse of time. To the same effect is the decision in *Abdul Majid v. Jawahir Lal*(2). There, Lord MOULTON observed :

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or affirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

Applying this test, when an order is made returning a petition, it does not deal judicially with the matter of the petition and cannot therefore be regarded as final. See also *Sachindra Nath Roy v. Maharaj Bahadur Singh*(3).

In *Husain Asghar Ali v. Ramditta Mal*(4) the appellate Court made an order holding that the appeal had abated and refusing to set aside

(1) (1914) I.L.R. 36 All 284 (P.C.). (2) (1914) I.L.R. 36 All 350 (P.C.).
(3) (1921) I.L.R. 49 Cal. 203, 213 (P.C.).
(4) (1932) I.L.R. 60 Cal. 662 (P.C.).

the abatement. The question arose whether that could be deemed a final order within the meaning of article 182(2). Their Lordships observe that, as the order in question was judicially made and had the effect of finally disposing of the appeal, it amounted to a final order which gave a starting point. Applying the test here laid down, when an order is made returning a petition, it contemplates a final order to be passed at a subsequent stage, when the defects are remedied and the petition is re-presented.

Again, when an appeal had been wrongly presented and an order was made returning it for presentation to the proper Court, it was held that such an order was not a final order within the meaning of article 182(2); *Abdul Kadir v. Samipandia Tevar*(1).

In the course of their judgment in *Khalil-ur-Rahman Khan v. Collector of Etah*(2), the Judicial Committee, referring to the amendment in question, seem to regard the result of an application as being synonymous with the final order passed upon it (page 85). Surely, when an order is made returning a petition, that does not represent "the result of the application". The order returning a petition is a long way off from the ultimate result which alone can properly be described as a final order.

"Final", when it occurs in a legal enactment, does not usually mean "last in point of time". Even a general dictionary like Webster's explains what "final" as a term used in law means. A decision or judgment is final when it ends the

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(1) (1920) I.L.R. 43 Mad. 835.
(2) (1933) I.L.R. 55 All. 993 (P.C.).

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action or proceeding in the Court that makes it, leaving nothing further to be determined or to be done by the Court except the administrative execution of the decision or the judgment as the case may be; Webster's Dictionary (1927), 9th Edn., page 816. In *Kadiresan v. Maung San Ya*(1) it has been held that an order directing notice on a petition for execution would not be final, but an order made on a subsequent date closing the case would be final.

As already observed, the amendment in question altered the provision in two respects; first, in clause 5 "the date of the final decree or order" has been substituted for "the date of applying", and secondly, the old clause 6 has been totally repealed. This has a bearing on the question of the meaning of the word "final". There was, under the Act of 1877, conflict of authority on the question whether the time ran when the Court ordered the notice to issue or when the notice was actually issued from the Court. In the Act of 1908 the wording was slightly altered and clause 6 was enacted. In spite of the change, the phraseology of the new clause was not clear enough to remove the doubt that prevailed; Rustomji's Law of Limitation (1927), 4th Edn., page 1026. By reason of the Amending Act of 1927, which has made the final order the starting point, the provision in clause 6 as it stood, which gave rise to the conflict of opinion, became unnecessary and has accordingly been removed. See Mitra on Limitation (1932), 6th Edn., Vol. II, page 1982. If "final" means "last in point of time", the object of the amendment will clearly

(1) A.I.R. 1933 Rang. 87.

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be frustrated as "the date of issue of notice" may happen to be the final order, in the sense that it is the order last made. This is clearly brought out by *Kadiresan v. Maung San Ya*(1) already cited. There, the question was whether "the date of notice" or the date of the order closing the case furnished the starting point. In no sense can an order directing notice be regarded as final; in the very nature of things it is interlocutory. When a Court directs notice to issue, it has in contemplation the making of a final order in due course. The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

This view entails no hardship whatsoever upon a diligent creditor. If the execution proceeding has ended, the final order gives the starting point; if, on the other hand, execution has been suspended by no default of the decree-holder, he can, treating the petition as a pending one, apply to have it revived, without being hindered by any rule of limitation; see *Shaikh Kamar-ud-din Ahmad v. Jawahir Lal*(2). This case incidentally throws light on the question what constitutes a final order. When it was ordered that "in default of prosecution on the part of the decree-holder the record be not sent to the Collector's Court", the Judicial Committee proceeded upon the footing that there was no final order.

Lastly, a word remains to be said as regards the so-called policy of the Amending Act. It is urged that the object of the amendment was to enlarge the limitation period in the interests of

(1) A.I.R. 1933 Rang. 87.

(2) (1905) L.R. 32 I.A. 102.

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the decree-holder. Granting that this is a relevant matter, one cannot help noting that the amendment was made in consequence of the recommendations of the Civil Justice Committee, which had for their object the speedy disposal of litigation. Take the case in hand. It shows how frivolous applications could have, under the law as it stood, kept alive a decree. In the case of seven successive petitions, the decree-holder, it is perfectly obvious, had not the slightest desire to prosecute them. Were it permissible to speculate, it would not be far-fetched to hold that the object of the amendment was to put an end to such frivolous petitions. In some cases undoubtedly the amendment benefits the decree-holder; for instance, where a prior petition is kept pending for a long time for no default of his, he unjustly suffers, if the time is to be reckoned from the date of the petition and not from the date of the final order. But, to say that the decree-holder gets some benefit from the amendment is one thing, and it is a wholly different thing to say that the object of the amendment is to benefit him.

The decision of PANDRANG ROW J. in Civil Miscellaneous Second Appeal No. 173 of 1932*, on which the respondent strongly relies, completely supports him. But, for the reasons already stated, we must, with great respect, dissent from the view expressed there.

We must, therefore, holding that the execution petition was barred by time, reverse the lower Court's order and allow the appeal with costs, to be paid by the Official Receiver out of the insolvent's estate.

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* 1936 M.W.N. 547.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish

A. VENKITASWAMI CHETTIAR AND TWO OTHERS
(APPELLANTS), PETITIONERS,

1936,
March 31.

v.

SEKKUTTI PILLAI (SECOND RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 110—Decree sought to be appealed against—Affirming decrees or reversing decrees—Test—Defendants several or subject-matters different—Test in case of.

A suit on a mortgage bond executed by the first and fourth defendants, one of the sons and the widow of a deceased Hindu, was brought against them and against the second and third defendants, the second defendant being the other son of the deceased and the third the son of the first. The trial Court passed a decree for the full amount claimed against the first and fourth defendants. The second and third defendants were held liable only for a fraction of the debt. The plaintiff filed an appeal to the High Court and the result of it was that the lower Court's decree against defendants 1 and 4 and against the second defendant was confirmed while, as regards the third defendant, it was practically reversed, his share in the joint property being held liable almost for the full amount claimed. On an application filed by the plaintiff for leave to appeal to His Majesty in Council against the High Court's judgment in so far as his claim against the second defendant was disallowed,

held that the decree as against the second defendant was one of affirmance and that, as the appeal raised no question of law which could be considered substantial within the meaning of section 110 of the Code of Civil Procedure, the plaintiff's application was unsustainable.

The proper test to find out whether in such a case the decree of the High Court is one of affirmance or reversal is to have regard not to the decision as a whole, but to the decision as it

* Civil Miscellaneous Petitions Nos. 6792 and 6794 of 1932.

VENKITASWAMI affects the subject-matter in dispute. The right way of construing section 110 is to read the words "decree or final order" in clause 3 in conjunction with, and to treat them as relating to, "the subject-matter" mentioned in clause 1.

Bibhootibhooshan Datta v. Sreepati Datta, (1934) I.L.R. 62 Cal. 257, and *Narendra Lal v. Gopendra Lal*, (1927) 31 C.W.N. 572; A.I.R. 1927 Cal. 543, followed.

Annapurnabai v. Ruprao, (1924) I.L.R. 51 I.A. 319; I.L.R. 51 Cal. 969, explained.

Perichiappa Chettiar v. Nachiappan, (1930) 35 L.W. 206, considered.

PETITIONERS praying that in the circumstances stated therein and in the affidavit filed with Civil Miscellaneous Petition No. 6792 of 1932 the High Court will be pleased to grant leave to appeal to His Majesty in Council against the judgment and decree of the High Court in Appeal Suit No. 218 of 1930 preferred to the High Court against the decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 22 of 1928.

T. M. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar* for petitioners.

T. R. Venkatarama Sastri for *K. Aravamudu Ayyangar* for respondent.

Cur. adv. vult.

THE JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This is an application by the plaintiff for leave to appeal to His Majesty in Council. One Sandanam Pillai died in 1919, leaving his widow, the fourth defendant, and two sons, the first and the second defendants. The third defendant is the son of the first. The suit was brought on a mortgage bond executed in 1923 by the first and fourth defendants. The trial Court passed a decree for the full amount claimed against the exocutants of the bond, namely,

defendants 1 and 4. As regards defendants 2 and 3, they were held liable only for a fraction of the debt. The plaintiff filed an appeal to the High Court and the result of it was that the lower Court's decree against defendants 1 and 4 was confirmed; the third defendant's share in the joint property was held liable almost for the full amount claimed, that is to say, so far as he was concerned, the lower Court's decree was practically reversed; lastly, in regard to the second defendant, the High Court confirmed the first Court's decree. The plaintiff's present application is for leave to appeal to His Majesty in Council against the High Court's judgment in so far as his claim against the second defendant was disallowed. The principal question to be determined is whether the High Court's judgment is an affirming one or not.

It is not disputed that the requirement of the section as regards the value of the subject-matter both of the suit and of the appeal, is fulfilled. It has been urged that some substantial question of law is involved in the appeal, but we are decidedly of the opinion that this contention cannot prevail. The second defendant was a minor when the debt sued on was incurred by his brother, the first. One of the points urged in the appeal was that the second defendant should be held to have ratified the transaction after he had become a major. Applying certain well-settled legal principles to the facts of the case, the High Court rejected that contention and we are clearly of the opinion, as already stated, that the appeal raises no question of law, which can be considered

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substantial within the meaning of section 110, Civil Procedure Code.

The main question then is, whether, when the intended appeal is directed as against the portion of the decree which pertains to the second defendant, the High Court's decree should be regarded as one of affirmance or of reversal. The applicant's contention shortly is, that where the decree, as passed, is on its face single, it should always be regarded as one and entire, irrespective of its dealing with several subject-matters or disposing of claims against several defendants. The argument is put thus : Taking the High Court's decree as a whole, has it or has it not varied the lower Court's decree? So far as the third defendant is concerned, it has undoubtedly done so. Therefore it is immaterial that the decree as against the second defendant has been confirmed. This contention, as we shall presently show, is hardly sound in principle and would not have been put forward, it is conceded, but for the supposed effect of the decision of the Judicial Committee in *Annapurnabai v. Ruprao*(1). As a question of construction, we fail to see why, when there are several decisions in respect of several subject-matters, the decree embodying those decisions should, by some fiction, be regarded as one and entire. Leaving over the question of parties for the moment, we shall first deal with the contention, as it bears on the question of various subject-matters. Suppose there is a suit filed in respect of ten loans of ten different dates, representing ten different transactions. The trial Court passes

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a decree in respect of the first loan, but negatives the plaintiff's claim in regard to the other nine alleged loans. The High Court reverses the trial Court's decree as to the first loan but maintains it as to the remaining loans. The argument is that the plaintiff can, taking advantage of the High Court's partial reversal, file an appeal questioning every one of the concurrent findings. Again, let us suppose, that upon a man's death, his heir files a suit for recovery of six items of movable property. The defendant denies that he took possession. The trial Court on evidence finds that the defendant's case is true in regard to items 4 to 6 and passes a decree in respect of items 1 to 3 alone. The High Court reverses the trial Court's decree as to item 4 and upholds it as regards the remaining items. The argument is that the plaintiff can file an appeal for attacking the concurrent findings in respect of items 5 and 6: the defendant can likewise claim the right of appeal for getting rid of the concurrent findings as regards items 1 to 3. The effect of this contention is that, although the items are distinct, the case in regard to each of them is distinct and the findings are distinct, yet the accident of there being a partial reversal enables either party to challenge the findings as to which both the Courts are agreed. This is a startling result, and the question is whether there is anything in the wording of the section which compels us to uphold a contention of this sort.

We shall next examine the applicant's contention as it bears on the question of parties. First, let us, for the purpose of illustrating the point, vary the facts of the present case. Instead of the

(1) (1924) L.R. 51 I.A. 319; I.L.R. 51 Cal. 969.

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second defendant having won (as he has done) in both the Courts, let us suppose that he had lost the suit by a concurrent finding. According to the argument, the reversal of the decree so far as the third defendant is concerned gives the second defendant a right to appeal. Then again, let us take the facts as they are. The effect of the contention is, that even defendants 1 and 4 against whom the decree has been confirmed can prefer an appeal. This contention, if accepted, would lead to anomalies of the most serious kind.

Two further illustrations will serve to bring out clearly all that is involved in the argument. Where the trial Court passes a decree against a debtor and his surety, but the appellate Court exonerates the surety, on the ground that there has been a variation of the contract without his consent, the debtor is on this contention enabled, by reason of the part-reversal of the decree, to file an appeal and attack the concurrent finding. Again, for money borrowed by A, the trial Court passes a decree against A and B on the ground that B was A's partner but rejects the claim against C and D, finding that they were not his partners. If the appellate Court reverses the trial Court's finding so far as C is concerned, it will be open to the plaintiff (on this contention) to attack the concurrent finding that D was not a partner: B will be likewise enabled to get rid of the finding against himself, though that finding also is a concurrent finding.

Not a single case decided previous to *Annappurnabai v. Ruprao*(1), on which the applicant so

(1) (1924) L.R. 51 I.A. 819; I.L.R. 51 Cal. 969.

strongly relies, lends the slightest support to this view. On the strength of that Privy Council ruling, an argument similar to the present one was in a recent case put forward: but a Bench of the Calcutta High Court repelled it with great force, observing that

"the enormity of the opposite view is so very great that a far more clear and express pronouncement of the Judicial Committee would be necessary to uphold it.";

Bibhootibhooshan Datta v. Sreepati Datta(1). We, with great respect, entirely agree. There, it was held that where the appellate decree modifies the original decree upon a single point and that completely in the applicant's favour, so that he has no further grievance in that matter, he cannot, because of that modification, have a right to appeal on other points on which both the Courts have concurred (see page 260). To the same effect is a decision of another Bench reported as *Narendra Lal v. Gopendra Lal*(2)—that where the lower Court granted a certain share and the High Court increased it further, the plaintiff cannot, without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement. What is to be regarded, according to both these cases, is not the decision as a whole, but the decision as it affects the subject-matter in dispute, and we think this is the proper test. The right way of construing section 110 is to read the words "decree or final order" in clause 3 in conjunction with, and to treat them as relating to, "the subject-matter" mentioned in clause 1. The

(1) (1934) I.L.R. 62 Cal. 257.

(2) (1927) 31 C.W.N. 572; A.I.R. 1927 Cal. 543.

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authorities on this subject have been so fully adverted to in the two cases mentioned above that no useful purpose will be served by our covering the same ground.

Now, turning to *Annapurnabai's* case, does it really support the petitioner's contention? There, a person died leaving two widows. The plaintiff claimed to have been adopted by the senior widow. The first defendant was the junior widow; the second defendant claimed to be her adopted son. The plaintiff denied the second defendant's adoption and both the defendants denied the plaintiff's. In the suit, the plaintiff claimed certain property. Not only did the two defendants deny, as already stated, his adoption but the first defendant claimed for herself maintenance at Rs. 3,000 per annum. The District Judge held that the plaintiff's adoption was proved and that the adoption alleged by the second defendant was not. He held further that the plaintiff was bound to provide maintenance for the first defendant at the rate of Rs. 800 per annum. On appeal to the Court of the Judicial Commissioner, the decree was modified by the maintenance being increased from Rs. 800 to Rs. 1,200 per annum; in other respects the decree was confirmed. Special leave to appeal was applied for by defendants 1 and 2. The petitioners' Counsel is reported to have argued:

"Having regard to the concurrent findings the petitioners desire to appeal only with regard to the amount of the maintenance."

Their Lordships, holding that the petitioners had a right of appeal, observed that the appeal should be limited to the question as to the maintenance

allowance. The respondent was unrepresented and their Lordships disposed of the matter in two brief sentences. It is difficult to believe that the order was intended to be a considered pronouncement upon a subject of such great importance. Indeed, there is reason to think, in view of the difference in the wording of the order as reported in the volume of the Indian Appeals and that of the Indian Law Reports, Calcutta, that their Lordships did no more than grant special leave, observing that the petitioners had a right of appeal. Is it to be inferred that the Judicial Committee left it open to the defendants to attack the concurrent finding as regards the plaintiff's adoption? Is it to be further held that their Lordships, without saying so, abrogated the principle which till then the Indian Courts had, without question, applied? Not infrequently are attempts made (attended, as is well known, with unfortunate results) to read into the Privy Council judgments much more than is to be found in them. This is one such attempt, and we are perfectly clear that it ought not to be allowed to succeed.

It must be admitted, as RANKIN C.J. observes in *Narendra Lal v. Gopendra Lal* (1) already cited, that the judgment of the Privy Council has the effect of overruling the principle on which the well-known case of *Raja Sree Nath Roy Bahadur v. The Secretary of State for India in Council* (2) rested. That arose under the Land Acquisition Act and the applicant claimed Rs. 77,000 odd. The Judge granted him about Rs. 28,000 and the High Court on appeal increased the amount by

(1) (1927) 31 C.W.N. 572; A.I.R. 1927 Cal. 543.

(2) (1904) 8 C.W.N. 294 (P.C.).

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Rs. 7,000. The plaintiff applied for leave to appeal to the Judicial Committee, which was refused. The line of reasoning seems to have been that in regard to the balance of the plaintiff's claim, namely, Rs. 42,000, both the Courts agreed in disallowing it and the High Court's judgment should therefore be deemed to be an affirming one. This view, as already stated, can no longer prevail; but it must be observed, and that is very important, *that that case comprised only one subject-matter*, namely, the amount of compensation claimed. The Privy Council ruling is authority for the position that if, *as regards the subject-matter in dispute*, the appellate Court has varied the lower Court's decision, the appellate decree is not an affirming one: incidentally this statement involves that it makes no difference whether the lower Court's decree has been varied to the prejudice of the applicant or in his favour.

There are, in some cases (to which it is unnecessary to refer), observations which seem to lend support to the applicant's contention, with which, with great respect, we disagree. There is, however, one case of our Court which requires special notice—*Perichiappa Chettiar v. Nachiap-pan*(1). That was a suit for an account against an agent, the claim having been valued at Rs. 40,000. The first Court passed a decree for about Rs. 5,600: the result of the High Court's decree was that the amount awarded to the plaintiff was reduced to about Rs. 2,000. He applied for leave to appeal. The argument negatived by the learned Judges was that there should be deemed to be as many subject-matters as there were items in dispute.

(1) (1930) 35 L.W. 206.

This appears clearly from more than one passage in the judgment of ANANTAKRISHNA AYYAR J. The learned Judge observes:

“On behalf of the second defendant (respondent in this petition), his learned Advocate argued that the question in dispute between the parties related really to various items in the account rendered by the agent, that the value of none of the items exceeded Rs. 10,000 . . . ” (Page 210);

and again:

“Further, in a suit for an account by the principal against his agent, it could not, in our opinion, be said that each objection raised by the plaintiff or the defendant to the Commissioner's report is a different subject-matter.” (Page 216)

This is precisely what we have been trying to show. There is a distinction between the decree taken as a whole and the several decisions in respect of the various subject-matters comprised in that decree. When a general account is claimed by an agent, the question is, is there a single subject-matter or are there as many subject-matters as there are items in dispute? This case decides that the subject-matter is single and cannot be split up. It is unnecessary in this case to express any opinion on this matter, but the observations of the learned Judges in regard to other matters, such as the effect of the Privy Council decision in *Annapurnabai's* case, are, we must point out with great respect, *obiter*.

In the result, the plaintiff's application fails and is dismissed with costs.

[Portion of the judgment granting leave to appeal in Civil Miscellaneous Petition No. 6794 of 1932 is omitted as not being necessary for the purpose of this report.]

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

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1936,
April 15.

v.

S. RAMACHANDRA ROW AND TWO OTHERS, RESPONDENTS.*

Madras Local Boards Act (XIV of 1920)—Election Rules under—Rules 16, 20 and 10 (c) of—Ballot papers—Polling Officer marking voters' numbers on—Invalidation of ballot papers by reason of—Setting aside of election on ground of—Election Commissioner's order of—Certiorari writ in respect of—Condition of issue of—Issue of writ of certiorari—Principles governing.

Rule 16 of the Madras Local Boards Act Rules governing disputed elections is infringed when the Polling Officer marks on the ballot papers the voters' numbers which he is only authorised to mark on the counterfoils. The effect of rule 20 of the said rules is to invalidate any ballot paper bearing on it a mark or writing indicating the identity of the voter.

The election of the returned candidate is not void on the ground of the non-compliance of the Polling Officer with rule 16 and the consequent invalidation of the ballot papers under rule 20, unless such non-compliance has materially affected "the result of the election" within the meaning of rule 10 (c) of the said rules. The words "the result of the election" in rule 10 (c) mean the return of the candidate and not the amount of his majority. If the number of ballot papers rejected by reason of non-compliance with the rules does not suffice to turn the scale against the elected candidate, though the extent of his majority may be affected, the result of the election cannot be held to be materially affected.

Where, in a case of non-compliance of the Polling Officer with rule 16 and the consequent invalidation of certain ballot papers under rule 20, the Election Commissioner declared the election of the successful candidate void and ordered a fresh election without considering the question whether the spoilt

* Civil Miscellaneous Petition No. 801 of 1936.

votes, if admitted, would have turned the scale against the successful candidate, MAHABALESWARAPPA v. RAMACHANDRA ROW.

held that the case was a proper one for interference by certiorari and that the Commissioner's order should be quashed.

Rez v. Commissioner of Income-tax for City of London, (1904) 91 L.T. 94, and *Rez v. Board of Education*, [1910] 2 K.B. 165, relied upon.

Per VENKATASUBBA RAO J.—When the Court below deals with a wrong question altogether, whether the error is described as one of law or of jurisdiction, certiorari will lie.

Review of decisions laying down the application of the principles governing certiorari.

Per CORNISH J.—The Election Commissioner declared the election void without considering and without determining the very question upon which his jurisdiction to declare the election void depended. He had no power to do that.

PETITION praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct the issue of a writ of certiorari calling upon the Election Commissioner (the District Judge), Bellary, the third respondent herein, to submit to the High Court all the records relating to Original Petition No. 55 of 1935 on his file and to quash the proceedings of the said Election Commissioner (the District Judge), Bellary, the third respondent herein, dated 17th February 1936, in the said Original Petition No. 55 of 1935.

K. S. Jayarama Ayyar and T. Ananda Rao for petitioner.

K. Rajah Ayyar for T. M. Venugopala Mudaliyar and A. Gopalacharlu for respondents.

Cur. adv. vult.

ORDER.

CORNISH J.—The petitioner, the successful candidate at a District Board election, prays that CORNISH J.

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a writ of *certiorari* may issue to bring up and quash the order of the Election Commissioner declaring his election void and ordering a fresh election. The result of the poll was that the petitioner had been returned by a majority of 114, having polled 1,206 votes to the 1,092 votes for his opponent, the first respondent. An election petition was brought by the first respondent alleging certain irregularities in the conduct of the Polling Officer in one of the polling booths. What had happened here was that the Polling Officer by a mistake had marked on the back of each ballot paper the number of the voter in the Electoral register. This number, according to rule 16, is only to be marked on the counterfoil when the ballot paper or counterfoil is handed to the voter. The result was that 322 ballot papers so marked and put into the ballot-box in this polling booth were invalidated and rejected by the Election Officer. Two of these ballot papers were apparently invalid on other grounds.

Rule 10 (c) of the Local Boards Act Rules governing disputed elections provides :

"If in the opinion of the Election Commissioner the result of the election has been materially affected . . . by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void."

There were, therefore, two questions for the Commissioner to decide. Firstly, whether there had been a non-compliance with the Act or the rules ; and secondly, whether such non-compliance had materially affected the result of the election. Undoubtedly there had been an infringement of the rules when the Polling Officer marked on the ballot papers the voters' numbers

which he was only authorised to mark on the counterfoils. He made the same mistake as the presiding officer made in *Woodward v. Sarsons*(1) with equally fatal results to the validity of the ballot papers. Rule 20 (1) says that

"any ballot paper . . . on which any mark is made by which the elector may afterwards be identified shall be invalid".

The rule is modelled on section 2 of the Ballot Act (35 and 36 Vict. C. 33), though the local draftsman has chosen to substitute the word "may" for the word "can" in the English Act and to introduce the superfluous word "afterwards" before the word "identified". But the effect of rule 20 and section 2 is the same ; it is to invalidate any ballot paper bearing on it a mark or writing indicating the identity of the voter. The Polling Officer had infringed rule 16 and the ballot papers offended against rule 20, so that there was certainly here a non-compliance with the rules.

The next question was whether this non-compliance had materially affected the result of the election. Rule 10 (c), which makes this the basis of the Commissioner's power to declare the election void, has been extracted from section 13 of the Ballot Act. The words "result of the election" in the section have been held to mean the return of the candidate and not the amount of his majority : see *Rogers on Elections*, Vol. II, page 41, and the cases there cited. The words must have the same meaning in the rule. So that, if the number of ballot papers rejected by reason of non-compliance with the rules did not suffice to

(1) (1875) L.R. 10 C.P. 733.

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turn the scale against the elected candidate, though the extent of his majority might be affected, the result of the election could not be held to have been materially affected. This is made very clear by O'BRIEN J. in *Eastern Division of Clare* case(1) where he said :

"I do not at all agree with the construction put upon that section (i.e., section 13, Ballot Act) by GROVE J. in *Hackney* case(2). He there says that 'the result of the election' does not necessarily mean the return of the candidate, but means his return by the particular number of votes. In his opinion, therefore, if the mistake or non-compliance with the rules produced a diminution of the votes by which the successful candidate was elected, although it might not be sufficient to destroy his majority, 'the result of the election' would be affected In my opinion that decision is entirely wrong. In *Woodward v. Sarsons*(3) no less than 294 votes were spoiled by the mistake of the presiding officer, but they would not, if admitted, have turned the scale against the successful candidate, and therefore did not affect 'the result of the election'. It was held that this did not render the election invalid"

In the election petition in the present case it was stated on affidavit that of the rejected votes in the particular ballot-box, the successful candidate had a majority of 68 in his favour. That is to say, two of 322 invalid ballot papers being bad on grounds other than the unauthorised mark made by the Polling Officer, of the remaining 320, 194 had been given for the petitioner and 126 for his opponent. The accuracy of this statement has not been contradicted, nor, it would seem, disbelieved by the Election Commissioner. He simply refused to consider it. He could, if he had wished for further confirmation, have ordered the

ballot papers to be produced, and satisfied himself of the fact. Rule 31 enables the ballot papers to be produced to the Court. This has nothing to do with a scrutiny. *Woodward v. Sarsons*(1) shows that the distribution of the invalid votes is material to the question whether the non-compliance with the rules had affected the result of the election. But there is no reason to doubt the correctness of the figures ; so that both on the invalid votes and on the good votes the petitioner had a majority. There was some argument before the Commissioner that electors on getting to know of the irregularity committed by the Polling Officer might have abstained from voting. But the Commissioner has found that there was no proof of it, though he remarks that he is unable to say that many were not kept away from the booth because they knew that their registered numbers would be marked on their ballot papers. The fact remains that there was no evidence that anybody who wanted to vote was prevented from voting. There were 143 electors in the area of this polling booth who did not vote. Even on the assumption that had they all gone to the poll they would have voted for the respondent, the petitioner would still have had a majority upon all the ballot papers. It is manifest, therefore, that the non-compliance of the Polling Officer with rule 16 and the consequent invalidation of the ballot papers under rule 20 did not materially affect the result of the election, and the Commissioner was wrong in his decision to the contrary.

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(1) (1875) L.L.B. 10 C.P. 733.

(1) (1892) 4 O'Mall. & H. 162.

(2) (1874) 2 O'Mall. & H. 77.

(3) (1875) L.R. 10 C.P. 733.

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The question then is whether this error of the Commissioner can be remedied by means of *certiorari*.

"The writ of *certiorari* is intended to bring into the High Court the decision of the inferior tribunal, in order that it may be certified whether the decision is within the jurisdiction of the inferior Court; . . . if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to a writ of *certiorari*."

Per SCRUTTON L.J. in *Rex v. The London County Council. The Entertainments Protection Association, Ex parte*(1). An Election Commissioner is undoubtedly such a tribunal. But *certiorari* will not issue in respect of a wrong decision of a tribunal upon a matter which is within its power to decide; for there is, as Lord SUMNER has observed in *Rex v. Nat Bell Liquors Ltd.*(2), a difference between a wrong exercise by a tribunal of the jurisdiction which it has and a usurpation by the tribunal of a jurisdiction which it has not. In *Colonial Bank of Australasia v. Willan*(3) Sir JAMES COLVILLE has indicated how a usurpation of jurisdiction by the tribunal might arise. It may be founded on the incompetency of the tribunal, or on the nature of the subject-matter, or on the absence of some essential preliminary, or on a fact to be adjudicated upon in the inquiry, as where the decision of some fact in the course of the inquiry by the tribunal ousts its jurisdiction; see the judgment of FLETCHER MOULTON L.J. in *Rex v. Woodhouse*(4). Thus a tribunal may wrongfully assume jurisdiction or decline jurisdiction upon an erroneous interpretation or understanding of the law which governs its powers. As

(1) [1931] 2 K.B. 215, 233.
(3) (1874) L.R. 5 P.C. 417, 422.

(2) [1922] 2 A.C. 128, 151.
(4) [1906] 2 K.B. 501, 537.

stated by FARWELL L.J. in *Rex v. Board of Education*(1), the Courts will prevent

"the intentional usurpation or mistaken usurpation of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction".

In that case, it was held that the Board of Education, by deciding a question not put to it for decision and by avoiding an answer to the real question which it had to decide, had declined jurisdiction and had made itself amenable to correction by *certiorari*. The same principle was stated by the Divisional Court (Lord ALVERSTONE L.O.J. and WILLS and KENNEDY JJ.) in *Rex v. Commissioner of Income-tax for City of London*(2). I think that in the present case the Election Commissioner has entirely misapprehended the real question for his decision. He has failed to decide it upon the mistaken hypothesis that the circumstance of 322 votes having been invalidated must have materially affected the result of the election. His words are :

"I need hardly say that the disenfranchising of at least 322 voters when the majority of the counter-petitioner was only 114 did materially affect the result of the election."

And being of opinion that "a vote recorded on an invalidated paper is no vote at all", he declines to consider in what numbers the invalid ballot papers had been distributed in favour of the rival candidates. In short, the Election Commissioner has declared the election void without considering and without determining the very question upon

(1) [1910] 2 K.B. 165, 179.

(2) [1904] 91 L.T. 94.

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which his jurisdiction to declare the election void depended. He had no power to do that.

In my judgment this is a proper case for interference by *certiorari* and the Commissioner's order should be quashed. The petition therefore succeeds and should be allowed with costs against the first respondent.

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VENKATASUBBA RAO J.—I entirely agree and I wish to add a few words in order to refer to, and remove, a certain confusion that exists in the application of the principles governing *certiorari* as laid down in authoritative decisions. It seems to be wrongly assumed that nothing short of some sort of defect connected with jurisdiction can afford ground for *certiorari*. This erroneous notion is, in my opinion, due to a misreading of the decisions on the point. In one sense, indeed, the question ultimately is one of jurisdiction and that view undoubtedly receives support from many of the cases where the remedy of *certiorari* was held available; but what is termed "want of jurisdiction" in those decisions has a much more extended meaning than is generally assumed in arguments advanced on this subject. As Lord O'BRIEN says in the well-known case of *The King (Martin) v. Mahony*(1):

"Procedure by *certiorari* is not at all exclusively connected with cases of jurisdiction or its absence." (Page 716)

The two decisions to which my learned brother has referred, *Rex v. Commissioners of Income-tax for City of London*(2) and *Rex v. Board of Education*(3), illustrate most clearly the extended use of the expression "want of, or defect of, jurisdiction"

(1) [1910] 2 I.R. 695.

(2) (1904) 91 L.T. 94.

(3) [1910] 2 K.B. 165.

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and show, as already stated, in the words of Lord O'BRIEN, that procedure by *certiorari* is by no means confined to cases of jurisdiction. The *Board of Education* case (1) mentioned above is a very instructive one and shows incidentally how difficult it is sometimes to distinguish jurisdiction from misconception of law. In that case, *certiorari* to quash was held to lie in respect of an error described at one moment as a mistake in law, at another, as declining or wrongly assuming jurisdiction. There, it was found that the Board of Education evaded the real point by turning the question put to them into another question. The subject-matter of the enquiry was, is it true that the Swansea authority refused to provide salaries on the same scale for the non-provided as for the provided schools? But the question which the Board had chosen to answer was not that asked, but the hypothetical question, whether the Managers could have got as good teachers for the lower salaries. FARWELL L.J., in dealing with this matter, observes:

"The statement of the Board as to want of evidence to show the impossibility of obtaining adequate teachers at the lower salaries shows a clear mistake in law." (Page 178)

Again:

"The Board under section 7, sub-section 3, act in a judicial capacity and are bound to obey the law and act according to the ordinary rules of evidence: they can neither dispense with the requirements of the Act nor assume knowledge of particular facts not proved before them." (Page 178)

In these two passages what is referred to is a mistake in law; but in another passage the error is described as one of jurisdiction:

"If the tribunal has exercised the jurisdiction entrusted to it *bona fide*, not influenced by extraneous or irrelevant

(1) [1910] 2 K.B. 165.

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considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the *intentional usurpation* or *mistaken assumption of a jurisdiction* beyond that given to the tribunal by law, and also the *refusal of their true jurisdiction* by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction." (Page 179)

That the remedy by way of *certiorari* is not restricted to cases of jurisdiction strictly so-called becomes manifest also from the judgments delivered in the other case to which I have referred. Lord ALVERSTONE L.C.J. points out that the fact that the Commissioners are final Judges would have been no answer to an application for *certiorari*, if it had been established that they had been considering an entirely wrong question. Did the Court below consider a wrong question altogether or did it deal with the proper question but deal with it wrongly? This distinction is of fundamental importance; in the former case, whether the error is described as one of law or of jurisdiction, *certiorari* would lie. Counsel on both sides have relied upon the observations of Lord SUMNER in *Rex v. Nat Bell Liquors, Ltd.*(1); Mr. Rajah Ayyar, who contends that only on grounds of jurisdiction could *certiorari* go, strongly relies upon this judgment; Mr. Jayarama Ayyar equally relies on certain observations which go to show that even a misapprehension of the law is a ground for the writ.

"It may well be",

observes Lord SUMNER,

"that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing

(1) [1922] 2 A C. 128.

the order made below, but none of the objections taken here show that the magistrate acted *under any misapprehension of the law.*" (Page 144)

This passage clearly shows that the argument that no ground other than that of jurisdiction can justify the issue of *certiorari*, is wrong; but it is equally clear, as decisions of great authority have explained, that it is not every mistake in law that can be remedied by this writ. Once again to quote FARWELL L.J. in the *Board of Education* case :

"In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby; a discretion to say whether the sums provided are fit and proper on the assumption that the Act allows the authority to prefer provided to non-provided schools as such, is entirely different from a discretion to say whether they are fit and proper when such preference is unlawful; wholly different considerations arise, and that which may be plain on one assumption in one way may be equally plain on the contrary assumption in another way." (Page 179)

As observed by MOLONY C.J. in *Rex v. Murphy*(1) :

"When the Court has jurisdiction to decide a matter, its jurisdiction is not ousted because it happens to give an erroneous decision, and it certainly cannot be deemed to exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence."

[See also *R. (Limerick Corp.) v. L.G.B.*(2) where this statement of the law has been approved]. But the disregard of the law may be so flagrant as to amount to usurpation, declining or abuse of jurisdiction. *Rex v. Board of Education*(3) illustrates this. The Board either misunderstood the question they had to decide; if not, their

(1) [1921] 2 I.R. 190, 226.

(2) [1922] 2 I.R. 76, 81.

(3) [1910] 2 K.B. 165.

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decision was so perverse as really to amount to "a non-exercise of the jurisdiction" entrusted to them (*Per* COZENS-HARDY M.R., page 175).

As to *certiorari*, there is a well-settled rule, namely, that it lies when in the exercise of jurisdiction there is error on the face of the adjudication [see *The King (Martin) v. Mahony*(1)]. Some confusion has been imported owing to a misunderstanding in regard to the application of this rule. The error must appear on the face of the record—that was the rule. The question became important in what is known as summary jurisdiction. It was formerly held that, in order to enable a Court to judge whether a conviction was legal, it must set out the evidence; state all the conclusions of fact constituting the offence; give a proper judgment. When the evidence was made a part of the record, Judges directed their ingenuity to discover faults in evidence and conviction.

"Parliament again and again intervened to protect magistrates and suitors from this dangerous, expensive, and dilatory technicality—(a) by declaring convictions, etc., to be 'final' or 'final and conclusive'; (b) by excluding *certiorari*; (c) by prescribing general forms of conviction without evidence . . . So far as regarded no-*certiorari* and finality clauses, . . . judicial decisions made them of small effect, but the general forms not stating evidence proved to be a successful remedy." (Pages 733 and 734)

This is the historical aspect of the question. When evidence was incorporated with the convictions, they were in the nature of speaking orders that might be quashed, because the error appeared on the face of the proceedings. Now the statute has made it unnecessary for magistrates to set

(1) [1910] 2 I.R. 695, 731.

out the evidence, the result being that the face of the record "spoke" no longer; "It was the inscrutable face of a sphinx"; see *Rex v. Nat Bell Liquors, Ltd.*(1).

"The statute did not stint the jurisdiction of the Queen's Bench or alter the actual law of *certiorari*. What it did was to disarm its exercise." (Page 159)

Naturally, in the case of tribunals exercising under the statute summary jurisdiction, *certiorari* in actual practice could lie only to correct errors of jurisdiction; the emphasis was, as one might expect, laid in the judgments in such cases, upon the question of jurisdiction. If this fact be not borne in mind, confusion necessarily results.

Turning to the case before us, the question which the learned Commissioner had to consider was, whether or not the result of the election was materially affected. On this point, I have very little to add to what my learned brother has said. Applying the rule laid down in *Woodward v. Sarsons*(2), which is on all fours, the invalid votes ought to have been counted. Taking the valid votes, the petitioner was returned by a majority of 114. If the invalid votes had been counted, he would have had a majority of 182. Even if it be assumed that every one of the 143 electors, who had not voted, did cast his vote in favour of the respondent, even then the petitioner would have had a majority of 39. According to *Woodward v. Sarsons*(2), unless the spoilt votes, if admitted, would have turned the scale against the successful candidate, the result of the election could not in any way be deemed to be affected; in other words,

(1) [1922] 2 A.C. 128, 159.

(2) (1875) L.R. 10 C.P. 733.

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the election could be declared void only if, by admitting the invalid votes, the respondent obtained a majority. In the light of this decision, the finding of the Commissioner cannot possibly be supported.

Then the question arises, is the error of such a nature as to justify the grant of *certiorari*? I agree with my learned brother that the facts of the present case bring it within the principles laid down in the two cases referred to above, namely, *Rex v. Commissioner of Income-tax for the City of London*(1) and *Rex v. Board of Education*(2). To what my learned brother has said on this part of the case, I have very little to add.

The lower Court's order is quashed and the petition is allowed with costs, which are fixed at Rs. 150. The learned Commissioner is directed to enquire into other matters raised in the petition and dispose of it according to law. (Rs. 150, Rupees one hundred and fifty only, to be paid to the petitioner by the first respondent).

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(1) (1904) 91 L.T. 94.

(2) [1910] 2 K.B. 165.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

MAHARAJAH OF PITTAPURAM (PLAINTIFF), APPELLANT,

1936,
April 17.

v.

THE CHAIRMAN, MUNICIPAL COUNCIL, COCANADA
(DEFENDANT), RESPONDENT.*

Zamindar—Village appertaining to zamindari—Public pathway in—Soil of pathway and trees of spontaneous growths thereon—Right to, of zamindar and of municipality or other local authority—Pathway vested in such local authority under provisions of Local Boards Act or Municipalities Act—Effect.

The question was as to the rights of the plaintiff and the defendant in respect of palmyra trees growing on a *puntha* or public pathway in a village. The plaintiff was a zamindar and the village was a part of his zamindari. The defendant was a municipal council. The *puntha* was originally vested in a taluk board by whom it was transferred to the defendant municipality in whom the *puntha* was vested at the date of suit. The trees in question were spontaneous growths and the defendant council had only such rights as vested in them under the statute by reason of the land being used as a public way.

Held that whether the *puntha* was in existence prior to the permanent settlement or came into existence after the permanent settlement, the zamindar, as owner of the adjoining land, would also be the owner of the soil of the *puntha* and of trees growing upon it, subject to the right of the public to use it as a highway.

City of London Land Tax Commissioners v. Central London Railway, [1913] A.C. 364, and *Chairman of the Naihati Municipality v. Krisheri Lal Goswami*, (1886) I.L.R. 13 Cal. 171, referred to.

Held further that the fact that under the provisions of the Local Boards Act or the Municipalities Act the pathway or the highway had come to be vested in a local board or municipality

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could not affect the rights of the adjacent owner in the soil of the highway.

Sundaram Ayyar v. Municipal Council of Madura and the Secretary of State for India, (1901) I.L.R. 25 Mad. 635, referred to.

As regards trees spontaneously growing on a highway, the balance of authority is in favour of the view that they belong to the owner of the soil and not to the local authority. There is nothing in the Local Boards Act to suggest that the beneficial enjoyment of trees spontaneously growing on the sides of a highway was intended to belong to the local authority or to exclude the general principle that they belong to the owner of the adjacent land.

APPEAL against the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 107 of 1927 preferred against the decree of the Court of the District Munsif of Cocanada in Original Suit No. 108 of 1926.

K. Subramanyam for Advocate-General (Sir A. Krishnaswami Ayyar) for appellant.

K. Srinivasa Rao for respondent.

Cur. adv. vult.

JUDGMENT.

This is an appeal by the plaintiff in which, though the pecuniary interests directly involved are small, some interesting questions arise for decision. There is a *puntha* or public pathway (marked Survey No. 260) in Suryarowpetta, a part of the plaintiff's zamindari. The defendant is the Municipal Council of Cocanada, in whom this *puntha* is now vested. Up to 1919 it would appear to have vested in the Taluk Board of Cocanada by whom it was transferred to the defendant municipality in 1919 or 1920. The point for decision is, what are the rights of the

plaintiff and the defendant in respect of the palmyra trees growing on this bit of land. Neither the plaint nor the written statement suggests that these trees were planted by the plaintiff or the defendant or the Taluk Board. P.W. 3 says: "I do not know who planted them." Presumably they were spontaneous growths and I deal with the matter on this assumption.

One contention on behalf of the plaintiff and one on behalf of the defendant may easily be put aside. The plaintiff claimed that the written statement admitted his original title to the land. I agree with the Courts below that this is not a reasonable construction of the allegation in the written statement. On behalf of the defendant, undue stress has been laid on the description of the land as "poramboke" in the Record of Rights and the Settlement Register. Being a public pathway, it was rightly classed as "poramboke"; but this description or classification throws little light on the question of title and much less on the right to the trees.

The written statement alleged that this piece of land had been acquired by the Government long ago for public purposes and the Taluk Board had been exercising ownership therein. No attempt has been made to prove any such acquisition. The case must therefore be dealt with on the footing that the Taluk Board and the defendant council have only such rights as vest in them under the statute by reason of the land being used as a public way.

The two issues framed in the case are by no means calculated to bring out the real points in controversy. The first issue was, whether the

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plaintiff has a subsisting title to the suit land. This language suggests that the question was raised in terms of article 142 of the Indian Limitation Act. But, as the question of limitation is raised by the second issue, the first issue must be taken to relate to the loss of the plaintiff's rights, if any, by some other means. But the judgments of both the Courts have mainly discussed the question, whether the plaintiff at any time had a right to the land or the trees.

The second issue was whether the plaintiff had been in possession for twelve years before suit. The word "for" must apparently be a mistake for "within" and that is how both the lower Courts have discussed it. The suit is not one for possession on the footing of dispossession but one for declaration and damages. In such a case it is difficult to see the justification for an issue in terms of article 142. Assuming, as a limitation issue *ex hypothesi* must, that the plaintiff had title at some anterior time, it would be for the defendant to establish its extinction, except when the suit falls under article 142. Further, I do not think that, in view of the pleadings, it was open to the Courts below to find that the plaintiff has not had enjoyment of the trees in question within twelve years of suit. The allegations in the written statement refer to the enjoyment of the land and the first issue specifically refers to the land and, when the second issue follows without specific reference to the trees as distinguished from the land, it is not clear whether the enjoyment of the trees by the plaintiff within twelve years was meant to be put in issue. The plaintiff specifically alleges in the fourth paragraph that

for fasli 1331 the trees were leased by the plaintiff to Veerasami and then it proceeds :

"The plaintiff understands that the defendant has been leasing out the trees for the subsequent faslis contrary to plaintiff's right."

In the eighth paragraph, it is stated that the cause of action arose on 10th July 1922 when the leaves were first cut by a lessee of the municipality. In answer to these definite allegations, there is not a word in the written statement suggesting that the defendant municipality, or the Taluk Board before it, ever leased or otherwise enjoyed the trees prior to fasli 1331. The District Munsif refers to an admission by P.W. 2 that the lessee Veerasami could not enjoy the trees as the defendant obstructed. But that would not amount to "dispossession" and much less to any proof that the municipality has been leasing these trees prior to the date admitted in the plaint.

The discussion of this question of limitation in paragraphs 4 and 5 of the appellate judgment is not very illuminating. I am not concerned to decide whether the plaintiff's allegation of enjoyment of these trees prior to 1918 is true or not. But the learned Subordinate Judge has not stated clearly what his opinion is as to the events that are said to have happened in 1918. His remark in the sixth paragraph that, because the plaintiff asserted in the plaint a specific kind of user for a long period of time, it was not open to him to rely upon the principle that possession must in such cases be held to follow the title, is too broadly stated [see *Ramanathan Chettiar v. Lakshmanan Chettiar*(1)]. It must be remembered in this case

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that the land is admittedly used as a public pathway and there is accordingly no possibility of its being used by the plaintiff as ordinary private land. The plaintiff claims only such interest in the land as a private owner could have in land which is subject to a public right of way ; and the user of it by the public as a way cannot be any interference with his rights. If, as owner of the soil, he is in law entitled to the trees, the least that should be shown by those who plead the extinction of his right thereto by lapse of time is that somebody else has been enjoying them for the statutory period. His mere non-enjoyment will not in a case of this kind amount to "dispossession" or "discontinuance" of possession. The sub-soil rights themselves require another kind of interference before any question of limitation can arise in respect thereof.

The question of the nature and extent of the plaintiff's right as a zamindar in land within his zamindari, when there is admittedly a public pathway over such land, may first be considered, without reference to the statutory provisions vesting such roads and pathways in Local Boards or Municipalities. In the absence of definite evidence as to the time when the site came to be used as a *puntha*, the question has to be dealt with on alternative hypotheses. If it became a *puntha* only after the permanent settlement, it is difficult to see why the plaintiff should not be held entitled to the land subject to the rights of the public. It is little to the point to say that this would depend upon the terms of dedication. Nobody has suggested an express dedication, and it will be strange indeed if there should have been

one for a village pathway. As observed by MOOKERJEE J. in *Chairman of the Howrah Municipality v. Khetra Krishna Mitter*(1), what is likely to have happened is that the public of the neighbourhood was merely allowed to use the land as a pathway and the only inference which may legitimately be drawn from such user is that the dedication was of just what was required for a public pathway.

Assuming however that the land was used as a public pathway even prior to the permanent settlement—and this is the assumption most favourable to the defendant—the question is whether the Courts below are right in their conclusion that the plaintiff has no title to maintain this suit. In dealing with this question, they have failed to take note of the distinction between the pathway *as such* and the ownership of the land. They have also lost sight of the basis on which the ownership of the soil under a highway rests.

The decisions referred to in the judgment under appeal, viz., *Narayanasawmy Naidu v. Secretary of State for India*(2), *Venkatarama Sivan v. The Secretary of State for India*(3) and *Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India*(4), relate to the claim of a zamindar or inamdar to ownership of what is actually used by the public, not of the soil subject to the rights of the public. For instance, in *Surya Rao Bahadur Garu, Rajah of Pithapuram v. Secretary of State for India*(4) the plaintiff claimed that the *puntha* land had become his private property in the sense that

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(1) (1906) I.L.R. 33 Cal. 1290, 1297 and 1298.

(2) (1912) 24 M.L.J. 36.

(3) (1918) 36 M.L.J. 203.

(4) (1924) 47 M.L.J. 784.

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he could get it cultivated, that is, in negation of the right of the public to use it as a way. The observation that the Government is the custodian of the rights of the public and that therefore it cannot be presumed to have parted with them at the permanent settlement must be understood in relation to the rights of the public, who have nothing to do with the soil. Similarly, in *Venkatarama Sivan v. The Secretary of State for India*(1) the question related to land used as a cremation ground in an inam village and the learned Judges applied the theory that it would be presuming a violation of trust to hold that Government would have assigned to the inamdar land which Government were bound to preserve for the communal use of the village. As indicated already, there is no question of public use or trust for public use, so far as rights in the soil of a highway are concerned, when there is no denial of the rights of the public. The decision in *Narayanamasami Naidu v. Secretary of State for India* (2) is of doubtful authority at the present day. [See per SADASIVA AYYAR J. in *Venkatarama Sivan v. The Secretary of State for India*(1)]. Whatever the position may be in respect of rivers bounding or flowing through an inam village, it will be too late at the present day to maintain that even in respect of rivers bounding or flowing through a zamindari, the bed continues to be vested in the Government. The principle that the proprietor of the adjoining land is also owner of the bed of the river *ad medium filum* has been recognised in several Indian decisions of which it is sufficient to mention *Venkata Lakshminarasamma v. The*

(1) (1918) 36 M.L.J. 203.

(2) (1912) 24 M.L.J. 36.

Secretary of State(1), *Secretary of State for India v. Maharajah of Bobbili*(2), *Subbarayudu v. Secretary of State for India*(3) and *Secretary of State for India v. Maharaja of Burdwan*(4). See also *Secretary of State for India v. Subbarayudu*(5) In *Secretary of State for India v. Subbarayudu* (5) the Judicial Committee reaffirm what has been said in *Orr Ewing v. Colquhoun*(6) and *Galbraith v. Armour*(7) that a public right of way over land stands on the same footing as a public right of navigation over a river and that, in respect of a river as well as of a highway, the bed or soil is presumed to belong to the proprietors of adjacent land.

The question therefore is, not whether the *puntha* or even the land underneath it is likely to have been granted to the zamindar at the time of the permanent settlement, but whether, by reason of his ownership of the adjacent lands, the zamindar does not in law become the owner of the soil underneath the highway. The reason of this rule was sought to be canvassed in *City of London Land Tax Commissioners v. Central London Railway*(8), but the House of Lords intimated that, whatever its history or reason may be, the rule was too well established to be so canvassed or limited with reference to the reason underlying it. Lord ATKINSON observed that the presumption is applicable even to cases where no grant or conveyance has to be construed and

(1) (1918) I.L.R. 41 Mad. 840 (F.B.).

(2) (1915) 30 M.L.J. 163.

(3) (1927) I.L.R. 50 Mad. 961. (4) (1921) I.L.R. 49 Cal. 103 (P.C.).

(5) (1931) I.L.R. 55 Mad. 268, 276 (P.C.).

(6) (1877) L.R. 2 App. Cas. 839

(7) (1845) 4 Bell's Appeals 374.

(8) [1913] A.C. 364.

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unless and until rebutted the rule must prevail. Lord SHAW put rivers and highways on the same footing for this purpose; (see page 379). In *Chairman of the Naihati Municipality v. Kishori Lal Goswami*(1) the Calcutta High Court applied this principle as between a zamindar and a municipality.

With reference to the ownership of trees on a highway, it is instructive to note the observations of Lord ATKINSON in *City of London Land Tax Commissioners v. Central London Railway*(2). Speaking of the rights of the owner of the soil, he quotes Lord MANSFIELD as citing with approval a passage from Rollo's Abridgment to the effect that

"the free-hold and all profits belong to the owner of the soil; so do all the trees upon it and mines under it".

There can thus be no doubt that, whether the *puntha* was in existence prior to the permanent settlement or came into existence after the permanent settlement, the zamindar, as owner of the *adjoining* land, will also be the owner of the soil of the *puntha* and of trees growing upon it, subject to the right of the public to use it as a highway.

Does it then make any difference that, under the provisions of the Madras Local Boards Act or the District Municipalities Act, the pathway or the highway has come to be vested in a Local Board or Municipality? The effect of such vesting has been fully discussed in *Sundaram Ayyar v. The Municipal Council of Madura and the Secretary*

of *State for India in Council*(1) and the result of the authorities has been stated as follows:

"What is vested in urban authorities is not the land over which the street is formed but the street *qua* street and the property in the street thus vested in a municipal council is not general property or a species of property known to the common law but a special property created by statute and vested in a corporate body for public purposes." (Pages 646 and 653)

It is clear according to the authorities that this vesting cannot affect the rights of the adjacent owner in the soil of the highway.

As regards trees on the highway, the rights of parties may differ according as they have been planted by the local authority or not. Whether ordinarily the local authority will have a right to plant trees on a highway or not, there can be no doubt that under the Local Boards Act it is authorised to plant trees (*see* section 95 of the Madras Local Boards Act, 1884, and section 112 of the Act of 1920), and it may be a legitimate inference that trees so planted belong to the local authority. It may also be that the owner of the soil may not be entitled to plant trees on the highway so as to obstruct the user thereof by the public or even without the previous permission of the local board if the statute so provides--*Vide* section 163 (a) inserted in the Local Boards Act by Act XI of 1930. But where trees spontaneously grow on the highway, the balance of authority is in favour of the view that they belong to the owner of the soil and not to the local authority. This is the view stated in Mackenzie on Highways at page 54 on the authority of the opinion of

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(1) (1886) I.L.R. 13 Cal. 171.

(2) [1913] A.C. 364, 372.

(1) (1901) I.L.R. 25 Mad. 635.

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JAMES V.C. in *Turner v. Ringwood Highway Board*(1). The other case referred to at the footnote on page 54 in Mackenzie's book, viz., *Nicol v. Beaumont*(2), throws no light on this question. *Coverdale v. Charlton*(3) related only to grass growing on the highway and, as observed in *Sundaram Ayyar v. The Municipal Council of Madura and the Secretary of State for India in Council*(4), its authority as to the nature and extent of the vesting in the local authority has been considerably shaken by later pronouncements. In *Stillwell v. New Windsor Corporation*(5) CLAUSON J. discussed *Coverdale v. Charlton*(3) and the learned Judge was of opinion that the trees on a highway should be treated as the highway authority's trees for all the purposes of exercising the rights of the highway authority, i.e., to the extent to which it is necessary to keep the highway fit for the use of the public. In that case, the claimant complained of the action of the local authority in removing or threatening to remove trees which were found to be in the highway. Dealing with the case on the footing that the trees might either have been planted by the highway authority or by the owner of the soil with the permission of the highway authority, the learned Judge held that if the highway authorities were satisfied that the trees caused an obstruction to the use of the highway, they would not only have the right but would be under a duty to remove the obstruction. He refers to the fact that even in *Coverdale v. Charlton*(3) BRAMWELL L.J.

(1) (1870) L.R. 9 Eq. 418.

(2) (1883) 53 L.J. (N.S.) 853.

(3) (1878) L.R. 4 Q.B.D. 104.

(4) (1901) I.L.R. 25 Mad. 635.

(5) [1932] 2 Ch. 155.

doubted whether the effect of section 149 of the English Public Health Act, 1875, was to vest the property in the trees in the highway authority. Being of opinion that the authority was entitled to remove the trees on the ground of obstruction, he left alone the question as to the property in the timber when the trees have been felled.

In the Madras Local Boards Act, a provision has been inserted by the Amending Act of 1930 prohibiting any person from felling, removing, destroying or otherwise damaging any tree vesting in or belonging to a local board and growing on any such public road [see sub-clause 2 of section 163 (A)]. There was no similar provision in the previous Acts, and it is perhaps too much to draw any inference from the language employed in this provision. But I may note, for what it is worth, that, according to this provision, *two* conditions must be satisfied, viz., not merely that the tree grows on a public road vested in or belonging to a local board but that the tree itself should vest in or belong to the local board. There is nothing in the Local Boards Act to suggest that the beneficial enjoyment of trees *spontaneously* growing on the sides of a highway was intended to belong to the local authority or to exclude the general principle that they belong to the owner of the adjacent land.

For these reasons, I should have upheld the plaintiff's claim to the trees in question but for one circumstance appearing in the evidence of D.W. 1, viz., that the defendant municipality is said to have acquired the lands adjoining the suit *puntha*. The bearing of this circumstance has not been adverted to by either of the Courts below nor

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has any reference been made to it in the written statement. But, as the defendant is a public body and as the fact has been spoken to by D.W. 1, I do not wish to deprive the defendant of the right which, on the very principle of the decision in *City of London Land Tax Commissioners v. Central London Railway*(1), it would have acquired by reason of the acquisition of the adjoining properties. Before coming to a definite conclusion on this point, it seems to me better to call for a finding from the lower appellate Court on the question, whether and to what extent the defendant municipality has become the owner of lands adjoining the suit *puntha*. Both parties will be at liberty to adduce any fresh evidence relevant to this question.

[The Subordinate Judge submitted a finding to the effect that the defendant municipality was the owner of the lands adjoining the suit *puntha*. In view of that finding the second appeal was dismissed with costs.]

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(1) [1913] A.C. 364.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

SRI RAJAH TYADA PUSAPATI SIMHADIRAJU
DAKSHINAKAVATA DUGARAJULUM GARU AND
ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

1936,
August 6.

v.

THE UNLIMITED ARYAN BANK OF VIZAGAPATAM,
REPRESENTED BY ITS OFFICIAL LIQUIDATOR, M.R.RY. NISHTALA
BHAYHAVANNULU PANTULU, AND SEVEN OTHERS, (PLAINTIFFS
1 AND 2 AND DEFENDANTS 3 TO 6 AND NIL), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), sec. 14—Reason of the
rule underlying—Requisites of—“Another civil proceed-
ing”—Meaning of—Stages before decree and after—
Non-existence of the distinction between, under the section.*

The principle underlying section 14 of the Limitation Act is that, if and so long as a person has been *bona fide* and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court. The reason of the rule seems equally to apply to the steps taken by him after the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the principle underlying section 14 of the Limitation Act. A party is seeking the relief that he is entitled to as much in the execution stage as during the pre-decree stage; and in a mortgage suit, the relief that he is entitled to is the sale of the property, and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant that relief, may legitimately be held to be steps taken in “another civil proceeding” within the meaning of section 14. In such a case the question of intervals between the dismissal of one execution petition and the presentation of another will not arise.

* Appeal No. 289 of 1926.

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Koganti Veerayya v. Narra Sreesilam, (1927) 110 I.C. 47, distinguished.

APPEAL against the decree of the Court of the Agency Additional District Judge of Waltair in Original Suit No. 95 of 1923.

D. Ramaswami Ayyangar for *C. S. Venkatachari* for appellants.

Y. Suryanarayana for respondents.

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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an appeal against the decree in a mortgage suit filed in the Court of the Agency District Judge of Vizagapatam and the only point pressed before us is one of limitation.

This suit became necessary by reason of the rule laid down by the Privy Council in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*(1) that, where a mortgage comprises property situate within the jurisdiction of the ordinary civil Courts in British India and also property situate in the Agency tracts which are subject to the special jurisdiction of the Agent under Madras Act XXIV of 1839 the ordinary civil Courts have no jurisdiction to take cognizance of the suit so far as it relates to the property situate within the Agency tracts. In the present case, the two mortgages executed in November 1895 and May 1897 respectively comprised properties partly situate in the Vizagapatam District proper and partly situate in the Vizagapatam Agency. The date fixed for payment was 29th November 1901; and, within six years of that date, an action was commenced in the Subordinate Judge's Court of Vizagapatam for relief in respect of both sets of properties. A decree *nisi* followed in due course

(1) (1919) I.L.B. 42 Mad. 813 (P.C.).

and also a final decree. Between February 1911 and July 1918 several applications for the execution of the decree were presented to and entertained by the Subordinate Judge of Vizagapatam, but these attempts at realisation of the decree proved infructuous, either for want of bidders or for other reasons not attributable to the default of the decree-holder. In July 1918 the Subordinate Judge of Vizagapatam passed an order proclaiming for sale the properties situate within his jurisdiction and proposing to transfer the matter to the Agent so far as the properties within the jurisdiction of the Agent had to be sold. On the next application, however, which was made after the judgment of the Privy Council in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*(1) had been reported, he held that this part of the decree was futile, and there was accordingly nothing to transfer to the Agent. It appears from the record that the properties situate in the regular jurisdiction were actually sold only some time in January 1923; and, as the amount then realised fell far short of the amount due on foot of the mortgage decree, this suit was instituted in the Agency Court in October 1923.

On the facts above stated, the question arises whether the plaintiffs are by reason of section 14 of the Limitation Act entitled to deduct the period during which the decree obtained by them in the Subordinate Judge's Court of Vizagapatam was sought to be executed and, if so, on what basis the period of such deduction is to be calculated. No question has been raised as to their right to deduct the period between the

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institution of the suit and the date of the decree. The learned Agency District Judge has held that the plaintiffs are entitled to deduction of the whole period from 17th August 1907 (the date when the first suit was instituted) to January 1920 when he thought the plaintiffs must be deemed to have become aware of the pronouncement of their Lordships of the Judicial Committee. It has not been contended before us that, if during this period the plaintiffs could be held to have been "prosecuting another civil proceeding" within the meaning of section 14 of the Limitation Act, they are nevertheless disentitled to the benefit of that section by reason of any lack of *bona fides* or due diligence on their part. It has been argued only as a point of law, first, that proceedings in execution of the decree in one suit are not within the contemplation of section 14 when calculating the period of limitation for the institution of another suit and, secondly, that if the period occupied by the proceedings in execution could be deducted at all, it must be calculated only with reference to the time during which each execution application presented by the plaintiffs was pending and not by taking into account the interval between the dismissal of one execution application and the presentation of another. The answer to both these arguments seems to us to depend upon the true interpretation of the expression "prosecuting another civil proceeding".

The Legislature has not, for purposes of computation, drawn any distinction in the first clause of section 14 between the suit stage and the later stages in execution, though, for purposes of

initiation of proceedings, a distinction has been made between a suit dealt with by the first clause of section 14 and an application provided for in the second clause. This latter distinction relates to the suit or application in respect of which the question of limitation arises and not to the prior proceeding in respect of which deduction is claimed. The concluding words of the first clause of section 14 no doubt provide that the previous proceeding should be founded upon the same cause of action as the later. And it is also true that, so far as proceedings in execution following upon a decree are concerned, there is no question of their being founded upon a particular "cause of action"; it is the suit in which the decree was passed that must be looked to for determining the identity of the causes of action between the two suits. It seems to us that, if the two suits are founded on the same cause of action, the fact that no "cause of action" can be predicated in respect of proceedings in execution is no reason for holding that the time *bona fide* but infructuously taken in executing the prior decree should not be deducted under section 14.

In determining the true scope of the indulgence allowed by section 14 (1) of the Limitation Act, we think the Court may well bear in mind the principle applied in cases arising under section 52 of the Transfer of Property Act, especially as the wording of that section (prior to its recent amendment) was practically identical with the language employed in section 14 of the Limitation Act. Till 1929, its language was that

"during the active prosecution of a contentious suit or proceeding in which any right to immovable property is in question the property cannot be transferred by any party to

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the suit so as to affect the rights of any other party to the suit under the decree made in the suit ”.

The question was frequently raised whether, for the purpose of section 52, the *lis* continued only up to the date of the decree in a mortgage suit or up to the realisation of the mortgage decree by proceedings in execution ; and the preponderance of authority was certainly in favour of the view that the *lis* continued up to the realisation of the mortgage decree by proceedings in execution ; cf. *Surjiram Marwari v. Barhamdeo Persad*(1), *Ghanshyam Das v. Ragho Singh*(2), *Ramasami Aiyangar v. Govinda Iyer*(3) and *Abdul Muhammad Rowther v. Seethalakshmi Ammal*(4). This principle has now received legislative recognition in the explanation added to section 52 by the amending Act of 1929. It has been suggested that section 52 of the Transfer of Property Act is not a provision in *pari materia* with section 14 of the Limitation Act and the analogy therefore is not true. The purport of the two provisions is no doubt different but the underlying policy seems to us to be the same in both cases. The principle of section 14 of the Limitation Act is that if and so long as a person has been *bona fide* and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court. The reason of the rule seems to us to apply equally to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual

purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of section 14 of the Limitation Act. A party is seeking the relief that he is entitled to as much in the execution stage as during the pre-decree stage ; and in a mortgage suit, the relief that he is entitled to is the sale of the property, and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in “another civil proceeding” within the meaning of section 14. That is the reason why in the earlier part of clause 1 of section 14 the Legislature has advisedly used the expression “civil proceeding” and does not use the word “suit”. The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal ; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because, under the law, proceedings in execution have to be taken in the Court of first instance. We are accordingly of opinion that both the points urged on behalf of the appellants must be held to be untenable. In this view, it is unnecessary to examine another possible line of argument that, notwithstanding the formal existence of several execution petitions in this case, they must all be regarded as a single proceeding in execution, and the so-called “dismissals” must only be regarded

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(1) (1905) 2 C.L.J. 288, 300.
(3) (1916) 81 M.L.J. 839.

(2) (1930) I.L.B. 10 Pat. 234.
(4) (1930) 130 L.C. 666.

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as disposals for statistical purposes, because the earlier petitions did not prove effective and their dismissal was not attributable to any default on the plaintiffs' part. It is sufficient to say that on this line of reasoning the question of intervals between the dismissal of one petition and the presentation of another will not arise.

Reliance was placed by Mr. Ramaswami Ayyangar (on behalf of the appellants) on an unreported judgment of JACKSON J. in Civil Miscellaneous Second Appeal No. 76 of 1923 and another judgment of the same learned Judge in *Koganti Veerayya v. Narra Sreesilam*(1). The judgment in the former case was reversed in Letters Patent Appeal on another point. We do not therefore have the opinion of the appellate Court on the point under section 14 of the Limitation Act. The question arose before JACKSON J. with reference to the successive stages in execution of the same decree; some intervening execution applications had according to the opinion of the learned Judge been presented to the wrong Court, and the question he had to consider was on what basis the period of exclusion under section 14 should be calculated in respect of a later application filed in the proper Court. That question had to be decided with reference to the language of clause 2 of section 14. Obviously, on the facts of that case, the theory, that a suit and proceedings in execution of the decree obtained therein altogether constitute a single proceeding when considered in relation to a later suit founded on the same cause of action as the prior suit, cannot apply. The learned Judge had to decide a point

(1) (1927) 110 I.C. 47.

of limitation with reference to different applications for execution presented in respect of the same decree. In such a case, he was of opinion that each execution application should be treated as a proceeding by itself, and it was only the period of actual pendency of each of such applications that could be taken into account under section 14 in determining whether a later application for execution was in time or not. We do not think it necessary for the purpose of this case to differ from that view [cf. *Maqbul Ahmad v. Pratap Narain Singh*(1)] because, in a case of that kind, the principle on which we have rested our present decision is obviously unavailable. The decision in *Koganti Veerayya v. Narra Sreesilam*(2) throws very little light on the question now under consideration; if anything, it is at variance with the appellants' contention in so far as it recognises that even the period between the passing of the decree in a suit and the filing of an appeal therefrom may in certain circumstances be deducted under section 14 of the Limitation Act. Such a deduction is inconsistent with the appellants' contention that it is only the actual period between the presentation of a proceeding and the disposal of that particular proceeding that can be allowed under section 14. JACKSON J. recognised the theory that, provided the suit had been rightly initiated, the appeal is really a continuation thereof and, for reasons we have already given, we think the same principle ought to be applied to proceedings taken in the execution department for realisation of the decree.

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(1) (1935) I.L.R. 57 All. 242 (P.C.).

(2) (1927) 110 I.C. 47.

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A point was suggested by Mr. Ramaswami Ayyangar that the Judge should not have taken January 1920 as the date up to which the plaintiffs were entitled to deduction, because the Subordinate Judge's order dated 5th July 1918 differentiated the properties within his jurisdiction from the properties in the Agency jurisdiction and no further proceedings were taken by the plaintiffs after that date for the sale of the properties in the Agency jurisdiction. We do not pause to examine the correctness of this argument, because, even if it should be held that the plaintiffs were entitled to deduction of the time only up to 5th July 1918, the present suit would nevertheless be in time if they are entitled to exclude the period from 17th August 1907 to 5th July 1918.

It was brought to our notice that the lower Court has declared that the plaintiffs are entitled to proceed against the other family properties of the defendants not comprised in the mortgages. The plaintiffs will be entitled to such a decree only if the suit had been instituted within the time allowed by law for a personal decree. But it is clear from the dates—and it is not disputed on the other side—that the personal remedy on the bond had become barred before the institution of this suit. That portion of the decree which relates to the liability of the other family properties of the defendants must accordingly be omitted. Subject to this variation, the decree of the lower Court is confirmed and the appeal is dismissed with costs. The appellants will pay the court-fee payable on the memorandum of appeal.

G.R.

APPELLATE CRIMINAL

Before Mr. Justice Pandrang Row.

MOOKA PANDARAM (RESPONDENT), PETITIONER,

v.

SINNU MUTHIRIYAN (PETITIONER), RESPONDENT. *

1936,
September 1.

Code of Criminal Procedure (Act V of 1898), sec. 144—Order of Sub-Magistrate under sub-sec. (1)—Confirmation of it by Sub-divisional Magistrate under sub-sec. (4)—Jurisdiction of District Magistrate to entertain another application under sub-sec. (4)—Power of District Magistrate to suspend order of Sub-Magistrate—Application to District Magistrate under sec. 144 (4)—Transfer to Sub-divisional Magistrate of—Power of.

Where a Sub-Magistrate passed a prohibitory order under section 144 (1) of the Code of Criminal Procedure and it was confirmed by the Sub-divisional Magistrate under section 144 (4), the power of the District Magistrate to entertain an application under section 144 (4) is not lost by reason of the fact that a Sub-divisional Magistrate who is subordinate to him had already dealt with an application made under that subsection to him.

The District Magistrate has no express or inherent power to suspend the order of the Sub-Magistrate. Section 144 permits any authority which has the power to rescind or alter an order to do so after hearing only the party who applies for it and this hearing can be completed without delay, and there is no particular reason why there should be a stay or suspension before such hearing.

When an application is made to the District Magistrate under section 144 (4) to alter or rescind the order of the Sub-Magistrate, the former must deal with it himself and cannot delegate his duty to a Sub-divisional Magistrate by transferring it to him.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying

* Criminal Revision Cases Nos. 607 and 608 of 1936.

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the High Court to revise the order of the District Magistrate of Trichinopoly—endorsement No. N. Dis. 1184/M. of 1936, dated 13th July 1936.

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 Sub-divisional Magistrate of Musiri in M.C. No. 45 of 1936, dated 10th August 1936.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioner.

A. Narasimha Ayyar for respondent.

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

ORDER.

These are applications which arise out of an order of the District Magistrate of Trichinopoly staying the order of the Sub-Magistrate of Turaiyur in M.C. No. 12 of 1936 pending the orders of the Sub-divisional Magistrate, Musiri, to whom the District Magistrate forwarded an application by one of the parties in M.C. No. 12 of 1936 under section 144 (4), Criminal Procedure Code. The Sub-Magistrate passed an order on the application of the present petitioner prohibiting the counter-petitioners from interfering with the performance of a certain festival by the petitioner. Some of the counter-petitioners applied to the Sub-divisional Magistrate of Musiri, under section 144 (4), Criminal Procedure Code, for rescinding the order and thereupon the Sub-divisional Magistrate after calling for the records passed an order confirming it except as regards counter-petitioners 1 to 6 in respect of whom the order was set aside apparently because they gave an undertaking before the Sub-divisional Magistrate that they

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would not interfere with the conduct of the festival. It may be mentioned in this connection that these counter-petitioners 1 to 6 were not the petitioners before the Sub-divisional Magistrate. In other words, they did not seek any rescission of the original order of the Sub-Magistrate. Thereupon one of the counter-petitioners, viz., the respondent in these petitions by name Sinnu Muthiriyar, approached the District Magistrate with a petition under section 144, Criminal Procedure Code, pointing out certain alleged irregularities in the enquiry by the Sub-Magistrate and also his objections to the procedure followed by the Sub-divisional Magistrate and prayed that the order of the Sub-Magistrate should be rescinded altogether and that the order should be suspended pending disposal of the petition. The District Magistrate passed the following order on the application on the same date on which it was presented :

“Endorsement. (i) Forwarded to the Sub-divisional Magistrate, Musiri, for enquiry and disposal. (ii) The order of the Sub-Magistrate, Turaiyur, in M.C. No. 12 of 1936 is stayed pending orders of the Sub-divisional Magistrate after enquiry.”

This order which appears to deal with the petition presented under section 144 (4), Criminal Procedure Code, almost as if it were one relating to a purely administrative matter is objected to on three grounds, namely, (i) that the District Magistrate had no power to entertain an application to rescind the order of the Sub-Magistrate after a similar application for rescission had been made to the Sub-divisional Magistrate and the latter had passed orders thereon, (ii) that the District Magistrate had no power to suspend

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the order of the Sub-Magistrate temporarily pending the result of the enquiry ordered by him to be made by the Sub-divisional Magistrate and (iii) that the District Magistrate had no power to transfer the case to the Sub-divisional Magistrate for disposal.

I am of opinion that, as regards the power of the District Magistrate to entertain an application under section 144 (4), the power is not lost by reason of the fact that the Sub-divisional Magistrate who is subordinate to him had already dealt with an application made under that sub-section to him. The wide powers of rescission or alteration given by sub-section (4) to section 144 are necessary for the protection of the subject. They are invoked not when a Subordinate Magistrate declines to pass an order under sub-section (1) but only when an order is passed thereunder interfering with the rights of subjects, and where an order of this kind, that is to say, an order which interferes with or limits the rights of subjects, is passed, the law allows the Magistrate himself who passed the order to change his mind and rescind or alter the order and allows every Magistrate superior to that Magistrate to do the same thing if he thinks fit. These are provisions intended for the protection of the liberty of the subject and should be construed liberally; otherwise, the final authority in the district who is to determine whether there should be any interference with the liberty of the subject, and if so, to what extent, for the purpose of maintaining public tranquillity or preventing breaches of the peace, will be the Sub-divisional Magistrate, and the District Magistrate would be powerless to interfere with what he considers a needless exercise by a

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Sub-Magistrate of the special powers given by section 144 (1), Criminal Procedure Code, if the Sub-divisional Magistrate has chosen to exercise his powers under sub-section (4). In the circumstances of this case, I am of opinion that the District Magistrate must be deemed to have had the power, if he thought fit, to rescind or alter the order of the Sub-Magistrate, the order of the Sub-divisional Magistrate being one which is in effect a confirmation of the Sub-Magistrate's order. The only alteration made in it was one which was of no consequence because the persons affected by the alteration were themselves prepared to abide by the order.

As regards the other two questions raised in these petitions, viz., the power of the District Magistrate to suspend the order and the power to transfer, I am of opinion that the contentions of the petitioner are well founded. A general power to suspend orders of Subordinate Magistrates is not given to superior Magistrates expressly by the Code of Criminal Procedure, and that power is sought to be based by the Public Prosecutor on what is called the inherent power of the criminal Courts to pass such orders as are necessary in the interests of justice. The authorities on this point, viz., the existence of inherent powers in criminal Courts in the mofussal are not uniform and it would appear as if the weight of authority in this province is against the proposition that there is such an inherent power. Section 144 permits any authority which has the power to rescind or alter an order to do so after hearing only the party who applies for it and this hearing can be

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completed without delay, and there is no particular reason why there should be a stay or suspension before such hearing. It is not a case in which the other side has to be given notice and has to be heard. In all these cases under section 144 it is really the liberty of the subject that is affected by the original order and, though this interference might be made by the Magistrate at the instance of, or when moved by, some private individual, the superior authority can always rescind or alter the order without hearing the person at whose instance the original order was passed, the only limitation on his power being that he should hear the party who applies for rescission or alteration before declining to do so.

As regards the power of transfer, it has not been seriously argued by the Public Prosecutor that there is a power of transfer in a case of this kind. The authority that was invoked by the application to the District Magistrate was the authority to rescind or alter conferred by section 144 (4) and this authority cannot be delegated. It has been decided in Criminal Revision Case No. 318 of 1914 that the power of rescinding the order lies only with the Magistrate to whom the application is made and that the order of the District Magistrate to whom the application was made transferring the application to a Sub-divisional Magistrate is bad. The application made to the District Magistrate under section 144 (4), Criminal Procedure Code, cannot be brought either under section 192 or under section 528, Criminal Procedure Code, which deal with the subject of transfer of cases. In this particular case it would almost appear as if the learned District Magistrate dealt

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with the application in an administrative way, and delegated his duty to the Sub-divisional Magistrate after suspending the order complained of. Moreover, the transfer to the very Sub-divisional Magistrate who had already dealt with an application relating to this very matter under the very same sub-section would not have been a proper exercise of the power of transfer, even if any such power really existed.

The District Magistrate's orders suspending the order of the Sub-Magistrate and transferring the case to the Sub-divisional Magistrate must be therefore set aside, and the District Magistrate will have to deal with the application made to him, himself, according to law, and the proceedings now pending before the Sub-divisional Magistrate as a consequence of the order of the District Magistrate transferring the case to him must be quashed.

I wish to make it clear at the same time that it will be open to the District Magistrate to rescind or alter the order or to decline to do so as he thinks proper; and nothing that has been said by me should be deemed to influence in any way his discretion which in a case of this kind has to be exercised for the protection of the rights of subjects consistently with the need for the preservation of the public tranquillity.

I direct further in the circumstances of the case that the cancellation of the order of suspension shall take effect only from the date immediately succeeding the date on which this order of the High Court is received by the District Magistrate.

V.V.C.

APPELLATE CIVIL.

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

1936,
May 1.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

THE TRUSTEES OF THE PORT TRUST, MADRAS,
RESPONDENTS.*

Presidency-towns Insolvency Act (III of 1909), sec. 49 (1)—Local authority—Port Trust, if a—General Clauses Act (X of 1897)—Sec. 3 (28)—Applicability and effect of—Sec. 49 (1) of Presidency-towns Insolvency Act—Debts due to Crown or local authority in—Meaning of—"Debt provable in insolvency" in sec. 46 of Act—Port Trust—Indemnity bond in favour of, in respect of goods delivered by it without production of railway receipt—Damages awarded to Port Trust under—Priority in respect of, against estate of executant of bond in hands of Official Assignee—Right of Port Trust to.

The Port Trust is a local authority within the meaning of section 49 (1) of the Presidency-towns Insolvency Act read with section 3 (28) of the General Clauses Act (X of 1897) even when it does not control, or is not entrusted by the Government with the control or management of, a municipal or local fund.

The words "legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund" in section 3 (28) of the General Clauses Act qualify the words immediately preceding them, namely, "or other authority", and do not relate to a municipal committee, district board or body of port commissioners.

Goods purchased in the mufassal by dealers in Madras were consigned to them in Madras, railway receipts being issued in respect of those goods. On arrival in Madras the goods came into the charge of the Port Trust. The railway receipts were

* Original Side Appeal No. 5 of 1936.

not produced by the dealers and the Port Trust, acting under section 57 of the Indian Railways Act, took an indemnity bond from the dealers and a third party and handed over the goods to the dealers. The dealers pledged the railway receipts relating to the goods with a bank and were subsequently adjudicated insolvents. After the insolvency the bank sued the Port Trust claiming that the goods covered by the railway receipts belonged to them. The Official Assignee represented the insolvents' estate in that suit and the third party was also a party to it. In that suit, a decree was passed in favour of the bank against the Port Trust for a certain amount and in favour of the Port Trust against the Official Assignee and the third party for the same amount by reason of the indemnity bond, the Port Trust having claimed to be indemnified by the insolvents and the third party against the damages which under the decree it had to pay to the bank. On a claim by the Port Trust to priority in respect of the amount payable by the insolvents' estate under section 49 of the Presidency-towns Insolvency Act,

held, that the Port Trust was entitled to priority.

The amount claimed by the Port Trust was a "debt provable in insolvency" under section 46 of the Presidency-towns Insolvency Act. Debts due to the Crown or a local authority in section 49 (1) of the Act mean "provable" debts. The words of section 49 (1) (a) are wide and all debts due to the Crown or to any local authority are to be paid in priority to all other debts.

Ex parte Kemp. In re Fastnedge, (1874) L.R. 9 Ch. 383, referred to.

Food Controller v. Cork, [1923] A.C. 647, distinguished.

APPEAL from the order of MOCKETT J., dated 11th October 1935, and passed in the exercise of the insolvency jurisdiction of the High Court in Application No. 357 of 1935 in Insolvency Petition No. 62 of 1929.

C. Krishnaswami Ayyar for appellant.

K. S. Krishnaswami Ayyangar and *O. T. G. Nambiar* for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by BEASLEY C.J.—This is an appeal from a judgment of MOCKETT J. in the Insolvency Court. The facts leading up to this appeal need only be stated very briefly. O. K. Narayana Ayyar & Sons, the insolvents, were dealers in groundnuts on a very large scale. They purchased groundnuts largely in the mufassal and these were consigned to them in Madras, sometimes by their vendors and sometimes by themselves. Railway receipts were, in accordance with the railway practice, issued in respect of those groundnuts. On arrival in Madras the groundnuts came into the charge of the Port Trust. It is a general rule that these should not be handed over to the consignees without production of the railway receipts, but under section 57 of the Indian Railways Act, the Port Trust can hand over the goods to the consignee after taking an indemnity bond. At that time, the insolvents used to pledge the railway receipts as security for advances made to them by some of the Madras banks, and it has since been held by the Privy Council in the *Official Assignee, Madras v. Mercantile Bank of India*(1) that a pledge of a railway receipt operates as a pledge of relative goods. On 25th June 1928 a large quantity of groundnuts were handed over to the insolvents by the Port Trust without production of the railway receipts and, instead, the Port Trust took from the insolvents and one Pyda Rangiah Chetty an indemnity bond of that date in their favour. The insolvents took advantage of this procedure to commit a fraud. They pledged the railway receipts relating to the

(1) (1934) I.L.R. 58 Mad. 181 (P.C.).

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groundnuts with the Central Bank. After the insolvency, the Central Bank claimed that the groundnuts covered by the railway receipts belonged to them and brought a suit against the Port Trust, Civil Suit No. 573 of 1929. The insolvent estate was of course represented by the Official Assignee and he and Pyda Rangiah Chetty were brought on record in that suit by means of third party notices. A decree was passed on 7th March 1934 in favour of the Central Bank against the Port Trust for Rs. 25,041-2-6 and in favour of the Port Trust against the Official Assignee and Pyda Rangiah Chetty for the same amount by reason of the indemnity bond, the Port Trust having claimed to be indemnified by the insolvents and Pyda Rangiah Chetty against the damages which under the decree it had to pay to the Central Bank, and in consequence of this they claimed priority in respect of the amount payable by the insolvents' estate under section 49 of the Presidency-towns Insolvency Act. The Official Assignee admitted the Port Trust only as unsecured creditors and did not allow their claim to preferential payment. The Port Trust therefore by notice of motion prayed that this order of the Official Assignee should be varied, contending that by reason of section 49 of the Presidency-towns Insolvency Act they were entitled to priority in respect of this amount. Section 49 reads as follows:

“(1) In the distribution of the property of the insolvent there shall be paid, in priority to all other debts—(a) all debts due to the Crown or to any local authority; . . .”

MOCKETT J. upheld the Port Trust's contention. Hence this appeal.

For the appellant, it is argued firstly, that the Port Trust is not a "local authority" and, there being no definition of local authority in the Presidency-towns Insolvency Act, the definition section in the General Clauses Act, namely, section 3 (28) is referred to. There the definition of "local authority" is as follows :

" 'Local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

It is contended that the Port Trust is not entrusted by the Government with the control or management of a municipal or local fund and is not therefore a "local authority" within the meaning of that sub-section and that no fund has been constituted under the Port Trust Act of 1905 such as that in section 139 of the Madras City Municipal Act. MOCKETT J. negatived this contention, because provision is made in the Port Trust Act for the imposition and recovery of rates and it is from these rates that the Port Trust income is derived, and had no doubt that its collection by the Port Commissioners constitutes a local fund within the meaning of section 3 (28) of the General Clauses Act. In our view, it is not necessary to employ the test of whether the Port Trust is entrusted with the control or management of a local fund, because Mr. K. S. Krishnaswami Ayyangar has put an interpretation upon that sub-section with which we agree. It is that the words "legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund" qualify the words immediately preceding them, namely, "or other

authority", and do not relate to a municipal committee, district board or body of port commissioners. We think that that is clearly correct. It is obvious that a municipal committee is a "local authority" and equally so a district board and, in our view, so also is a body of port commissioners ; and it is conceded that the Port Trust come within this description and it does not seem to us to be intended or reasonable that they should be a "local authority" only when they control or are entrusted by the Government with the control and management of a municipal or local fund, but it is otherwise in the case of other authorities not definitely specified who can only bring themselves within that definition if the latter part of the sub-section can be applied to them ; and, moreover, the word "or" and not "and" other authority is used. The Port Trust therefore is a local authority.

Next, the appellant argues that the amount claimed is not a "debt due" to the Port Trust within the meaning of section 49 of the Presidency-towns Insolvency Act as it was not a debt due or ascertained at the date of the adjudication in insolvency, though it seems to be conceded in argument by the appellant that this would be a "debt provable in insolvency" under section 46. But a distinction is sought to be drawn between a "debt due" and a "debt provable". We think it is clear beyond doubt that this is a "debt provable in insolvency". Section 46 of the Presidency-towns Insolvency Act provides in sub-section (1) that

"demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable in insolvency".

At the date of the adjudication the Port Trust held the indemnity secured from the insolvents and Pyda Rangiah Chetty before the insolvency in respect of future loss or damages occasioned by the release of the groundnuts without the production of the railway receipts. The bond was clearly a contract of indemnity; and, although the claim against the insolvents was not at that time ascertained, there was still that claim and it was ascertainable and after the adjudication was in fact ascertained. The claim was therefore excepted from demands not provable in sub-section (1). Sub-section (3) provides that

“ . . . all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency ”.

The contract of indemnity was clearly an obligation incurred by the debtors before the date of the adjudication and the debt in question comes within sub-section (3); and the explanation to section 46, in our opinion, makes the position even clearer. The debt therefore is one which is “provable in insolvency”. But is it a “debt due” as provided in section 49 (1) (a)? The appellant argues that it is not and refers to *Ex parte Kemp. In re Fastnedge*(1). The headnote of that case is as follows:

“ Sums retained by bankers against acceptances, and for which they have given marginal notes, are not debts due to the bankrupt in the course of his business within the order and disposition clause, the Bankruptcy Act, 1869, section 15 (5). The expression ‘debts due’ in that clause is not to be confined to

(1) (1874) L.R. 9 Ch. 383.

debts presently payable, but, on the other hand, will not include debts which were only contingent at the commencement of the bankruptcy.”

This case however does not assist the appellant because on page 388 illustrations are given by MELLISH L.J. of the various meanings of the word “due” which may be found in the Bankruptcy Act itself and he states:

“ Then again, in the 49th section it is enacted that an order of discharge shall release the bankrupt from all other debts provable under the bankruptcy except debts due to the Crown. In that place I think that ‘debts due to the Crown’ means all provable demands which the Crown has against the bankrupt, whether they have become payable or not, and whether they are in point of law strictly debts or not.”

In the present section 28 of the English Bankruptcy Act, which is the equivalent of section 45 of the Presidency-towns Insolvency Act, although differently worded, the words “debts due to the Crown” do not appear though it is clear from MELLISH L.J.’s remarks that those were the words in the old section. It is difficult to see why a “debt due to the Crown” should in section 45 of the Presidency-towns Insolvency Act be given a different meaning when those words appear in the priority of debts section. The scheme of the Act is to treat debts due to the Crown differently to those due to others, in the discharge section to preserve the liability for the payment of those debts notwithstanding the order of discharge and in the priority of debts section to give priority to those debts, and we think that it follows that the same construction as MELLISH L.J. gave to those words in the discharge section of the English Bankruptcy Act would have been given to the words in the

priority of debts section in the same Act. The fact that in section 45 of the Presidency-towns Insolvency Act only debts due to the Crown are mentioned does not in our view make any difference. We are clearly of the view that debts due to the Crown or a local authority must mean "provable" debts. But the appellant has a further argument to advance and it is that nevertheless priority cannot be given to this debt because it is not the kind of debt which under the English Act is entitled to priority. This is quite true. The equivalent section in the English Bankruptcy Act is section 33 and it reads as follows:

"(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts (a) all parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land-tax, property or income-tax assessed on the bankrupt up to the fifth day of April next before the date of the receiving order and not exceeding in the whole one year's assessment."

Hence it is only that specific class of debt which, when due either to the Crown or to the local authority, is entitled to priority and therefore a debt due to the Crown not being one of that class will not come under the section, and *Food Controller v. Cork*(1) is certainly authority upon this point. The facts of that case are that during the war the Food Controller in exercise of certain statutory powers conferred on him in that behalf appointed H. J. Webb & Co. agents to sell on commission and distribute frozen rabbits imported from Australia by the appellants, the Board of

(1) [1923] A.C. 647.

Trade. The company sold the rabbits to various retail dealers and received the purchase-moneys which it was bound to pay over to the Food Controller less commission and expenses. The company went into voluntary liquidation and was found to be insolvent and at that date owed the Food Controller £9,689-5-10 representing purchase-moneys which had been collected by the company on account of the Food Controller but not paid over to him. The Food Controller lodged a proof of the debt and claimed to be paid in priority to the other creditors of the company on the ground that it was a Crown debt. The question turned on the construction of the Companies (Consolidation) Act, 1908, sections 186 and 209. Section 186 deals with the consequences which shall ensue on the voluntary winding up of a company and provides that the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and section 209 is similarly worded to section 33 of the Bankruptcy Act. It was held that the Crown had no claim to priority of payment other than such priority as was given by statute; and no such priority was given by statute. Lord SHAW in his judgment on page 665 says:

"The Crown as a creditor is by its assent to this legislation plainly restricted in priority to the limited specifications of Crown debts given. It follows that beyond that point the Crown assents to an equal division. Any super-eminent right, whether under the name of prerogative or otherwise, has disappeared. The Crown stands plainly bound to that result."

MOCKETT J. thought—and we think correctly—this case is of no assistance in dealing with the Presidency-towns Insolvency Act. Had that section been similarly worded to the equivalent

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section in the English Bankruptcy Act, the position would have been perfectly clear. Unfortunately for the appellant it is not so worded and we are not entitled to go outside the words of the Act and import into it words which are in the English Act for the purpose of limiting the scope of the section. Nor are we concerned with the intention of the Legislature when there is no expression of that intention to be gathered from the words of the Act. We are not entitled to make guesses and to say that the Indian Legislature intended to do what the English Bankruptcy Act has done. If we were, it would be equally open to us to hazard the opinion that the Indian Legislature intended to provide differently in order to meet local conditions. The words of section 49 (1) (a) are wide indeed and all debts due to the Crown or to any local authority are to be paid in priority to all other debts. That being so, it is impossible to hold that the Port Trust debt is not under this section entitled to priority. It follows therefore that this appeal must be dismissed with costs against the insolvents' estate. The Official Assignee will get his costs out of the estate also. Costs will be taxed on the Original Side scale.

Solicitors for appellant : *King & Partridge.*

Solicitors for respondents : *Moresby & Thomas.*
A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

C. V. CHELAPATHI RAO NAIDU (PETITIONER),
APPELLANT,

v.

THE BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS, MADRAS, REPRESENTED
BY ITS PRESIDENT (COUNTER-PETITIONER), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927)—Application—Suit—Questions dealt with by civil Court as in—Appeal in former case—Maintainability of—Sec. 9 (5) of Act—"Excepted temple"—Test of temple being an—De facto exercise of hereditary right.

The Madras Hindu Religious Endowments Act by its own scheme clearly indicates a distinction between cases in which questions arising under it are to be dealt with by a civil Court as in a "suit" and cases in which questions are to be dealt with in a civil Court as on an "application". In the latter case, under the scheme of the Civil Procedure Code, no appeal will lie unless specially provided for.

Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras, (1933) I.L.R. 57 Mad. 271 (F.B.), relied on.

Maung Ba Thaw v. Ma Pin, (1934) I.L.R. 12 Rang. 194 (P.C.), considered.

In determining whether or not a certain temple comes under the definition of an "excepted temple" within section 9 (5), what is contemplated by the Act is a consideration of the *de facto* exercise of the hereditary right and not a mere presumptive right not exercised for several generations.

The expression "has been" in the amendment to the Act introduced in 1930 does not mean anything different from the expression "is hereditary" in section 9, clause 5 (b), before the amendment. Both of them refer to cases in which succession has in fact been devolving hereditarily from the founder.

* Appeal No. 26 of 1931 and Civil Revision Petition No. 97 of 1931.

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Krishnamurthi v. Hindu Religious Endowments Board, Madras, (1935) I.L.R. 59 Mad. 245, approved.

Gossami Sri Gridharaji v. Romanlalji Gossami, (1889) I.L.R. 17 Cal. 3 (P.C.), considered.

APPEAL against, and PETITION under section 107 of the Government of India Act praying the High Court to revise, the order of the District Court of Bellary dated 21st November 1929 and made in Original Petition No. 5 of 1927.

P. R. Ganapathi Ayyar for appellant.

K. Subba Rao for *P. V. Rajamannar* for respondent.

JUDGMENT.

VARADA-
CHARIAR J.

VARADACHARIAR J.—This appeal and the connected revision petition arise out of an application under section 80 (2) of the Madras Hindu Religious Endowments Act (I of 1925) in respect of the temple of Sri Ranganadhaswami at Hospet. In the first instance, it was claimed both before the Board and before the District Court that the temple was a private one but that part of the claim has not been pressed and the only point remaining to be determined is, whether or not it falls within the definition of an "excepted temple" in section 9 (5) of the Act.

The learned District Judge has referred to one or two errors into which the Board had fallen when passing its order dated 21st April 1926. As the learned District Judge has dealt with the matter fully, I do not see that anything turns upon the errors found in the Board's order. The learned District Judge has held that, though the petitioner's grandfather, one Chelapathi Rao Naidu, was the founder (wholly or at least in part) of the temple about the year 1870, it is not possible

to say that the right of succession to the office of trustee in this case is hereditary, as required by section 9, clause 5 (b) (as it stood prior to the amendment in 1930). This conclusion is based on his finding that, after the death of the original Chelapathi Rao Naidu, the management has not been in the hands of his heirs but of some persons related to him by marriage. The evidence shows that the management has for a long time been in the hands of some agents, namely P.W. 5 and his father and uncle. In some of the documents reference is made to one or another of Chelapathi Rao Naidu's relations but beyond that it is difficult to find any indication of the part that they took in the management. As regards the petitioner, it is not possible to say from the evidence that he took any part in the management till disputes arose between the agent and the local temple committee.

In the ordinary course, I should have followed the judgment of the Full Bench in *Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras*(1) and held that no appeal lay. But Mr. Ganapathi Ayyar contended that that judgment required reconsideration in the light of the decision of the Privy Council in *Maung Ba Thaw v. Ma Pin*(2). It is true that the decision in the Rangoon case was pronounced after the judgment of the Full Bench but I do not find in it the enunciation of any new principle not present to the minds of the learned Judges who pronounced the Full Bench decision. In the recent case, their Lordships only re-affirmed the principle of

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(2) (1934) I.L.R. 12 Rang. 194 (P.C.).

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their earlier decision in *Secretary of State for India v. Chellikani Rama Rao*(1), and that judgment has been considered at great length in the Full Bench judgments. Mr. Ganapathi Ayyar suggested that two at least of the learned Judges who took part in the Full Bench case have proceeded on the footing that *Secretary of State for India v. Chellikani Rama Rao*(1) turned upon the language of the definition of "decree" found in the Civil Procedure Code of 1882, and therefore afforded no guidance under the Code of 1908; and he asked us to say that the decision in *Maung Ba Thaw v. Ma Pin*(2) shows that that assumption is not right. Whatever may be said against some of the observations in the Full Bench case, I do not understand the basis of the Full Bench decision to be as assumed by Mr. Ganapathi Ayyar. It seems to me to proceed on the footing that the Religious Endowments Act has by its own scheme clearly indicated a distinction between cases in which questions arising under it are to be dealt with by a civil Court as in a "suit" and cases in which questions are to be dealt with in a civil Court as on an "application". In the latter case, it cannot be denied that under the scheme of the Code no appeal will lie unless specially provided for. I therefore see no reason for not following the Full Bench ruling and accordingly hold that the appeal is incompetent.

Dealing with the matter as one coming up in revision, there can be no question as to the jurisdiction of the lower Court and I find nothing in the way of material irregularity alleged against

(1) (1916) I.L.R. 39 Mad. 617 (P.C.).
(2) (1934) I.L.R. 12 Bang. 194 (P.C.).

the proceedings in the lower Court. At best, all that could be said is that the learned Judge has either misinterpreted the definition of an "excepted temple" or erred in holding that the succession in this case has not been hereditary. It seems to me very doubtful if either of these grounds will suffice to bring the case under the revisional jurisdiction of this Court. So far as the finding of fact is concerned, I see no reason to differ from it, even if I could.

On the point of law, Mr. Ganapathi Ayyar relied upon the decision of the Privy Council in *Gossami Sri Gridhariji v. Romanlalji Gossami*(1) and contended that once the Court holds that the temple was founded by a private founder, it must follow as a matter of law that succession to it is hereditary unless the deed of endowment or the usage of the institution proves the contrary; and, there being nothing to the contrary in this case, he argued that the learned Judge should have held that the case falls within the definition of an "excepted temple" even if succession has not *in fact* been hereditary since the days of the original founder. This point was dealt with by me as a single Judge in *Krishnamurthi v. Hindu Religious Endowments Board, Madras*(2). Having carefully listened to the arguments of Mr. Ganapathi Ayyar, I have not been persuaded that the view there expressed is not correct, so far as the scheme of the Religious Endowments Act is concerned. A distinction was attempted to be made on the ground that in this case the petitioner

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(1) (1889) I.L.R. 17 Cal. 3 (P.C.).

(2) (1935) I.L.R. 59 Mad. 215.

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has become manager and that therefore his management should be held to be in his hereditary right. I am not by any means satisfied on the evidence that he has really entered upon the management in any effective sense. But, even if a different conclusion should be possible on the facts, I do not see that it affects the legal position, because he has not succeeded as the heir of the last trustee nor was the last trustee in office as the heir of his predecessor. In *Krishnamurthi v. Hindu Religious Endowments Board, Madras*(1) stress was no doubt laid upon the use of the expression "has been" in the amendment introduced in 1930, but it does not appear to me that the expression "is hereditary" in section 9, clause 5 (b), means anything different. Both of them seem to me to refer to cases in which succession has in fact been devolving hereditarily from the founder. Both the appeal and the civil revision petition therefore fail and are dismissed with costs in the appeal only.

MOCKETT J. MOCKETT J.—I agree. I desire to add a few words with regard to two arguments of Mr. Ganapathi Ayyar.

He argued that the authority of the Full Bench decision in *Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras*(2) was shaken by the subsequent decision of the Judicial Committee reported as *Maung Ba Thaw v. Ma Pin*(3). It will be seen that the Board in that case referred to its own decision in *Secretary of State for India v. Chellikani Rama Rao*(4), a Madras case, and it

(1) (1935) I.L.R. 59 Mad. 245. (2) (1933) I.L.R. 57 Mad. 271 (F.B.).
(3) (1934) I.L.R. 12 Rang. 194 (P.C.). (4) (1916) I.L.R. 89 Mad. 617 (P.C.).

does not seem to me that the decision in *Maung Ba Thaw v. Ma Pin*(1) has in any way altered the position as it stood at the date of the decision of the Full Bench. The case of *Secretary of State for India v. Chellikani Rama Rao*(2) was fully considered by the Full Bench and the actual decision in *Maung Ba Thaw v. Ma Pin*(1) has been the subject of discussion in a later decision by a Bench of this High Court reported as *Krishnamurthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam*(3). In that case, MADHAVAN NAIR J. expresses the view that nothing that he had read in the Rangoon case affects the opinion expressed by him in the Full Bench case. These matters are therein fully considered and I agree with my learned brother that there is no material before us on which we can hold that we are not bound by the Full Bench decision.

Mr. Ganapathi Ayyar argued further an interesting point. He points out that it is settled law according to the decision of the Judicial Committee in *Gossami Sri Gridharaji v. Romanlalji Gossami*(4) that the right of a claimant to the trusteeship of a temple is presumed in his favour if it can be shown that the temple had been founded by the claimant's ancestors and no proof of any usage at variance with this presumption is forthcoming. That rule of Hindu law, says Mr. Ganapathi Ayyar, affects the meaning of section 9, clause 5, of the Madras Hindu Religious Endowments Act. That very point has been dealt with by my learned brother in the case reported

(1) (1934) I.L.R. 12 Rang. 194 (P.C.). (2) (1916) I.L.R. 39 Mad. 617 (P.C.).
(3) (1935) I.L.R. 59 Mad. 554. (4) (1889) I.L.R. 17 Cal. 3 (P.C.).

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as *Krishnamurthi v. Hindu Religious Endowments Board, Madras*(1). I desire to express my complete agreement with that decision and in particular for the reasons given at page 248. It seems too that whether the words are "is" or "has been", the effect is the same. As my learned brother points out, the fact that many years ago this temple was founded by the claimant's ancestor is not surely what is contemplated by the Act but what is contemplated is a consideration of the *de facto* exercise of the hereditary right and not a mere presumptive right not exercised for several generations. I agree that this appeal and the civil revision petition must be dismissed for the reasons given.

V.V.C.

(1) (1935) I.L.R. 59 Mad. 245.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

SRI MAHANT SITARAM DASS BAVAJI (PLAINTIFF),
APPELLANT,

v.

THE HINDU RELIGIOUS ENDOWMENTS BOARD,
MADRAS, AND TWO OTHERS (DEPENDANTS),
RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 63—Powers of Hindu Religious Endowments Board under—Power to settle list of properties of the institution to be covered by the scheme—Associate trustee appointed under sec. 63 (1)—Status same as that of co-trustee.

The power given to the Hindu Religious Endowments Board by section 63 of the Madras Hindu Religious Endowments Act to frame a scheme carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are whose disposal is to be provided for by the scheme.

An associate trustee appointed under section 63 (1) of the Act should have the powers which a co-trustee has under the general law and it is not contemplated by the section that he could be invested by the scheme with the power in effect to supersede the existing trustee.

APPEAL against the decree of the District Court of Ganjam in Original Suit No. 34 of 1928.

B. Jagannatha Doss for appellant.

K. Subba Rao for *P. V. Rajamannar* for respondents.

JUDGMENT.

VARADACHARIAR J.—This appeal arises out of a suit under section 63 (4) of the Hindu Religious

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Endowments Act, impugning a scheme framed by the Board for the management of a group of maths. Only two points have been pressed before us : (i) as to the propriety of giving the associate trustee overriding powers over the mahant and (ii) as to the power of the Board to settle a list of properties belonging to the institution. The latter point may be briefly disposed of.

It does not appear from the record whether any objection was taken by or on behalf of the mahant before the Board about the properties to be included in the list attached to the scheme of properties belonging to the math. We cannot agree with the contention advanced by Mr. Jaganatha Doss, on behalf of the mahant, that the Board has no power to settle such a list. Section 63 undoubtedly gives power to the Board to frame a scheme for the management of the institution and this power carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are whose disposal is to be provided for by the scheme. A question of this kind was raised before this Court in *Vaithinatha Aiyar v. Thyagaraja Aiyar*(1) and the learned Judges held that, in a suit under section 92 of the Code of Civil Procedure asking for the framing of a scheme, the Court has the power to settle the question whether certain properties belong to the institution or not. This decision was confirmed on appeal by the Privy Council in *Vaidyanatha Ayyar v. Swaminatha Ayyar*(2)

(1) (1919) 41 M.L.J. 20.

(2) (1924) I.L.R. 47 Mad. 884 (P.C.).

and, though the question of the Court's power was not specifically raised before their Lordships, the Judicial Committee did deal with the merits of the claim, thus clearly implying that this was within the legitimate scope of the Court's power when framing a scheme. Some observations on this question will also be found in *Anjaneya Sastri v. Kothandapani Chettiar*(1).

In the lower Court an attempt was also made to prove that some of the properties included in the list attached to the scheme, Exhibit F, are the private properties of the mahant and do not belong to the math. In support of that claim, reliance was placed on the circumstance that these properties came to the present mahant under the will of his predecessor, Exhibit D. As the learned Judge has pointed out, this will make no distinction between the properties now claimed as the private properties of the mahant and the other properties in respect of which no doubt has been raised as to the ownership of the math. From the few sale deeds filed in the case, it no doubt appears that some of those properties were purchased in the name of the prior mahant ; but, it being admitted that he was an ascetic and a celibate and the head of the institution, the probabilities are that they were purchased with the funds of the institution. At any rate, in the absence of anything to show any difference in his method of dealing with these properties as compared with the other admitted properties of the institution, the Court is entitled to draw the inference that he purchased them for the benefit

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(1) (1935) 43 L.W. 409.

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of the institution. We therefore see no reason to interfere with the lower Court's decision on this point.

Proceeding next to the objection taken to clauses (2) and (3) of the scheme*, we think that the appellant's objection to these clauses is well founded. We agree with the learned Judge that the circumstances justify the appointment of an associate trustee ; but section 63 does not contemplate that the person so added is in effect to supersede the mahant. Clause (2) of the scheme almost makes it clear that the new trustee is to have the management of the institution, with a vague direction that, in so managing it, he may avail himself of the help and advice of the mahant in all important matters. We are not satisfied that this kind of substantial supersession of the mahant is warranted by the terms of section 63. Clause (3) of the scheme gives further effect to the principle underlying clause (2) by declaring that, in matters in which the mahant might not co-operate with

* NOTE.—Clauses (2) and (3) of Exhibit F run as follows :—

Clause (2).—The paid trustee shall take possession of all the maths, their endowments and other properties belonging to them and all the title deeds and documents relating to the institutions and retain such possession in conjunction with the mahant and manage the institutions with the help and advice of the mahant in all important matters connected with the institutions.

Clause (3).—In any matter in which the mahant might not co-operate with the paid trustee, the paid trustee shall have the power of acting independently of him. He shall however place the mahant in possession of sufficient funds for conducting the pooja and other services to the deities in the maths and the distribution of Sadavritti to travellers subject to the mahant's maintaining proper accounts showing the expenditure from the amounts allowed to him for these purposes.

the paid trustee, the paid trustee should have the power to act independently of him. It is true that the scheme draws a distinction between religious matters and secular matters and leaves the mahant comparatively free in religious matters. This distinction is more easily drawn on paper than worked in practice. But, apart from that consideration, for the reasons we have already given, this kind of special power conferred on the new trustee is not warranted by the Act. We appreciate the necessity for some provision to ensure the working of the institution in the event of a deadlock between the two trustees ; but the Board or other competent authority must devise some means of ensuring it in a form consistent with the provisions of the Act. We must accordingly direct that clauses (2) and (3) of the scheme, Exhibit F, must be omitted and a general provision inserted that the paid trustee appointed under clause 1 shall have the powers which a co-trustee will have under the general law.

We are informed that the locality in which the suit institution is situate has now ceased to form part of this Presidency and we do not know which authority will in the new state of things be competent to deal with this institution by way of supervision. All that we can do at this stage is to leave the matter with the above direction, so that any other authority competent to give further directions may do so when the contingency contemplated by clause (6) of the scheme is availed of.

The appeal is accordingly allowed to the extent above indicated and in other respects dismissed. There will be no order as to costs because the parties succeed in part and fail in part.

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MOCKETT J.—I agree. Under section 63 (2) of the Hindu Religious Endowments Act, provision is made for associating one or more persons with the trustee for the purpose of participating or assisting in the administration of the endowments. By that I understand that the person appointed is to participate with the trustee and to assist the trustee. What has happened in this case is that a paid trustee has been appointed who, as I understand clause (2) of the scheme, has the right to have his views and intended actions prevail over the present mahant, and the result seems to be that the position of the mahant is virtually negligible. It is the paid trustee who is to manage the institution, he can ask for the advice and the help of the mahant, but nothing is said about the necessity for him to accept them, and the whole of that part of the scheme is qualified by the most ambiguous words "in all important matters". Then, under clause (3), "if the mahant does not co-operate, the paid trustee can act independently". It seems to me, the result is that the mahant remains there as a mere cipher so far as secular matters are concerned and, so far as powers are concerned, he might very well have been removed. In my view, this position is not contemplated by any of the relevant provisions of the Act. If the Board desire to remove the trustee, provision is made by section 73. If they desire to retain him, then provision must be made, as indicated by my learned brother, for a scheme by which he continues to function, but in co-operation with somebody else nominated by the Board.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

A. PR. L. M. L. LAKSHMANAN CHETTIAR
(RESPONDENT), APPELLANT,

1936,
August 28.

v.

K. SRINIVASA IYENGAR AND TWO OTHERS (APPELLANTS),
RESPONDENTS.*

*Insolvency—Hindu joint family—Insolvency of one member—
Effect—Vesting in the hands of Official Receiver—Subse-
quent annulment of adjudication on the ground that creditors
had been paid in full—Re-vesting of property in the hands
of the member—Character and incidents of.*

On the making of an order of adjudication of a member of an undivided Hindu family, his share vests in the Official Receiver and is in his hands not as joint family property but as separate property available for the benefit of the personal creditors of the insolvent member. When the insolvency of such a member is annulled on the ground that his creditors have been paid in full, the properties which remained in the hands of the Official Receiver go back to the debtor (member) with the same character in which it was held by the Official Receiver while the bankruptcy continued. The annulment would not completely wipe out the effect of a valid order of adjudication. The bankruptcy is wiped out to this extent, viz., that the properties go to the debtor (member) free from all claims in bankruptcy, so that he can deal with the properties as if they are his own, that is, with all the original powers and rights which he would have, had there been no bankruptcy.

APPEAL against the decree of the Court of the District Judge of Chittoor, dated 23rd February 1933, in Appeal Suit No. 51 of 1932 preferred against the order of the Court of the District Munsif, Sholinghur, in Execution Petition No. 491

* Appeal Against Appellate Order No. 180 of 1933.

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of 1931 in Original Suit No. 1098 of 1929 on the file of the District Munsif's Court, Gobichetti-palaiyam.

S. A. Seshadri Ayyangar for appellant.

D. Ramaswamy Ayyangar for respondents.

Cur. adv. vult.

JUDGMENT.

This miscellaneous second appeal raises a question as to the effect of an annulment in regard to the share of an insolvent who was at the moment of adjudication a member of an undivided Hindu family. The insolvent, one Raghava Ayyangar, and his brother, the first defendant, were undivided brothers of a joint Hindu family owning certain immovable property. In 1922 the said Raghava Ayyangar was adjudicated an insolvent by the High Court. Subsequent to his adjudication and before obtaining the order of discharge, he appeared to have borrowed from the plaintiff a sum of money on a promissory note. He died thereafter. Subsequent to his death, the plaintiff filed, in or about 1930, Original Suit No. 1098 of 1929 on the said promissory note against the first defendant and his sons, defendants 2 and 3, and also against the fourth defendant who was the widow of the said Raghava Ayyangar. A decree was passed in the said suit against the defendants for the amount claimed by the plaintiff payable out of the assets of the said Raghava Ayyangar in the hands of the defendants. On 28th September 1931 the adjudication order was annulled and I find from the report of the Official Assignee that it was at his instance that the order of adjudication was

annulled. The ground for the annulment was that the creditors had been paid in full but in spite thereof the insolvent had not applied for annulment and as the insolvent was dead the Official Assignee desired that the adjudication should be annulled and that he may be permitted to draw his commission on the amount paid to the creditors. The plaintiff filed an application for execution of his decree, out of which this second appeal arises, by attaching and selling a half share in the properties mentioned by him in the execution petition. The application was resisted on two grounds : that the properties were the separate properties of the first defendant and, even assuming they were joint family properties, the first defendant had a half share on the date of adjudication and, on annulment, they reverted to defendants 1 to 3 as joint family property and they had taken the same by survivorship and the creditor had no right to attach the same. Both the Courts have concurrently found that the properties were not separate properties but joint family properties wherein Raghava Ayyangar had a half share. The District Munsif allowed execution to proceed ; but the learned District Judge dismissed the execution petition on the ground that, immediately on the annulment, the property vested in defendants 1 to 3 as joint family property, and it cannot be regarded as assets in the hands of the first defendant liable to be proceeded against for the debts of the said Raghava Ayyangar. This view of the learned District Judge has now been assailed before me as unsound by Mr. Seshadri Ayyangar. I am inclined to accept his contention.

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The legal consequences of a valid order of adjudication made on the insolvency of a member of a coparcenary in regard to his share in the joint family property may be thus stated. The share of the insolvent vests in the Official Receiver. In regard to an insolvent who is a father having undivided sons, the right of the father to dispose of his sons' share in the joint family property for the discharge of debts which are neither illegal nor immoral also vests in the Official Receiver. The insolvent does not cease to be a member of the joint family but still continues as a member thereof. In a recent decision of this Court the following observations occur :

" neither the filing of the insolvency petition nor the adjudication of the applicant . . . can sever the joint family status"; *Venkatarayudu v. Sivaramakrishnayya*(1).

In that case it was held that the vendee from the Official Receiver of an undivided share of a member did not become a tenant in common with the other members of the family, and therefore was not entitled to claim mesne profits from the date of sale. Bankruptcy is an involuntary alienation. On the question whether an alienation of a share of a member of a joint family effects a severance in status there has been a conflict of opinion. One view is that it does effect a severance in status ; see *Soundarajan v. Arunachalam Chetty*(2) and *Chinnu Pillai v. Kalimuthu Chetti*(3). The other view is that it does not. The ground for this view may be thus stated. The severance of a joint family can only be effected by a mode known to and recognized by Hindu law,

(1) (1934) I.L.R. 58 Mad. 126, 136.
(2) (1915) I.L.R. 39 Mad. 159, 172 (F.B.).
(3) (1911) I.L.R. 35 Mad. 47, 59 (F.B.).

that is, what is called *vibagha* or partition. The effect of a partition according to Hindu law is that,

" whether it is effected amicably or by a decree of Court, it breaks up not only the joint ownership of property, but also the family union, i.e., the corporate character of the family "; *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1).

The effect of an alienation may be to break up the joint ownership of the property but the corporate character of the family can only be disturbed by a member. It is unnecessary for me to consider which view is correct. But there can be no doubt as to what the consequences of an alienation are. They are thus stated by BHASHYAM AYYANGAR J. :

" An undivided member of a family, though he may alienate the whole ; . . . , or any part of his undivided share, will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred. No doubt such a member acts unfairly towards the rest of the family and if they are dissatisfied with his so doing, their only remedy is to become divided from him "; *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1).

The members of the family lose their right of survivorship in the share of the insolvent and it ceases to be joint family property, so that on the death of the insolvent the share which vested in the Official Assignee is not divested from him ; see *Fakirchand Motichand v. Motichand Hur-ruckchand*(2) and the observations of WALLACE J. in *Narayana Sah v. Sankar Sah*(3) :

" . . . by the insolvency of a coparcener, of course for his personal debts, his share vests in the Official Assignee and is thus lost to the joint family . . . The death of the

(1) (1902) I.L.R. 25 Mad. 690, 717 (F.B.).
(2) (1883) I.L.R. 7 Bom. 438. (3) (1929) I.L.R. 53 Mad. 1, 14 (F.B.).

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coparcener before partition would not restore to the joint family the share which has vested in the Official Assignee”.

If this is the true legal position, the share of the insolvent is in the hands of the Official Assignee not as joint family property but as separate property available for the benefit of the personal creditors of the insolvent. The question is, what is the effect of an annulment on the said property in the circumstances of this case when there has been a valid adjudication? Mr. Ramaswami Ayyangar argues that under section 37, on annulment, the property reverts to the debtor. The effect of a reverter according to him is that the property regains its original character as joint family property and is taken by the members of the family as if no partition had taken place, with benefits of survivorship; and thereafter it will not be available to the personal creditors of the insolvent unless that share had been seized in execution and rendered available for the enforcement of the debts. Mr. Ramaswami Ayyangar relied on two English cases, viz., *Bailey v. Johnson*(1), and *Bailey v. Johnson*(2) the same case on appeal, for the position that the effect of an annulment is to remit the debtor to his original position at the moment of adjudication as if there had been no insolvency, and therefore, as, at the moment of adjudication, the debtor was a member of a joint family, the property went back to him as joint family property. Construing the analogous section 81 of the English Bankruptcy Act of 1869 KELLY C.B. in *Bailey v. Johnson*(1) observes thus :

“ . . . the only sensible meaning which can be attached to the word ‘revert’ is, that what was apparently the

(1) (1871) L.R. 6 Ex. 279, 283.

(2) (1872) L.R. 7 Ex. 263.

property of the trustee at the time of the annulling of the bankruptcy, shall thereupon become the property of the person whose bankruptcy has been annulled, as if it had always been his.”

This observation, in my opinion, does not support Mr. Ramaswami Ayyangar. If the language of KELLY C.B. is to be given full effect, it is this. At the date of annulment it was the property of the trustee and on annulment it becomes the property of the debtor, that is, the property goes back to the debtor with the same character in which it was held by the Official Receiver while the bankruptcy continued. The annulment would not completely wipe out the effect of a valid order of adjudication. The bankruptcy is wiped out to this extent, viz., that the property goes to the debtor free from all claims in bankruptcy so that the debtor can deal with the property as if it is his own, that is, with all the original powers and rights which he would have had had there been no bankruptcy. In the same case, *Bailey v. Johnson*(1), it will be seen that BLACKBURN J. was not prepared to say that the effect of section 81 in every case will be

“to go back to the beginning, and to place the bankrupt in the position of having always owned what is by the section to ‘revert’ to him . . .”.

I agree with the remarks of REILLY J. in *Jethaji Peraji Firm v. Krishnayya*(2):

“Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been.”

It will be unsafe to rely upon observations in the cases decided in England where the conditions

(1) (1872) L.R. 7 Ex. 263, 265.

(2) (1929) I.L.R. 52 Mad. 648, 668.

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are not similar and where the conception of a joint Hindu family is unknown. If the effect of insolvency is to divest the share of the insolvent of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment, unless he can by an unequivocal act of his own impress it with the said character. Under section 37 of the Provincial Insolvency Act, it reverts to the debtor as his property, that is, as his individual property, so that, if on the date of the reversion he is not alive, it will go to his heir under the law, and in this case to the widow, the fourth defendant. The property thus not being joint family property, defendants 1 to 3 have not taken it by survivorship. It is therefore available for the satisfaction of the debt of the plaintiff. I therefore reverse the decree of the learned District Judge and restore that of the District Munsif with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Stodart.

SECRETARY OF STATE FOR INDIA IN COUNCIL
THROUGH THE COLLECTOR OF RAMNAD AT MADURA
(DEFENDANT), APPELLANT,

1936,
May 1.

v.

V. M. MEYYAPPA CHETTIAR *alias* V. KASI
MEYYAPPA CHETTIAR THROUGH HIS AUTHORIZED
AGENT V. SUBRAMANIA AYYAR
(PLAINTIFF), RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 67—Foreign business—Profits of, brought into British India—Assessment to income-tax of, under sec. 23 (4)—Suit for declaration of invalidity of, on ground of assessee not being a resident of British India—Maintainability of—Finding of assessing authority that assessee was a resident of British India—Jurisdiction of assessing authority to enquire into question of assessee's residence—Finding of assessing authority not otherwise open to attack.

The plaintiff, a merchant having a business in Saigon, was assessed to income-tax in British India on profits of that business brought into British India in the years 1929-30 and 1930-31. Such profits would, under section 4 (1) and (2) of the Indian Income-tax Act of 1922, be chargeable only if they were received by or brought into British India by a resident in British India. The plaintiff by his local agent contended before the Income-tax Officer that he did not reside in British India and that he had no property in British India but the Income-tax Officer found against him and required him under section 22 of the Act to submit a return of his income. The plaintiff did not do so and was assessed under section 23 (4) of the Act, with the result that under section 30 of the Act he became debarred from the remedies provided by the Act, namely, the right of appeal to the Assistant Commissioner and second appeal to the Commissioner and the right conferred by

* Appeal Against Order No. 99 of 1934.

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section 66 of the Act of having a reference made to the High Court. The plaintiff paid the tax and filed a suit for a declaration that he was not liable to be assessed to income-tax on the income received by him from the business in Saigon and for recovery of the tax levied from him.

Held that the assessing officer had power to determine the question of the plaintiff's residence in British India and the consequent receipt of the profits in question in British India and that, as he did make an enquiry as to the facts relating to the plaintiff's residence in British India and it could not be said that he did not or could not honestly come to the conclusion that the plaintiff was a resident of British India and received in British India the income remitted from Saigon, the plaintiff's suit was barred by section 67 of the Act and was not maintainable.

Scheme of the Act discussed.

Case-law, English and Indian, reviewed.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah dated 25th January 1934 and made in Appeal Suit No. 36 of 1933 preferred against the decree of the Court of the District Munsif of Devakottah in Original Suit No. 236 of 1931.

N. Srinivasa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for appellant.

K. Rajah Ayyar for *V. Ramaswami Ayyar* for respondent.

Cur. adv. vult.

JUDGMENT.

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VARADACHARIAR J.—This appeal arises out of a suit for a declaration that the plaintiff is not liable to be assessed to income-tax on the income received by him from his business in Saigon and for recovery of tax levied from him for the years 1929-30 and 1930-31. The first issue in the case raised the question whether the suit was not barred by section 67 of the Indian Income-tax

Act XI of 1922. Dealing with this point as a preliminary issue, the District Munsif dismissed the suit as barred by that section. The lower appellate Court was of opinion that the suit would be maintainable if the assessment was *ultra vires* or had been made without jurisdiction. In view of the allegations in the plaint, it held that the Court must decide on evidence whether the plaintiff was permanently residing in French territory as, in that case, any income there received by the plaintiff from the Saigon business would not be income assessable under the Act. It recorded a concession by the plaintiff's Vakil that issue 6 in the case, viz., "Whether the assessment was made without proper enquiry and without giving the plaintiff an opportunity to prove his contentions", could not be tried by the civil Court. Issue 5 (a) raised the question of fact, "whether the plaintiff had ceased to reside in British India, and whether he had no assessable income in British India." The other issues were consequential. The lower appellate Court accordingly remanded the suit for trial of issue 5 (a) and for findings on the other issues in the light of the finding that may be come to on issue 5 (a). Against that order of remand, this appeal has been preferred by the Secretary of State.

In view of the arguments urged before us, it is necessary to refer to a few facts appearing from the documents put in evidence as bearing on the preliminary issue. The plaintiff was at one time admittedly a resident of Palavangudi in the Chettinad (Ramnad District); but his case was that from 1926 he had been permanently residing at Pondicherry in French Territory and that, after

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a partition in his family in 1928, he had no proprietary interests, business or assets, anywhere in British India. In October 1929 the plaintiff's agent appeared before the Income-tax Officer and put forward this contention. For reasons recorded in Exhibit I, that officer declined to accept that plea. He was of opinion that the plaintiff's residence out of British India was only temporary, that his wife was living in Chettinad and that he had a right to a share in the family house in Chettinad after his father's death. An appeal against Exhibit I proved infructuous ; and, as the plaintiff did not make any return in respect of his income or produce his accounts in spite of several adjournments, he was assessed under section 23 (4) of the Act on a sum of Rs. 8,100, being the amount disclosed by the accounts of the partnership to have been remitted to him (*vide* Exhibit II).

For the next assessment, there was no appearance by or on behalf of the plaintiff before the Income-tax Officer. The steps taken to serve notices on the assessee are detailed in Exhibit III. On default of appearance in spite of these steps, the assessment had again to be made under section 23 (4). But as, in the meanwhile, the assessee had sent a notice of suit to the Commissioner of Income-tax on 26th November 1930, the Income-tax Officer referred in his order (Exhibit III) dated 4th March 1931 to the materials on which he came to the conclusion that the plaintiff must be regarded as residing in Palavangudi. In addition to the circumstances stated in Exhibit I, he referred to the fact that the plaintiff's wife was living in Palavangudi in a house which he believed was purchased by the plaintiff in her name

and that from an affidavit filed by that wife it appeared that the plaintiff celebrated his daughter's marriage in that house in the year Sukla (1929-30) and that the plaintiff occasionally used to come and stay with her in that house.

In the circumstances above stated, two contentions have been urged before us in support of the Government's appeal : (i) that the bar enacted by the first part of section 67 of the Income-tax Act of 1922 is absolute and unqualified and (ii) that the Legislature has left it to the income-tax authorities to decide both questions of fact and of law, that appropriate remedies by way of appeal and reference (including a reference to the High Court on points of law) have been provided in the Act and that it could not therefore be the intention of the Legislature that civil Courts should in a separate suit be at liberty to examine the *correctness* of the conclusions arrived at by the income-tax authorities.

Before dealing with the decisions cited before us, it is necessary to emphasise the fact that, in some of them, the question of exclusion of the civil Court's jurisdiction had to be dealt with merely on general principles and in the absence of a statutory prohibition, while, in others, the decision turned upon the scope of the prohibition enacted by statute. In the former class of cases, reliance has naturally to be placed on the *general scheme* of the law creating or empowering the authority whose acts are sought to be challenged. The observations of the Judicial Committee in *The Colonial Bank of Australasia v. Willan*(1) are

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(1) (1874) L.R. 5 P.C. 417, 443.

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frequently referred to as defining the limits of the civil Court's powers of intervention. But, even in applying these observations, it seems to me unwarranted to assume that in all cases in which a prerogative writ can, according to these observations, issue from a superior Court, there must also exist a right of civil suit in the ordinary Courts of the land.

Whenever the right sought to be vindicated is not a creature of the statute itself but a common law right relating to the person or property of the subject, Courts start with the presumption that there must be a remedy in the ordinary Courts and insist on very clear and unmistakable indications of an intention to curtail or exclude the same; and in this connection a distinction has been formulated between questions affecting the jurisdiction of the statutory authority and matters affecting the correctness of its decision. Even under the head of jurisdiction, a further refinement has been recognized, as indicated in the judgment of Lord ESHER in *The Queen v. Commissioners for Special Purposes of the Income Tax*(1), according as the statute in question does or does not entrust to the statutory authority itself jurisdiction to determine whether or not the preliminary state of facts essential to give it jurisdiction to act under the statute exists. In *Reg v. Bolton*(2), which is referred to with approval in *The Colonial Bank of Australasia v. Willan*(3) and numerous later decisions, it was observed that the test of jurisdiction (for this purpose) was whether or not the authority in question "had

(1) (1888) 21 Q.B.D. 313, 319.

(2) (1841) 1 Q.B. 66.

(3) (1874) L.R. 5 P.C. 417, 443.

power to enter upon the enquiry, not whether its conclusions in the course of it were true or false". The Court explained the principle by adding that it might be shown that the tribunal had no authority to commence the enquiry

"inasmuch as the question brought before them was not one to which their jurisdiction extended; and this, although by misstatement they have made the proceedings on the face of them regular".

In cases where the relevant statute contains a specific provision limiting or excluding the jurisdiction of civil Courts, the determination of the ambit of the civil Courts' jurisdiction must *prima facie* rest upon the language used in the excluding provision. Even here, when the language is not sufficiently definite or comprehensive, its interpretation is naturally influenced by the presumption against the intention to oust the jurisdiction of civil Courts, especially when personal liberty and rights of property are concerned. One well-known class of cases where the statute law has advisedly enacted only a restricted exclusion of civil jurisdiction is that relating to taxation by local or municipal bodies. (Cf. section 354 of the Madras District Municipalities Act of 1920 and section 228 of the Madras Local Boards Act of 1920 which preclude a challenge in a civil Court of any assessment, etc., *provided* that the provisions of the Act have been in substance and effect complied with.) The result of such language is practically to assimilate this class of cases to those where the statute contains no *express* words of exclusion of civil Courts' jurisdiction. [Cf. *Navadip Chandra Pal*

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v. *Purnananda Saha*(1) and *Chairman of Giridih Municipality v. Srish Chandra Mozumdar*(2) which turned on section 116 of the Bengal Municipal Act (Bengal Act III of 1884) which merely said that no objection shall be taken to any assessment or rating in any other manner than in that Act provided.]

Even where the words of exclusion in the statute are positive enough to exclude a writ of *certiorari*, the Judicial Committee made a reservation in *The Colonial Bank of Australasia v. Willan*(3) in respect of *manifest* defect of jurisdiction or fraud of the party. Whatever may be the disinclination of the Legislature in England against enacting a total exclusion of the civil Courts' authority or of English Courts in inferring it, such exclusion is not unknown in this country. The decision in *Spooner v. Juddow*(4) is an instance in point. [See also *Govindarajulu Naidu v. Secretary of State*(5).]

The point for decision in *Spooner v. Juddow*(4) related to the immunity of officers acting in excess of their powers in the administration of revenue law (similar to that provided for in the second part of section 67 of the Income-tax Act); but their Lordships' observations, it was said, are equally apposite to the question arising under the first part of the section. The case is of special significance in view of the strong opinion expressed by Sir ERSKINE PERRY (in the Supreme Court) in favour of the maintainability of the action. The learned Chief Justice referred to the

(1) (1898) 3 C.W.N. 73.
(3) (1874) L.R. 5 P.C. 417, 443.

(2) (1908) I.L.R. 35 Cal. 859.
(4) (1850) 4 M.I.A. 353.

interpretation placed by the Judicial Committee in *Calder v. Halket*(1) on 21 Geo. III, c. 70, section 24, and added :

"If jurisdiction does not exist in the Supreme Court to correct wrongs of this kind, it exists nowhere."

[See footnote on page 362 of *Spooner v. Juddow*(2), Sanjivi Rao's Edition of the Indian Reports.]

And yet their Lordships held against the jurisdiction of the Supreme Court, adding :

"Whether the plaintiff might have redress before any other tribunal can only be material in a doubtful construction of the Statutes . . ."

If the jurisdiction of the Court is *clearly* taken away, "our decision", they said, "could not be influenced by the consideration that the plaintiff is left without remedy".

In *Venkataratnam v. Secretary of State for India*(3) the exclusion of jurisdiction by section 110 of the Government of India Act, 1915, has been held to exclude even the jurisdiction to issue a writ of *certiorari*. Whether the High Court can issue a writ of *certiorari* on an Income-tax Officer in the mofussil is a question beset with even greater difficulty [see *In re Nataraja Iyer*(4) and *Thyagaraja Chettiar v. Collector of Madura*(5)]; but one cannot on that account recognise a right of suit in contravention of the declared policy of the Legislature.

In the interpretation and application of taxing statutes, the distinction between liability to

(1) (1840) 2 M.I.A. 293. (2) (1850) 4 M.I.A. 353.
(3) (1929) I.L.R. 53 Mad. 979. (4) (1912) I.L.R. 36 Mad. 72.
(5) (1935) I.L.R. 59 Mad. 702.

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assessment and the method or quantum of assessment has long been recognized in the Land Revenue law of this country. After a review of the relevant statutory provisions, it was pointed out by a Full Bench in *Fahamidannissa Begum v. The Secretary of State for India in Council*(1) that the former question had always been treated as and declared to be a matter for Courts of justice. The same distinction was recognized in section 58 of the Madras Revenue Recovery Act which excludes from the cognizance of civil Courts only questions as to "rate of land revenue or as to the amount of assessment". In *Fahamidannissa Begum v. The Secretary of State for India in Council*(1) the question was raised whether any and what departure had been made from this underlying principle by Act IX of 1847, either by reason of its general scheme or by the specific provision in section 9 which enacted that

"no suit or action in any Courts of justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act".

The majority approached this question from the point of view that, because of the declared policy of the Indian Legislature for at least fifty years, they should not adopt a construction involving a departure from it unless the Legislature had expressed such intention in clear and unmistakable language. As regards section 9, they held that it only referred to suits for *damages*. This method of approach was approved of by the Judicial Committee on appeal in *Secretary of State for India in Council v. Fahamidannissa Begum*(2)

(1) (1886) I.L.R. 14 Cal. 67, 84 (F.B.).

(2) (1889) I.L.R. 17 Cal. 590 (P.C.).

and, with reference to section 9, their Lordships observed :

" . . . full effect can be given to this section without holding that it deprives the owner of a permanently-settled estate of that right of appeal which is given to him in order that he may have determined in a civil Court 'the justness of the demand' of the revenue authorities."

The language of section 9 was in effect limited by their Lordships in view of the previous state of the law and they added on page 605 :

"If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which 'the revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement', it would have been done in express terms and not by such enactments as are contained in the Act of 1847."

Pausing for a moment to compare section 9 of Act IX of 1847 with section 67 of the Income-tax Act of 1922, I may point out that the exclusion in the Income-tax Act cannot be explained away as relating only to suits for *damages*, because the section consists of two parts, of which the latter alone may be said to correspond to section 9 of Act IX of 1847. The first part in terms provides that

"no suit shall be brought in any civil Court to set aside or modify any assessment made under this Act".

Subject to the controlling effect of the words "made under this Act", there can be little doubt that the exclusion of the jurisdiction of the civil Court is almost absolute. Can it be suggested that there is anything in the history of this branch of the law which, as in the case of Land Revenue law, would justify the Court in limiting the scope of the exclusion? I am not aware of any such considerations.

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On the other hand, in the English system from which the Income-tax law has been borrowed, it was settled as early as in *Allen v. Sharp*(1) that legislative policy as well as considerations of expediency pointed to the propriety of treating the assessment by the assessing authorities as final and conclusive unless appealed from in the manner pointed out by the statute. It is true that in *Kensington Income Tax Commissioners v. Aramayo*(2) [affirming the decision in *Rex v. Kensington Income Tax Commissioners*(3)], it was decided that "prohibition" will lie and is an appropriate remedy if the Commissioners acted without jurisdiction. The case there was clearly within the principle of *Reg v. Bolton*(4), because, according to the then state of the law, only certain specified Commissioners could assess a person to income-tax in respect of profits derived from foreign possessions. *Even on the facts found or assumed to exist*, the Court held that the particular Commissioner whose proceedings were sought to be restrained had no jurisdiction to proceed with the assessment, as he admittedly was not one of those specified in the Act as competent to deal with such profits. The sense in which that decision must be understood was explained in *Rex v. Bloomsbury Income Tax Commissioners*(5). When it was argued that the Commissioners had no jurisdiction to make or proceed upon the assessment because, according to the petitioner's contention, he was not chargeable to income-tax, and it was further contended that the Commissioners

(1) (1848) 2 Ex. 352.

(3) [1914] 3 K.B. 429, 477.

(5) [1915] 3 K.B. 768.

(2) [1916] 1 A.C. 215.

(4) (1841) 1 Q.B. 66.

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could not give themselves jurisdiction to assess a person by determining in the first instance that he was chargeable when in fact he was not, the Lord Chief Justice (Lord READING) reviewed the history of the Income-tax law and, after referring to *Allen v. Sharp*(1) and *The Queen v. Commissioners for Special Purposes of the Income Tax*(2), held that

" . . . the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, . . . reserving always to the individual the right to have the Commissioners' decisions on points of law reviewed by the Courts. The obligation is placed, for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact; . . . "

The only qualification added is that the assessing authorities should have materials before them on which they could honestly come to a conclusion against the assessee.

"Once that conclusion is reached, it follows that they had jurisdiction to decide all questions of fact."

AVORY J. observed that

"in such a case it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise of their jurisdiction depends . . . "

Both AVORY J. and LUSH J. make it clear that a writ of prohibition may issue if the assessing authority had never satisfied itself that a person was chargeable or had acted without any enquiry or if its belief was founded on an obvious and manifest mistake in law. Mr. Rajah Ayyar referred to an observation of SHEARMAN J. in

(1) (1848) 2 Ex. 352.

(2) (1888) 21 Q.B.D. 313.

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Rex v. Swansea Income-tax Commissioners. English Crown Speller Co., Ex parte(1) to the effect that

“there may be cases in which prohibition may be obtained where the applicant shows that he is not liable to the jurisdiction of the Commissioner at all”.

Read in the light of other decisions and of the remarks of the other learned Judge who took part in that very case, this observation can only refer to cases like *Kensington Income Tax Commissioners v. Aramayo*(2) where even on undisputed facts or facts assumed by the Commissioner, he would have no jurisdiction.

Whatever might be said of the Indian Income-tax Act of 1886, there can be little doubt that the Indian Acts of 1918 and 1922 must, in view of their elaborate provisions and safeguards, be interpreted in the light of the principles above set forth as underlying the English Income-tax law. As I have already indicated, it may be open to doubt whether an ordinary civil action will lie in all cases in which and in all circumstances under which a writ of *certiorari* or *prohibition* may issue from a superior Court. But it certainly cannot be said that an assessment may be challenged by a civil suit even in circumstances in which a writ of *certiorari* or of *prohibition* will not be available. According to the facts which have been set out at the commencement of this judgment, the present case is one in which the assessing officer did make an enquiry as to the facts relating to the plaintiff's residence in British India and there is no reason to think that he did not or could not honestly come to the conclusion that the plaintiff was a resident of British India

(1) [1925] 2 K.B. 250, 260.

(2) [1916] 1 A.C. 215.

[cf. *Rogers v. Inland Revenue*(1)] and received in British India the income remitted from Saigon. In this view the plaintiff's suit must fail.

Mr. Rajah Ayyar contended that, according to the scheme of the Income-tax Act, it must not be held applicable to a non-resident assessee who disputed his liability to be assessed and that it did not entrust to the revenue authorities the right to decide the question of his liability and much less the right to decide it finally. I am not able to accept these contentions. In *Rex v. Bloomsbury Income Tax Commissioners*(2), already referred to, it was laid down, on the authority of *Allen v. Sharp*(3), that the procedure under the Act applied as much to a person who contended that he was not chargeable as to one who admitted that he was chargeable but complained of the manner or extent of assessment. The provisions of sections 42 and 44-A of the Indian Act clearly contemplate assessments being imposed on income accruing to non-resident foreigners and there is no reason why the assessing authority should not have the power to decide a disputed question of residence or receipt in British India for the purpose of clauses (1) and (4) of section 4, if it could and must decide disputed questions under sections 42 and 44-A. The notice under section 22, clause (2), of the Act must be issued to all persons who, in the opinion of the Income-tax Officer, are in receipt of an income liable to tax and, if a person thus served disputes his liability, I think it is his duty to put forth his objection before the assessing authorities. Section 30 makes it clear that one of

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(1) (1879) 1 T.C. 225.

(2) [1915] 3 K.B. 758.

(3) (1848) 2 Ex. 352.

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the grounds of appeal contemplated by the Act is the assessee's denial of liability to be assessed under the Act. I see no reason to limit the scope of the *denial* there contemplated to the exceptions enumerated in clause (3) of section 4. That a denial of liability on the ground of non-residence may be raised in the course of assessment proceedings is shown by *Inland Revenue Commissioners v. Lysaght*(1) on appeal from *Commissioners of Inland Revenue v. Lysaght*(2). See also *Rex v. Marylebone Income Tax Commissioners. Ex parte Schlesinger*(3). *Inland Revenue Commissioners v. Lysaght*(1) also shows that in certain circumstances and subject to certain limitations the question of *residence* may be a question of law fit to be referred to the High Court for its opinion [See also *Levene v. Inland Revenue Commissioners*(4).] Mr. Rajah Ayyar also contended that as the plaintiff did not appear before the Income-tax Officer he could not have applied to the Assistant Commissioner under section 30 ; but I fail to see how that circumstance can affect the construction of the Act as to the scope of the matters to be decided by the assessing authorities.

It is not necessary for the purposes of this case to decide whether the language of section 67 of the Act of 1922 is clear or comprehensive enough to exclude a *suit* even in cases like those instanced by AVORY and LUSH JJ. in *Rex v. Bloomsbury Income Tax Commissioners*(5) as fit cases for the Court's interference by writs of *certiorari* or *prohibition*. The answer to that question will in

(1) [1928] A.C. 234.
(3) [1927] 13 T.C. 746.

(2) [1927] 2 K.B. 55.
(4) [1928] A.C. 217.

(5) [1915] 3 K.B. 768.

some measure depend upon the construction to be placed on the expression "made under this Act" occurring in the section.

As observed by MUTTUSWAMI AYYAR J. in *Venkata v. Chengadu, etc.*(1) (with reference to similar language in section 59 of the Madras Revenue Recovery Act) :

"The section presupposes that certain proceedings were professedly taken under the Act and that there might be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act."

The question (which was left open in that case) is whether the proceedings contemplated are those which are vitiated by mere errors of procedure or include those taken without jurisdiction. Later decisions relating to sales for arrears of public charges have proceeded not so much on the construction of this or like expressions but on the broad ground that sales not warranted by the statute are *void* and do not therefore require to be *set aside* within the shorter period of limitation [cf. *Balkishen Das v. Simpson*(2) and *Marukolandayammal v. Secretary of State for India*(3)]. In *Fischer v. Twigg*(4)—a case under the District Municipalities Act—it was observed that

"an imposition which is expressly prohibited by the Act cannot be deemed to be made under the provisions of the Act".

The principle thus stated may perhaps be unexceptionable but its application will not always be easy. Take, for instance, the first exception provided for in clause (3) of section 4 of the

(1) (1898) I.L.R. 12 Mad. 168, 175.

(2) (1898) I.L.R. 25 Cal. 833.

(3) (1932) I.L.R. 55 Mad. 876.

(4) (1897) I.L.R. 21 Mad. 367.

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Income-tax Act of 1922, i.e., that, in the case of property held *in part* in trust for religious or charitable purposes, the income applied thereto shall not be taxed. Suppose the income-tax authorities on the materials before them hold that only a certain amount has been so applied but the assessee contends that a larger portion of the income has been applied for the purposes of the trust, could it have been intended that such a dispute might be agitated in a regular suit?

Turning for a moment to the language of section 67 of the Income-tax Act of 1922, it is obvious that the second part of the section, relating to the immunity of Government and its officers, must cover not merely acts authorized by the statute but also acts done without jurisdiction but in the *bona fide* belief that they were authorized (*cf.* the fuller language employed in section 1 of Act XVIII of 1850). Mr. Rajah Ayyar suggests that this wider import is to be derived from the expression "intended to be done" in that part of the section, but it seems possible that the word "intended" was used only to signify "futurity" so as to preclude suits for injunction in respect of proceedings "*intended*" to be taken by the income-tax authorities.

Amongst the reported cases under the Indian Income-tax Acts brought to our notice, the only instance in which the assessee's suit succeeded is the decision of the Bombay High Court in *Haji Rahmatulla v. Secretary of State for India*(1). The decision turned on section 39 of Act II of 1886 which was substantially in the same terms

as the first part of section 67 of the Act of 1922 and the learned Judges categorically laid down that

"if the assessment is clearly *ultra vires*, we do not think the provisions of that Act will apply".

There was no further discussion of the question of jurisdiction and the rest of the judgment deals only with the propriety of the assessment. The ground of denial of liability in that case no doubt was that the profits did not arise or accrue in British India but the rival contentions would seem to have turned on a point of law, the facts not being in dispute; and the learned Judges held that on the facts stated "the profits accrued in the Baroda State". The case is accordingly of no help to the present plaintiff, though it is an authority against a total denial as a right of suit. The Act of 1886 contained no provisions corresponding to the second part of section 67 of the present Act which I have referred to above as throwing some light on the construction of the first part; nor did it contain the safeguards enacted in the present Act, by way of a right of appeal (under section 30), reference to a Board of Referees (under section 33-A) and reference to the High Court with a right of appeal to the Privy Council (under sections 66 and 66-A). I am not prepared to assume that the existence of these provisions indicating an elaborate special procedure would have made no difference in the opinion of those learned Judges.

In *In re Ramjidas Mahaliram*(1) the discussion related to writs of *certiorari* and *prohibition*. The

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(1) (1925) 92 I.C. 851.

(1) (1935) I.L.R. 62 Cal. 1011.

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decision emphasises the significance of the fact that in the Act itself

“there is machinery by which the assessee may bring the matter before the Court and he can no longer contend that he has no specific or adequate remedy”.

It is true that on page 1033 the learned Judge observes that it is not for the Income-tax Officer to decide whether the state of facts contemplated by section 34 exists and

“if he reopens the assessment without their existence he is acting without jurisdiction”.

But the context suggests that the learned Judge made that observation with reference to the nature of the special provisions in section 34; otherwise, he would not have left unanswered the argument based on *The Queen v. Commissioners for Special Purposes of the Income Tax*(1) and *Rex v. General Commissioners of Taxes for Clerkenwell*(2). The remark that English decisions are not authoritative on the construction of the Indian Income-tax Act was directed to the argument that the assessing officer's functions are only “administrative” and not “judicial”.

In *Secretary of State for India in Council v. A. H. Forbes*(3) the actual decision was in favour of the Government, but the learned Judge affirmed the principle that if a statutory authority purports to exercise its powers on what is not according to law (the subject-matter of those powers), the Court will interfere

“because the authority is not acting under the statute and is not protected thereby”.

(1) (1888) 21 Q.B.D. 313.

(2) [1901] 2 K.B. 879.

(3) A.I.R. 1922 Pat. 361.

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The reference to *Chairman of Giridih Municipality v. Srish Chandra Mozumdar*(1) and the quotation made from that judgment suggest that the learned Judge did not in the circumstances find it necessary to keep apart the two classes of cases in one of which the exclusion of the civil Court's jurisdiction is enacted in much more restricted terms than in the other.

In *Raja of Ramnad v. Secretary of State for India*(2) it was no doubt stated that where a

“certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred”;

but the observation was *obiter* and it became unnecessary to pursue the matter as the assessee's suit failed on another ground. Further, no reference was made to the possible distinction between cases in which the item of income was even on the admitted facts outside the scope of the Act and those in which the assessing authorities had to decide on *evidence* whether it was within the Act or not. *Dayaram Ramdas v. Secretary of State for India*(3) likewise contains only a *dictum* that if the income-tax authorities had assessed anything but “income” or had levied assessment on the classes of income exempted by the Act, they would have overstepped the limits of their jurisdiction and the assessment would not have been under the Act. *Dr. R. N. Singha v. Secretary of State for India in Council*(4) adds very little, beyond referring to the distinction

(1) (1908) I.L.R. 35 Cal. 859.

(2) (1928) I.L.R. 52 Mad. 12, 17, 18.

(3) A.I.R. 1925 Sind 130.

(4) (1927) I.L.R. 5 Rang. 825.

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between "erroneous" assessment and "*ultra vires*" assessment.

In *Forbes v. Secretary of State for India*(1) there appears a concession by Counsel in the course of the argument (*see* page 153) that if the Collector assesses anything but income, he acts beyond his jurisdiction, but on the next page he is reported to have maintained that it is for the Collector to determine who is chargeable and that the civil Courts have no jurisdiction to determine that question. The judgment reflects this line of argument ; it is however noteworthy that when Counsel was referred to *Kameswar Pershad v. The Chairman of the Bhabua Municipality*(2), he pointed out, what I have already indicated, that the provisions of the Income-tax Act are different from those of the Municipal Act. The learned Government Pleader claimed that *Forbes v. Secretary of State for India*(1) was a direct authority in his favour even for the purposes of the present case, because, he said, in both cases the question must be held to relate to the *person* chargeable ; but this ignores the fact that in the Calcutta case the *income* was admittedly assessable whereas in the present case the income will not be within the Act at all if the plaintiff's contention as to his residence is true. The learned Judges however recognized the principle that in respect of matters which the Act has left to be determined by the assessing authorities, their decision cannot be questioned by a separate suit. As I have held that in the present case also the assessing authority had power to determine the question of the

(1) (1914) I.L.R. 42 Cal. 151.

(2) (1900) I.L.R. 27 Cal. 849.

plaintiff's residence in British India and the consequent receipt of the profits here, the plaintiff's suit must fail even according to the principle of the Calcutta decision.

The appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

STODART J.—This appeal arises out of a suit filed by the respondent, Meyyappa Chetty, in the Court of the District Munsif, Devakottah. The plaintiff is a merchant having a business in Saigon. He was assessed to income-tax in British India on profits of this business brought into British India in the years 1929–30 and 1930–31. Such profits are chargeable only if they are received by or brought into British India by a resident in British India ; see section 4, sub-section (1), of the Act. The plaintiff by his local agent contended before the Income-tax Officer that he did not reside in British India, but the Income-tax Officer found against him and required him under section 22 to submit a return of his income. He did not do this and was assessed under section 23, sub-section (4), and under section 30 became debarred from the remedies provided by the Act, namely, from the right of appeal to the Assistant Commissioner and second appeal to the Commissioner and from the right conferred by section 66 of having a reference made to the High Court. Incidentally it may be observed that the plaintiff contended also that he had no property in British India, but he must have had some property which could be proceeded against for the realization of the tax ; for he paid the tax.

The plaintiff then filed this suit for a declaration that he was not liable to be assessed and to

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recover the tax paid by him. He contended that he was not a resident of British India but of Pondicherry in French India. He contended, firstly, that the Income-tax Officer had not conducted a proper enquiry into the question of his residence and that he had had no proper opportunity of stating his case on this point, and, secondly, that the Income-tax Officer was wrong in holding that he was a resident of British India. The first of these grounds is now given up. There is no doubt that the Income-tax Officer did hold an enquiry as to the question of the plaintiff's residence and decided that question to the best of his ability on the materials available. The learned District Munsif held that the plaintiff's suit was not maintainable, being barred by section 67 of the Act, the first part of which is:

"No suit shall be brought in any civil Court to set aside or modify any assessment made under this Act."

The plaintiff appealed to the learned Sub-ordinate Judge of Devakottah who held on the contrary that, if it was true that the plaintiff was not a resident of British India, then the Income-tax Officer's decision on that point was wrong and the assessment based on that decision was not made "under the Act" and so a suit to set aside that assessment lay; and in the result remanded the suit for trial of the issue:

"Whether the plaintiff had ceased to reside in British India and whether he had no assessable income in British India."

Against that order of remand this appeal is preferred by the Secretary of State.

The learned Government Pleader for the appellant contends that the question of the respondent's

residence was one which the Income-tax Officer had jurisdiction to decide; that his decision on the point was thus made under the Act; and that it cannot be challenged by a suit in the ordinary civil Courts but only in the manner provided by the Act. Learned Counsel for the respondent argues on the other hand that in deciding the point wrongly, the Income-tax Officer wrongly assumed jurisdiction and the assessment which followed on that decision was without jurisdiction. My finding is that the appellant's case is supported by ample authority and that the appeal must succeed.

The respondent does not dispute the general principle that, when the Legislature sets up authorities and tribunals to deal with a certain limited subject-matter, then a person aggrieved by an act done or decision made by such tribunal must have recourse to the remedies provided by the statute unless the act or decision complained of is done or made without jurisdiction or is in excess of jurisdiction. In the latter case, he has recourse to the civil Courts; his remedy in India being by way of suit, in England by one of the prerogative writs such as *prohibition* or *certiorari*; see Robertson's Civil Proceedings by and against the Crown and Halsbury's Laws of England under the title "Crown Practice", chapters II to V, and the judgments of BANKES L.J. and ATKIN L.J. in *Rex v. Electricity Commissioners*. *London Electricity Joint Committee Co.*, (1920), *Ex parte*(1) and more particularly the general observations of ATKIN L.J. at page 205:

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(1) [1924] 1 K.B. 171.

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"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their authority, they are subject to the controlling jurisdiction of the King's Bench exercised in these writs."

The point which we have to decide in this appeal is whether the decision which the Income-tax Officer made as to the residence of the respondent was made in excess of his authority. A question of that kind must obviously arise in all cases in which under the Income-tax Act the taxing officer has to decide whether any particular item of income is or is not chargeable. I may observe also that the exempting clause in the Income-tax Act, namely, section 67, and similar clauses in other Acts which protect acts done and decisions made by statutory authority do nothing more than enunciate the general principle. For instance, section 67 protects assessments made "under the Act". It does not protect assessments made in excess of jurisdiction.

This general principle is well established in decisions of the Indian Courts. See the judgment of MOOKERJEE J. in *Chairman of Giridih Municipality v. Srish Chandra Mozumdar*(1), where the question for decision was the validity of a tax levied on property :

"A corporation, which is invested with authority to assess taxes, is really invested with a quasi-judicial power, and although its action when taken in conformity with the provisions of the law, which created the authority, may not be liable to challenge in the civil Courts, it does not enjoy a similar immunity, when that action can be challenged on the ground that it has been taken either in excess of or in contravention of the powers conferred upon it by the Statute." (page 865)

(1) (1908) I.L.R. 35 Cal. 859.

The Bengal Municipal Act which was then under consideration contained an excluding clause (section 116) to the effect that no objection could be taken to any assessment or rate in any other manner than in the Act provided, and this clause was strongly relied on by the municipality on whose behalf it was contended that a regular suit for cancellation of the assessment was not contemplated by the Legislature. On this point, MOOKERJEE J. said :

"In my opinion, this contention is not well founded upon principle, and is not supported by any authority. The effect of the provisions of section 116 was considered by this Court in the cases of *Navadip Chandra Pal v. Purnananda Saha*(1) and *Kameshwar Pershad v. The Chairman of the Bhabua Municipality*(2). In these cases it was pointed out that section 116 does not take away the jurisdiction of the civil Courts in a case, in which it is alleged and established that the assessment, the propriety of which is in question, is open to objection on the ground that it is *ultra vires* ; in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no power to interfere."

Again, in a case in which the Standard Life Assurance Company sued the Municipal Council, Cocanada, to recover a sum levied on it as profession tax, it was held in *Municipal Council, Cocanada v. The Standard Life Assurance Company*(3) : (i) that the suit lay because the council had no authority to tax an insurance company, life insurance not being one of the businesses or trades in respect of which a tax might be levied and (ii) that the suit was not barred by the excluding clauses, namely, section 101 of the District Municipalities Act, 1884 :

(1) (1898) 3 C.W.N. 73. (2) (1900) I.L.R. 27 Cal. 849.
(3) (1900) I.L.R. 24 Mad. 205.

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"The assessment or demand of any tax, when no appeal is made as hereinafter provided, and the adjudication of an appeal by the Municipal Council shall be final." ;

and section 262 (2):

"No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act . . . provided that the provisions of this Act have been, in substance and effect, complied with."

Their Lordships say :

"The question really is whether when a Company, which . . . is not taxable under the Act, . . . is nevertheless taxed, it can be said that 'the provisions of the Act have been in substance and effect complied with'."

In other words, the immunity conferred on statutory authorities by the provision which shuts out the jurisdiction of the civil Court does not extend to cases where their decisions are *ultra vires*.

The respondent here, as I have said, does not quarrel with the general proposition of law that the statutory authority is immune from suit so long as it acts in conformity with the statute and does not exceed its powers. What then is his position? It is this. Before proceeding to make the assessment, the Income-tax Officer had to decide whether or no the assessee resided in British India. Having wrongly decided this in the affirmative, he wrongly assumed jurisdiction. Therefore the assessment was made without jurisdiction and is not protected by the general principle; and is not protected by section 67 either, since it was not made "under the Act". The question for decision therefore in this appeal is simply this: Had the Income-tax Officer jurisdiction to decide the point of the respondent's residence? Then, if he did so after proper enquiry

—for absence of proper enquiry has always been held to impair jurisdiction—his action in making the assessment in pursuance of that decision was not wrong. I must observe again that, though the respondent raised the plea of absence of proper enquiry in the trial Court, he abandoned it on appeal. The whole case of the respondent therefore is that before proceeding to make the assessment, the Income-tax Officer had to find that the respondent was a resident of British India and having wrongly found that as a fact, he wrongly assumed jurisdiction to assess this particular item of income and thus acted without jurisdiction in assessing it.

Another point which arose in the course of the argument is this. Being a subject of a foreign State, the respondent claims to have been within his rights in ignoring the requisitions of the Income-tax Officer that he should make a return of his income. Section 30 of the Act debars him from the remedies provided by the Act. Is he therefore to have no redress in the Courts of British India? As will be seen hereafter, there is ample authority for the position that the absence of any other remedy is not to be taken into consideration in deciding the question whether the decisions of a statutory tribunal are or are not final.

That a statutory tribunal or authority, which has to arrive at a decision as to the existence or non-existence of certain facts before proceeding to take further action under the statute, is acting within its jurisdiction in making that decision and is immune from civil proceedings to quash that decision except such as are prescribed by the statute, is established beyond all controversy.

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In *The Queen v. Commissioners for Special Purposes of the Income Tax*(1) the question arose on the interpretation of the words "at the end of the year". The Commissioners for General Purposes were empowered to grant certificates for refund of income-tax overpaid, on application made "at the end of the year". They having done so in certain cases in which the applications were made long after the end of the year, the Commissioners for Special Purposes refused to honour the certificates on the ground that they were granted without jurisdiction. It was held that the Commissioners for General Purposes had jurisdiction to decide whether in the circumstance the applications were made in time. Lord ESHER M.R. dealing with this point observed :

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned . . . But there is another state of things . . . The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more . . . It is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the preliminary facts on which the further exercise of their jurisdiction depends . . ."

(1) (1888) 21 Q.B.D. 313, 319.

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In a recent case, *Rex v. Bloomsbury Income-tax Commissioners*(1), where the question at issue was the legality of a surcharge made by the Commissioners on the report of a surveyor of taxes, it was contended on behalf of the applicant that the Commissioners could not give themselves jurisdiction by wrongly deciding that the applicant was chargeable. Lord ESHER's finding in the case just cited was emphatically affirmed. Lord READING C.J. said :

"In my judgment this dictum states accurately the principle applicable to such cases."

And again :

"In my view an examination of the Income Tax Acts shows that the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact . . . The exigencies of the State require that there should be a tribunal to deal . . . with all such questions and to decide them finally . . . The obligation is placed, for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable but not to the extent of the assessment made upon him."

Rex v. General Commissioners of Taxes for Clerkenwell(2) was an application to prohibit the Commissioners from assessing certain profits to income-tax on the ground that by an erroneous decision on the facts they were seeking to give themselves a jurisdiction which they did not possess. It was held that they were merely deciding facts going to the quantum of taxable liability and that the proper remedy was by appeal upon a case stated, that is to say, the

(1) [1915] 3 K.B. 768.

(2) [1901] 2 K.B. 879.

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remedy provided by the statute. The Commissioners, having jurisdiction under the Income-tax Act (1842) to assess a certain company to income-tax in respect of profits of a business carried on either wholly, or in part only, in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the amount of those profits, and therefore *prohibition* would not lie. What the Commissioners had decided was that the profits of the Eastman Kodak Company carrying on business in the United States were technically the profits of the Kodak Company which carried on business in London. The Court refused to enter into the merits of this decision. *The Colonial Bank of Australasia v. Willan*(1) is an interesting and authoritative case which is relevant here on two grounds. The appeal was brought from a judgment of the Supreme Court of Victoria, which quashed an order made by a Court of Mines established under a statute called the Mining Statute. The order of the Court of Mines was that a certain company should be wound up forthwith under the provisions of the Mining Companies Limited Liability Act, and was made at the instance of the Colonial Bank on the ground that the company owed it a large amount of money. The Supreme Court having been moved by a writ of *certiorari* rescinded the order on the ground that it was made without jurisdiction as the company was not indebted to the bank, which again depended on the question whether the debt was incurred with the authority of duly constituted officers of the company. The Judicial Committee held that the question of the existence of the debt was a

(1) (1874) L.R. 5 P.C. 417.

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question which the Judge of the Court of Mines was competent, in fact bound, to decide; that the Supreme Court could only come to the opposite conclusion upon a retrial of the question (which of course was inadmissible); and that the winding up order could not therefore be quashed on the ground that it was made without jurisdiction. See page 443 :

"An objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide."

The second point on which this decision is relevant to the present case arises from the fact that the Mining Statute contained a clause providing that no proceedings under the Act should be removed or be removable to the Supreme Court save as provided in the Act. The Judicial Committee held that this privative clause did not operate to deprive the Supreme Court absolutely of its power to issue a writ of *certiorari*, but merely controlled and limited its action on such writ; and expressed its opinion that in such cases the Court would interfere to quash an order only upon the ground of manifest defect of jurisdiction in the tribunal making it, or of manifest fraud in the party procuring it. See Halsbury's Laws of England, Vol. IX, page 862, paragraph 1458, under the Title "Crown Practice":

"Although *certiorari* is taken away (by the statute), it may be granted when the inferior Court has acted without or in excess of jurisdiction, for in such a case the Court has not brought itself within the terms of the statute taking away *certiorari*."

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This is the exact position contended for by the respondent here. Section 67 does not bar a suit to set aside an assessment made without jurisdiction for the reason that such an assessment is not made under the Act.

The second main contention of the respondent is that being a foreign national he was entitled to ignore the requisitions made by the Income-tax Officer calling upon him to make a return of his income under section 22 of the Act. Having thus become debarred from the remedies provided by the Act by way of appeal and second appeal, etc., he is left without remedy unless he can file a suit against the Government to establish that he is not assessable to income-tax. The fact that a person has no other remedy has however been held by the highest authority to be no answer to the objection that no action lies in the ordinary civil Courts to challenge the act of a statutory authority so long as the latter acted within its authority. In *Spooner v. Juddow*(1), which was an appeal by a Collector of Revenue against a decision of the Supreme Court of Bombay mulcting him in damages in an action for trespass, it was held by the Judicial Committee that the action was barred by XXI Geo. III, c. 70, section 8 :

"That the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, . . ."

It was also held, on the argument that the respondent had no other remedy, as follows :

"Whether the plaintiff might have redress before any other tribunal can only be material in a doubtful construction of the Statutes and Charters establishing the Court in which

(1) (1850) 4 M.I.A. 353.

the action was brought. If by these Statutes and Charters its jurisdiction is clearly taken away, our decision could not be influenced by the consideration that the plaintiff is left without remedy."

There is always a remedy of course for acts done or decisions made under colour of any particular statute when these acts are done or decisions are made without jurisdiction or in excess of jurisdiction. MOOKERJEE J., in *Chairman of Giridih Municipality v. Srish Chamdra Mozumdar*(1), cited above, indicates the particulars in which the jurisdiction of the quasi-judicial tribunal may be defective or when it may be exercised in excess; see page 866. There may be a manifest defect of jurisdiction in the tribunal that made the order, such as in the case reported as *Kensington Income-Tax Commissioners v. Aramayo*(2), where an income-tax assessee was assessed by the Commissioners for Kensington when on the facts stated he should have been assessed by the Commissioners for the City of London. There may be manifest fraud in the party obtaining the order. There may be something defective in the character or constitution of the Court. Again, the subject-matter of the enquiry on which the decision was made may be outside the scope of the Act as in *Municipal Council, Cocanada v. The Standard Life Assurance Company*(3) cited above. There may be the absence of some preliminary proceeding which was necessary to give jurisdiction to the tribunal. For example, take those cases where revision of property tax in a municipality is challenged on

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(1) (1908) I.L.R. 35 Cal. 859.

(2) [1916] 1 A.C. 215.

(3) (1900) I.L.R. 24 Mad. 205.

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the ground that the prescribed formalities of publication, etc., were not observed. The cases cited by the learned Counsel for the respondent are examples of these principles and are no exceptions to the general rule. In *Haji Rahmatulla v. Secretary of State for India* (1) the assessee had been assessed on profits which accrued in the Native State of Baroda and were received by him in the Native State of Gondal. Such profits are clearly outside the scope of the present Income-tax Act as they were outside the scope of the then existing Act (II of 1886). On the facts of the case the Income-tax Officer had no jurisdiction and his fallacious reasoning that the profits were taxable because they accrued on the sale of grain which was grown in British India and exported into Baroda was rejected. See also the observations of the learned Judges in *Raja of Ramnad v. Secretary of State for India* (2):

"If the tax was levied under the Act, no doubt, a suit would be barred, but if the assessment was made in respect of an item of income which is not assessable under the Act, a civil suit would lie to recover it, inasmuch as the officer making the assessment had no jurisdiction to make it. In cases in which the Income-tax Officer has to decide whether a certain item of income is assessable or not, his decision cannot be said to be *ultra vires* even if it is illegal. But, where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment made in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred by reason of section 52."

For the converse proposition that no suit will lie when the Income-tax Officer is acting within his powers in making the assessment, see *Forbes*

(1) (1925) 92 I.C. 351.

(2) (1928) I.L.R. 52 Mad. 12.

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v. Secretary of State for India (1). That was a case where the plaintiff Forbes contended that he was not liable to be assessed on profits received by him as an executor. JENKINS C.J. said:

"... the Collector ... has come to the conclusion that the subject-matter with which he was dealing was *income*, as admittedly it was and so was subject to tax. He further determined that the plaintiff, being the person to whom the income accrued, was the person chargeable ... In so determining he was exercising a jurisdiction that was clearly vested in him by the Act, and I cannot see how it can be said that he purported to exercise a jurisdiction which he did not possess and so did not make an assessment under the Act ... this is *income* which is liable to be taxed within the meaning of the Act ... the Collector has determined that the plaintiff is a person chargeable and in so doing has acted within the limit of his jurisdiction. That being so, it appears to be a case where, according to section 39" (which is in terms the same as section 67 of the present Act), "it is right to say that the suit does not lie."

I agree therefore with my learned brother in holding that the respondent's suit was not maintainable. This appeal is allowed with costs. The order of the lower appellate Court is set aside and the decree of the trial Court restored.

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(1) (1914) I.L.R. 42 Cal. 151.

APPELLATE CIVIL

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

1936,
July 29.

MULLANGI RAMAYYA AND FIVE OTHERS (SECOND PLAINTIFF
AND FIRST PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

v.

THONDAPU BAPANAMMA AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Hindu law—Widow—Surrender by—Validity of—Alienation
by her of portion of husband's estate for purposes binding
upon reversioners—Surrender of whole of her interest in
what remains after—Validity of.*

A Hindu widow who has alienated a portion of her husband's estate for purposes binding upon the reversioners is not incompetent to surrender the whole of her interest in what remains. The conception of the entirety of the estate to be surrendered must in such a case be applied only to the existing estate.

Vijiaraghavachariar v. Ramanujachariar, (1928) 55 M.L.J. 859, and *Sakharam Bala v. Thama*, (1927) I.L.R. 51 Bom. 1019, distinguished.

Rangasami Gounden v. Nachiappa Gounden, (1918) I.L.R. 42 Mad. 523 (P.C.), referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of VARADACHARIAR J., dated 26th February 1935 and passed in Second Appeal No. 338 of 1931 (Appeal Suit No. 135 of 1926 on the file of the District Court of East Godavari—Original Suit No. 92 of 1924 on the file of the Court of the Subordinate Judge of Rajahmundry).

Ch. Raghava Rao and *M. Sreeramamurthy* for appellants.

G. Lakshmananna for respondents.

* Letters Patent Appeal No. 83 of 1935.

The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the judgment of VARADACHARIAR J. in Second Appeal No. 338 of 1931 (*vide* foot-note on page 253). The facts have been clearly set out in the judgments of the lower Courts and in the judgment of our learned brother and need not be repeated. Mr. Ch. Raghava Rao, for the appellants who were the plaintiffs in the suit, has contended again before us that the surrender by Sitamma in favour of her daughter's son, now deceased, who was the husband of the first defendant, was invalid. This is put upon two grounds. In the first place, it is said that the surrender was only partial because the deed of surrender executed by Sitamma, Exhibit I, did not contain Survey No. 345, an item of land got in exchange by Gangaraju himself before he died. Exhibit I contains Survey No. 260/3-A which was the survey number given up by Gangaraju when he obtained Survey No. 345 in exchange. Since one item of the estate of the husband was not surrendered by the widow, it is contended that the surrender as a whole was invalid. The other ground is that, admittedly, the widow Sitamma had made alienations by way of sale of other portions of the estate of her husband which came to her after his death and that she thereby became incompetent to make any surrender in favour of the nearest reversioner. Our learned brother, VARADACHARIAR J., found against the appellants' contention and hence this Letters Patent Appeal preferred with the leave of the learned Judge.

With regard to Survey No. 345, our learned brother made a slight slip when he stated that both the lower Courts had accepted the reason

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BURN J. given on behalf of the defendants for including in the surrender deed Survey No. 260/3-A instead of Survey No. 345. The learned District Judge said that the explanation given on behalf of the defendants might be true or might not. He did not expressly accept the explanation. We agree however with Mr. Lakshmananna for the respondents that this slight mistake in the judgment of our learned brother is not a matter of any importance. Exhibit I shows that the widow Sitamma meant to surrender in favour of her daughter's son the whole of her husband's estate remaining in her control. There is evidence that Survey No. 345 also was handed over to her daughter's son and that he remained in enjoyment of it thereafter. We see no reason to suppose that this transfer of possession to Sitamma's daughter's son was not made in pursuance of the widow's intention to surrender her husband's estate. This is a point of fact, and, since we think that it is clear beyond the possibility of any doubt, we cannot accept the suggestion made on behalf of the appellants that this question should be remanded to the lower appellate Court for a finding.

With regard to the other contention that the widow became incompetent to make a surrender because she had already alienated certain portions of the estate of her husband in her hands, we cannot accept it. Our learned brother has dealt very fully with the matter and we agree with his reasoning and with his conclusion. The only case which tends to support the position taken by Mr. Raghava Rao in this appeal is that of

Vijiaraghavachariar v. Ramanujachariar(1). In that decision, PHILLIPS and ODGERS JJ. referred to the decision of the Privy Council in *Rangasami Gounden v. Nachiappa Gounden*(2) and proceeded to apply the principle. They said :

"To apply this principle it is clear that when the widow purported to surrender her estate she did not and could not surrender the whole of her husband's estate so as to efface herself entirely. The previous alienations were her own act and she could not get rid of them. To that extent she was unable to surrender the whole of the estate and therefore the surrender which she purported to make is invalid."

This they said was the view taken in *Sakharam Bala v. Thama*(3). It is necessary however to point out, as our learned brother VARADACHARIAR J. did, that in the case of *Vijiaraghavachariar v. Ramanujachariar*(1) it was admitted that at any rate one of the alienations made by the widow before she purported to surrender her husband's estate to the nearest reversioner had been found to be invalid, and that, in the Bombay case, the widow after first purporting to make a gift of practically the whole of her husband's estate proceeded thereafter to purport to surrender the whole of it to the nearest reversioner including the property already gifted away by her. It is obvious that those facts are very dissimilar from the facts in this case. Here, it has never been contended that the alienations made by Sitamma were invalid and not binding upon the reversioner. Mr. Raghava Rao suggests indeed that this point also ought to be referred to the lower Courts for a finding, but we are clear that there is no necessity to do that.

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(1) (1928) 55 M.L.J. 859.

(2) (1918) I.L.R. 42 Mad. 523 (P.C.).

(3) (1927) I.L.R. 51 Bom. 1019.

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There is evidence on behalf of the defendants that the alienations made by Sitamma were made in order to discharge her husband's debts. This was not contradicted and the witnesses who gave it were not cross-examined on the point. We therefore hold that it is a question of fact which is concluded. Those alienations being valid, we think our learned brother, VARADACHARIAR J., was undoubtedly right in holding that those items of property ceased to be part of the estate of Sitamma's husband in her hands. That being so, we fail to see why those alienations should render her incompetent to make a surrender of the whole of her interest in what remained of her husband's estate. As our learned brother put it :

"Wherever any portion of what was once the estate of the husband has ceased legally to belong to it, by reason of an alienation binding upon the estate, the conception of the *entirety* of the estate to be surrendered must reasonably be applied only to the existing estate."

We do not think that there is anything in the observations of their Lordships of the Privy Council to support the view that, where an alienation by a widow has been made for purposes binding upon the estate of the reversioners, the widow becomes incompetent to surrender the whole of her interest in what remains. Their Lordships, as our learned brother pointed out, have laid emphasis upon the necessity for the surrender of the whole interest of the widow. Particularly, they lay stress upon the necessity for seeing that the widow is not carrying out a mere device to divide the estate between herself and the reversioner and is not reserving for herself any interest in the estate. These requisites are completely carried out in the case before us.

Sitamma undoubtedly surrendered everything, retaining nothing for herself. For these reasons, this appeal must be dismissed with costs.

A.S.V.

Judgment of Varadachariar J. in Second Appeal
No. 388 of 1931.

The plaintiffs are the appellants. They sued for possession of certain properties as reversioners to the estate of one Gangaraju whose widow Sitamma died in March 1924. The widow had by a registered document (Exhibit I), dated 30th October 1906, surrendered the properties to her predeceased daughter's son, one Venkatarayudu (or Venkanna). This Venkatarayudu also happened to predecease the widow and the plaintiffs have thus become the actual reversionary heirs to the estate. The first defendant is the widow of Venkatarayudu and she relied on the deed of surrender as a defence to the claim of the plaintiffs as reversioners.

The validity of this deed of surrender was attacked before the Court of first instance on three grounds (*Vide* paragraph 14 of the first Court's judgment): viz., (i) that it was not a *bona fide* document, (ii) that it was not a complete surrender of all the properties inherited by her from her husband and (iii) that Venkanna was a minor on the date of the surrender and did not accept it.

Both the Courts below have overruled the first objection and it has not been pressed before me. They overruled the third ground also and even that has not been seriously pressed before me, because, apart from any doubt as to whether Venkanna was or was not a minor at that time, there is no rule which prevents a surrender being made in favour of a minor reversioner and, as pointed out by the lower appellate Court, there is nothing particularly onerous about the surrender deed by reason of which its validity may remain in suspense till the minor attains age. It merely reproduces the legal obligation which the daughter's son would be under, even if he succeeds as heir, to pay off the debts, if any, of Gangaraju.

Mr. Raghava Rao's main argument was therefore directed to the second ground of the objections taken before the first Court. The discussion in paragraphs 16, 17 and 18 of the first Court's judgment will show that there were several defects in

the schedule to Exhibit I; but both the Courts have found that notwithstanding these defects the daughter's son was put in possession of all the properties that were actually in the enjoyment of the widow. They have also accepted the reason given on behalf of the defendant for including Survey No. 260/3-A instead of No. 345 in the surrender deed, notwithstanding the exchange which had taken place during Ganga-raju's lifetime. It therefore remains only to deal with the argument, advanced before the lower appellate Court for the first time and repeated here, that the widow had made certain alienations and this circumstance made her incompetent to surrender the estate to the next reversioner.

With reference to surrenders made by widows after they have alienated portions of the husband's estate, questions have been raised in three ways: (i) It has sometimes been contended that as a result of surrender the surrenderee could recover the alienated property even during the lifetime of the widow, if the alienation was not binding on the estate. The balance of authority is against this view, though so recently as in *Prafulla Kamini Roy v. Bhabani Nath Roy*(1) there has been a difference of opinion in the Calcutta High Court, (ii) Another line of argument has been that unless the surrenderee is also given a right to impeach the alienation by including that property in some way in the surrender arrangement, the surrender will be invalid. In the very nature of things, this consideration can apply only to alienations which are, or which could be shown to be, invalid and not binding upon the estate. In the case of *Krishnavaramma v. Hanumantha Rao*(2) the learned Judges (KRISHNAN PANDALAI and CURGENVEN JJ.) would appear not prepared to accept even this contention independently of any question whether the alienation was valid or invalid. They say: "When it is said that the surrender must be of the entire property, it means the entire property then in the possession and enjoyment or control of the family." It is unnecessary for the purposes of this case to express any opinion upon this line of argument. It may be urged in its favour that if in some way the right to impeach the invalid alienation does not pass to the surrenderee, there may result the anomaly that the surrendered properties will go to the surrenderee and the right to impeach the invalid alienation may go to the actual

reversioner after the widow's death. A possible answer to this is that by the mere fact of upholding the surrender the reversion is wholly out off, so that the surrenderee will, by implication of law, also get the right to impeach the alienation after the widow's death. I prefer to leave this line of argument there.

A third position, suggested by the decision in *Vijiaraghavachariar v. Ramanujachariar*(1) and the one pressed before me by Mr. Raghava Rao, is that after making the alienation the widow becomes incompetent to make a surrender, because she could not in that situation put the surrenderee in possession of the entire estate of her husband. I must point out that in *Vijiaraghavachariar v. Ramanujachariar*(1) the learned Judges refer to the fact that one of the alienations by the widow had been found by a Court of law invalid as against the reversion, even before the surrender was made. Similarly, in the case of *Sakharam Bala v. Thama*(2), relied on by the learned Judges, there had been an earlier gift deed which *prima facie* will be inoperative after the widow's lifetime. If I may follow the mathematical way of stating the thing adopted by SADASIVA AYYAR J. in *Chidambaramma v. Hussainamma*(3), wherever there is a voidable alienation of her husband's estate by a Hindu widow, the legal estate vested in her may be said to become divided into two estates, (a) the alienated estate enjoyed by the purchaser during her lifetime and (b) the reversionary estate to be enjoyed after her lifetime. So far as the latter interest is concerned, there is no question of the widow reserving it to herself, but so far as the former interest is concerned, a Court of law may be justified in refusing to give effect to the surrender when the widow has converted a portion of her interest in her husband's estate into its money value and retains the benefit thereof. Mr. Raghava Rao however relies upon the language used by the learned Judges in *Vijiaraghavachariar v. Ramanujachariar*(1) as supporting the broad contention that, independently of any question of the validity or otherwise of the alienation as against the reversion, the moment a Hindu widow alienates any portion of her husband's estate she becomes thereafter incapable of exercising the right of surrender. I am unable to agree that either the decision

(1) (1928) 55 M.L.J. 859.

(2) (1927) I.L.R. 51 Bom. 1019.

(3) (1915) I.L.R. 39 Mad. 565.

(1) (1925) I.L.R. 52 Cal. 1018.

(2) 1923 M.W.N. 1010.

relied on or anything in the observations of the Privy Council dealing with the doctrine of surrender justifies this extreme contention. What their Lordships of the Privy Council emphasise in insisting upon the widow's self-effacement, the surrender being of the entirety of the estate, is that there should be nothing like an attempt to reserve a portion of the estate for herself, either directly or indirectly. A widow could easily contrive to retain a benefit for herself by going through a form of alienation of a portion of the property, and it is in that sense that I suggested already that, where the alienation is not for purposes binding on the estate, it may amount to reservation of a benefit to the widow within the intent of the Privy Council cases. But where certain portions of the property which the widow inherited from her husband have ceased to be part of the husband's estate altogether, having been alienated for a justifiable purpose, as, for instance, the discharge of the husband's debts, there is no question of the widow retaining any benefit for herself.

I put it to Mr. Raghava Rao whether, if the creditor brought a suit for recovery of her husband's debt and sold away a portion of her husband's estate in execution, he would be prepared to contend that the widow thereafter could not surrender the remainder of the estate. Though he would not commit himself to any answer, he was not prepared to go so far and preferred to draw a distinction between the voluntary acts of the widow and involuntary alienations. But, in the attempt to understand the principle laid down in the Privy Council cases, I do not think that a distinction between voluntary and involuntary alienations is the true test. Wherever any portion of what was once the estate of the husband has ceased legally to belong to it, by reason of an alienation binding upon the estate, the conception of the entirety of the estate to be surrendered must reasonably be applied only to the existing estate.

Judging the present case in the light of the above test, there is nothing to suggest that the alienations said to have been made by the widow were made for purposes not binding on the estate. There is a slight verbal error in the statement in paragraph 4 of the lower appellate Court's judgment "that admittedly certain properties were sold by the widow for no necessity". What was admitted was that certain properties had been sold by the widow. This is spoken to by D.W 1.

himself in his chief examination. He there states that the sales were to the first plaintiff and to the second plaintiff or to a Chetty and that the sales were for the discharge of her husband's debts. Nothing was put to him in cross-examination to suggest that the sales were not for the discharge of the husband's debts. The plaintiffs recalled and examined the second plaintiff and some other witnesses after the defence evidence had been closed. Even then no attempt was made to suggest that the statement as to the sales having been made for the discharge of the husband's debts was not true. In these circumstances, the learned District Judge was justified in holding that the surrender was not invalid by reason either of the non-inclusion of the alienated property or by reason of any incapacity of the widow to make a surrender after making alienations for such binding purposes.

This second appeal therefore fails and it is dismissed with costs.

ORIGINAL CIVIL.

Before Mr. Justice Wadsworth.

BALASUNDARAM, PLAINTIFF,

v.

KAMAKSHI AMMAL AND OTHERS, DEFENDANTS.*

Hindu Law—Dancing girl—Devolution of property of—Dancing girl renouncing her caste and becoming a respectable married woman—Acquisition of property by—Character and incidents of such property—Subsequent reverter to her caste and its calling—Status of such a dancing girl and devolution of such property.

When a dancing girl, practising the calling of her caste, acquires property thereby, it devolves more or less after the fashion of stridhanam, females taking in preference to males. But if a dancing girl eschews the calling of her community

* Civil Suit No. 301 of 1932.

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and adopts the ordinary life of a respectable married woman and acquires property, that property would devolve in accordance with the ordinary rules of Hindu law, in spite of the fact that she belongs to the dancing girl caste, and such property is impressed with a character which it cannot lose by passing on her death into the hands of a dancing girl practising the calling of her caste; and the devolution of property, acquired during her widowhood by such a dancing girl after she reverts to what may be described as an immoral life, would not be different, since any subsequent lapse from conjugal virtue would not give her any character other than that of an unchaste married woman.

Subbaratna Mudali v. Balakrishnaswami Naidu, (1917) 6 L.W. 184, considered.

C. R. Rajagopalachariar for plaintiff.

C. Veeraraghava Ayyar and *A. P. Sundarachari* for defendants.

JUDGMENT.

The plaintiff prays for a declaration that the mortgage, dated 6th July 1925, executed by one Rajammal in favour of the deceased husband of the first defendant is of no effect as against the plaintiff as reversioner to the estate of the deceased Papathi Ammal, mother of Rajammal, and cannot convey rights beyond the lifetime of Rajammal. There is also a prayer for an injunction which is not now pressed.

The second defendant supports the plaintiff.

The first defendant contends that Rajammal was the absolute owner of the suit house and that the plaintiff is not entitled to claim the suit property as a reversioner in the event of her death.

The evidence in the case is somewhat scanty, but it raises certain interesting questions with reference to the devolution of property in the

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dancing girl caste. On the materials before me the following facts seem to be established. One Papathi Ammal who died many years ago had two daughters, Rajammal and the second defendant. It must, I think, be taken as proved that they belonged to the dancing girl caste. Papathi Ammal appears to have married and been widowed. She then came to Madras, became the concubine of a goldsmith, and while living as his concubine she somehow or other acquired the suit property. There is no sale deed in the evidence; but the recitals in the mortgage deed in favour of the first defendant's husband, taken along with those of the release deed executed by the second defendant in favour of Rajammal, leave no doubt in my mind that this property did come down by inheritance from Papathi Ammal to her two daughters. Papathi Ammal died about the year 1900. Rajammal and the second defendant seem to have lived as dancing girls and to have been dedicated to a temple in Saidapet near Madras. Rajammal had no children, but following the custom of the dancing girl community she adopted a daughter, Navaneethammal, who is not a party in this suit. The second defendant had two children, a daughter who is the third defendant and a son who is the plaintiff. The suit property was registered in 1902 by the Collector in the joint names of Rajammal and the second defendant. In 1909 the second defendant released her interest in the properties so far as she was competent to do so in favour of Rajammal, and in the face of the terms of the release deed it cannot be contended that it would have the effect of shutting out any reversionary right

which her children might claim on the death of Rajammal. In 1925 there was a mortgage by Rajammal and the third defendant in favour of the first defendant's husband. Now, if Rajammal and the second defendant had an absolute title to this property, there would be no question of a reversionary right in favour of the plaintiff in view of the release deed. If, however, Rajammal and the second defendant had no more than the ordinary limited estate of a Hindu female, then the plaintiff would be a reversioner.

There is remarkably little authority in the reported cases regarding the devolution of property through females of the dancing girl caste. It is of course quite settled that when a dancing girl, practising the calling of her caste, acquires property thereby, it devolves more or less after the fashion of *stridhanam*, females taking in preference to males. It seems also to be settled that when a dancing girl, eschewing the calling of her community, adopts the ordinary life of a respectable married woman and acquires property, that property would devolve in accordance with the ordinary rules of Hindu law, in spite of the fact that she belongs to the dancing girl caste. There is an observation in the case of *Subbaratna Mudali v. Balakrishnaswami Naidu*(1) that when the property of a dancing girl passes to her female heir the latter takes an absolute estate. This seems to be a reasonable view, though I have not been able to find any positive decision in support of it. But obviously, if the disability of a Hindu female in the matter of owning property is the

logical consequence of her disability as a member of the family and her dependence on the males of that family, no such disability should attach to the women of an emancipated community such as the *Devadasis* who live and acquire property quite independently of their male relatives. But what is the position when a woman like Papathi Ammal, belonging to the dancing girl community, elects not to follow the traditional calling, but to become an ordinary married woman and then, after her widowhood, reverts to what may be described as an immoral life and brings up her daughters so that they follow the caste calling? It seems to me reasonable that, if the mother acquires property while she is an ordinary married woman subject to the ordinary Hindu law, it should devolve upon her heirs in accordance with the ordinary rules of Hindu law, since the property is impressed with a character which it cannot lose by passing into the hands of a woman practising the calling of a dancing girl. But I doubt very much whether, when a woman of the dancing girl community has once elected not to take up the caste calling but to live the life of an ordinary Hindu married woman, any subsequent lapse from conjugal virtue would give her any other character than that of an unchaste married woman. Having definitely left the calling of the caste and adopted the constraints of ordinary married life, I do not see how she can at the same time enjoy the position of a respectable Hindu female and retain a sort of *animus revertendi* towards the traditional calling; and I see no logical reason why if she subsequently relapsed into unchastity she should get the benefit

(1) (1917) 6 L.W. 184.

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of the pseudo-respectability which surrounds the calling of a dancing girl.

If that reasoning is correct, it follows that in the present case the property acquired by Papathi Ammal, a married woman who has lapsed into unchastity, has devolved upon her daughters clothed with the character of property acquired by an ordinary Hindu female, that is to say, subject to the disability of the ordinary Hindu female to take an absolute estate; and when it passes to the daughters, they would hold it subject to the same disabilities as attended the ownership of that property by a female when it was in the hands of their mother. It follows that Rajammal and the second defendant would have only a limited estate in the property and, on the release of her rights by the second defendant, Rajammal, in spite of the fact that she was a member of the dancing girl community living a life of unchastity, would hold that property as a limited owner with limited powers of alienation. The third defendant having joined with Rajammal in the mortgage in favour of the first defendant's husband obviously cannot attack that mortgage. The plaintiff must in my opinion be declared to be a reversioner to Rajammal and he must be given a declaration that the mortgage of the property to the first defendant is not binding as against the reversioner. The suit is therefore decreed with costs.

G.R.

PRIVY COUNCIL.

TALLURI VENKATA SESHAYYA AND OTHERS,
APPELLANTS,

v.

THADIKONDA KOTISWARA RAO AND OTHERS,
RESPONDENTS.

J.C.*
1936,
November 20.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Res judicata—*Code of Civil Procedure (Act V of 1908), sec. 11—Indian Evidence Act (I of 1872), sec. 44—Negligence or gross negligence, whether may be treated as fraud or collusion.*

The provisions of section 11 of the Code of Civil Procedure are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion, or by showing a want of *bona fides* in the prosecution of the former suit.

It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts.

Lalla Sheo Churn Lal v. Ramnandan Dobey, (1894) I.L.R. 22 Cal. 8, *Punnayyah v. Viranna*, (1921) I.L.R. 45 Mad. 425, and *Ananda Rao v. Appa Rao*, (1924) 47 M.L.J. 700, distinguished.

Karri Bapanna v. Yerramma, (1923) 45 M.L.J. 324, disapproved.

APPEAL (No. 6 of 1931) from a decree of the High Court (November 30, 1927) which reversed a decree of the Subordinate Judge of Masulipatam (February 5, 1925).

T. Seshayya, the grandfather of the first respondent's adoptive father, built five temples in Vellatur and conducted the festivals and other

* Present: Lord BLANESBURGH, Lord THANKERTON and Sir SHADI LAL.

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affairs of the temples during his lifetime. By his will of 1826, executed shortly before his death, he directed his widow to make a permanent endowment for the temples out of his self-acquired properties. His widow purchased lands in Kowthavaram and another village and made a formal gift of the lands to the idols. In 1838, T. Seshayya's sons, who, as dharmakartas, were conducting the festivals and managing the affairs of the temples, executed a document formally recognizing the gift. Some other lands were given as an endowment to the temples by a stranger to the family.

In 1888, Gajanana, the surviving son of T. Seshayya, and Gajanana's adopted son granted a permanent lease of the Kowthavaram lands to one Gopalakrishnamma.

In 1891 two persons, with the leave of the Court, under section 18 of the Religious Endowments Act (XX of 1863), instituted a suit against Gajanana, his adopted son and their lessee claiming that the temples were public and the alienation was invalid and praying for the removal of the dharmakartas. The main defence was that the temples were private temples and the Act did not, therefore, apply.

Issues (1) and (2) in the suit were :

(1) Whether the lands were irrevocably bestowed on the temple ?

(2) Whether it is a private foundation or a public endowment ?

The District Judge dismissed the suit, holding that the temples were private and the lands were a private foundation and the Act did not apply. Other suits were subsequently filed to which it is unnecessary to refer.

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The present suit was instituted in 1923 under Order I, rule 8, of the Code of Civil Procedure for a declaration that the temples were public temples, for setting aside the lease of 1888 and for other reliefs.

The defendants, *inter alia*, pleaded that the suit was barred as *res judicata* by the decision in the suit of 1891.

The Subordinate Judge held, *inter alia*, that the temples were public temples, that the decision in the suit of 1891 was not binding on the plaintiffs, as the plaintiffs in that suit were guilty of negligence in the conduct of that suit, and that the permanent lease of 1888 was invalid, and made a decree declaring that the temples were public temples and the lands in question were part of the endowment.

On appeal, the High Court expressed the view that the temples were public temples but held that there was no negligence in the conduct of the suit of 1891 and the decision in that suit, that the temples were private, was *res judicata* and binding on the plaintiffs in this suit and accordingly dismissed the suit.

Dunne K.C. and *Chinna Durai* for appellants.—On the question of *res judicata*—The previous litigation was not *bona fide*. The most valuable documents, namely, the deed of gift made by the then owners of the property to the idol showing complete dedication, were not put in. In the appeal in the High Court, the whole of the plaintiffs' evidence was omitted from the record and was not printed. A whole series of documents, the Inam Registers, were not produced. There was gross negligence in the conduct of the suit and that would take the case out of the section. It would prevent the operation of the bar. *Ananda Rao v. Appa Rao*(1).

(1) (1924) 47 M.L.J. 700.

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Subba Rao for respondents—

[*Abdur Rahim v. Mahomed Barkat Ali*(1) referred to.]

There was no negligence in the omission to file the documents. The lands were admittedly entered in the name of the God. This was known and there was, therefore, no necessity to go to the Inam Registers. The production of the Inam Registers, apart from the deed of gift, would not have helped the plaintiffs. There was nothing in the deed of gift to indicate that the temples were public. If anything, it points the other way. The evidence was mainly directed to user.

Dunne K.C. in reply.—On the question whether there was gross negligence, it has to be seen whether there was any duty cast on the plaintiffs to put in the documents bearing on the issue. It is said that the documents do not show that the temples were public and that putting them in would make no difference. That is beside the point. They should have been put in. It could not be anticipated what effect the documents would have on the Judge. [Reference was made to *Lalla Sheo Churn Lal v. Ramnandan Dobey*(2) and *Karri Bapanna v. Yerramma*(3)].

A litigation conducted with gross negligence leads to the inference of fraud. Fraud, either on the part of the plaintiff or the defendant, is sufficient to bring the case within the section. Suppression of the documents shows collusion.

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The JUDGMENT of the Judicial Committee was delivered by Lord THANKERTON.—This is a consolidated appeal from a judgment and decree of the High Court of Judicature at Madras dated 30th November 1927, whereby a judgment and decree of the Subordinate Judge of Masulipatam, dated 5th February 1925, was set aside and the appellants' suit was dismissed.

The present suit was instituted on 21st August 1923 by the present appellants, along with a fifth plaintiff who died during the trial, as representing

the interested public, under Order I, rule 8, of the Code of Civil Procedure, with the requisite permission of the Subordinate Judge of Masulipatam. The plaintiffs seek a declaration that five temples of the village of Vellatur, Guntur District, are public temples and that certain inam lands, situated in Kowthavaram village, form the endowment of these temples and they seek to have set aside : (a) a permanent lease in respect of these lands executed on 6th December 1888 by the then managers of the temples, (b) a mortgage deed on the security of these lands, dated 3rd November 1900, and (c) the Court sale effected in execution of the decree obtained on the basis of the said mortgage in Original Suit No. 29 of 1911 on the file of the District Court of Kistna ; they further seek restoration of possession of these lands to the first defendant, who is the present hereditary dharmakarta of the temples. The other defendants are the persons who are in possession of the temple lands claiming under the permanent lessee and the members of an undivided family who purchased the right to the annual rent reserved under the permanent lease.

Three main questions were argued before their Lordships, namely, (i) whether the suit is barred by limitation, (ii) whether the suit is maintainable under Order I, rule 8, of the Code of Civil Procedure and (iii) whether the suit is barred by *res judicata*. The appellants' failure on any one of these questions will involve the dismissal of the appeal. In the view that is taken by their Lordships, the suit is barred by *res judicata* and it becomes unnecessary to deal with, or express any opinion upon, either of the other two

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(1) (1927) L.R. 55 I.A. 96, 102 ; I.L.R. 55 Cal. 519.

(2) (1894) I.L.R. 22 Cal. 8, 12.

(3) (1923) 45 M.L.J. 324.

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questions, or the particular facts out of which they arise.

The five temples in suit were built early in the last century by one Thadikonda Seshayya, a native of Vellatur and the grandfather of the first respondent's adoptive father, who had amassed wealth in Hyderabad and had returned to his native place. The temples were built for the deities of Siddhi Ganapati Swami, Rajeswara Swami, Bhimeswara Swami, Adi Seshachala Swami and Kameswara Maharani, and Thadikonda Seshayya conducted the festivals and the other affairs of the deities during his lifetime; he left a will, dated 26th August 1826, shortly before his death, directing his widow, Adilakshamma, to make a permanent endowment for the temples to the extent of Rs. 70,200 out of his self-acquired properties. The widow purchased two sets of properties in the villages of Kowthavaram and Peddapulivarru for the temples, conducted the affairs of the temples out of the lands so purchased, and afterwards made a formal gift of the lands to the idols. Another set of properties in the village of Vellatur was endowed to the same temples by the Zamindar of Narasaraopet.

Seshayya's two sons, Siddhi Ganapati Doss and Nagabhushana Gajanana Doss, conducted the festivals and other affairs until the death of Ganapati in 1857. The latter's widow claimed the dharmakartaship, but the Collector decided in favour of Gajanana. In 1859 the Inam Commissioner granted an inam title deed in respect of the devadayam inam situated in the village of Kowthavaram. In 1867 Gajanana started borrowing money on the security of the

devadayam lands, which culminated in a usufructuary mortgage for Rs. 8,000, dated 15th January 1887, under which the lands of Kowthavaram were handed over to the mortgagee. In order to discharge this mortgage, Gajanana and his adopted son Seshayya, granted the permanent lease of Kowthavaram lands, dated 6th December 1888, which is in suit, and the mortgagee, Gopalkrishnamma, on the same day executed the counterpart of the lease.

On 18th January 1891, two persons interested in the temples and in the performance of the service and worship thereof, who had obtained the leave of the Court under section 18 of the Religious Endowments Act (XX of 1863), filed a suit, Original Suit No. 4 of 1891 on the file of the District Court of Kistna, against Gajanana, his adopted son Seshayya and Gopalakrishnamma, the permanent lessee, claiming that the five suit temples at Vellatur were public temples and praying for the removal of the first two defendants from the office of dharmakarta. The main defence was that the temples and lands were private property to which the Act (XX of 1863) did not apply. Gajanana died before the suit was heard. In a judgment dated 5th February 1892, the District Judge of Kistna dismissed the suit holding that the temples were private and that the lands were a private foundation and that Act XX of 1863 did not apply. An appeal by the plaintiffs to the High Court of Madras was dismissed by a judgment dated 3rd August 1893.

The respondents' plea of *res judicata* rests upon these judgments but, before dealing with

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them, it will be convenient to refer to the subsequent history of the temples and the Kowthavaram lands in suit.

On 3rd November 1900, Seshayya mortgaged for Rs. 4,000 his rights in the Kowthavaram lands, subject to the permanent lease, and the Vellatur lands to Vadlamannati Srinivasa Dikshit. Seshayya died about 1905 leaving a will by which he appointed executors and gave them directions for the management of the temples and the properties. He was survived by his widow, Subbama, who brought a suit on 22nd October 1908 (Original Suit No. 65 of 1908 in the District Court of Guntur) against the executors of her husband's will, Srinivasa, the mortgagee, and others, claiming the Vellatur lands on the ground that she had succeeded Seshayya as *dharmakarta* and that the mortgage of 1900 and other alienations by Seshayya were not valid. This suit which did not relate to the Kowthavaram lands was subsequently renumbered as Original Suit No. 84 of 1910 and on 14th February 1913, the Subordinate Judge of Guntur decided in favour of Subbama, holding that the Vellatur lands were public endowments to the temples and the mortgage of 1900, so far as relating to the Vellatur lands, was not binding on Subbama as hereditary manager of the temples.

Meantime, Srinivasa had brought a suit on his mortgage in the District Court of Kistna (Original Suit No. 29 of 1911) against Subbama and the executors of Seshayya in which Subbama contended that the mortgage was not binding on the properties. The Court granted a mortgage decree on 31st July 1912.

Appeals were taken in the Guntur suit of 1910 and the Kistna suit of 1911 to the High Court of Madras and judgment in both the appeals was delivered on 23rd March 1913. The High Court held that the mortgage of 1900 was binding on Kowthavaram lands but not on Vellatur lands and that the Kowthavaram lands were liable to be sold. The decree of the Kistna Court was modified by dismissing the mortgagee's suit so far as Vellatur lands were concerned. On 15th April 1919, Srinivasa purchased the mortgaged properties at Kowthavaram in execution of his mortgage decree. The appellants seek cancellation of this sale in the present suit.

Shortly after the decision of the High Court of Madras, Subbama adopted the first respondent, and the validity of the adoption, although raised in the suit, is no longer challenged by the appellants, in view of the concurrent findings of the Courts below.

It is unnecessary to refer to certain other suits which were brought during the intervening period before the present suit was brought in 1923. It is now necessary to return to the suit of 1891.

Mr. Dunne, on behalf of the appellants, conceded that, subject to the question of *bona fides*, the present appellants must be deemed to be claiming under the plaintiffs in the 1891 suit within the meaning of explanation VI of section 11 of the Civil Procedure Code, as they were both claiming as representing the public interest in the temples and the Kowthavaram lands. He further conceded that the matter in issue in the two suits was substantially the same. But the appellants maintain that the 1891 suit was not a *bona fide*

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litigation, that it was brought by the plaintiffs in collusion with the defendants and that there was gross negligence in the plaintiffs' conduct of the suit; and that, accordingly, it could not form *res judicata* against the present plaintiffs.

The appellants' contention is founded on the non-production of a deed of gift of 1838 and of some of the documents connected with the inam enquiry, and also on the fact that, on their appeal to the High Court, the plaintiffs did not place their own oral and documentary evidence before the High Court, but only the defendants' evidence.

The learned Subordinate Judge held that the plaintiffs in the suit of 1891 had been guilty of gross negligence in the conduct of the proceedings before the Courts and that therefore the decision in such a suit could not bind the present plaintiffs or the worshippers at large. This decision was reversed by the High Court who held that the plaintiffs in the 1891 suit were not guilty of fraud or collusion, or even of gross negligence. In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to in the judgments, are *Lalla Sheo Churn Lal v. Ramnandan Dobey*(1), *Punnayyah v. Viranna*(2), *Karri Bapanna v. Yerramma*(3) and *Ananda Rao v. Appa Rao*(4). Their Lordships are not concerned to discuss the validity of these decisions, or the

(1) (1894) I.L.R. 22 Cal. 8.
(3) (1923) 45 M.L.J. 324.

(2) (1921) I.L.R. 45 Mad. 425.
(4) (1924) 47 M.L.J. 700.

elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's* case(1) that the principle of section 44 of the Indian Evidence Act can be extended to cases of gross negligence.

The provisions of section 11 of the Civil Procedure Code are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of section 44 of the Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts.

Under section 11, explanation VI, of the Civil Procedure Code, the plaintiffs in the present suit are deemed to be claiming under the plaintiffs in the 1891 suit, and again the statute defines a condition as necessary to the applicability of the section, namely, that the plaintiffs of 1891 litigated *bona fide*.

In the opinion of their Lordships, no case of fraud apart from collusion being suggested, the

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appellants are bound to establish either that the 1891 decrees were obtained by collusion between the parties, or that the litigation by the 1891 plaintiffs was not *bona fide*.

At the hearing before their Lordships, the appellants based their case entirely on inferences to be drawn (a) from failure to produce to the Courts in the 1891 suit certain documents, and (b) from the omission to lay the plaintiffs' evidence before the High Court. The appellants' oral evidence in the present suit tending to show collusion in the 1891 suit was not accepted by the Subordinate Judge and was not referred to before their Lordships. The Subordinate Judge's finding of gross negligence is **very far from a finding of intentional suppression of the documents which would amount to want of *bona fides* or collusion, or of such intentional suppression of the plaintiffs' evidence before the High Court.** In their Lordships' opinion, there is no evidence in this suit which establishes either want of *bona fides* or collusion on the part of the plaintiffs in the 1891 suit and, accordingly, the appellants have failed to show that the decisions in the 1891 suit are not binding on them as *res judicata*. It follows, on this ground alone, that the appeal must fail.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs and that the judgment and decree of the High Court dated 30th November 1927 should be affirmed.

Solicitors for appellants : *Hy. S. L. Polak & Co.*
Solicitor for respondents : *Harold Shephard.*

C.S.B.

APPELLATE CIVIL—FULL BENCH.

Before Sir M. Venkatasubba Rao, Kt., Officiating Chief Justice,
Mr. Justice Cornish and Mr. Justice Venkataramana Rao.

MADANA MOHANA NAIKO (PLAINTIFF), APPELLANT,

1936,
October 7.

v.

KRUPASINDHU NAIKO AND ELEVEN OTHERS
(DEPENDANTS 1 TO 6 AND NIL), RESPONDENTS.*

Court-fee—Erroneous decision of lower Court as regards the category in which the suit ought to be placed for purpose of court-fee—Appellate Court—Power of, to require a party to make good the deficiency in the court-fee—Court Fees Act (VII of 1870), sec. 12, cl. (ii), and sec. 7 (iv) (b)—Scope of.

An appellate Court has power to require a party to make good the deficiency in the court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of court-fee but such decision is in the opinion of the appellate Court erroneous.

APPEAL against the decree of the Court of the Subordinate Judge of Berhampore in Original Suit No. 35 of 1927.

The facts and the arguments appear fully in the order of reference and in the opinion of the Full Bench.

The appeal coming on for hearing as regards the question of court-fee payable in the lower Court, the Court (CORNISH and VARADACHARIAR JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

VARADACHARIAR J.—In this case, a question as to the scope of clause (ii) of section 12 of the Court Fees Act has been

* Appeal No. 432 of 1929.

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raised, under the following circumstances. The plaintiff who sued for partition valued the suit for purposes of jurisdiction at Rs. 6,000, but he paid a court-fee of Rs. 100 only under article 17-B of the Court Fees Act. An issue (No. 10) was raised as to whether the court-fee paid was correct; the lower Court, without any discussion, held it was correct.

As the suit was decided against the plaintiff, he filed an appeal here, valuing the appeal at Rs. 6,000 but again paid a court-fee of Rs. 100 only. When the matter came before us, we held that court-fee should be paid on an *ad valorem* basis under section 7 (iv) (b) of the Court Fees Act and the appellant has accordingly paid in the amount required to make up the fee payable on the valuation of Rs. 6,000. With reference to the additional fee payable on the same basis in the lower Court Mr. Jagannadha Doss has contended that the case does not fall under clause (ii) of section 12 of the Court Fees Act and the plaintiff cannot now be called upon to pay the additional fee.

The argument was based on certain decisions of this Court and of the other High Courts relating to the provisions as to finality in the concluding part of the first clause of section 12. As the question raised is one of some general importance, we gave notice to the Government Pleader and have had the benefit of an argument on behalf of the Government. Though we do not feel much doubt as to the true construction of clause (ii), we have preferred to refer the matter to a Full Bench, because our view may seem to restrict or qualify the language employed in the judgment of the Full Bench in *Lakshmi Amma v. Janamajayan Nambiyar*(1).

Beginning with *Annamalai Chetti v. Cloete*(2), this Court has consistently held that the concluding words of clause (i) of section 12 do not preclude an appeal by a party when the question raised relates not to "valuation" in the narrow sense of amount but to the "category" in which a suit is to be placed for the purpose of determining the court-fee. The view taken in *Annamalai Chetti v. Cloete*(2) was affirmed by a Full Bench in *Lakshmi Amma v. Janamajayan Nambiyar*(1). Mr. Jagannadha Doss argues that the expression "the said question" in clause (ii) of section 12 must be interpreted in the light of these decisions that an appellate Court can act under this clause only when there has been an error in the lower Court's

(1) (1894) 4 M.L.J. 183 (F.B.). (2) (1881) I.L.R. 4 Mad. 204.

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determination of the amount at which the subject-matter of the suit should be valued and that where, as in the present case, the lower Court has erred in determining the "category" in which a suit is to be placed, the appellate Court cannot invoke this clause and require the party to pay the additional fee required to make up the proper fee payable on the plaint in the lower Court. We are not prepared to accept this contention.

The decisions above referred to do not proceed on the footing that the word "valuation" will not comprise the question of category as well as the question of amount. Indeed, under the opening words of clause (i), it is the duty of the Court to decide both classes of questions; the question of category will fall to be decided on the construction of the plaint and the question of amount may have to be determined after an investigation under sections 9 and 10 of the Act. But in pursuance of the principle that court-fee is primarily a question of revenue and not a matter in dispute between the parties, the Legislature thought it right to exclude a right of appeal in such matters and hence provided that the decision of a Court under clause (i) of section 12 "shall be final as between the parties". Difficulties arose in reconciling this provision with the provisions in the Civil Procedure Code giving a right of appeal against an order rejecting a plaint for non-payment of the proper court-fee. The High Courts have sought to reconcile the two provisions by holding that the finality enacted by section 12, clause (i), of the Court Fees Act, must, in view of the right of appeal given in the Code, be restricted to cases where the decision of the lower Court relates to the question of amount and not to the question of category. It is unnecessary for us to say anything as to the correctness or otherwise of this line of reasoning. But we think that the language employed in the decisions dealing with this question must be understood with reference to the question then under consideration and not extended to cover the interpretation of clause (ii) of section 12 which has been enacted with a wholly different purpose in view, namely, the protection of the interests of the revenue.

Even as a matter of construction, it seems to us that the expression "said question" in clause (ii) refers back to the expression "every question" in the opening part of the first clause and if the opening words of clause (i) will comprise both sets of questions, namely, amount as well as category, we see no

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reason why the same scope should not be given to clause (ii) as well. The last few words of clause (i) are really parenthetical and there is no reason why clause (ii) should be read as a proviso to the main provision in clause (i). It is true that a fiscal enactment should be interpreted according to the natural meaning of the words employed but there is no more justification for restricting their natural meaning than for widening it. If by reason of the collocation of the provisions there is any room for ambiguity, it seems to us legitimate to have due regard to the fact that the purpose of clause (ii) is to protect the interests of the revenue.

In *Shama Soondary v. Hurro Soondary*(1) and in *Lakshmi Ammal, In re*(2) the power of the appellate Court to take action under section 12, clause (ii), in circumstances like those of the present case was recognised, but the question was not raised or considered in its present form. The observations of the Privy Council in *Rachappa Subrao v. Shidappa Venkat-rao*(3) and the decision of this Court in *Tekana Kavandan v. Aligiri Kavandan*(4) no doubt affirm the differentiation between the interests of the revenue and the rights of the parties, but they do not throw much light on the present aspect of the question, nor are the decisions in *Raj Rajeswari Jiu v. Gati Krishna*(5) and *Baijnath v. Dhani Ram*(6) of much help in this connection.

We may add that it has been contended on behalf of the Government that even if clause (ii) of section 12 should be construed in the manner suggested on behalf of the appellant, the appellate Court may insist on the payment of the deficient fee even in respect of the lower Court, either under section 28 of the Court Fees Act or in the exercise of inherent power. We are not much impressed with this argument but, as we are referring the question to a Full Bench, we have thought it right to refer to the argument. We refer the following question for the opinion of a Full Bench:

"Has an appellate Court power to require a party to make good the deficiency in the court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the

(1) (1881) I.L.R. 7 Cal. 348.

(3) (1918) I.L.R. 43 Bom. 507, 518 (P.C.).

(5) (1923) 39 C.L.J. 217.

(2) (1925) 49 M.L.J. 608.

(4) (1914) 25 I.C. 506.

(6) (1929) I.L.R. 51 All. 886.

suit ought to be placed for purposes of court-fee but such decision is in the opinion of the appellate Court erroneous?"

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ON THE REFERENCE.

B. Jagannadha Doss for appellant.

S. A. Seshadri Ayyangar for fifth and sixth respondents.

C. Rama Rao for second and seventh to eleventh respondents.

S. Suryaprakasa Rao for *G. Ranga Rao* for third respondent.

K. S. Champakesa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for Government.

The OPINION of the Court was delivered by VENKATASUBBA RAO Offg. C.J.—The question of law referred to the Full Bench for determination is interesting and not covered by authority. When the appeal came to be heard by the referring Judges, it was found that the court-fee paid on the memorandum of appeal was deficient and an order was thereupon made directing that the proper amount should be paid. So far the case presented no difficulty, but the question arose whether the learned Judges could require the appellant to pay the proper court-fee in the Court of first instance. That doubt that has arisen, which has led to this reference, may be expressed as follows. Section 12 of the Court Fees Act runs thus:

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"(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the

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said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph ii, shall apply."

It seems to have been argued, that in what is termed "valuation" two different things are involved, first, the fundamental question of category, and, secondly, the question of appraisal, and that it has been held in numerous decisions that the finality contemplated in sub-section (i) attaches to a decision relating to appraisal as distinguished from category. The next step in the argument seems to be, that the words "the said question" in sub-section (ii) must receive the same interpretation as the expression "every question relating to valuation" in sub-section (i) and if that be so, when the decision relates to category, it does not attract the operation of sub-section (ii) and the appellate Court cannot therefore make an order directing the deficiency to be made good. This contention appears to us to involve a fallacy. The words "every question" are of a comprehensive nature and there seems to be no reason why they should be construed in the restrictive sense suggested; indeed, some at any rate of the decided cases show that the view that a decision relating to category is not final is not based upon any such limited construction. True, that, in *Annamalai Chetti v. Cloete*(1), the learned Judges place upon the words the narrow meaning. They observe:

"In our judgment the terms of the 12th section ought not to receive a larger interpretation than they fairly admit of."

(1) (1881) I.L.R. 4 Mad. 204.

They do not declare the decision of the Court in which the plaint or appeal is filed final on all questions which may arise respecting the court-fee but on every question relating to valuation for the purpose of determining the amount of the court-fee."

It is difficult to see, as observed in *Muhammad Sadik v. Muhammad Jan*(1), how a Court could determine the amount without deciding the question as to the relief sought (i.e., the category to which a particular suit belongs) and how yet the relief sought is to be deemed as not comprised in the question relating to the valuation (see page 93). On the other hand, in a later case on the point, namely, *Lakshmi Amma v. Janamajayan Nambiyar*(2), the learned Judges proceeded upon the footing that the word "valuation" comprises both the factors, i.e., the category as well as the computation of value. Having said so, they felt constrained to hold, in view of certain provisions of the Civil Procedure Code, that the question of valuation should be viewed in two aspects for the purpose of deciding when a decision as to valuation is final and when appealable. They ultimately decided that, when the mistake made by the Judge relates to the category, an appeal lies, and not when it relates to the computation. Whether the 1877 Code, which was then under consideration, warrants this conclusion, is a matter open to doubt, but it is not at present within our province to express any final opinion on that point. The difficulty felt seems to have been as to how to reconcile the provisions of the Code relating to appealability with section 12 of the Court Fees Act.

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(1) (1888) I.L.R. 11 All. 91 (F.B.). (2) (1894) 4 M.L.J. 183 (F.B.).

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Now let us examine the provisions of the present Civil Procedure Code. Order VII, rule 11, shows that the question of the deficient court-fee can be viewed not only in two [as assumed in *Lakshmi Amma v. Janamajayan Nambiyar*(1)] but in three aspects. Clause (b) refers to the case where the relief claimed is undervalued; this comprises both the category and the computation. Under clause (c) the mistake relates neither to category nor to appraisalment; the valuation in both these aspects having been properly made, the plaint is nevertheless written upon an insufficiently stamped paper. Rule 11 provides that the plaint shall be rejected when the plaintiff, being required to make good the deficiency, fails to do so. The rejection of a plaint amounts to a decree under section 2 and is appealable under section 96. Were the matter *res integra*, it does not seem to us impossible to reconcile these provisions with section 12 of the Court Fees Act, giving full effect to both the statutes. The present trend of decisions seems to be that where a plaint is rejected under clause (b) of Order VII, rule 11, the order rejecting the plaint is not appealable when the order is based on a question of valuation pure and simple; but if the order involves a decision as to the category to which a suit belongs, the order is appealable. As we have said, this view is the result of the endeavour to reconcile the Code with the Court Fees Act. But is it really necessary to take such a view? One might suggest that if the decision under section 12 of the Court Fees Act leads to a rejection of the plaint under the Code, then such a

(1) (1894) 4 M.L.J. 183 (F.B.).

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rejection, amounting as it does to a decree, ought in all cases to be appealable; but where the decision does not lead to a rejection of the plaint, there is no reason why finality should not in every case attach to that decision. In this way, as we have observed, both the statutes can be reconciled. To explain what we mean, let us take this example. Supposing the Court decides that the proper court-fee has been paid, that decision should be final as between the parties and it should not be open to the defendant to question it. Again, let us suppose that the Court decides that the court-fee paid is deficient and requires the plaintiff to make good the deficiency and he complies with the order; here no question of the rejection of the plaint can arise and the decision as between the parties ought to be final. As we have said, however, this is not a matter which directly arises under the present reference; but the discussion is relevant in this way. It shows that the view taken in the numerous cases as to appealability does not necessarily rest upon the restrictive construction suggested of the opening words of section 12—we have already referred in this connection to *Lakshmi Amma v. Janamajayan Nambiyar*(1).

The only ground urged therefore disappearing, we can see no ground which would justify us in giving to the words "the said question" in the second part the limited meaning contended for. Though the question has been pointedly raised here for the first time, we may observe that our attention has been drawn to numerous

(1) (1894) 4 M.L.J. 183 (F.B.).

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cases where it was assumed, without discussion, that the High Court acting under section 12, clause (ii), has power to require the plaintiff to bring the additional fee payable in the lower Court even where its decision was as to category as distinguished from computation.

Our answer to the question is therefore in the affirmative.

G.R.

APPELLATE CIVIL.

*Before Sir M. Venkatasubba Rao, Kt., Officiating
Chief Justice, and Mr. Justice Horwill.*

In re KANTHEESWARAM EKANTHALINGASWAMI
KOIL THROUGH ITS TRUSTEE M. VEDANAYAGAM PILLAI
(FIRST RESPONDENT), PETITIONER.*

*Court-fee—Appeal in High Court—Future mesne profits claimed
by plaintiff-respondent in his memorandum of objections
filed in—Court-fee on—Payable, if—Decision of Taxing
Officer that court-fee is payable—Revision of—Jurisdiction
of High Court as to—Court Fees Act (VII of 1870), ss. 5,
7 and 11—Applicability and effect of.*

In a suit for possession the plaintiff omitted to claim in his plaint future mesne profits. He subsequently applied for permission to amend his plaint by including a claim for such profits. The lower Court, which passed a decree in his favour for possession, rejected that application. Against the decree for possession, the defendants filed an appeal in the High Court and in the memorandum of objections which the plaintiff filed, a claim was again put forward to future mesne profits. A difference arose between the plaintiff's Advocate and the Court Fee Examiner as to the necessity of paying a court-fee on the memorandum of objections. That difference was referred to the Taxing Officer, and he held that an *ad valorem* fee was payable.

* Civil Miscellaneous Petition No. 5722 of 1933.

Held that the decision of the Taxing Officer was wrong and that no court-fee was payable on the memorandum of objections.

Doraiswami v. Subramania, (1917) I.L.R. 41 Mad. 188 (F.B.), *Srinivasa Row v. Ramaswami Chetti*, (1900) 10 M.L.J. 144, and *Kandunni Nair v. Raman Nair*, (1930) I.L.R. 53 Mad. 540, referred to.

Held, however, that under section 5 of the Court Fees Act the decision of the Taxing Officer became final and was not revisable by the High Court and that therefore the court-fee paid could not be ordered to be refunded.

Ranga Pai v. Baba, (1897) I.L.R. 20 Mad. 398, *Kasturi Chetti v. Deputy Collector, Bellary*, (1898) I.L.R. 21 Mad. 269, *Swaminatha Aiyar v. Guruswami Mudaliar*, (1927) 53 M.L.J. 457, and *Kandunni Nair v. Raman Nair*, (1930) I.L.R. 53 Mad. 540, followed.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a certificate for the refund of the excess court-fee paid on the memorandum of cross-objections in Appeal Suit No. 211 of 1928 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 18 of 1923 (Original Suit No. 6 of 1924, Additional Sub-Court, Tinnevely).

T. R. Venkatarama Sastri for *K. R. Rama Ayyar* for petitioner.

Government Pleader (*K. S. Krishnaswami Ayyangar*) for Government.

Cur. adv. vult.

ORDER.

VENKATASUBBA RAO OFFG. C.J.—The plaintiff omitted to claim in his plaint future mesne profits and subsequently applied for permission to amend his plaint by including a claim for such

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profits. The lower Court, which passed a decree in his favour for possession, rejected that application. Against the decree for possession, the defendants filed an appeal in this Court and in the memorandum of objections which the plaintiff filed, a claim was again put forward here to future mesne profits. Two questions have been argued and they arise in this way. The plaintiff contended that on his memorandum of objections no court-fee was payable, as the claim which he preferred in appeal in this Court could not in principle differ from any claim he might have put forward in the Court of first instance. This contention was overruled by Mr. White, the then Taxing Officer, who held that an *ad valorem* court-fee was payable on the amount claimed. Two questions have been argued : first, is the decision of the Taxing Officer revisable by the High Court ? and secondly, is his decision on the merits right ?

On the first question, we are constrained to hold that under section 5 of the Court Fees Act the decision of the Taxing Officer has for every purpose become final. It is unnecessary to deal with the cases cited by Mr. Venkatarama Sastri bearing on the other sections of the Act such as section 12. For instance, he strongly contended that, in spite of the use of the word "final" in section 12, the High Court, in the exercise of its revisional jurisdiction, set aside, at the instance of the aggrieved plaintiffs, the orders of the lower Courts regarding the court-fee payable by them on their plaints [*vide* observations in *Muhamad Ellaiyas v. Rahima Bee*(1), *Kattiya Pillai v. Ramaswamia Pillai*(2) and *Secretary of State for*

(1) (1928) 56 M.L.J. 302.

(2) (1929) 56 M.L.J. 394.

India v. Raghunathan(1)]. The question here, however, turns on the specific wording of section 5 which prescribes that when a particular procedure is followed the decision given becomes final. In this case, a difference arose between the plaintiff's Advocate and the Court Fee Examiner as to the necessity of paying a court-fee on the memorandum of objections. That difference was referred to the Taxing Officer who held that an *ad valorem* fee was payable. The requirements of section 5 are thus fulfilled and we must, giving the words of that provision their plain and natural meaning, hold that the decision of the Taxing Officer has become final and cannot be impeached before us. It will be observed that, in the matter of the adjudication being final, the section makes no difference between the decision of the Taxing Officer and that of the Taxing Judge to whom he may refer the question. To be consistent, the plaintiff must go the length of contending that the decision of the Taxing Judge can be no more final under the section than that of the Taxing Officer ; the anomaly of this position is obvious. Apart from my interpretation of the section, the settled practice of the Court has been, dating back to the years 1897 and 1898, to treat the adjudication of the Taxing Officer as final and on a matter of this sort it is desirable not to depart from the established practice ; *Ranga Pai v. Baba*(2) and *Kasturi Chetti v. Deputy Collector, Bellary*(3) ; see also *Swaminatha Aiyar v. Guruswami Mudaliar*(4) and *Kandunni Nair v. Raman Nair*(5). While on this subject, I may usefully

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(1) (1933) I.L.R. 56 Mad. 744.

(2) (1897) I.L.R. 20 Mad. 398.

(3) (1898) I.L.R. 21 Mad. 269.

(4) (1927) 53 M.L.J. 457.

(5) (1930) I.L.R. 53 Mad. 540.

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point out that this section, like several other sections of the Court Fees Act, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court.

Although this conclusion should be sufficient to dispose of the matter, we have thought it proper to deal with the second contention, as the point raised is one of considerable importance. In dealing with this question, it is important to bear in mind the procedure prescribed by the Code of Civil Procedure in determining the amount of past and future mesne profits. As regards past mesne profits, the Court has the option either to pass a decree fixing the amount (that decree in a sense is "final", though the term is inappropriate, there being a single decree) or to pass a preliminary decree directing an enquiry as to the quantum of the profits and postponing the passing of the final decree till the enquiry is held. But, as regards future mesne profits, the Court has no such option but is bound in the first instance to pass a preliminary decree directing an enquiry. Then, turning to Order VII, rule 2, Civil Procedure Code, there can be no question that in the very nature of things it applies to past mesne profits alone, for it enacts that the amount of the claim shall be stated approximately and it is obvious that future mesne profits are incapable of being estimated, depending, as they do, upon an uncertain element, namely, the period of time which would intervene between the institution of the suit and the recovery of possession. In the Court Fees Act there are two sections which are relevant for the present purpose. Section 7 (i) prescribes that in suits for money including suits

for damages or compensation, the court-fee shall be computed according to the amount claimed. Mesne profits being in essence damages or compensation, this section applies to suits for mesne profits. Once again, this provision can have no reference to future mesne profits which, as already stated, are incapable of being ascertained, the plaintiff not being bound under Order VII, rule 2, Civil Procedure Code, to state approximately the amount of such profits. Section 11 of the Court Fees Act with the Madras amendment provides for each of the cases which Order XX, rule 12, Civil Procedure Code, contemplates. Whatever obscurity there was in the law previously, there seems to be no room for doubt under the present provisions. As already observed, in the matter of past mesne profits, a final decree may straightaway be passed; in such a case part 1 of section 11 applies, which enacts that, if the profits decreed are in excess of the profits claimed, the decree shall not be executed until the excess court-fee is paid. If, however, in respect of past mesne profits, the decree passed is preliminary and not final, the first clause of part 2 applies. It provides that, where an enquiry into past mesne profits is directed and the amount ascertained on such enquiry exceeds the amount claimed, no final decree shall be passed till the excess fee is paid. In the first case (that which falls under section 11, part 1), the decree that has already been passed shall not be executed; in the second case (that which falls under section 11, part 2, first clause), no final decree shall be passed. So much for mesne profits antecedent to the suit. Then, as to subsequent profits, the second clause

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of part 2 provides that, when a final decree is passed following upon a preliminary decree directing an enquiry (this is in strict accordance with Order XX, rule 12, Civil Procedure Code), the final decree shall not be executed until the requisite court-fee is paid. The point to note is, and that is very important, that in respect of future mesne profits, no portion of the court-fee is payable before the final decree is passed; even then, if the plaintiff does not seek to execute the decree which he has invited the Court to pass in his favour, he may altogether escape the payment of court-fee. This rule, which may appear anomalous, is, however, based upon an intelligible principle. A claim to subsequent mesne profits is in respect of a cause of action not arising at the date of suit; nevertheless, the Court is empowered to grant them by way of an exception to the general rule that the reliefs claimed should be confined to causes of action which had already arisen; but, as has been pointed out in *Doraiswami v. Subramania*(1), the power of the Court to award mesne profits subsequent to suit is discretionary. On this ground, it has been held that when in a suit for past and future mesne profits, the Court passes a decree for the past mesne profits, and says nothing in regard to the future mesne profits, a fresh suit to recover such profits is not barred by *res judicata*; *Doraiswami v. Subramania*(1), *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan*(2), *Bipulbihari Chakravarti v. Nikhilchandra Chakravarti*(3) and *Kalidas Rakshit v. Keshab Lal Majumdar*(4). Thus, the

(1) (1917) I.L.R. 41 Mad. 188 (F.B.). (2) (1918) I.L.R. 40 All. 292.
(3) (1929) I.L.R. 57 Cal. 381. (4) (1930) I.L.R. 58 Cal. 1040.

passing of a decree in respect of the subsequent profits being in the discretion of the Court (though except for special reasons the Court will not refuse to exercise the discretion in favour of the party), section 11 of the Court Fees Act has enacted that, prior to the passing of such decree, no court-fee is payable. Is there any reason then why in principle this rule, which applies in terms to suits, should be departed from in the case of appeals? It is contended by the learned Government Pleader that the body of the Act not having provided for appeals in the case of such claims, we must turn to the Schedules to the Act, which contain several articles relating not only to plaints but also to memoranda of appeal. True, the value of an appeal is not always the value of the suit but the value of the relief granted by the decree, which the party seeks to get rid of; in that sense, where the suit and the appeal are differently valued, the Schedules to the Act may furnish the appropriate article. In the matter in hand, there is no question of an amount being claimed in appeal in excess of what has been granted by the lower Court. On the other hand, the claim made here is identical with that made in the Court below, namely, to have the right to subsequent profits adjudicated upon. The lower Court has held that in the circumstances of the case the plaintiff ought not to be allowed to claim in this suit future mesne profits. It is this conclusion that the plaintiff attacks in the appeal. This very case illustrates the good sense underlying section 11, for we have held, confirming the decision of the lower Court, that the plaintiff ought not to be allowed to claim subsequent

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mesne profits by amending his plaint, and, as I have shown, he is not precluded by the doctrine of *res judicata* from claiming these very profits in a fresh suit, paying a proper court-fee on his plaint. The contention of the Government Pleader involves the levying of a double court-fee which, of course, would be an obvious injustice. I am clearly of the opinion that the decision of the Taxing Officer is wrong; but we are constrained, owing to our decision on the first point, to refuse to make an order granting a refund. We make no order as to costs.

HORWILL J.

HORWILL J.—I agree. The learned Government Pleader has put forward a somewhat novel argument that the main sections of the Court Fees Act do not apply to appeals, unless a section makes a specific mention of appeals, such as section 7 (iv) (c) does, and that the provisions which apply to appeals are to be found almost entirely in the Schedules. If that were so, then appeals would be governed almost wholly by the most general provisions, such as are found for example in Schedule I, article 1. None of the rulings quoted before us have gone anything like so far as this. The learned Government Pleader relies principally on the judgments of WHITE C.J. in *Reference under Court Fees Act, 1870* (1) and in a Full Bench case, *Ramakrishna Reddi v. Kotta Kota Reddi* (2), in which he sat soon afterwards. The subject-matter of each of those suits was a mortgage which was sought to be redeemed. In *Reference under Court Fees Act, 1870* (1), the dispute was confined in appeal to a sum of money which had

(1) (1905) I.L.R. 29 Mad. 367.

(2) (1906) I.L.R. 30 Mad. 96 (F.B.).

to be paid before the mortgage could be redeemed, and the discussion turned on the question, now long settled, whether the "subject-matter", which was to form the basis for the computation of the court-fee, meant, in relation to appeals, the subject-matter of the appeal or the subject-matter of the original suit; and it was held that court-fee had to be paid in appeal on the subject-matter of the appeal. As the subject-matter of the appeal was a sum of money, clearly section 7, subsection (ix), applicable to suits for redemption, could not be applied to the appeals, and it was held that the only provision of the Court Fees Act applicable would be article 1, Schedule I. This decision went no further. An examination of the wording of the various sections of the Court Fees Act shows that they are intended to apply to appeals also; for example, section 7 begins:

"The amount of fee payable under this Act in the suits next hereinafter mentioned. . . . shall be computed as follows:—"

In section 7 (iv) (f) we find the words "for accounts". Thus section 7 (iv) (f), on the face of it, is applicable only to suits for accounts; yet we find for all the clauses of section 7 (iv) that the method of computing the value of the suit is

"according to the amount at which the relief sought is valued in the plaint or memorandum of appeal".

Thus, the whole of section 7 (iv), although on the face of it applicable only to suits, yet gives the method of computing the value of appeals. The only reason why the word "appeal" is found here is that reference is made to the plaint; and if no mention were made of the memorandum of appeal, appeals as well as suits would have to be valued according to the amount at which the

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relief sought is valued in the plaint. In the other clauses of section 7 and in other sections no reference is made to the memorandum of appeal except where there is some necessary difference in the method of valuing a suit and an appeal. There can be no doubt that all the High Courts have always taken it for granted that appeals are valued in the same way as suits.

With regard to the question as to what mesne profits should be included in valuing an appeal, the cases quoted by the learned Government Pleader have been of defendants who have appealed against decrees for possession with mesne profits. It is, however, necessary to maintain a distinction between an appeal by a plaintiff, who has had his suit dismissed, and that of an unsuccessful defendant. The latter has to rid himself of the decree and therefore everything that has been granted to the plaintiff in the decree and against which he wishes to appeal must be the subject-matter of the appeal, even though more has been given in the decree (by way of interest or ascertained mesne profits, for example than was due to the plaintiff at the time of filing his suit. But the plaintiff who has had his suit dismissed is in fact told that he had no cause of action against the defendant at the time of filing his suit and it is against this adverse finding that he has to appeal. After having his suit dismissed he goes to the appellate Court in the same position as at the time of filing his suit. Even so long ago as *Srinivasa Row v. Ramaswami Chetti*(1), this distinction between the positions of a defendant-appellant and a plaintiff-appellant

(1) (1900) 10 M.L.J. 144.

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was considered so obvious as not to require discussion, and this distinction has always since been maintained. The power of a Court to grant future mesne profits and future interest is an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of filing his suit and that the Court can give him no more. These provisions were clearly made to prevent the constant litigation that would be necessary if persons unlawfully kept out of possession of their lands had to file suits every three years for mesne profits that had accrued since the filing of the previous suit. Although, therefore, a plaintiff can ask in his plaint for future mesne profits, no cause of action for these mesne profits has arisen and no court-fee is payable on that part of his claim. If, therefore, the position of a defeated plaintiff is the same when he files his appeal as it was at the time of filing his plaint, he would not have to pay court-fee in appeal on mesne profits that had accrued after the filing of his plaint. The decided cases have in fact gone further and held that even a defendant-appellant has not to pay court-fee on mesne profits that have not been ascertained. It is true that in *Punya Nahako, In re*(1) WALLACE J. says:

“ : the applicant who seeks to be relieved from the payment of such mesne profits must pay court-fee on such mesne profits up to the date of his appeal memorandum ” ;

but this case is now considered to be no longer good law. In *Kandunni Nair v. Raman Nair*(2), for example, it was made clear that unless past

(1) (1926) I.L.R. 50 Mad. 488, 493.

(2) (1930) I.L.R. 53 Mad. 540.

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mesne profits had been exactly ascertained no court-fee was payable on them. The Madras amendment to section 11 of the Court Fees Act has provided that the Court may direct an enquiry as to future mesne profits and that a decree cannot be executed until court-fee is paid on those mesne profits. It would seem to follow from this that until a decree is sought to be executed no party is bound to pay court-fee on those profits. The present case is an example of the complications and injustice that result where a party is made to pay court-fee on future mesne profits at the time of the appeal. As the refusal of a Court to grant future mesne profits does not operate as *res judicata*, the defeated party can again claim future mesne profits; and, if he is compelled to pay court-fee in the first instance, he would have to pay it again when he instituted a fresh suit. That is what has happened with the present petitioner, who has had his claim for future mesne profits negatived both in the trial Court and in this Court and who will be free to bring a fresh suit for these profits.

Although we are of opinion that there was no need for the petitioner to have paid court-fee on his memorandum of cross-objections claiming mesne profits, we regret that we cannot order refund of the court-fee paid. Mr. Venkatarama Sastri has quoted to us many cases relating to section 12 of the Court Fees Act to show that, even where the statute says that the decision of the appellate Court shall be final, all the High Courts have nevertheless been willing to reopen the question where they considered that the decision of a subordinate Court had been erroneous. It is

unnecessary to refer to the cases quoted by Mr. Venkatarama Sastri because the learned Government Pleader does not deny that under section 12 High Courts have been prepared to interfere; but we cannot accept Mr. Venkatarama Sastri's argument that the word "final" used in sections 5 and 12 of the Act does not mean "final" in the ordinary sense of the word, as being conclusive between the parties, but as conferring a mere temporary finality to any contentions that parties may raise during the preliminary proceedings of getting the appeal filed. We find no justification for this contention in any of the cases quoted to us and Mr. Venkatarama Sastri has not attempted to support this argument from any reported cases. His argument seems to be that if a final decision under section 12 can be interfered with by the High Court, it cannot really be final and that the explanation of the word "final" given by him is the only reasonable one. We would however explain the interference of the High Courts with orders passed under section 12 as the exercise of the revisional jurisdiction given to the High Court to correct the errors of subordinate Courts, a power which has not been taken away by any provisions of the Court Fees Act. Section 5, however, applies to proceedings in the High Court itself, where a question of revision would not arise. All Courts have an inherent right to correct mistakes made through inadvertence, but an error based upon an interpretation of the past practice of the Court and upon an interpretation of the law cannot be considered to be an inadvertence. There is no reason therefore why the natural interpretation of section 5, viz.,

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that the decision of the Taxing Officer shall be final except when in his opinion the matter is of such importance that it should be referred to the Chief Judge of the Court for his final decision, should not be accepted. That the decision of the Taxing Officer is final and binding on all parties was laid down in *Ranga Pai v. Baba*(1). The matter was made clearer in *Kasturi Chetti v. Deputy Collector, Bellary*(2) where it was pointed out that, if the word "final" in section 5 is not final in the ordinary sense of the word, neither is the decision of the Judge to whom the matter is referred by the Taxing Officer, final; and no finality can be reached at all. In *Kandunni Nair v. Raman Nair*(3) the question was precisely the same as in *Ranga Pai v. Baba*(1), the earlier case being followed and approved. Neither in *Kasturi Chetti v. Deputy Collector, Bellary*(2) nor in *Kandunni Nair v. Raman Nair*(3) was any doubt thrown upon the accuracy of the law laid down in *Ranga Pai v. Baba*(1) that the decision of the Taxing Officer was final and binding not only on the party who had disputed the correctness of the taxation but also on the respondent who was no party to it. No case has been quoted to us in which this well-settled interpretation of section 5 has been even doubted. We must therefore hold that although the decision of the Taxing Officer in this case was wrong it is nevertheless binding on the petitioner.

The petition is therefore dismissed. There will be no order as to costs.

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(1) (1897) I.L.R. 20 Mad. 898.

(2) (1898) I.L.R. 21 Mad. 269.

(3) (1930) I.L.R. 53 Mad. 540.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Mockett.

ANUMOLU NARAYANA RAO AND ANOTHER, MINORS BY THEIR
MOTHER AND GUARDIAN, ANUMOLU RAMADEVAMMA
(DEFENDANTS 2 AND 3), APPELLANTS,

1936,
August 31.

v.

GHATTARAJU VENKATAPPAYYA AND FIVE OTHERS
(PLAINTIFF AND DEFENDANTS 4 TO 7 AND NIL),
RESPONDENTS.*

*Negotiable Instruments Act (XXVI of 1881), sec. 118—
Promissory note—Presumption of consideration—Unavail-
ability of, when suit on promissory note is filed against
undivided sons of Hindu promisor governed by Mitakshara
law after the latter's death—Indian Evidence Act (I of
1872), sec. 114—Presumption—Applicability to such a
case.*

A suit on a promissory note instituted against the undivided sons of a Hindu promisor governed by the Mitakshara law, after the latter's death, cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation of the sons in respect of the property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of a debt due by the father. In such a case the onus of proving the existence of the debt must *prima facie* be laid on the creditor who can call in aid the presumption permissible under the general law of evidence, namely, section 114 of the Indian Evidence Act, and not the presumption under section 118, clause (a), of the Indian Negotiable Instruments Act.

APPEAL against the decree of the Court of the Subordinate Judge (Additional) of Guntūr in Original Suit No. 61 of 1928.

* Appeal No. 89 of 1931.

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C. Sambasiva Rao for appellants.

Ch. Raghava Rao for respondents.

Cur. adv. vult.

JUDGMENT.

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VARADACHARIAR J.—This appeal arises out of a suit for money instituted by the endorsee of a promissory note (Exhibit A) dated 8th August 1925 for Rs. 5,000 executed in favour of the fourth defendant by one A. Venkatarayudu, deceased, (hereinafter referred to as A.V.). The endorsement purports to have been made on 2nd July 1926 in consideration of the plaintiff undertaking to pay off the debt due by the fourth defendant to one G. Venkatarayudu (hereinafter referred to as G.V.) under Exhibit B, a promissory note dated 2nd August 1924 for Rs. 4,000. It is common ground that, after the suit note was endorsed to the plaintiff, a notice was sent through the fourth witness for the defendant, a Vakil of Guntur, demanding payment of the money, and that A.V. sent a reply stating that the promissory note was devoid of consideration. The reply notice is not now forthcoming and it is therefore not possible to say, nor is the fourth witness for the defendant able to remember, what more was stated in it as to the circumstances under which and the purpose for which the note was executed. Notwithstanding this reply which repudiated liability, this suit was instituted only on the last day of the period of limitation and more than a year and a half after A.V.'s death.

The appellants, who were defendants 2 and 3 in the lower Court, are the two undivided minor sons of A.V. and the first defendant is his undivided

younger brother. In the written statements the defendants set out in some detail the circumstances which according to their information and belief led to the execution of the suit note. Briefly stated, the story was to the effect that in certain domestic disputes between A.V. and G.V., who were brothers-in-law, the fourth defendant, a common friend and relation, was requested to intercede with a view to persuade G.V. to take back his wife (the sister of A.V.) whom he had sent away or threatened to send away to A.V.'s house and that, by way of assuring A.V. that both parties will act according to his advice in the matter, A.V. executed the suit note in favour of the fourth defendant, and a brother of G.V. (on G.V.'s part) executed a similar promissory note for Rs. 5,000 in favour of the fourth defendant. The written statement filed by the first defendant was fuller in particulars than that filed on behalf of defendants 2 and 3 by their mother. In answer to the plaintiff's allegation that he was a holder in due course, it was stated that he had paid no consideration for the transfer and that he was not the real transferee but only acting on behalf of G.V. who, on account of quarrels with the defendants' family, was trying to harass them by taking a transfer of this note which he knew was not supported by consideration.

It is not denied that, before the institution of this suit, the relations between G.V. and the defendants had become very strained and had led to civil and criminal proceedings. It is also admitted by some of the witnesses examined on the plaintiff's side that G.V. had put away his wife (the sister of A.V.) and married another wife,

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but they would have it that this happened only after A.V.'s death and in consequence of the disputes between G.V. and the first defendant and had nothing to do with the execution of Exhibit A by A.V.

Among the issues framed on 13th February 1929, the first issue raised the question whether the suit note was executed by A.V. and was supported by consideration. The first defendant had filed his written statement on 2nd February 1929 and on 8th April 1929 the plaintiff's pleader endorsed on the plaint that the claim against the first defendant was given up. In explanation of this step it was stated that the first defendant was in jail in consequence of a conviction in a sessions case and that to avoid delay he was given up. The step that followed makes one suspicious as to the true reason for adopting this course. The later conduct of the litigation shows that the plaintiff was not prepared to examine either G.V. or the fourth defendant as a witness in the case. The issue as originally framed cast on the plaintiff the onus of proving execution as well as consideration and that would have necessitated the plaintiff leading evidence in the first instance. On 16th April 1929 a petition was filed on the plaintiff's side laying stress on the fact that the first defendant had been given up and praying that, as the written statements of defendants 2 and 3 practically admitted the genuineness of the note and raised in substance a plea of absence of consideration, the first issue should be recast so as to throw the onus of proof on the defendants. The Court acceded to this suggestion and,

overruling the objection of the appellants to such a course, recast the issue in its present form.

At the trial two out of the three attestors to the suit note were examined as the first and second witnesses for the defendants and they supported the defendants' version as to the origin and purpose of the note. The remaining attestor, a brother of G.V., was examined as the fourth witness for the plaintiff; and he deposed that the suit note was executed in the *kottu* or business place of the fourth defendant who paid the consideration in cash to A.V. Evidence to the same effect was given by the first witness for the plaintiff, a brother of the fourth defendant (the promisee). The plaintiff, as the third witness, spoke to the transfer in his favour being supported by consideration and stated that he had executed a *paddu* (or memo) to G.V. undertaking to discharge the fourth defendant's debt to G.V. under Exhibit B.

The learned Subordinate Judge expressed himself unable to accept the defendants' story as to the object of the execution of the suit promissory note and held that it was supported by consideration. He also held that the plaintiff was a holder in due course and accordingly gave him a decree against the family properties in the hands of defendants 2 and 3. Hence this appeal by defendants 2 and 3. The plaintiff was also given a decree against the fourth defendant (as endorser) who appears to have submitted to the decree.

It will be convenient to deal at the outset with the question of the frame of the issue and the onus of proof which was argued before us at some length. Section 118, clause (a), of the Negotiable Instruments Act provides that every

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negotiable instrument shall be presumed to have been made and endorsed for consideration ; and, according to clause (g), the holder of a negotiable instrument shall be presumed to be a holder in due course. Though this section is not, like sections 119 to 122, limited in terms to a "suit upon the instrument," it seems only reasonable to hold that the "special rules of evidence" laid down in section 118 must have been intended to apply only as between the parties to the instrument or those claiming under them. In other cases the presumption can only be in the terms enacted in section 114 of the Evidence Act (*vide* ill. c) which by the use of the expression "may presume" leaves it to the Court to apply the presumption or not according to circumstances. When a suit like the present is instituted against the undivided sons of a Hindu promisor governed by the Mitakshara law, the suit cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation in respect of property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of a debt due by the father and this way of stating the position would *prima facie* throw on the creditor the onus of proving the existence of a debt.

The inappropriateness of applying even as against the undivided sons of the executant the provisions of the Negotiable Instruments Act can be shown by one or two illustrations. The sons can always avoid liability by proving the illegality or immorality of the debt but no such defence is contemplated or permitted by the

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Negotiable Instruments Act. Again, take a suit by the endorsee of a promissory note executed by the father, it being presumed or proved that he is a holder in due course ; the endorsee may be entitled to a decree against the executant (father) even after proof that, as between the original parties to the note, there was no consideration at all. But in such a case, when absence of consideration has been proved, it will be preposterous to postulate the existence of a "debt" and impose on the sons a pious obligation in respect thereof. If, as observed in *Krishnanand Nath Khare Ram v. Raja Ram Singh*(1), one has to reconcile oneself to

"the difficulty of applying the legislative provisions of Western law to the ancient customs and traditions of the law of the joint Hindu family . . .",

one need not add to this difficulty by an unreasonable extension of the provisions of the Negotiable Instruments Act. With reference to the possibility of regarding the "family" itself as the "maker" of a promissory note executed by the father or manager, see the observations of PAGE J. in *Ramgopal Ghose v. Dharendra Nath Sen*(2)

It must now be taken as established by the decision of the Judicial Committee in *Sadasuk Janki Das v. Sir Kishan Pershad*(3) that none can be held liable on a negotiable instrument unless his liability appears on the instrument itself in a manner recognized by law. An heir or legal representative will of course be liable if his ancestor or predecessor was liable on the instrument. Any other person can be made liable

(1) (1922) I.L.R. 44 All. 393, 396. (2) (1927) I.L.R. 54 Cal. 380.
(3) (1918) I.L.R. 46 Cal. 663 (P.C.).

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only upon the consideration and not on the note. If a decree had been obtained against the father, his undivided sons may perhaps become liable to discharge the decree debt, *Periasami Mudaliar v. Seetharama Chettiar*(1), apart from any proof of the debt independently of the decree; and it might perhaps make no difference in such a case that the decree against the father was based on the presumption laid down in section 118 of the Negotiable Instruments Act. Likewise, a decree thus obtained against the father may, by the operation of section 53 of the Code of Civil Procedure, 1908, become executable against the interests of the sons in the family property, leaving it open to them to escape liability only on proof of illegality or immorality, without entitling them to call upon the creditor to establish the existence of a "debt" apart from the decree. No such special considerations apply to a case where, as in the present, no decree has been obtained against the father and the suit is brought after his death against his undivided sons. In this class of cases it seems to me right to hold that the onus of proving the existence of a debt must *prima facie* be laid upon the creditor, who can of course call in aid the presumption permissible under the general law of evidence, namely, section 114 of the Evidence Act.

On behalf of the plaintiff-respondent Mr. Raghava Rao relied on the decision in *Nachiappa Chetty v. Dakshinamurthy Servai*(2) as supporting his contention that, in a suit on the father's note, the burden of proof is not different in respect of the claim against the sons from that applicable to the claim against the father. On the facts it

(1) (1903) I.L.R. 27 Mad. 243 (F.B.). (2) (1915) 28 I.C. 345

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may be pointed out that in that case the suit had been instituted during the father's lifetime. This is what made it possible for the learned Judges to say that the sons had been added only to give them an opportunity of proving, if they can, that the debt was incurred for illegal or immoral purposes. Similar language cannot be appropriately used where the suit is instituted after the father's death and the sons are the only defendants. If the learned Judges intended to lay down the rule in broad terms, so as even to cover a case like the present, I am, with all respect to them, unable to concur in that view. Their conclusion is mainly based on the decision in *Krishna Ayyar v. Krishnasami Ayyar*(1), but, as I read the judgments of SHEPHARD and SUBRAHMANIA AYYAR JJ. in the last-mentioned case, their reasoning, far from leading to such a conclusion, seems to me to suggest the contrary result.

The actual decision in *Krishna Ayyar v. Krishnasami Ayyar*(1) related to the propriety of joining in the same action a claim for a personal decree against the executant of a promissory note and a claim to recover the debt from the shares of his coparceners in the joint property of the family. While holding such joinder to be permissible, both SHEPHARD and SUBRAHMANIA AYYAR JJ. clearly recognize that the liability of the executant is on the note, while the liability of the other coparceners is on the debt, and is an obligation arising under the Hindu law; see also *Seshayya v. Sanjivarayadu*(2) and *Ramasami Nadan v. Ulaganatha Goundan*(3). I am unable

(1) (1900) I.L.R. 23 Mad. 597.

(2) (1933) 67 M.L.J. 393.

(3) (1898) I.L.R. 22 Mad. 49, 62, 63 (F.B.).

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to agree that in such cases the cause of action as against the two sets of defendants can be said to be the same in the sense that evidence sufficient to establish the liability of the executant would necessarily and always suffice to establish the liability of the other set of defendants. In the Full Bench judgment in *Mallesam Naidu v. Jugala Panda*(1) there is no doubt that the language employed may seem to support the contention that the cause of action is the same as against both father and son. But the question then under discussion was whether a separate cause of action accrued as against the sons after the father's death or the cause of action against both accrued once for all during the father's lifetime.

Mr. Raghava Rao contended that, so far as the creditor was concerned, the same evidence would suffice to establish the liability both of the father and of the sons, and the only difference between them was that, by way of defence, the sons can plead the illegal or immoral character of the debt. He also laid emphasis on the circumstance that the extinction of the father's liability or its unenforceability on the ground of limitation will equally avail the sons as a defence. But this contention ignores the fact that, for purposes of joinder as also the continued subsistence of the liability, the decision in *Krishna Ayyar v. Krishnasami Ayyar*(2) draws no distinction between the claim against the sons and the claim against the other coparceners of the executant. Nevertheless there can be no doubt that, in respect of the claim against the coparceners who are

(1) (1938) I.L.R. 25 Mad. 292 (F.B.). (2) (1900) I.L.R. 23 Mad. 597.

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not sons, there lies on the plaintiff-creditor himself the further burden of proving that the suit debt was incurred for family purposes, cf. *Abdul Majid Khan v. Sharaswatibai*(1). In this view, the decision in *Krishna Ayyar v. Krishnasami Ayyar*(2), even if it can be read as laying down that the cause of action as against the non-executants is the same as that against the executant of the note, will not support the conclusion that, as against all the defendants joined in a suit of the kind there contemplated, the onus of proof resting on the plaintiff will be the same.

Reliance was placed by Mr. Raghava Rao on *Ayyasami Pillai v. Gurusami Naicken*(3), *Nataraja Naicken v. Ayyaswami Pillai*(4) and *Thankammal v. Kunhamma*(5) in support of the contention that the liability even of non-executants may be described as one on the note. The observations in these cases are opposed not only to the judgments in *Krishna Ayyar v. Krishnasami Ayyar*(2), *Seetharama Chetty v. Seshiah Chetty*(6) and *Shanmuganatha Chettiar v. Srinivasa Ayyar*(7), but to the principle of the decision of the Judicial Committee in *Sadasuk Janki Das v. Sir Kishan Pershad*(8). The assumption in *Nataraja Naicken v. Ayyaswami Pillai*(4) and *Thankammal v. Kunhamma*(5) that the decision of the Privy Council in *Karmali Abdulla v. Karimji Jiwani*(9) supports the view that even non-executants can be held liable on the bill or

(1) (1933) 39 L.W. 72 (P.C.). (2) (1900) I.L.R. 23 Mad. 597.
(3) (1916) 3 L.W. 463. (4) (1916) 32 M.L.J. 354.
(5) (1918) 37 M.L.J. 369. (6) 1912 M.W.N. 1011.
(7) (1916) I.L.R. 40 Mad. 727. (8) (1918) I.L.R. 46 Cal. 663 (P.C.).
(9) (1914) I.L.R. 39 Bom. 261 (P.C.).

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note seems to me, with all respect, unwarranted, because, as pointed out in *Shanmuganatha Chettiar v. Srinivasa Ayyar*(1), their Lordships expressly say that the suit should not be regarded as one on the bill but must be treated as "an action of accounting against both Rashid and Karim".

Reference has been made in some of the judgments relied on by Mr. Raghava Rao to the principle that, when the loan and the note are contemporaneous, there can be no cause of action independent of the note, because that is the only contract. Judicial opinion is by no means unanimous as to this proposition [see *Chinnayya Naidu v. Srinivasa Naidu*(2) and *Ramasami Pillai v. Murugiah Padayachi*(3)], but, in any event, that proposition can hold good only as between the parties to the note and has therefore no bearing on the question now under consideration.

In *Satyanarayana v. Mallayya*(4) there is no doubt an observation that the difference between the claim on the note and the claim on the debt is a verbal distinction and not one of substance. The observation may perhaps be justified where, as in *Krishna Chettiar v. Nagamani Ammal*(5), the distinction was insisted on merely with reference to the interpretation of the frame of the suit, though even in this respect the Privy Council in *Sadasuk Janki Das v. Sir Kishan Pershad*(6) insisted on the distinction. It seems to me too sweeping to say that for all purposes the distinction is unsubstantial. To take one instance, the difference

(1) (1916) I.L.R. 40 Mad. 727.

(3) (1935) I.L.R. 59 Mad. 268 (F.B.).

(5) (1915) I.L.R. 39 Mad. 915.

(2) (1934) 67 M.L.J. 912.

(4) (1934) I.L.R. 58 Mad. 735 (F.B.).

(6) (1918) I.L.R. 46 Cal. 663 (P.C.).

will be very material when the Court is called upon to apply the provisions of sections 120 and 121 of the Negotiable Instruments Act.

Some of the cases above referred to also bear on the question whether the plaintiff, as endorsee of the note, is limited to the remedy available on the note or can also claim to recover the debt from the property of non-executants, on the ground of their liability under the Hindu law. Judicial opinion is divided on the point, but, as I have come to the conclusion that this appeal must succeed on the merits even on the assumption that the plaintiff is entitled to recover the debt from the undivided sons of the executant and even on the footing that he is entitled to invoke the aid of section 118 of the Negotiable Instruments Act, I do not pause to consider the necessity or desirability of obtaining the opinion of a Full Bench on the questions above discussed. It has to be borne in mind that, when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances, cf. *Yellappa Ramappa Naik v. Tippanna*(1), and that even the onus under section 118 of the Negotiable Instruments Act need not always be discharged by direct evidence adduced by the defendant; *Muhammad Sharif Khan v. Muhammad Moozzum Ali Khan*(2), *Singar Kunwar v. Basdes Prasad*(3) and *Bishambar Das v. Ismail*(4). Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce

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(1) (1928) 56 M.L.J. 287 (P.C.).
(3) (1930) 124 I.C. 717.

(2) (1922) 79 I.C. 464.
(4) A.I.R. 1933 Lah. 1029.

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better evidence deliberately abstains from doing so ; *Murugesam Pillai v. Manickavasaka Desika Gnana Sambandha Pandara Sannadhi*(1), *Guruswami Nadar v. Gopalasami Odayar*(2) and *Raghavendra Rao v. Venkataswami Nayakan*(3).

In dealing with the evidence, we are obliged to refer at the outset to certain defects and omissions in the lower Court's discussion of it which are so material as seriously to impair the value of the judgment under appeal. Even in cases where the defendant is the heir-at-law of the obligor and as such bound by the recitals contained in the document executed by his predecessor, the Court will, in weighing the evidence, be justified in taking into account the fact that the defendant was not himself a party to the transaction and the plaintiff and those supporting the plaintiff are thus placed in a position of advantage. The disparity arising from this circumstance becomes all the greater when the defendants are minors. And yet, the learned Judge has in this case made strong comments on the omission of the defendants to disclose the source of their information as to the circumstances attending the execution of the suit promissory note and upon the differences in details between the written statement of the first defendant and the written statement filed by the mother on behalf of defendants 2 and 3. On the other hand, it does not appear to have occurred to him at all that the omission of the plaintiffs to call the fourth defendant and G.V. to give evidence in the case was, in the circumstances, of great significance.

(1) (1916) I.L.R. 40 Mad. 402 (P.C.).
(2) (1919) I.L.R. 42 Mad. 629.
(3) (1929) 30 L.W. 966, 971.

[His Lordship discussed the evidence and proceeded :—]

Reviewing the evidence with due regard to the considerations above set forth, we are of opinion that the evidence given by two of the attestors (the first and the second witnesses for the defendants) in support of the appellants' story was at least sufficient to shift the onus on to the plaintiff and that the latter had deliberately chosen not to place the best evidence before the Court. That the third attestor (fourth witness for the plaintiff) supports the plaintiff does not count for much in the circumstances of this case, because that witness is a brother of G.V. and, according to the appellants, G.V. is behind the plaintiff in this suit. The episode that the second witness for the plaintiff has denied does not seem to us such a vital part of the defendants' case that the discrediting of that episode on the strength of her testimony must of itself disprove the substance of the defendants' case. Her evidence has to be weighed in the light of the admitted fact that the house in which she lives has long been and still continues to be under mortgage to G.V. ; and it is curious that she was in the first instance summoned on the appellants' side. We must also observe that we are not satisfied with the reasons given by the learned Judge for discrediting the third witness for the defendants who appears to be a man of respectability and not merely of "professed" respectability. A.V. was no doubt the witness's aunt's daughter's son, but that may itself be a reason for his being informed of domestic matters arising in A.V.'s family. We do not see any change, as the learned Judge seems

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to find, between the version given by the second witness for the defendants and that spoken to by the third witness for the defendants. Their stories relate to different stages.

Mr. Raghava Rao rightly urged that the learned Subordinate Judge has had the advantage of seeing the witnesses before him and has expressed himself favourably impressed by the demeanour of the second and the third witnesses for the plaintiff in the witness-box. The cases referred to in this connection do not profess to lay down a rule of law limiting the powers of the appellate Court but only indicate a rule of caution for its guidance. We have duly borne this caution in mind, but, for the reasons we have already given, we find ourselves unable to give the same weight to the lower Court's judgment in this case as we should be disposed to do in other circumstances. In the view that we take as to the effect of the whole evidence adduced in the case, this appeal must be allowed and the suit dismissed as against defendants 2 and 3 with costs here and in the Court below, payable by the plaintiff.

MOCKETT J.

MOCKETT J.—I agree. As to the questions of fact which arise in this appeal I have nothing to add to what my learned brother has said. It is very apparent that the trial Judge has failed to direct his mind to the proper aspect of some of the salient features of this case, especially the remarkable omission by the plaintiff to call the fourth defendant and G.V. It is possible no doubt that the general handling of this case was due to the frame of the issues. But in any event, when the whole facts were before

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the Court, the absence from the witness-box of the two persons to whom must have been known the real facts should have been a helpful guide to the Court in arriving at a decision; but this feature of the evidence seems to have been given little, if any, attention. The suggestion thrown out in this appeal that the defendants should have called the fourth defendant and G.V. is to me wholly unconvincing.

Mr. Raghava Rao and Mr. Sambasiva Rao have addressed us fully on the question of onus of proof and a number of cases have been cited. It is suggested by Mr. Raghava Rao that there is a conflict of authority with regard to the position, but it seems to me that the matter now directly before us has not been concluded by authority. The whole difficulty arises from what is described in *Krishnanand Nath Khare Ram v. Raja Ram Singh*(1) as

“applying the legislative provisions of Western law to the ancient customs and traditions of the law of the joint Hindu family. . . .”

Section 118 of the Negotiable Instruments Act is essentially a product of Western law. Long before the provisions of the Bills of Exchange Act of 1882, it was one of the rules of the Law Merchant that consideration was presumed in the case of negotiable instruments. The Indian Evidence Act of 1872 allows the Court to presume that a bill of exchange was accepted or endorsed for good consideration and section 118 of the Negotiable Instruments Act of 1881 introduces a statutory presumption that all negotiable instruments are made or drawn for consideration. An

(1) (1922) I.L.R. 44 All. 393, 396.

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examination of the Indian case-law shows that complications which have arisen in suits apparently founded on promissory notes brought against members of a joint Hindu family have been matters really of pleading and joinder of parties and causes of action. No such difficulties arise in England and no English cases have been cited in argument. It is natural that from the Indian case-law should guidance be sought, when a relic of the Law Merchant as to burden of proof is intermingled with the doctrine of family necessity. Much reference has been made to *Nachiappa Chetty v. Dakshinamurthy Servai*(1), which at first sight appears to be in favour of the respondents in this case. But it must be observed that in that case the father was alive at the time of the suit and his sons were joined with him as defendants. The suit was primarily against the maker of the negotiable instrument, a party to the instrument. Now in this case the essential feature of liability under a negotiable instrument is absent. The decision of the Judicial Committee in *Sadasuk Janki Das v. Sir Kishan Pershad*(2) is clear that in order to make a person liable on a promissory note it must be shown that his name appears upon it. The decision of the Judicial Committee in *Karmali Abdulla v. Karimji Jiwanji*(3) does not seem to be in the least at variance with *Sadasuk Janki Das v. Sir Kishan Pershad*(2). At page 273 their Lordships point out that the action is one for an account. In this case, the defendants' names do not appear upon the instrument; their father's

(1) (1915) 28 I.C. 845.

(2) (1918) I.L.R. 46 Cal. 663 (P.C.).

(3) (1914) I.L.R. 39 Bom. 261 (P.C.).

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name appears upon it, but they are not sued as the legal representatives of their father. They are sued under the provision of Hindu law by which sons are liable for their father's debts. In other words, the suit is on a debt and not on the promissory note at all. When that distinction is borne in mind, it seems to me that this case presents little difficulty. My learned brother has examined the cases and I do not wish to repeat his analysis. It will be seen that the point now raised has never before come up for decision in the clear-cut form in which it is now presented to us. As stated in *Satyanarayana v. Mallayya*(1), the difference between a claim on a promissory note and a claim on a debt may in certain cases be lacking in substance and I think RAMESAM J. in delivering the Judgment of the Full Bench had such circumstances in mind. But, in a case such as is before us, the form of the suit is of vital importance to the defendants and for the reason that if the burden is on them to negative the acts of their father, they are in a difficult, if not in a hopeless, position. The defendants are mere children without any knowledge of the facts. The plea therefore in this case as to the form of the action is, as I have said, of great importance and I imagine must always be so in suits brought after the death of the father against the sons ostensibly on a promissory note. As pointed out by my learned brother, some doubt has arisen in this matter owing to the observations made in *Ayyasami Pillai v. Gurusami Naicken*(2), *Nataraja Naicken v. Ayyasawmi Pillai*(3) and *Thankammal*

(1) (1934) LL.R. 58 Mad. 735 (F.B.).

(2) (1916) 3 L.W. 463.

(3) (1916) 32 M.L.J. 354.

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v. *Kunhamma*(1). I am inclined however to think that COUTTS TROTTER J. in *Ayyasami Pillai v. Gurusami Naicken*(2) had in mind the importance of the promissory note rather as evidence of the debt, and in none of these cases was the question of burden of proof given any prominence. So far as *Nataraja Naicken v. Ayyasawmi Pillai*(3) is concerned, personally I see nothing very extraordinary in a suit being framed on the note against the maker and under the Hindu law against the members of the family. On the other hand, I find it much more difficult to contemplate a suit on a negotiable instrument against anybody not a party to it. The distinction as to the form of pleading is pointed out by PAGE J. in *Ramgopal Ghose v. Dhirendra Nath Sen*(4) where a suit in the alternative is discussed by the learned Judge at page 393. In *Seshayya v. Sanjivarayadu*(5) CORNISH J. indicates the two sorts of liability—of the maker on the note and of the coparcener on the debt under Hindu law. No doubt the observations in reported cases suggest a difference of opinion on the subject. In this respect it must be repeated that the short question as to onus of proof in such a case as ~~this~~ was never considered in any of those cases, and a careful examination of the cases shows that what was being considered was the question of the sons' liability for the amount of the note. But it has now to be considered and answered; and I take the view that to hold that the onus of proof as to consideration rests on a defendant sued on a

(1) (1918) 37 M.L.J. 369.

(3) (1916) 32 M.L.J. 354.

(2) (1916) 3 L.W. 463.

(4) (1927) I.L.R. 54 Cal. 380.

(5) (1933) 67 M.L.J. 393.

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promissory note on which his name does not appear is contrary to the view of the Judicial Committee as clearly expressed in *Sadasuk Janki Das v. Sir Kishan Pershad*(1). I find it impossible to suppose that the presumption as to consideration was intended to operate except as between parties to a negotiable instrument. Although Hindu law may make a defendant-son liable for the amount of a negotiable instrument signed by his father, nothing except his written name thereon can make him a party thereto, liable as a party, and subject to the statutory presumption affecting consideration between parties. When, as here, the signatory, father, is dead and it is sought to make any one other than his legal representatives as such liable for money lent under a promissory note, it seems to me that any subtleties found by the Court in *Nataraja Naicken v. Ayyasawmi Pillai*(2) disappear and the suit can only be on the debt of which the promissory note is evidence; and personally I have little difficulty in holding that, that being so, the burden of proof from the beginning must be on the plaintiff to prove the debt like any other debt.

The above view is not, I think, contrary to any actual decision of this Court, nor does it affect any question of liability for a debt; and it is only necessary to state it in a case such as this when a nice question of burden of proof involves the allocation of form of action to its precise legal category.

G.R.

(1) (1918) I.L.R. 46 Cal. 663 (P.C.).

(2) (1916) 32 M.L.J. 354.

APPELLATE CIVIL.

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

1936,
August 7.

SRI SRI SRI NANDAMANI ANANGA BHIMA
DEO KESARI GAJAPATHI (N_{IL}), APPELLANT,

v.

SRI MADANO MOHONO DEO (DEFENDANT),
RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Application in accordance with law—Vakil without vakalat—Execution application presented by—Application in accordance with law, if.

The presentation of an execution application by a Vakil who has no vakalat authorising him to present it is no presentation at all in the eye of the law and is a mere nullity. The application is in such a case not one made in accordance with law.

APPEALS under Clause 15 of the Letters Patent against the judgment and orders of KING J., dated 18th March 1935 and passed in Appeals Against Appellate Orders Nos. 12 to 14 of 1929 preferred to the High Court against the orders of the District Court of Ganjam in Appeal Suits Nos. 161, 163 and 162 of 1927 preferred respectively against the orders of the Court of the District Munsif of Aska, dated 11th November 1926, in Original Execution Petitions Nos. 1272, 1274 and 1273 of 1925 in Original Suits Nos. 174, 172 and 173 of 1916 on the file of the Court of the District Munsif of Berhampur.

B. Jagannadha Das for appellant.

B. V. Ramanarasu for respondent.

* Letters Patent Appeals Nos. 62 to 64 of 1935.

The JUDGMENT of the Court was delivered by BURN J.—These appeals are from the judgment of our learned brother, KING J., in Civil Miscellaneous Second Appeals Nos. 12 to 14 of 1929. The facts have been set out in the judgment of our learned brother and need not be repeated here. We do not find that there is any very great difficulty in this case. The only point that arises for decision is whether the decree-holder, the appellant herein, “applied in accordance with law” for execution when his petition, Execution Petition No. 1414 of 1923, and the connected petitions were presented to the District Munsif on 20th November 1923. The last execution petition before that had been presented in 1920 and the execution petition now under consideration was presented in 1925, and therefore it is clear that, unless the application of 1923 was one made in accordance with the law, article 179 (as it then was) of the Indian Limitation Act will bar execution. Now, to begin with, Execution Petition No. 1414 of 1923 and the connected execution petitions are not apparently in themselves defective in any way. They are signed by the decree-holder and no criticism of their contents has been offered. The objection on behalf of the judgment-debtors is that they were presented by the decree-holder’s Vakil, Mr. A. Thumbanadham, who had no vakalat authorising him to present them. It is clear that there was no vakalat, and we must assume that as a point of fact. The learned District Munsif says that there is no doubt that Mr. A. Thumbanadham had authority to file the execution petitions. It is not known upon what evidence the learned District Munsif

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made this statement, but, if it is true, it must refer to some *oral* authority because no written authority has been produced, and there is in fact no allegation anywhere that vakalats had in fact been executed in favour of Mr. Thumbanadham by the decree-holder. The question then is whether the decree-holder in 1923 "applied in accordance with law to the proper Court for execution"; *vide* article 179, Limitation Act as it stood in 1923 and 1925. This question, we think, admits of a very simple answer. Under Order XXI, rule 10, Civil Procedure Code, the decree-holder "shall apply for execution . . ." By Order III, rule 1 (to quote the relevant portions):

"Any . . . application . . . to any Court, required or authorised by law to be made . . . by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made . . . by the party in person, or by his recognised agent, or by a pleader appearing, applying or acting . . . on his behalf."

It is not alleged in this case that the party made these applications to the Court in person. It is not alleged that he made them by a recognised agent. The only case is that he made them by his pleader, Mr. Thumbanadham. Order III, rule 4, says:

"No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment."

This means, according to the contentions of the judgment-debtor, that the act of the pleader in presenting these execution petitions was a mere nullity. According to the contentions of the learned Advocate for the appellants, Mr. Jagannadha Das, the want of a vakalat was a mere

irregularity which may be cured or condoned. We have had a very large number of cases cited but none of them is exactly applicable; many, we think, are quite irrelevant. It is not to the point to discuss cases in which there have been defects, whether grave or trivial, in the applications, complaints or petitions, nor cases in which there have been defects or omissions in vakalats filed in Court. This is not a case of any defects in particulars in any document. It is a case simply of want of authority on the part of the pleader to act. Order III, rule 4, says that no pleader shall act unless he has been appointed by a document in writing. This means, in our opinion, that, if the pleader has not been appointed by a document in writing, he is wanting in capacity or competence to act. It is not a question of a defect in the pleader's authority; it is not a question of an irregularity or even of an illegality in anything that he does; it is simply a question of want of capacity to act. If a pleader purports to do something which he has no power or capacity to do, we think it must be clear that what he purports to do can have no legal effect.

Mr. Jagannadha Das has contended that, since upon the application of 1923 the executing Court took action, issuing notices to the judgment-debtors, posting the case for various dates of hearing, on some dates ordering costs to be paid and the like, therefore the execution petitions cannot, after all that has been done, be treated as mere waste paper or as if they had not been presented at all. This argument, we think, would have great force if anything had really been done upon those execution petitions, but the end of

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them was that they were withdrawn and were accordingly dismissed without any execution having really taken place. It is, we think, unfortunate perhaps that the decree-holder should be met with a plea of an apparently technical kind like this when he seeks to execute his decree. But there is no doubt that a technical point, if it is a good one, is the best of all points; and in the present case, as we are satisfied that the presentation of these execution petitions by the decree-holder's pleader was a mere nullity, we hold that our learned brother's judgment was correct and that these appeals must be dismissed. But, in view of the fact that the appellant was successful in both the Courts below, we make no order as to costs in these Letters Patent Appeals.

A.S.V.

APPELLATE CIVIL.

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

1936,
August 5.

GOPISETTI SANYASI RAO DORA (PETITIONER, DEFENDANT-
JUDGMENT-DEBTOR), APPELLANT,

v.

GOPISETTI SURYANARAYANAMMA (RESPONDENT,
PLAINTIFF-DECREE-HOLDER), RESPONDENT.*

Maintenance—Decree for, imposing personal liability and creating charge on properties—Sale of charged properties in execution and purchase thereof by decree-holder subject to charge—Personal liability of judgment-debtor for subsequent arrears—Effect on.

In a suit for maintenance, a compromise decree was passed which imposed a personal liability on the judgment-debtor and

* Appeal Against Order No. 856 of 1934.

also laid a charge on certain of his properties. The judgment-debtor not having paid the maintenance, the charged properties were brought to sale and were purchased by the decree-holder subject to her own maintenance charge. When the judgment-debtor again fell into arrears in payment of the maintenance, the decree-holder again applied for realization of the arrears by arrest of the judgment-debtor and by sale of his other properties, and the Court directed execution to proceed against him.

Held, that the personal liability of the judgment-debtor under the decree had not been extinguished.

Quaere: Whether the charge on the properties had been extinguished.

Balamani Ammal v. Rama Aiyar, (1924) 48 M.L.J. 273, and *Sami Aiyar v. Ramaswami Chettiar*, (1922) 44 M.L.J. 171, distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Berhampur dated 19th February 1934 and made in Execution Application No. 420 of 1933 in Execution Petition No. 100 of 1933 in Original Suit No. 20 of 1921.

B. Jagannadha Das for appellant.

K. Subba Rao for respondent.

The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the order of the learned Subordinate Judge of Berhampur in Execution Application No. 420 of 1933 in Execution Petition No. 100 of 1933 in Original Suit No. 20 of 1921. The appellant is the judgment-debtor, and the respondent the decree-holder, in Original Suit No. 20 of 1921 in which the respondent obtained a decree for maintenance at the rate of Rs. 50 per mensem. In the decree certain properties were charged with the payment of maintenance to the respondent. There were other properties charged with the payment of maintenance to the respondent's daughter, but with those we are not

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now concerned. The judgment-debtor not having paid the maintenance, the decree-holder brought the charged property to sale and purchased it herself, the purchase being said to be subject to her own maintenance charge. The judgment-debtor having again fallen into arrears in payment of the maintenance, the decree-holder again applied in Execution Petition No. 100 of 1933 for realization of the arrears by arrest of the defendant and by sale of his other properties. The judgment-debtor contended that he was not liable to be arrested and that his other properties were not liable for the maintenance. The learned Subordinate Judge found in favour of the decree-holder and directed execution to proceed. Hence this appeal.

The learned Subordinate Judge is undoubtedly right in saying that the decree, which was a compromise decree, contains a provision imposing personal liability upon the appellant as well as laying a charge upon the lands forming item No. 2 in the plaint A Schedule. The learned Subordinate Judge has held that the mere fact that the decree-holder purchased the charged property does not involve the extinction of her claim against the defendant personally. Mr. Jagannadha Das for the appellant has attempted to persuade us that the learned Subordinate Judge is wrong. Mr. Jagannadha Das contends that, when the decree-holder purchased the charged property in execution of her decree for maintenance, her claim against the judgment-debtor personally became merged in her claim by virtue of the charge upon the property, and since the charge upon the property must be deemed to have been extinguished, therefore her claim against the judgment-debtor

personally also must have been extinguished. There is no authority in support of this contention, but Mr. Jagannadha Das discussed cases of mortgage as being to some extent analogous. He cited the case reported as *Balamani Ammal v. Rama Aiyar*(1) and illustration No. i on page 558 of the second edition of Mulla's Transfer of Property Act. The illustration is based upon the decision quoted. We are not satisfied that the analogy of a mortgage is sufficiently close to warrant the application of the principles derived from mortgage cases to this one. This decree for maintenance is not a decree for a single sum of money once for all. It is a decree that the decree-holder shall from time to time become entitled to a payment of Rs. 50 per mensem. Under the decree payment was to be made once in six months. It is difficult to see how a liability, which has not come into existence, and cannot come into existence until some time in the future, can be deemed to have been extinguished by reason of the purchase of the property by the decree-holder. There is no question here of capitalising the whole of the future value of the lady's annuity of Rs. 50 per mensem and saying that the sale of the charged property has brought in an amount equal to that. Moreover, we cannot say that the case cited, *Balamani Ammal v. Rama Aiyar*(1), really helps the analogy which Mr. Jagannadha Das wishes us to consider. In that case, it was expressly pleaded by the plaintiff that his mortgage had become extinguished, or, in other words, that the debt due to

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(1) (1924) 48 M.L.J. 273.

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the mortgagee from the mortgagor had been discharged. If that were so, there could of course be no liability on the mortgagor after the mortgagee had acquired the mortgage security. But there is nothing to prevent a mortgagee from purchasing the mortgaged property in execution of his decree on the mortgage without surrendering his claim against the mortgagor personally. It happens every day that the mortgagee gets permission to bid in the sale of the mortgaged property held in execution of his decree, and, if the sale of the mortgaged property does not produce an amount sufficient to discharge the claim under the mortgage, the mortgagee is at liberty, where the stipulations in the bond are appropriate, to apply for a personal decree against the mortgagor for the balance. In the present case, Mr. Jagannadha Das admits that, if a third party had purchased this property at the Court-auction subject to the maintenance charge in favour of the respondent, the judgment-debtor's personal liability would not have been in any way reduced. We cannot say that it is in any way reduced merely because the purchaser was the decree-holder herself, particularly since the purchase was made subject to the maintenance charge. We are unable to say that the judgment-debtor's liability under the decree is extinguished merely by the fact that the charged property has been purchased by the decree-holder. It is not necessary for us to say whether the charge on the property has been extinguished but we think it is quite clear that, even if it has, the personal liability of the judgment-debtor under the decree has not been extinguished. We do not think there is much

assistance to be gained from the decision in *Sami Aiyar v. Ramaswami Chettiar*(1). That was a case of a surety's liability for a debt being merged on the extinction of the debt itself. Here, as we have pointed out, the debt is not extinguished, and we do not see how the judgment-debtor's liability for the debt can be deemed to have been extinguished. The decision of the learned Subordinate Judge appears to us to be correct and this appeal is dismissed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

T. V. A. K. T. ANNAMALAI CHETTIAR (RESPONDENT),
APPELLANT,

v.

T. T. K. K. KUMARAPPAN SRIRANGA CHARARIAR
(APPELLANT), RESPONDENT. *

Executing Court—Jurisdiction—Sale of property directed by decree—Disputed questions of fact which, if proved, would take away executing Court's jurisdiction to order—Jurisdiction of executing Court to go into.

When there is a final decree for sale of mortgaged property, it is not permissible for the executing Court to enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on the ground that it is a temple service inam and therefore inalienable, where the allegation of the judgment-debtor that the property is inalienable temple service inam is denied by the decree-holder.

The executing Court has no power to go into disputed questions of fact which, if proved, would take away its jurisdiction to order sale.

(1) (1922) 44 M.L.J. 171.

* Letters Patent Appeals Nos. 35 and 37 of 1935.

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v.
SURYA-
NARAYANAMMA.

1936,
September 16.

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CHARIAR.

Ranga Ayyar v. Sundararaja Ayyangar, (1933) 37 L.W. 358, approved.

Raja of Vizianagaram v. Dantivada Chelliah, (1904) I.L.R. 28 Mad. 84, and *Raja of Kalahasti v. Venkatadri Rao*, (1927) I.L.R. 50 Mad. 897, considered.

Anjaneyalu v. Sri Venugopala Rice Mill, Ltd., (1922) I.L.R. 45 Mad. 620, distinguished.

Krishnamurti v. Imperial Bank of India, (1936) I.L.R. 59 Mad. 642, 654, referred to.

APPEALS under Clause 15 of the Letters Patent against the judgments of PANDRANG ROW J., dated 25th January 1935 and passed in (i) Appeal Against Appellate Order No. 52 of 1933 preferred against the order of the District Court of Chittoor in Appeal Suit No. 89 of 1932. Execution Petition No. 708 of 1931 in Original Suit No. 352 of 1928 ; and (ii) Appeal Against Appellate Order No. 103 of 1933 preferred to the High Court against the order of the District Court of Chittoor in Appeal Suit No. 203 of 1931 preferred against the order of the Court of the Subordinate Judge of Chittoor in Civil Miscellaneous Petition No. 7 of 1931 in Execution Petition No. 82 of 1928 in Original Suit No. 29 of 1927.

K. Rajah Ayyar, S. V. Venugopalachari and S. A. Seshadri Ayyangar for appellant.

D. Ramaswami Ayyangar for *C. S. Venkatachari* for respondent.

BURN J. The JUDGMENT of the Court was delivered by BURN J.—There is only one point for decision in these appeals and that may be stated as follows : When there is a final decree for sale of mortgaged property, is it permissible for the executing Court to enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on

the ground that it is a temple service inam and therefore inalienable? The allegation of the judgment-debtor that the property is inalienable temple service inam is denied by the decree-holder. The learned Advocate for the respondent is not able to cite any authority for the proposition that the executing Court in such a case has jurisdiction to enquire into the question of fact whether the land is inalienable or not. Mr. Rajah Ayyar for the appellant in Letters Patent Appeal No. 35 of 1935 has brought to our notice a decision of PAKENHAM WALSH J. in *Ranga Ayyar v. Sundararaja Ayyangar*(1) which is exactly in his favour. The learned Advocate for the respondent relies upon *Raja of Vizianagaram v. Dantivada Chelliah*(2) and *Raja of Kalahasti v. Venkatadri Rao*(3). PAKENHAM WALSH J. dealt with *Raja of Vizianagaram v. Dantivada Chelliah*(2) but it does not appear that *Raja of Kalahasti v. Venkatadri Rao*(3) was cited before him. The distinction as it appears to us between those two cases and the present case and between those two cases and the case decided by PAKENHAM WALSH J. is that in *Raja of Vizianagaram v. Dantivada Chelliah*(2) it was admitted that the land was service inam being the emoluments attached to the office of village carpenter. If so, the land was inalienable by reason of section 5 of the Madras Hereditary Village Officers Act (III of 1895). In the case of *Raja of Kalahasti v. Venkatadri Rao*(3) there was no dispute about the fact that the land sought to be sold was part of an impartible estate which was inalienable by

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(1) (1933) 37 L.W. 368. (2) (1904) I.L.R. 28 Mad. 84.
(3) (1927) I.L.R. 50 Mad. 897.

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reason of section 6 of the Madras Impartible Estates Act (II of 1904). In the present case, there is no provision of statute law forbidding this alienation, but the learned Advocate for the respondent brought to our notice the decision in *Anjaneyalu v. Sri Venugopala Rice Mill, Ltd.*(1). That however is distinguishable from this case, because that was a case in which a village service inam was attached and sought to be sold in execution of a decree for money. PAKENHAM WALSH J. has pointed out that in the case before him, which is precisely similar to the case before us, there is a decree explicitly for the sale of the mortgaged property. The decree on the face of it discloses no want of jurisdiction. There is nothing in the proceedings from which the executing Court can simply take notice that the land is inalienable, and in such a case, as PAKENHAM WALSH J. observes, it is very undesirable to lay down that the executing Court should go behind the decree. The learned Judge observes at page 360:

"The question therefore in this case is very simple and it is whether, when there is no want of jurisdiction apparent on the face of the decree, the party in execution can raise a disputed point of fact, which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter. I am quite clear that there is no authority quoted to this effect and the doctrine would obviously have most disastrous consequences."

We are fully in agreement with this reasoning which appears to us to be decisive. The learned Advocate for the respondent has brought to our notice that there are many cases in which the Court executing a decree has been held to have

(1) (1922) I.L.R. 45 Mad. 620.

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power to enquire into the validity of the decree, for example, cases in which it is alleged that a decree has been passed against a dead person. We are not disposed to extend the principle to any cases outside the limits within which the principle has hitherto been confined. As the learned Officiating Chief Justice has observed in *Krishnamurthi v. Imperial Bank of India*(1):

"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.'"

The learned Advocate for the respondent contends that he is not asking that the executing Court should be considered to be empowered to question the validity of the decree, but that he is only asking that it should be held to have power to enquire into facts which, if proved, would take away its jurisdiction to order sale. Our learned brother, PANDRANG ROW J., has accepted this contention. Referring to *Raja of Vizianagaram v. Dantivada Chelliah*(3) and *Raja of Kalahasti v. Venkatadri Rao*(4), he says that

"if the executing Court has the power to decide whether execution should be allowed as directed in the decree, it follows that the executing Court in order to decide this question whether execution should proceed or not has necessarily the power of taking such evidence as may be necessary to decide it".

With all respect, we think that there is here a slight begging of the question involved. The question which we have to decide is whether the

(1) (1936) I.L.R. 59 Mad. 642, 654. (2) (1931) I.L.R. 9 Rang. 480 (F.B.).
(3) (1904) I.L.R. 28 Mad. 84. (4) (1927) I.L.R. 50 Mad. 897.

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executing Court has power to go into disputed questions of fact which, if proved, would take away its jurisdiction to order sale. The only authority of this Court which is exactly in point would answer this question in the negative. It is not necessary to criticise *Raja of Vizianagaram v. Dantivada Chelliah*(1) and *Raja of Kalahasti v. Venkatadri Rao* (2). Those cases simply lay down that, where there are indisputable, or undisputed, facts brought to the notice of the Court which take away its jurisdiction to order sale, the Court, as CURGENVEN J. observed in *Raja of Kalahasti v. Venkatadri Rao* (2), has to stay its hand and refrain from execution. That is not at all, with due respect to our learned brother, the same as saying that when there is a dispute with regard to the facts, the Court has power or is bound to enquire into the dispute and to decide the question of fact. We think therefore that in this case the learned District Judge of Chittoor was right in holding that the judgment-debtor was not entitled to raise this question in execution. It follows that the orders of our learned brother in Civil Miscellaneous Second Appeals Nos. 52 of 1933 and 103 of 1933 must be set aside and the orders of the learned District Judge restored in both cases. The appellants will recover their costs from the respondent in all the Courts

A.S.V.

(1) (1904) I.L.R. 28 Mad. 84. (2) (1927) I.L.R. 50 Mnd. 897, 909.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice K. S. Menon.

MARINA MANGAMMA AND FOUR OTHERS (RESPONDENTS
1 AND 3 TO 6), APPELLANTS,

1936,
September 4.

v.

MUTYALA DORAYYA AND THREE OTHERS (APPELLANTS
AND SECOND AND SEVENTH RESPONDENTS),
RESPONDENTS.*

*Hindu law—Gift—Female—Gift of immovable property to—
Interest taken under—Presumption as to—Gifts by hus-
band and by other relations—Distinction between cases of.*

In the absence of direct evidence one way or the other there is no presumption as to the quantum of interest which a Hindu female takes in respect of immovable property given to her. There is no distinction in this respect between cases where a gift of immovable property is made by a husband to his wife and those where it is made by a Hindu to other female relations.

Where, during a partition in the lifetime of a Hindu, one of the shares was given to a widowed daughter who had no children,

held, accordingly, that the question of the quantum of interest taken by the daughter must be decided independently of any particular presumption or any particular view as regards onus of proof.

Held further that, in the circumstances of the case, the daughter took the property given to her only for her life.

Mahomed Shumsool v. Shewakram, (1874) L.R. 2 I.A. 7, explained.

APPEAL under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J., dated 28th March 1935, in Second Appeal No. 610 of 1931 preferred to the High Court against the decree of

* Letters Patent Appeal No. 100 of 1935

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the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 90 of 1928, preferred against the decree of the Court of the District Munsif of Peddapur in Original Suit No. 309 of 1926.

V. Govindarajachari and N. Vasudeva Rao for appellants.

G. Lakshmanna and G. Chandrasekhara Sastri for respondents.

Cur. adv. vult.

PANDRANG
ROW J.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—In this Letters Patent Appeal the only question for us to decide is whether the view adopted by VARADACHARIAR J., namely, that in the absence of direct evidence one way or the other there is no presumption as to the quantum of interest which a Hindu female takes in respect of immovable property given to her, is right or not.

The case is one in which during the partition in the lifetime of the father one of the shares was given to the widowed daughter who had no children. The plaintiffs claim that the properties were given to her for life only as maintenance and the daughter claims that they were given to her as an absolute estate with full powers of alienation. The suit was one to declare that the deed of gift executed by the widow in favour of certain of her nephews is not valid and binding on the plaintiffs after her death. It would appear that the lower appellate Court, that is the Subordinate Judge, was under the impression that there was a presumption in favour of the widow in a case like this and that the burden of proving that the properties were given to the first defendant

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only for her life was upon the plaintiffs. VARADACHARIAR J., however, thought that, though in a sense there is a presumption that properties given to a female are given only with limited rights and not with absolute rights, nevertheless, in a case of this kind, the question of the quantum of interest has to be decided independently of any particular presumption or any particular view as regards onus of proof. In other words, he was of opinion that the decision must take into account the surrounding circumstances and the notions and dispositions of the parties to the transaction in the course of which these properties came to the widow.

The general rule in the case of a gift made to a Hindu female by her male relations is that in construing such a deed of gift the Court is entitled to assume that the donor intended the donee to take a limited estate only, unless the contrary appears from the deed. The basis of the rule, as stated in Mulla's Principles of Hindu Law, VIII Edn., page 467, is that females as a rule take only a limited estate in property inherited by them from male relations, and the donor must be presumed to have made the gift with that fact present to his mind. The learned author then refers to the leading case on the subject, namely, *Mahomed Shumsool v. Shewakram*(1), and goes on to observe that, though the rule thus laid down by the Privy Council applies alike to all females who take a limited estate in property inherited by them, the Courts in India have, following the spirit of the texts referring to stridhana, drawn a distinction between cases

(1) (1874) L.R. 2 I.A. 7.

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where a gift of immovable property is made by the husband to his wife, and those where it is made by a Hindu to other female relations. The learned author observes that there is nothing in *Mahomed Shumsool's* case to justify this distinction, the rule laid down there being one which purports to apply to all females who take a limited estate in property inherited by them, and he refers to the fact that in a subsequent case the Judicial Committee applied the rule where a bequest had been made to a daughter and he concludes that it is therefore difficult to support the distinction made by the High Courts in India. Apart from these observations of the learned author which are entitled to much weight, nothing has been brought to our notice from which it can be gathered that the Judicial Committee has in any way confined the rule laid down in *Mahomed Shumsool v. Shewakram*(1) to gifts or bequests made by a husband to his wife or held that it would not apply to gifts or bequests by other relations. The rule itself is based on the general principle that, where the terms of a grant are ambiguous or where there is no grant in writing, it is permissible, in order to find out the intention of the grantor, to look to the surrounding circumstances of the transaction; and the notions and ideas of the grantor would be one of such circumstances to be taken into consideration. It is not seriously contended that the rule, if applicable when there is a grant in writing, is inapplicable when there is no grant in writing as in this case. If that rule is to be applied to the present case there can be no doubt that the conclusion arrived

(1) (1874) L.R. 2 I.A. 7.

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at by our learned brother is right. All the circumstances point to the conclusion that it could not have been intended to give an absolute estate to a childless widow and that the properties must have been given to her only for her life.

We therefore see no reason to interfere in appeal with the decision of VARADACHARIAR J. in this case. The Letters Patent Appeal is accordingly dismissed with costs.

A.S.V

APPELLATE CRIMINAL.

Before Mr. Justice Lakshmana Rao and
Mr. Justice K. S. Menon.

IN RE H. B. BABINGTON (ACCUSED), PETITIONER.*

1936,
September 25.

Code of Criminal Procedure (Act V of 1898), sec. 528-B—European British subject—Claim to be dealt with as a—Relinquishment of—Failure to set up claim in trial Court or in appeal, if amounts to—Proceedings in revision—Subsequent stage of the same case, if—Claim, if can be set up in revision—Coorg Sessions Judge—Conviction on appeal by, of a person not claiming to be dealt with as a European British subject in trial Court or in appeal—Revision against—Jurisdiction to entertain—High Court or Court of Judicial Commissioner of Coorg—Criminal Procedure Code, sec. 4 (1)(j)—Coorg Code (Coorg Courts Regulation No. I of 1901), sec. 16—Effect of.

The Sessions Judge of Coorg confirmed on appeal an order of the District Magistrate of Coorg convicting the petitioner under sections 408 and 477-A, Indian Penal Code. The petitioner applied to the High Court, Madras, to revise the order of the Sessions Judge of Coorg, alleging that he was a European British subject and contending that the High Court was the

* Criminal Revision Case No. 943 of 1935 (Criminal Revision Petition No. 872 of 1935).

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revisional authority by reason of the provisions of section 4 (1) (j), Criminal Procedure Code, and section 16 (Regulation No. I of 1901) of the Coorg Code. Neither in the trial Court nor in the appellate Court did the petitioner claim to be dealt with as a European British subject and there was nothing on the record to show that he was a European British subject.

Held that the petitioner must, in view of the provisions of section 528-B, Criminal Procedure Code, be deemed to have relinquished his right to be dealt with as a European British subject and he was therefore precluded from asserting his status as such in revision.

Proceedings in revision before the High Court on a conviction by a trial Court or an appellate Court are a subsequent stage of the same case.

Held further that the Court of the Judicial Commissioner of Coorg, and not the High Court, had revisional jurisdiction in the matter.

The revisional jurisdiction of the Presidency High Courts cannot be invoked by reason of the definition in section 4 (1) (j), Criminal Procedure Code, merely because the accused is, in fact, a European British subject. The words "proceedings against European British subjects" in section 4 (1) (j) mean proceedings against persons who had actually claimed to be dealt with as such and not proceedings against European British subjects whether they had claimed to be dealt with as such, or not. The same meaning must be given to the same words occurring in section 16 (Regulation No. 1 of 1901) of the Coorg Code.

Jeremiah v. Johnson, (1923) 45 M.L.J. 800, and *Queen Empress v. Grant*, (1888) I.L.R. 12 Bom. 561, approved.

Ashbey Clarke Harris v. Mrs. Peal, (1919) 17 A.L.J. 896, and *H. G. Bolton v. Emperor*, (1932) I.L.R. 60 Cal. 676, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Coorg Division in Criminal Appeal No. 5 of 1935 preferred against the judgment of the District Magistrate of Coorg in Criminal Case No. 12 of 1935.

COORG CODE—Coorg Courts Regulation I of 1901
—Section 16 runs as follows :—

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The Court of the Judicial Commissioner shall, except with reference to proceedings against European British subjects, or persons charged jointly with European British subjects, be deemed to have, throughout the Province of Coorg, the powers conferred by the Code of Criminal Procedure, 1898, or by any other enactment relating to criminal jurisdiction for the time being in force in the said Province, on a High Court, other than a High Court established by Royal Charter.

M. A. T. Coelho and *J. S. Athanasius* for petitioner.

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

Cur. adv. vult.

The JUDGMENT of the Court was delivered by K. S. MENON J.—This is an application to revise an order of the Sessions Judge, Coorg, confirming the order of the District Magistrate of Coorg, convicting the petitioner under sections 408 and 477-A, Indian Penal Code, and sentencing him to imprisonment till the rising of the Court and to pay a fine of Rs. 100; in default of payment of fine, simple imprisonment for one month.

The learned Public Prosecutor raised a preliminary objection that it is the Court of the Judicial Commissioner of Coorg that has revisional jurisdiction over the matter. Mr. Coelho for the petitioner answers that, as the petitioner is a European British subject, this Court alone is the revisional authority by reason of the provisions of section 4 (1) (j), Criminal Procedure Code, and section 16 (Regulation No. I of 1901) of the Coorg Code. It is not disputed that, if the petitioner had asserted his right as a European British subject, his case is one to which

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K. S. MENON J.

the provisions of Chapters XXXIII and XLIV-A, Criminal Procedure Code, would apply. But the petitioner never claimed to be dealt with as a European British subject either in the trial Court or in the appellate Court, and in view of the provisions of section 528-B, Criminal Procedure Code, he must be deemed to have relinquished his right to be dealt with as such and he shall not assert it in any subsequent stage of the case. The learned Public Prosecutor contends that the proceedings in revision in this Court must be deemed to be a subsequent stage of the case and that therefore the petitioner is not entitled to assert his right now as a European British subject. The contention of the petitioner, on the other hand, is that proceedings in revision cannot be treated as a subsequent stage of the case. On this question there has been a conflict of decisions. In the case of *Jeremiah v. Johnson*(1), this Court (KRISHNAN J.) held that proceedings in revision must be treated as a subsequent stage of the case. This is in accordance with the view of the Bombay High Court, vide *Queen Empress v. Grant*(2). On the other hand, a contrary view has been taken by the Allahabad and Calcutta High Courts. In *Ashbey Clarke Harris v. Mrs. Peal*(3) WALSH J. held that an application in revision is not a subsequent stage of the same case. The learned Judge observes :

"It is a totally independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent to or consequent upon the hearing of the original case."

This view was accepted in preference to that of this Court and of the Bombay High Court by

(1) (1923) 45 M.L.J. 800.

(2) (1888) I.L.R. 12 Bom. 561.

(3) (1919) 17 A.L.J. 896.

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a Division Bench of the Calcutta High Court in *H. G. Bolton v. Emperor* (1). The reason given for adopting the view taken by the Allahabad High Court is that, as section 439, Criminal Procedure Code, confers no rights on a person convicted either by a trial Court or a lower appellate Court to invoke the revisional jurisdiction of the High Court and as that jurisdiction is often exercised without an application having been made to it and is discretionary, the hearing in revision cannot be properly described as a subsequent stage of the case. With all respect, we are unable to agree with the view of the Allahabad or of the Calcutta High Court in this matter. If a person who is convicted by a trial Court or an appellate Court brings the fact of such conviction to the notice of the High Court, and the High Court exercises its revisional jurisdiction in the matter, orders passed in revision by the High Court are orders in the original case itself, and there can be no doubt that they are orders passed at a stage subsequent to the trial stage and the appellate stage of the case. It cannot at all be said that such orders are passed independently of any proceedings consequent on the hearing of the original case. It is the records of the original case that have to be amended in pursuance of the orders of the High Court in revision, and not of any other totally independent proceedings. And, even though a person who is convicted has no right to invoke the revisional jurisdiction of the High Court, still, if such jurisdiction is exercised by the High Court, it cannot at all be said that the orders made by the High Court in revision are not

(1) (1932) I.L.R. 60 Cal. 676.

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orders in the case. In other words, whether the orders passed in revision are to be deemed to be orders passed in the case itself or not does not depend on whether the person who is affected by the order has a right to invoke the jurisdiction by the exercise of which such orders were passed. It follows therefore that proceedings in revision before the High Court on a conviction by a trial Court or an appellate Court are a subsequent stage of the same case.

This does not, however, dispose of the difficulty in this case, for Mr. Coelho contends that, even though his client is precluded from asserting his right as a European British subject and thus invoking the jurisdiction of this Court in revision, still by virtue of the definition in section 4 (1) (j), Criminal Procedure Code, it is this Court and this Court alone that has jurisdiction in this matter, as the petitioner is a European British subject. The contention of the learned Public Prosecutor, on the other hand, is that it is only in cases where the right to be dealt with as a European British subject has been claimed that this Court becomes a Court of revision and that, in all other cases, whether the person be a European British subject or not, it will be the highest Court of criminal appeal for the local area that will have revisional jurisdiction. The question therefore is whether the words "proceedings against European British subjects" in section 4 (1) (j) really mean proceedings against European British subjects whether they had claimed to be dealt with as such, or not, or only against those who had actually claimed to be dealt with as such. This question was dealt with at length by a Division

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Bench of the Bombay High Court (BIRDWOOD and PARSONS JJ.) in the case of *Queen Empress v. Grant*(1) and also by this Court (KRISHNAN J.) in the case of *Jeremiah v. Johnson*(2), already referred to, and both the Courts held that the words "European British subjects" in section 4 (1) (j) of the Code of Criminal Procedure meant European British subjects who had claimed to be dealt with as such. As we generally agree with the reasons given by the learned Judges in those cases and with the conclusion arrived at, we do not think it is necessary to repeat what has already been stated in those decisions but shall only add a few observations. Ordinarily, a Court is not expected to know whether the accused in any proceeding before it is a European British subject or not. If no claim is made to be dealt with as such, the case would be tried in the ordinary manner without reference to the special provisions in Chapters XXXIII and XLIV-A, Criminal Procedure Code. In such a case there will be nothing on the record for the High Court to know that the proceedings are really against a European British subject, unless the accused brings the fact to the notice of the High Court by asserting his status as such. This, we have already held, he is precluded from doing by reason of the provisions of section 528-B of the Code of Criminal Procedure. Unless there is something on the record to show that the proceedings are really against a European British subject, the revisional jurisdiction of the Presidency High Courts cannot be invoked by reason of the definition in section 4 (1) (j) of the Code of Criminal

(1) (1888) I.L.R. 12 Bom. 561.

(2) (1923) 45 M.L.J. 800.

BABINGTON,
In re.
K. S. MENON J.

Procedure, merely because the accused is, in fact, a European British subject. We therefore think that the words "proceedings against European British subjects" in section 4 (1) (j) mean proceedings against persons who had claimed to be dealt with as European British subjects, and that that was the intention of the Legislature, for otherwise the result would be that the definition in section 4 (1) (j) would nullify the effect of the substantive provision in section 528-B. The same meaning must be given to the same words occurring in section 16, Regulation No. I of 1901 of the Coorg Code, as reference is made therein to the Code of Criminal Procedure. It follows that it is the Court of the Judicial Commissioner, Coorg, and not this Court, that has jurisdiction in this matter. The preliminary objection is therefore upheld. The petition is dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Venkatasubba Rao, Mr. Justice Varadachariar and Mr. Justice Horwill.

P. SIVASURYANARAYANA CHETTI *alias* ALLEYA
(MINOR) BY NEXT FRIEND SESHAMMA (PLAINTIFF), APPELLANT,

1936,
October 20.

v.

P. AUDINARAYANA CHETTI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Hindu Law—Adoption by widow—Assent of sapinda to—
Revocability of.*

When a sapinda upon a dispassionate consideration of the question once gives his consent to an adoption by a widow, he cannot arbitrarily or capriciously withdraw it.

Quaere: Whether a sapinda can revoke his consent for justifiable reasons.

Where a sapinda gave his consent to an adoption by a widow and reaffirmed it in a written statement filed by him, but revoked it later owing to "family misunderstandings",

held, on the evidence in the case, that the consent was not given with any fraudulent or corrupt motive and the subsequent revocation was arbitrary and unjustifiable.

Observations of SESHAGIRI AYYAR J. in *Suryanarayana v. Ramadoss*, (1917) I.L.R. 41 Mad. 604, approved.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 52 of 1933.

The material facts and arguments appear sufficiently from the judgment.

T. M. Krishnaswami Ayyar for appellant.

Kasturi Seshagiri Rao for *R. Venkatasubba Rao* for first respondent.

* City Civil Court Appeal No. 11 of 1934.

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NARAYANA.

V. Radhakrishnayya and Y. Venkatasubrahmaniam for second respondent.

Cur. adv. vult.

VENKATA-
SUBBA RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This appeal was directed to be posted before a Bench of three Judges, as it was thought it would become necessary to examine conflicting decisions on the points raised.

The facts have been fully and lucidly set out by Mr. Ramappa in his judgment and we shall therefore refer only to such of them as have an immediate bearing on the questions at issue. There were three brothers, Audinarayana, Venkatasubbayya and Subbaroya. Venkatasubbayya died in 1926 and his minor son is the plaintiff. The second defendant is the widow of Subbaroya, who died in 1931; Audinarayana the surviving brother is the first defendant. The plaintiff alleged in his plaint that on the strength of the first defendant's consent, which he attacked as being fraudulent and corrupt, the second defendant proposed to take in adoption a boy by name Radhakrishna, her brother's son, and the suit was brought for a declaration that the consent was invalid and for an injunction restraining the widow from making the intended adoption.

We must at the outset state that in the lower Court it was objected on behalf of the defence that a suit such as the present, asking for a declaration of the sort claimed, is not legally maintainable. This objection was expressly abandoned before us and therefore we have not had to consider the question whether the present suit does lie or not. We refer to this, in order to

guard against our decision being understood as involving any pronouncement on that point.

Now to return to the facts, the first defendant's consent was given by a deed dated 26th January 1933, which was registered. The suit was filed on the following day, i.e., 27th January, and on 24th July, when the action was pending, the first defendant sent a notice to the widow revoking his consent.

Two questions have been raised: first, whether the first defendant's consent was given with a fraudulent or corrupt motive and was therefore not sufficient to validate the adoption, and secondly, whether the subsequent revocation was proper and valid.

It is suggested that three motives influenced the first defendant in giving his consent. He had a grand-daughter (daughter's daughter) and he is alleged to have favoured the adoption with the view of getting this girl married to the boy taken in adoption. This argument, if valid, would affect not the adoption of any particular boy but any adoption whatsoever. The parties in question belong to a family known as Bokkali and Radhakrishna is a member of the Sarvepalli family. It was hinted with reference to this contention, that if the adoption was of a Bokkali boy, such a marriage as the one that was contemplated could not take place. It is hardly necessary to remark that this is an assumption totally wrong, as the boy, to whatever family he originally belonged, would upon adoption be a Bokkali boy. Then the question resolves itself into, did the first defendant consent to the adoption with the view of getting his grand-daughter married to a boy of this very

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family? This argument does not seem to have been pressed in the lower Court, as there is no reference to it in the judgment of the learned City Civil Judge. Moreover, granting for a moment that such an idea was entertained by the first defendant, the argument seems to treat a mere hope or a bare expectation as amounting to an inducing motive. That the first defendant formed an honest judgment and was not actuated by any fraudulent motive appears clearly from his own evidence. Such idea as he had in regard to the marriage, he does not suggest he communicated to the widow, nor does he say that there was any sort of understanding between them in regard to it. He certainly was not over-friendly to the widow and yet was constrained to admit that, when he gave his consent, what influenced him was the spiritual benefit that would be conferred upon his deceased brother's soul.

Secondly, it is urged that from certain circumstances it ought to be inferred that the first defendant's consent was bought. It is unnecessary to set forth in any detail the circumstances that led to the filing of the two suits referred to in the judgment of the Court below. The argument is, that the widow agreed to forego a substantial part of her claim in Civil Suit No. 257 of 1932 and the obtaining by her of the first defendant's consent was a part of this corrupt bargain. It was on 10th January 1933 that the widow and the first defendant agreed to settle their disputes. This agreement was reduced to writing and it contains a clause which distinctly provides that the adjustment of the widow's suit as mentioned above is conditional upon the first defendant

withdrawing his counter-suit and the present plaintiff assenting to that course. The plaintiff was a party to the last-mentioned action and it was contemplated that his next friend's consent was to be obtained for its withdrawal. The agreement therefore between the first defendant and the widow was perfectly open and above board, and the plaintiff's next friend, when informed of it, refused to accede to the withdrawal of the first defendant's suit; indeed the action was kept alive at his instance to be actively prosecuted. Thus the intended settlement between the widow and the first defendant fell through and it was subsequent to this that the latter gave his consent to the adoption. There is thus no substance in the contention that the giving of the consent was a part of any corrupt bargain.

Thirdly, it is stated that it was with a view to spite the plaintiff the first defendant gave his consent. It is suggested that as the conduct of the plaintiff's next friend prevented the settlement of the pending disputes, the first defendant with the object of retaliating on the plaintiff gave his consent. There is not a shred of evidence in support of this and even the first defendant repudiates in his evidence any connection between his consent and the proposed withdrawal of the suit.

Then we pass on to the question whether a sapinda's consent is revocable and, if so, whether the revocation here is valid. As the lower Court points out, the first defendant in revoking his consent acted arbitrarily. As already mentioned, he gave his consent on 26th January 1933; in his written statement filed on 23rd March, there is a re-affirmation by him of his previous

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consent, which he wishes should remain in force. But within a few months he changed his mind and purported to cancel it, but had the honesty to admit in the witness-box that his revocation was due to "family misunderstandings", though he would add that he would prefer a Bokkali boy. On this evidence the learned Judge's conclusion that the revocation was arbitrary is perfectly justified. As SESHAGIRI AYYAR J. points out in *Suryanarayana v. Ramadoss*(1), the assent of a sapinda is presumptive evidence of the *bona fides* of the widow's act. That being of the essence of the doctrine of consent, it is impossible to uphold the contention that a sapinda may at his pleasure withdraw his consent. It has been faintly argued that the discretion in the exercise of which a sapinda gives his consent, necessarily carries with it a power to revoke it. This is contrary to the spirit of the Hindu law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person. We, without hesitation, concur in the view of SESHAGIRI AYYAR J. that, when a sapinda upon a dispassionate consideration of the question once gives his consent, he cannot arbitrarily or capriciously withdraw it. Whether he can do so for justifiable reasons, is a matter we need not go into, for, in the present case, there is not a shadow of justification for suggesting that such reasons exist.

Some analogy was suggested between a husband's authority and a sapinda's consent, but it is hardly necessary to remark that in this respect they are entirely dissimilar. That a husband can

(1) (1917) I.L.R. 41 Mad. 604.

revoke his authority can admit of no doubt, although the statement by Sirkar that he may revoke it "at any time *before adoption*" is somewhat misleading, as any adoption by the widow must necessarily be only after the husband's death and at that time no question of revocation by him can possibly arise (Sirkar's Hindu Law of Adoption, 2nd Edition, page 237).

In the result, the appeal is dismissed with costs of the second respondent.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice K. S. Menon.

PULIYERI KUNHUKUTTAN *alias* KELU
(FIRST RESPONDENT), APPELLANT,

v.

IMBICHIKUTTAN *alias* IMBICHIKUNHAN
AND THREE OTHERS (APPELLANTS AND RESPONDENTS 2 AND 3),
RESPONDENTS.*

*Malabar law—Stani—Stanom property—Kanam demise of—
Renewal by stani of, before expiry of its period—Validity
of—Renewal to take effect on date of renewal itself.*

A renewal of a kanam demise, four years before the expiry of the period thereof, but to take effect on the date of the renewal itself, executed by a stani in respect of stanom property is valid and binding on the stanom, even in the absence of proof of a valid necessity for such a renewal, provided there is no fraud or other circumstance vitiating the transaction.

APPEAL under Clause 15 of the Letters Patent against the judgment of VARADACHARIAR J. in

* Letters Patent Appeal No. 75 of 1935.

SIVASURYA-
NARAYANA
v.
AUDI-
NARAYANA.

1936,
September 4.

KUNHUKUTTAN
v.
IMBICHI-
KUTTAN.

Second Appeal No. 3 of 1931 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 164 of 1929 preferred against the decree of the Court of the District Munsif of Calicut (Additional) in Original Suit No. 1009 of 1926.

The suit was for redemption and was brought by the plaintiff as assignee of a melkanam granted by the fourth defendant in December 1923. The plaintiff sued on the footing that the defendants were in possession under Exhibit A, a kanam of 1910. The defendants however maintained that they were in possession under a renewal (Exhibit III) granted in October 1918 by the fourth defendant's predecessor. The validity and binding character of that renewal (Exhibit III) was the main question in dispute between the parties in the Courts below. Issue 4 raised the question whether the renewal was tainted by fraud and collusion. The District Munsif found against the suggestion of fraud and collusion but the lower appellate Court did not deal with it. Issue 2 raised the general question of the validity of Exhibit III. The defendants contended in the alternative that Exhibit III had been ratified by the fourth defendant; and that question was raised by issue 5. The Courts below found against the validity of Exhibit III. On the question of ratification, the first Court decided in favour of the defendants and dismissed the suit, but the lower appellate Court reversed that finding and accordingly decreed the suit. In second appeal, VARADACHARIAR J. held in favour of the validity of Exhibit III, reversed the decree of the lower appellate Court and restored that of

the District Munsif. His Lordship found it unnecessary, in the view which he took of the validity of Exhibit III, to deal with the question of ratification.

K. P. Ramakrishna Ayyar for appellant.

K. Kuttikrishna Menon and *K. N. Kumaran* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by K. S. MENON J.—This is an appeal against the judgment of VARADACHARIAR J. in Second Appeal No. 3 of 1931. The facts are all set out in the first paragraph of that judgment and it is unnecessary to repeat them. The only question for decision is whether Exhibit III, a renewal of the kanam demise Exhibit A four years before the expiry of the period under the latter, but to take effect on the date of the renewal itself, executed by a predecessor of the fourth defendant, who was the then stanom holder, to the father of defendants 1 and 2, in respect of properties appertaining to the stanom, is valid and binding on the stanom, in the absence of proof of a valid necessity for such a renewal. Our learned brother, preferring to follow the trend of recent decisions of this Court, the last of which is Civil Miscellaneous Appeal No. 406 of 1928, to that reported as *Vataavatta Nair v. Kenath Puthen Vittil Kuppassan Menon*(1), held that it was valid. Mr. K. P. Ramakrishna Ayyar for the appellant, relying on the decision in *Vataavatta Nair v. Kenath Puthen Vittil Kuppassan Menon*(1), contends that considerations which arise in deciding the question of the

(1) (1918) 36 M.L.J. 630.

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validity of such renewals are the same whether such a renewal is to take effect at once or on the expiry of the period under the prior demise. In this we are unable to agree with him. This question was gone into elaborately by the learned Judges who decided Civil Miscellaneous Appeal No. 406 of 1928 and they came to the conclusion that the two sets of cases are governed by entirely different considerations. As we agree with the conclusion arrived at in that case and generally with the reasons, it is unnecessary to enter into a lengthy discussion here. In the case of a renewal to take effect at once, there is an implied surrender and a grant of a fresh demise. It is certainly open to a tenant, a kanamdar, to surrender the unexpired portion of his term. The landlord or the stanom holder is no doubt not bound to accept such a surrender. But there is nothing in law to prevent him from accepting it, provided of course there is no fraud or other circumstance vitiating the transaction. Once the surrender is accepted, the stanom holder has, in the ordinary course of management of stanom properties, the right to lease the property for the customary period or demise it on nominal kanam for the usual period of twelve years, provided the terms of such leases or kanam demises are not onerous or otherwise to the detriment of the stanom. It is immaterial whether the new demise is granted to the same person or a stranger or whether it is granted the same day or a few days or months hence. In this case, the amount of kanam in Exhibit III is the same as in Exhibit A and is only nominal, being only Rs. 10, and the rent reserved in the renewed demise is the same

as in Exhibit A. The renewal cannot therefore be said to be less beneficial to the stanom. But Mr. K. P. Ramakrishna Ayyar contends that, as the income from the stanom properties including the renewal fees is the absolute property of the stanom holder for the time being, the grant or renewal by one stanom holder before the expiry of the term under the prior demise would be prejudicial to the person who will happen to be the holder of the stanom at the time the prior period expires, inasmuch as he will be deprived of the renewal fees, and that the principle of the decision in Civil Miscellaneous Appeal No. 406 of 1928 does not apply to dealings in respect of stanom properties by a stanom holder. But once it is granted that it is within the ordinary powers of management for a stanom holder to grant leases for twelve years and to demise on nominal kanam for twelve years and not merely to enure during the lifetime of the stanom holder, this argument loses all its force, and it is not disputed before us that he has such powers. There is no reason, therefore, for not applying the principle of the decision in Civil Miscellaneous Appeal No. 406 of 1928 to cases of renewals by stanom holders of demises in respect of stanom properties as well, which take effect from the dates of such renewals. The appeal is therefore dismissed with costs.

A.S.V.

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K. S. MENON J.

APPELLATE CRIMINAL.

*Before Mr. Justice Mockett.*1936,
October 16.IN RE ELUKURI SESHAPANI CHETTI (ACCUSED),
PETITIONER.**Indian Evidence Act (I of 1872), sec. 25—Confession—Statement of fact merely, or—Prosecution—Proof of knowledge on part of accused—Absence of—Filling up the gap by a statement of accused—Permissibility—Confession of one offence made in course of investigation of a different offence—Admissibility of.*

In the course of an investigation of a case relating to receipt of stolen goods, the police went to the shop of the accused. No stolen goods were found there, but there was a tin which, the accused told the police officer, contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. The accused was charged with an offence under section 266, Indian Penal Code, for being in possession of a false weight (rupee). The prosecution failed to prove that the accused knew the rupee to be false and the gap was filled up from a statement put in by the accused in which he stated that two days before the police officer came to his shop the rupee had come into his hands and he knew it to be false.

Held that the moment one of the articles was shown to be false, the statement made by the accused to the police officer would be a confession and as such inadmissible in evidence. A confession made to the police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible.

Emperor v. Kangal Mali, (1905) I.L.R. 41 Cal. 601, and *Kodangi v. Emperor*, A.I.R. 1932 Mad. 24, followed.

Held further, that at the close of the evidence for the prosecution, proof of "*scienter*" which is an essential ingredient of the offence was lacking, and the accused should have been discharged.

Mohideen Abdul Kadir v. Emperor, (1903) I.L.R. 27 Mad. 238, applied.

* Criminal Revision Case No. 220 of 1936 (Criminal Revision Petition No. 202 of 1936).

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Kurnool in Criminal Appeal No. 5 of 1936 presented against the judgment of the Court of the Stationary Sub-Magistrate of Kurnool in Calendar Case No. 553 of 1935.

Nugent Grant and *K. Srinivasa Rao* for petitioner.

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

ORDER.

The petitioner has been convicted under section 266, Indian Penal Code, for being in possession of a false weight knowing it to be false. The facts are slightly unusual. It appears that the police were investigating in Kurnool a case relating to the receipt of stolen goods. In the course of that investigation they went to the shop of the petitioner who is a shroff. They did not find any stolen goods but the cupboard was not wholly bare. In a tin, which I think may be said to be in the possession of the petitioner, was found a rupee which has been produced. While having the appearance of a single rupee it is in fact two sides of two rupees joined together and it weighs more than an ordinary rupee. In order to convict the petitioner the prosecution were bound to prove the possession of a false rupee known to be false and intended to be fraudulently used. They proved it as follows: Before the Magistrate the prosecution called as their principal witness the police officer who went to the petitioner's shop

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He stated as follows—I have not the evidence before me but I am told that the evidence given corresponds to what was stated in the complaint—

“ I questioned him (petitioner) as to what the tin kept by his side contained and the accused told me that it contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. I opened the tin and found only the coins used for weighing as stated by the accused ” (including the rupee).

That and the production of the rupee were all the evidence against the petitioner at the stage when the evidence for the prosecution had been called and I think it is clear that at that stage the Magistrate should have dismissed the case because the all-important ingredient, viz., that the petitioner knew the rupee to be false, was not present. But the petitioner put in a statement in which he stated that two days before the police officer came to his shop the rupee had come into his hands and he knew it to be false. This statement was used to fill up the gap in the prosecution evidence which the prosecution themselves had not proved. With regard to this I have been referred to the decision of WHITE C.J. in *Mohideen Abdul Kadir v. Emperor*(1). In that case, at the close of the case for the prosecution, the all-important element, viz., the publication of the defamatory statement, had not been proved and it was sought to be proved by an admission contained in the accused's statement under section 342, Criminal Procedure Code. That is a case exactly in point and I think on that ground this criminal revision case should succeed. It is quite clear that at the close of the

(1) (1903) I.L.R. 27 Mad. 238.

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evidence for the prosecution proof of “ *scienter* ” an essential ingredient, was lacking, and the accused should have been discharged. Instead, as in *Mohideen Abdul Kadir v. Emperor*(1), the evidence was supplied by questioning him.

But there is another ground to which I attach far greater importance. There is no doubt in my judgment that the statement made by the accused to the police officer should not have been admitted in evidence because it is clearly a confession. The accused told him, he says, that the tin contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. The moment one of these is shown to be false it seems to me that that is a confession and not, as the Public Prosecutor has argued, a mere statement of fact. I respectfully agree with the statement as to what is a good test, whether a communication to the police is a confession or a mere statement of fact, contained in *Emperor v. Kangal Mali*(2). The learned Judges, after distinguishing between admissions of fact and confessions of guilt, go on to say:

“ In fact a useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true, then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, as in the case of the statements to which we have just referred, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible ” (as admissions).

In my judgment this is clearly a confession, as I have already said, and, as has been pointed out by JACKSON J. in *Kodangi v. Emperor*(3), a confession

(1) (1903) I.L.R. 27 Mad. 238.

(2) (1905) I.L.R. 41 Cal. 601, 612.

(3) A.I.R. 1932 Mad. 24.

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In re.

made to the police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible. The whole spirit of section 25 of the Indian Evidence Act is to exclude confessions to the police and, the moment a statement is found to amount to a confession, I do not think it matters in the slightest of what crime it is said to be a confession. A consideration of this case shows that this conviction rests on (i) a statement by the accused at a stage when there was no *prima facie* case against him and (ii)

confession to a police officer. By reason of these grave infirmities in the prosecution case I am constrained to allow this criminal revision case.

The conviction and sentence are set aside and the fine, if collected, will be refunded.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

1936,
November 27.

IN RE KANDA MOOPAN alias GOPAL NAICKER
(ACCUSED), PETITIONER.*

Code of Criminal Procedure (Act V of 1898), sec. 35—Sentences of imprisonment awarded in default of payment of fines—Concurrent, if can be.

Under section 35, Criminal Procedure Code, a criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently.

* Criminal Revision Case No. 801 of 1936 (Case Referred No. 54 of 1936).

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Imperator v. Akidullah, (1911) 15 I.C. 808, *Emperor v. Subrao Sesharao*, A.I.R. 1926 Bom. 62, *Shidlingappa v. Emperor*, A.I.R. 1926 Bom. 416, and *Emperor v. Ghulam Ahmed*, (1929) 118 I.C. 224, followed.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Ramnad in his letter, dated 30th October 1936, No. R.O.C. C-3, 5541/36.

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

ORDER.

The question raised in this reference by the District Magistrate of Ramnad is whether a criminal Court is competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. The section that relates to this subject is section 35 of the Code of Criminal Procedure and the words of the section show that the direction can be given only in respect of sentences of imprisonment or transportation. The point appears to be covered by authority as will be seen from the decisions in *Imperator v. Akidullah*(1), *Emperor v. Subrao Sesharao*(2), *Shidlingappa v. Emperor*(3) and *Emperor v. Ghulam Ahmed*(4), the last three cases being rulings by Benches of the High Courts concerned. It follows therefore that the direction of the Sub-Magistrate in this case to the effect that the sentences of imprisonment awarded by him in default of payment of the fines imposed by him should run concurrently is illegal and it is therefore cancelled.

V.V.C.

(1) (1911) 15 I.C. 808.

(2) A.I.R. 1926 Bom. 62.

(3) A.I.R. 1926 Bom. 416.

(4) (1929) 118 I.C. 224.

APPELLATE CIVIL—FULL BENCH.

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

1934,
December 18.
1935,
February 8.

S. M. NARAYANA AYYANGAR (DEFFNDANT), APPELLANT,

v.

S. P. R. M. SUBRAMANIAN CHETTIAR AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Estates Land Act, Madras (I of 1908), sec. 3 (4) (f)—"Improvements"—Coconuts, if fruits, and coconut plantation, if fruit garden, within the meaning of—*Res judicata*—*Erroneous decision of law, if and when.*

A ryot resisted the claim of a landlord for a higher rate of rent with respect to a particular area and stated that he was liable to pay only the dry rate on the ground that the coconut plantation in the same was an "improvement" within the meaning of section 3 (4) (f) of the *Estates Land Act*. In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding it was held that the planting of a coconut garden was not an "improvement" and that the landlord was entitled to the enhanced rate.

Held by the Full Bench: (i) Coconuts are fruits and coconut trees are fruit trees and a coconut plantation is a fruit garden within the meaning of section 3 (4) (f) of the *Estates Land Act* and that, accordingly, the landlord was not entitled to the enhanced rent claimed.

Vellayappa Chetty v. Subramaniam Chettiar, (1926) I.L.R. 50 Mad. 482, overruled.

Sri Raja Bommadevara Chayadevamma v. Venkataswamy, (1931) 62 M.L.J. 511, approved.

(ii) The principle that a decision of law though erroneous is *res judicata* in a later suit between the same parties should be confined only to the matters which existed at the time of

* Second Appeals Nos. 1148 to 1151 and 1181 of 1932.

the prior suit, unless some question of general principle was settled in the same, and that, accordingly, the decision in the prior suit did not apply to the new areas in the holding which were not planted with coconut trees at the time of the prior suit and in respect of which no claim was or could be made in the same.

Hoystead v. Commissioner of Taxation, [1926] A.C. 155, considered.

Bayyan Naidu v. Suryanarayana, (1912) I.L.R. 37 Mad. 70, 73 (F.B.), *Maharaja of Jeypore v. Ramamurty*, (1933) I.L.R. 57 Mad. 73, and *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*, (1916) 32 M.L.J. 63, approved.

APPEALS against the decrees of the District Court of Ramnad at Madura in Appeal Suits Nos. 501 to 504 of 1929 and 350 of 1929 preferred against the decrees of the Court of the Special Deputy Collector of Manamadura in Summary Suits Nos. 2626 and 2627 of 1923, 3860 and 3861 of 1926 and 1579 of 1920, respectively.

The material facts of the case and the arguments of Counsel appear fully in the order of reference to a Full Bench by VARADACHARIAR J. and in the judgment of the Full Bench.

The appeals came on for hearing before VARADACHARIAR J. who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This batch of second appeals arises out of suits for rent in respect of two sets of holdings covered by pattas Nos. 38 and 54. Two of the second appeals arise out of suits of 1923 and two more out of suits of 1926 and the fifth arises out of a suit instituted in 1920 and is the result of an intermediate remand by this Court.

One of the main questions in these cases turns on the effect of the definition of "improvements" in section 3, clause 4, of the *Estates Land Act*, the point for decision being whether

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a coconut plantation comes within that definition or not. One Bench of this Court, in a suit between these very parties reported as *Vellayappa Chetty v. Subramaniam Chettiar*(1), held that it does not. Another Bench, in a case reported as *Sri Raja Bommadevara Chayadevamma v. Venkataswamy*(2), has dissented from that decision and held that it is an "improvement". It is by reason of the decision in *Vellayappa Chetty v. Subramaniam Chettiar*(1) that the lower Courts have held that that matter is *res judicata* between the parties, even though the present suits relate to subsequent faslis.

One of Mr. Rajah Ayyar's contentions on behalf of the appellant is that the point being merely one of law, turning on the definition in the Act, the rule of *res judicata* should not be applied, and he next contends that it cannot be applied to some at least of these suits, where even according to the present plaints the claim is not on the same basis as in the old suits but on a different basis by reason of changed facts. He also contends that, in the application of the rule of *res judicata*, the present case is governed by the analogy of the decision in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(3) and not of that in *Badar Bee v. Habib Merican Noordin*(4). With reference to the decision in *Maharaja of Jeypore v. Ramamurty*(5), he takes exception to some observations in that judgment and relies on certain other portions of that judgment and he further contends that the decision in *Tarini Charan Bhattacharya v. Kedar Nath Halidar*(6) is, if anything, in his favour, rather than against him.

I must say that the question of *res judicata* is by no means free from difficulty and the decisions on the point are by no means uniform. It has to be remembered that the policy of section 13 of the Estates Land Act was a statutory declaration that, even if a practice had theretofore existed of paying for improvements effected by the tenant, it should no longer be capable of being enforced. It will be a matter for consideration how far that policy can be controlled by the application of the rule of *res judicata*, merely on the ground that, in a litigation relating to prior faslis, the Court has interpreted section 3, clause 4, of the Estates Land Act in a particular

(1) (1926) I.L.R. 50 Mad. 482.

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

(5) (1933) I.L.R. 57 Mad. 73.

(2) (1931) 62 M.L.J. 511.

(4) [1909] A.C. 615.

(6) (1928) I.L.R. 56 Cal. 723 (F.B.).

manner. I am not, as at present advised, quite satisfied that the decision is one on a mixed question of law and fact. I do not say more on that matter, as I am suggesting that the case may be placed before his Lordship the CHIEF JUSTICE for his consideration whether it may be posted before a Bench of two Judges or before a Full Bench to deal with the question of *res judicata* on the point of law and also to consider the conflict between the judgments in *Vellayappa Chetty v. Subramaniam Chettiar*(1) and *Sri Raja Bommadevara Chayadevamma v. Venkataswamy*(2).

On hearing the case opened by Mr. Rajah Ayyar I felt that, even if I should uphold the plea of *res judicata* to some extent, it might still become necessary to deal with the conflict between *Vellayappa Chetty v. Subramaniam Chettiar*(1) and *Sri Raja Bommadevara Chayadevamma v. Venkataswamy*(2), and that, if I should accept his contention that it is not *res judicata*, this conflict will necessarily have to be considered. As will appear from the judgments in those two cases, the practice of rearing coconut and palm trees in extensive areas of land classified as "dry" is quite common in the southern districts and it seems to me desirable that there should be an authoritative pronouncement as to whether such plantations are or are not "improvements" within the meaning of the definition in the Estates Land Act.

The matter will be placed before his Lordship the CHIEF JUSTICE.

ON THE REFERENCE :

K. Rajah Ayyar and *A. Srinivasa Ayyangar* for appellant.

S. R. Muthuswamy Ayyar for respondents.

Cur. adv. vult.

The OPINION of the Court was delivered by RAMESAM J.—This batch of second appeals arises out of a number of suits for rent for different faslis under section 77 of the Estates Land Act.

(1) (1926) I.L.R. 50 Mad. 482.

(2) (1931) 62 M.L.J. 511.

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There are two holdings under the tenant—one holding under patta No. 38 and another holding under patta No. 54. Rent is claimed for portions of the suit holdings at a rate higher than the dry rate on the ground that there are coconut gardens in these holdings. In a former litigation between the same parties, which culminated in Second Appeals Nos. 433, etc., of 1924, the same claim was made. The defendant-ryot resisted the claim at the higher rate on the ground that a coconut plantation is an improvement within the meaning of section 3 (4) (f) of the Estates Land Act and that he is not liable to pay the higher rate and is liable to pay only the dry rate. It was held by DEVADOSS and WALLACE JJ. that the planting of a coconut garden was not an improvement under the Act and that the plaintiff was entitled to the enhanced rate. The same holdings are the subject-matter of the present suits.

It is conceded by the appellant that, so far as patta No. 38 is concerned, the coconut plantation now existing is merely the old plantation, but as to patta No. 54 it is said that at the time of the former litigation only a portion, viz., seven kurukams, was planted with coconut plants, but now a larger area is sought to be charged at the higher rate. I will refer to this question of additional area later on. Leaving this aside, two questions arise in the present second appeals. The first is whether coconuts are fruits and a coconut plantation can be regarded as a fruit garden within the meaning of section 3 (4) (f) of the Estates Land Act. So stated, this question is undoubtedly a question of law, viz., the construction of an Act, the question being whether a

particular term in the Act can be so interpreted or defined as to cover a particular class of trees.

Now it may be said that the fruit of the coconut tree is not a fruit in one sense of the term but is a nut and apparently this was the view that prevailed with DEVADOSS and WALLACE JJ. in *Vellayappa Chetty v. Subramaniam Chettiar*(1). But this case was considered in *Sri Raja Bommadevara Chayadevamma v. Venkataswamy*(2) by another Bench of this Court (REILLY and ANANTAKRISHNA AYYAR JJ.) and was dissented from. Both the learned Judges have dealt with the matter at some length and have given good reasons for differing from the former decision and for holding that coconut trees are fruit trees. Even DEVADOSS J., from whose judgment the latter case came up in Letters Patent Appeal, held that coconut trees are fruit trees, but he does not refer to the judgment in the other case reported as *Vellayappa Chetty v. Subramaniam Chettiar*(1). It is unnecessary to repeat the reasons given by REILLY and ANANTAKRISHNA AYYAR JJ. I will only add the following consideration. In the Century Dictionary, under "coconut" we have "the nut or fruit of the coconut tree". And then under "double coconut" we have "the fruit of a remarkable palm . . . The fruit often weighs 40 or 50 lb. . . ." Under "sea coconut" we have "the fruit of a species of palm". In Murray's English Dictionary under "double coconut" we have got practically the same sentence repeated. In common parlance the coconut is always referred to as a fruit before the fibre is removed.

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I therefore hold that coconuts are fruits and that coconut trees are fruit trees and a coconut plantation is a fruit garden within the meaning of section 3 (4) (f) of the Estates Land Act. It follows that the tenant who has effected improvements in these cases ought not to be liable for any additional rent beyond the dry rate.

The next question is how far the defendant-appellant is affected by the rule of *res judicata*. As already mentioned, the former decision, which, in the light of our present decision, must be held to be erroneous, was between the same parties and in respect of the same holdings. Mr. Rajah Ayyar, the learned Advocate for the appellant, contends that an erroneous decision of law should not be held to be *res judicata* in a later litigation between the same parties relating to a different year and that the former decision should be confined to the year in respect of which the former litigation arose.

The question how far an erroneous decision on a matter of law or on the terms of a tenancy would be *res judicata* has been considered in three decisions of this Court. The first one is *Bayyan Naidu v. Suryanarayana*(1). It was there held that a former decision as to the extent of a holding in a suit between a landlord and a tenant relating to the validity of a patta under the Rent Recovery Act would be *res judicata* in respect of later years on the ground that it decides a general question not peculiar or special for that particular year. So far as this matter is concerned, the Estates Land Act is similar to the Rent Recovery Act, and, if any question of general principle is

(1) (1912) I.L.R. 37 Mad. 70, 73 (F.B.).

settled in one litigation in respect of one year as regards the terms of a patta, that would bind the parties for the future years also until new circumstances intervene. The next decision of this Court that I would refer to is *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(1). There, the suits related to the recovery of a cess claimed by a zamindar from inamdars. The cess was payable annually. It was held that, in cases where in a prior litigation the cess was held to be payable, that decision constitutes *res judicata* in a litigation with respect to later years. The conclusion of the learned Judges is thus expressed :

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

The reason of the judgment may be expressed thus : the former litigation settles the terms on which the two parties are related to each other in the matter of the holdings, provided the decision and the terms are confined to the actual object-matter of the suit. The earlier decisions of this High Court in *Parthasaradi v. Chinnakrishna*(2), *Mangalathammal v. Narayanswami Aiyar*(3) and *Natesa Chetti v. Vengu Nachiar*(4) were dissented from. In *Maharaja of Jeypore v. Ramamurty*(5) the same view was followed. An attempt to re-open the decision in *Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(1), based on

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

(3) (1907) I.L.R. 30 Mad. 461.

(6) (1933) I.L.R. 57 Mad. 73.

(2) (1892) I.L.R. 5 Mad. 304.

(4) (1909) I.L.R. 33 Mad. 102.

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the decision of the Privy Council in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (1), was made, but failed. That attempt is again repeated before us, Mr. Rajah Ayyar contending that the decisions in *Sree Rajah Bomma-devara Venkata Narasimha Naidu v. Andavolu Venkataratnam*(2) and *Maharaja of Jeypore v. Ramamurty*(3) should be re-considered in the light of the Privy Council decision just mentioned. In the same volume (1926 Appeal Cases) at page 155 we have got *Hoystead v. Commissioner of Taxation*(4), another decision of the Privy Council. The earlier decision relates to the valuation of land for rating purposes. The second decision relates to land-tax assessment, and it was held that an admission on a fundamental matter in a prior case—and a decision stands on the same footing—estops a different contention in a later case. At first sight it looks as if these two decisions are in conflict. Possibly the decision in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(1) may be explained on the footing that the valuation of land for purposes of rating for each year is so peculiar to that year and has to be made on considerations confined to that year and should be so uninfluenced by considerations that prevailed in prior years that no question should be considered as a general principle, and what happened in one year—whether a matter of principle or a matter of detail—should not be used in another year, and therefore the decision of one year is not *res judicata* for another year. If that decision is not to be explained in that way and should be

(1) [1926] A.C. 94.
(3) (1938) I.L.R. 57 Mad. 73.

(2) (1916) 32 M.L.J. 63.
(4) [1926] A.C. 155.

regarded as inconsistent with the decision in *Hoystead v. Commissioner of Taxation* (1), I prefer to follow the latter decision. This is practically the view accepted in *Maharaja of Jeypore v. Ramamurty*(2) as to these two cases. These cases have also been considered in *Sankaralinga Nadar v. Commissioner of Income-tax, Madras*(3), and a similar view was taken there of the first case.

It is said that in cases under the Bengal Tenancy Act it has been held that a decision between a landlord and tenant as to the rate of rent in a prior year does not constitute *res judicata* in later years when the same question comes up. But even there it has been held that, where the earlier decision decides a matter of general principle, it would be *res judicata* in later years; see *Gnanada v. Nalini Bala Debi*(4) and *Sreemati Ayetonnessa Bibi v. Amjad Ali*(5). It is true that in Calcutta [*Alimunnissa Chowdhurani v. Shama Charan Roy*(6)] a view prevailed at one time similar to the decision in *Mangalathammal v. Narayanswami Aiyar*(7), but this decision has since been overruled by that Court in *Tarini Charan Bhattacharya v. Kedar Nath Haldar* (8).

It is then argued by Mr. Rajah Ayyar, relying on a passage in this last judgment, that some exception should be made to the principle of *res judicata* in matters of jurisdiction, limitation or procedure on grounds of public policy. It is difficult to conceive how the question of *res judicata* can arise for the same object-matter in later years with reference to questions of

(1) [1926] A.C. 155.
(3) (1929) I.L.R. 53 Mad. 420 (F.B.).
(5) (1928) 48 C.L.J. 184.
(7) (1907) I.L.R. 30 Mad. 461.
(2) (1933) I.L.R. 57 Mad. 73.
(4) (1925) 43 C.L.J. 146.
(6) (1905) I.L.R. 32 Cal. 749.
(8) (1928) I.L.R. 56 Cal. 723 (F.B.).

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jurisdiction, limitation or procedure. But here we are not concerned with any such question. It is suggested that the rules of the Estates Land Act are based on public policy and some exception should be made in such matters. We are not referred to any principle or authority to support such a proposition and I am unable to accept this contention. But, as already observed, the principle of *res judicata* should be confined only to matters which actually existed at the time of the former decision. If there are new areas in patta No. 54, which were not planted with coconut at the time of the former suit and in respect of which no claim for enhanced rate of rent was or could be made in the former suit, the matter is not *res judicata* in the present suit in respect of such areas. The respondent contended that even in respect of such areas the question of general principle is settled between the parties. There can be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision. Areas and trees to which it was not applied then will be governed by the correct principle of law. It is said by the respondent that this matter was not raised earlier. The appellant claims that he did raise it. However, the consideration of this question and how far the matter may be allowed to be raised are points which we leave to the learned Judge who would dispose of the second appeals in the light of the above observations, and if, in his discretion, he thinks fit, he can allow those points to be raised

in second appeal. It is for him and not for the Full Bench to consider this question.

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With these observations these cases are remitted to the learned Judge for disposal.

BEASLEY C.J.—I agree.

KING J.—I agree.

[The appeals came on for final hearing after the expression of the above opinion of the Full Bench and the Court (VARADACHARIAR J.) delivered the following JUDGMENT:—]

Now that the Full Bench have held that the decision in *Vellayappa Chetty v. Subramaniam Chettiar*(1) will operate as *res judicata* in respect of the areas then in question, it follows that Second Appeals Nos. 1148, 1150 and 1181 of 1932 fail and must be dismissed with costs in Second Appeal No. 1148 of 1932 only.

[The remaining portion of the judgment dealing with Second Appeals Nos. 1149 and 1151 of 1932 is omitted as not necessary for this report.]

G.R.

(1) (1926) I.L.R. 50 Mad. 482.

APPELLATE CIVIL.

Before Sir M. Venkatasubba Rao, Kt., Officiating Chief Justice,
and Mr. Justice Horwill.

1936,
September 16.

RAMANATHAN CHETTIAR, MINOR, BY NEXT FRIEND
C. T. RM. CHIDAMBARAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

S. RM. M. CT. M. FIRM (DEFENDANT), RESPONDENT.*

*Hindu Law—Ancestral, self-acquired and separate property—
Distinction between—Joint family—Sole surviving member
—Property in the hands of—Character of—Act of such
member—Effect of.*

The property in the hands of a sole surviving member of a joint Hindu family is his separate property which however must not be confused with his self-acquired property; what is separate property becomes, on the introduction of a fresh member into the family, ancestral property with all its incidents. Similarly, although when debts are incurred the family consists of a single male member, he must be deemed in contracting debts to be acting on behalf of a potential joint family which is capable by expansion of comprising more than one member. Viewed in this light, the act of the last single survivor must be deemed as that done in a representative capacity, that is to say, as representing a potential joint family.

APPEAL from the judgment and decree of LAKSHMANA RAO J., dated 30th day of July 1935 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 378 of 1934.

B. Sitarama Rao for K. Rajah Ayyar and V. Ramaswami Ayyar for appellant.

S. Doraiswami Ayyar for K. S. Rajagopala Ayyangar for respondent.

Cur. adv. vult.

* Original Side Appeal No. 27 of 1935.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO OFFG. C.J.—This suit has been brought by the plaintiff for a declaration that he is not bound by the decree obtained in the High Court by the first defendant against the second in Civil Suit No. 448 of 1932. The facts may be briefly stated. Chidambara, the undivided brother of the second defendant (Vairavan), died in 1907. The plaintiff who was born in 1922 is the natural-born son of the second defendant but was adopted in 1924 to the deceased Chidambara by his widow, Valliammal. A mortgage by the deposit of title deeds was granted on 30th May 1927 by the second defendant to the first to secure a debt of Rs. 50,000 and on that mortgage the first defendant brought the suit above-mentioned and obtained a decree. It is this decree that the plaintiff impeaches and seeks to get rid of.

The learned trial Judge on the Original Side has found (i) that Chidambara and Vairavan, who were members of a Nattukottai Chetti Hindu family, inherited a banking concern which till Chidambara's death they both conducted and which thereafter the second defendant continued; (ii) that the plaintiff's family, while carrying on business as bankers, had dealings with the first defendant and the mortgage in question was granted in respect of a debt that had become due in the course of such dealings. Holding on these findings that the mortgage is binding upon the plaintiff and that he is bound by the decree, the learned Judge dismissed the suit.

The first contention urged by Mr. Sitarama Rao is that his client (the plaintiff) is not bound by the decree, as he was not made a party to the

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mortgage suit, and the second defendant was not sued in a representative capacity, that is, as representing the family of which he was the manager. There is some evidence to show that R. M. M. S. T. Vairavan Chetty, impleaded as the defendant in the mortgage suit, is not the individual Vairavan but the family firm of which he was the manager. Granting, however, that the initials "R. M. M. S. T." do not convey this meaning and that the second defendant alone was individually impleaded, there can be no question on the authorities that he effectively represented in the suit the entire family, which has therefore become bound by the decree. In *Doulat Ram v. Mehr Chand*(1), the leading case on the point, their Lordships point out that, where the mortgage extends to the entire interest of the family and is not confined to the share of any particular member and where in the plaint the mortgagee claims not only to recover against the individual mortgagor the amount of the mortgage but asks that the debt may be satisfied out of the mortgaged property (where these conditions are fulfilled), although the manager alone is impleaded, he effectively represents all the members, who therefore become bound by the decree; see also *Sheo Shankar Ram v. Jaddo Kunwar*(2), *Sankaranarayana Pillai v. Rajamani*(3) and *Unnamalai Ammal v. Abboy Chetty*(4). This contention of Mr. Sitarama Rao therefore fails.

Mr. Sitarama Rao next contends that, if any part of the sum of Rs. 50,000 had been utilized in

(1) (1887) I.L.R. 15 Cal. 70 (P.C.).

(2) (1914) I.L.R. 36 All. 383 (P.C.).

(3) (1923) I.L.R. 47 Mad. 462.

(4) (1925) 50 M.L.J. 172.

paying off a debt incurred before the plaintiff's adoption, for that portion of the debt the plaintiff would not be liable. Whether this as a proposition of law is correct or not, we shall examine presently, but the contention receives no support from the evidence on the record. The question put to the first defendant's agent and his answers on this point may be here reproduced:

"Q.—So far as you know, you do not know what for he (Vairavan) borrowed this money?

A.—I know; for paying bank dues, for lending to others.

Q.—So the debts he borrowed were for discharging his old liabilities?

A.—I do not know all these details. He was taking all these things for his banking purposes."

This evidence remains uncontradicted and there is nothing to show that any portion of the amount borrowed was utilized for the payment of the debts incurred before the plaintiff's adoption. Here I must point out that the finding of the trial Judge, that the debt was incurred for a legitimate purpose in the course of the carrying on of a family concern, has not been attacked. The evidence extracted above shows that the amount was borrowed "for paying bank dues, for lending to others", these being the natural incidents of a banking concern. Mr. Sitarama Rao's contention therefore is opposed to the facts proved and cannot be accepted.

Granting for a moment that a portion of the debt was incurred before the plaintiff's adoption, does that circumstance make any difference? Mr. Sitarama Rao has had to assume for his contention that the debts were incurred not only before the plaintiff's adoption but also before his

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birth. Before dealing with this contention we may usefully refer to certain principles which may be regarded as fundamental and have not been and cannot be controverted. The doctrine, that a son is liable to pay his father's debts not incurred for immoral or illegal purposes, applies as much to debts incurred previous to, as after, his birth. Similarly, a nephew subsequently born is liable for the debts incurred by his uncle for purposes recognized by the Hindu law as proper. This principle is incontestable and has been tacitly assumed or acted upon in several decisions; *Muttayan Chetti v. Sivagiri Zamindar*(1), *Muttayan v. Zamindar of Sivagiri*(2) on appeal from *Muttayan Chetti v. Sivagiri Zamindar*(1), *Ponnambala Pillai v. Sundarappayyar*(3) and *Maharaja of Bobbili v. Zamindar of Chundi*(4); and Mr. Sitarama Rao, as already stated, far from disputing it, affirms its correctness. There is a distinction in this respect between alienations and debts. In the case of alienations, whether they are for justifiable purposes or not, the person subsequently born or adopted cannot question them, *Ponnambala Pillai v. Sundarappayar*(3) and *Veeranna v. Sayamma*(5), but in the case of debts, as already pointed out, the character of the debt when incurred becomes the decisive element. Mr. Sitarama Rao, acceding to these propositions, puts his argument thus: From *Veeranna v. Sayamma*(5) it follows that the second defendant as the sole survivor of the family (this argument implies that the plaintiff had not even been born at the material time, that is, when a portion of the debts was incurred) was the absolute

(1) (1878) I.L.R. 3 Mad. 370, 378. (2) (1882) I.L.R. 6 Mad. 1 (P.C.).

(3) (1897) I.L.R. 20 Mad. 354, 356. (4) (1910) I.L.R. 35 Mad. 108.

(5) (1928) I.L.R. 52 Mad. 398.

owner of the business assets. If that be so, the learned Counsel proceeds to argue, the second defendant, when contracting those debts, acted on his own behalf and not as representing any Hindu coparcenary, which may be likened to a corporation. The next step in the argument is, that, as the second defendant never purported to act on behalf of a coparcenary, the debts incurred by him cannot be binding upon the plaintiff who, having been subsequently born, became by adoption his nephew. This position, which is said to be a logical deduction from *Veeranna v. Sayamma*(1), is untenable and we cannot accept it as sound. That case related to an alienation and not to a debt. There, it was argued that, so long as any widow remained in the family possessing an unexercised power of adoption, no alienation by way of gift made by the last surviving male member could be binding upon the son subsequently brought into the family by adoption. This contention was repelled as being opposed to the basic principles of Hindu law. In the judgment delivered in that case, the theory, that the last survivor is no more than the provisional heir, based upon the fiction of relation back in the case of such adoptions, was repudiated. The effect of the decision is no doubt that for the purpose of alienations the sole survivor is regarded as the absolute owner, but we agree with Mr. Doraiswami Ayyar that it would be wrong to apply the principle to the case of debts by extending the analogy. The property in the hands of the sole survivor is separate property, which, however, must not be confused with self-acquired property; what is separate property becomes, on

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the introduction of a fresh member into the family, ancestral property with all its incidents. Similarly, although, when the debts are incurred, the family consists of a single male member, he must be deemed in contracting debts to be acting on behalf of a potential joint family, which is capable by expansion of comprising more than one member. Viewed in that light, the act of the last single survivor must be deemed as that done in a representative capacity, that is to say, as representing a potential joint family. Mr. Sitarama Rao has been driven to concede that, if at the time a debt is incurred there happen to be two or more members instead of a single surviving member, the foundation on which his contention rests disappears. That is the reason why he has had to confine his argument to the period not before the plaintiff's adoption which was in 1924, but before his birth which was in 1922. It would be a strange thing to hold in a matter of this sort that, where there are two or more survivors, a different legal consequence would follow than from where there is a single survivor. Indeed to accept Mr. Sitarama Rao's contention would lead to grave anomalies and leave this branch of the Hindu law in a most confused state. Nothing that has been shown compels us to take such a view.

In the result, the appeal fails and is dismissed with costs.

G.B.

ORIGINAL CIVIL.

*Before Sir M. Venkatasubba Rao, Kt., Officiating Chief Justice,
and Mr. Justice Venkataramana Rao.*

THE RAJA OF VIZIANAGRAM, PETITIONER,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE DISTRICT COLLECTOR, VIZAGAPATAM,
AND FIVE OTHERS—RESPONDENTS.*

Letters Patent (Madras), 1865, cl. 17—Native Indian minors resident in mufassal—Guardianship of—Proceeding relating to—Jurisdiction of High Court in regard to—Guardians and Wards Act (VIII of 1890)—Effect of—"Inhabitant of Madras"—Meaning of, in cl. 22 of the Madras Supreme Court Charter of 1800—Father of minors being an—Jurisdiction of High Court in case of—Supreme Court—Jurisdiction of, in regard to native Indian minors resident in mufassal—Madras Court of Wards Act (I of 1902), sec. 15—Assumption of superintendence under, of person and property of adult male proprietor, neither an idiot nor a lunatic—Wards of such proprietor—Guardianship of—Rights of Court of Wards and of disqualified proprietor—Infringement by Court of Wards of guardianship right of disqualified proprietor in respect of such wards—Application by him to High Court for safeguarding his right—Maintainability of—Madras Court of Wards Act, ss. 23 (b) and (c), 34, 48, 50 and 67—Scope and effect of—Guardians and Wards Act, ss. 3, 4, 19, 21 and 41—Applicability and effect of—Guardianship of infant—Father's wishes in regard to—Consideration for—Necessity—Sending of infant out of Court's jurisdiction—Permissibility.

Under section 15 of the Madras Court of Wards Act the Local Government made a declaration that the petitioner, the Raja of Vizianagram, was a disqualified proprietor and directed the Court of Wards to assume superintendence both of his

* Original Petition No. 174 of 1936.

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person and property. A manager was appointed by the Court of Wards under section 24 of the said Act for the property of the petitioner but no guardian for his person was appointed. The petitioner had four minor children, two girls of the ages of 14 and 10 and two boys of the ages of 12 and 9. Learning that the Court of Wards was intending to send his minor children to England, the petitioner filed an application in the High Court praying that it might, in the exercise of its powers under the Letters Patent and such other powers it possessed, make an order restraining the Court of Wards from sending his minor children to Great Britain and, if necessary, appointing some suitable person as their guardian. The minors resided within the Presidency, but outside the city, of Madras but the petitioner owned a valuable and spacious house at Madras for which he paid the rates, kept up an establishment there and resided in it during his visits to the city at frequent intervals. The petitioner and the other nearest relations of the minors, excepting their mother, expressed their disapproval of the proposal of the Court of Wards to take the children to England.

The Court of Wards contended (i) that the application was barred in virtue of section 50 of the Court of Wards Act, (ii) that as the minors resided outside the local limits of the ordinary original civil jurisdiction of the High Court and they were not European British subjects, the High Court had no jurisdiction to entertain and adjudicate upon an application relating to their guardianship and (iii) that under the Court of Wards Act, the Court of Wards had itself become the legal guardian of the minor children and, in the alternative, that in regard to the four matters referred to in section 23 of the Court of Wards Act, namely, "the custody, residence, education and marriage" of the minors, the Court of Wards was vested with a discretionary power in the exercise of which it could not be controlled by a Court of law, unless it was shown that it had acted *mala fide*, i.e., fraudulently, corruptly or maliciously.

Held (i): The application is not barred by section 50 of the Court of Wards Act.

Per the Officiating Chief Justice.—A proceeding instituted by a male proprietor, not being a minor or lunatic, is not a nullity, and the fact that the manager does not appear on the record as his next friend is a mere irregularity and is no ground for dismissing it. Ordinarily, the manager should represent him,

and where that has not been done, the Court, acting reasonably and on proper grounds being shown, ought to give the parties an opportunity to cure the defect. But when, as in the present case, the proceeding is directed against the Court of Wards itself, the usual course cannot be pursued because the same person cannot be permitted to figure both as plaintiff and defendant.

Semle: It is not the intention of the Court of Wards Act that the disability imposed by section 50 thereof should extend to a case where the intended suit or proceeding relates neither to the person nor the property of the disqualified proprietor.

Per Venkataramana Rao J.—The words "in all suits or proceedings" in section 50 must be construed with reference to the extent of disability imposed by the Act and so construed they must relate to the person and property of the ward. A proceeding which relates neither to the person nor to the property of the ward but to the person of a third party who is not a ward is not barred by the section.

Further, section 50 can have no application to a proceeding initiated by the ward against the Court of Wards.

The effect of section 50 is only this, that, if in any suit or proceeding it is necessary under the general law of procedure that there should be a next friend or guardian *ad litem*, then the manager or other officer shall be such next friend or guardian, i.e., he will be a statutory next friend or guardian. The personal rights of the ward are not affected any more than expressly declared to be affected by section 34 of the Court of Wards Act. An adult ward the superintendence of whose person has been assumed by the Court of Wards is not necessarily to be treated as a minor or a lunatic and an application by such an adult ward who is neither a lunatic nor a person so mentally infirm as to be unable to conduct his case is perfectly competent under the general law and there is nothing in section 50 which renders it incompetent.

Even if the petitioner is not competent to maintain the present application, it is open to the High Court to take action under Clause 17 of the Letters Patent if it is brought to its notice that the interest of infants required to be safeguarded.

Kaulpati Kunwar v. Ram Baran Singh, (1932) I.L.R. 54 All. 954, 964 (F.B.); *Dhanipal Das v. Maneshar Bakhsh Singh*, (1906) I.L.R. 28 All. 570, 580 (P.C.); *Sri Thakurji v. Hiratal*,

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(1922) I.L.R. 44 All. 634; *Krishna Pershad Singh v. Gosta Behari Kundu*, (1907) 5 C.L.J. 434; *Krishna Pershad Singh v. Moti Chand*, (1918) I.L.R. 40 Cal. 635, 649 (P.C.); and *Mohamed Abdus Salam v. Kamalamukhi*, (1918) 46 I.C. 316; relied upon.

Narindra Bahadur Singh v. Oudh Commercial Bank, (1917) 46 I.C. 68; and *Narindra Bahadur Singh v. The Oudh Commercial Bank Ltd.*, (1921) I.L.R. 43 All. 478 (P.C.), distinguished.

Held (ii): The High Court has under Clause 17 of the Letters Patent, 1865, jurisdiction in regard to minors, though not of British birth, resident outside the limits of the Presidency-town and its jurisdiction to act under that clause is not affected by the Guardians and Wards Act.

The jurisdiction of the Supreme Court over infants, which the High Court inherited, was not limited to the city of Madras, and, outside the city limits, to European British subjects only but extended to native Indian minors outside the city of Madras. Even if prior to the passing of the Government of India Act, 1858, its jurisdiction did not extend to native Indian minors in the mufassal, such a bar did not exist after the assumption of direct control by the Crown under that Act. The moment direct control was assumed by the Crown, every native of British India became *ipso facto* a British subject and from that time onwards until its abolition the Supreme Court could have exercised jurisdiction over native Indian infants in the mufassal and the High Court has inherited that jurisdiction.

The jurisdiction of the High Court under Clause 17 of the Letters Patent is not in the exercise of its ordinary original civil jurisdiction and it is saved by section 3 of the Guardians and Wards Act which says that "nothing in the Act shall be construed to take away any power possessed by any High Court established under the Statute 24 and 25 Vic. c. 104".

Barnardo v. McHugh, [1891] A.C. 388, 395; *In re Willoughby (an infant)*, (1885) 30 Ch. D. 324, 332; *Annie Besant v. Narayaniah*, (1913) 25 M.L.J. 661, 684, 685; *In re Nataraja Iyer*, (1912) I.L.R. 36 Mad. 72; *Venkataratnam v. Secretary of State for India*, (1929) I.L.R. 58 Mad. 979; *Ardasheer Oursatjee v. Peroneboye*, (1856) 6 M.I.A. 848, 858 to 874; *In re Southern Rhodesia*, [1919] A.C. 211, 221; *Mayor of Lyons v. East India Company*, (1886) 1 M.I.A.

175, 274; *Campbell v. Hall*, (1774) 1 Cowp. 204, 208; 98 E.R. 1045, 1047; *In the matter of M. K. Oachick*, (1791) 1 Morton 139; and *In re Tarunchandra Ghosh*, (1929) I.L.R. 57 Cal. 538, relied upon.

In re Bombay, Justices of, (1829) 1 Knapp. 1, 58; 12 E.R. 222, explained.

In the matter of Phanindrachandra Set, (1930) I.L.R. 58 Cal. 919; *Anilbala v. Dhirendra*, (1920) 32 C.L.J. 314, 318, 320; and *In the matter of the Petition of Jaundha Kuar v. The Court of Wards*, (1881) I.L.R. 4 All. 159—cases relating to the jurisdiction of the High Court over lunatics under Clause 17 of the Letters Patent—considered.

In the matter of Ameer Khan, (1870) 6 Beng. L.R. 392; *In re Govindan Nair*, (1922) I.L.R. 45 Mad. 923 (F.B.); and *Mahomed Alli Allabux v. Ismailji Abdulaji*, (1926) I.L.R. 50 Bom. 617—cases relating to the jurisdiction of the High Court to issue a writ of *habeas corpus* in the mufassal—considered.

Per Venkataramana Rao J. (*The Officiating Chief Justice inclining to the same view but not resting his judgment thereon*)—The petitioner being an "inhabitant of Madras" within the meaning of Clause 22 of the 1800 Charter could have invoked the jurisdiction of the Supreme Court and it could have assisted him in asserting his paternal right over his children resident in the mufassal, if that right was infringed by one who was also subject to the jurisdiction of that Court. On this ground also the High Court has power in the present case to exercise its jurisdiction under Clause 17 of the Letters Patent and give protection to the petitioner and safeguard his paternal rights.

Walcot v. Botfield, (1854) Kay. 534, 543; 69 E.R. 226, 230; *In re Moir. Warner v. Moir*, (1884) 25 Ch. D. 605, 610; *In re Willoughby (an infant)*, (1885) 30 Ch. D. 324, 332; *Anilbala v. Dhirendra*, (1920) 32 C.L.J. 314, 323; *Hope v. Hope*, (1854) 4 De. G.M. & G. 328; 43 E.R. 534; and *Annie Besant v. Narayaniah*, (1913) 25 M.L.J. 661, 686, relied upon.

Per Venkataramana Rao J.—*Quære* whether the natives of India without any exception were intended to be excluded from the class designated as "British subjects" in some places and as "His Majesty's subjects" in other places in the legislation relating to India before 1858.

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Held (iii): The Court of Wards by becoming the guardian of a disqualified proprietor does not *ipso facto* become the guardian of his minor children. He continues to be their guardian unless and until his guardianship is put an end to by a proceeding instituted by the Court of Wards under section 19 of the Guardians and Wards Act. Even in respect of the four matters referred to in section 23 of the Court of Wards Act, namely, "the custody, residence, education and marriage" of the minors, the rights which originally vested in the disqualified proprietor as their legal guardian are not taken away from him and transferred to the Court of Wards by virtue of the fact that the superintendence of his person has been assumed.

Per the Officiating Chief Justice.—Clauses (b) and (c) of section 23 of the Court of Wards Act do not confer an indefeasible right on the Court of Wards which it could exercise at its pleasure. They confer not a right but a power. The purpose of those clauses is merely to make that legal and possible which otherwise the Court of Wards would have no right or authority to do. The Court of Wards is empowered to incur charges or make disbursements, which it would have no right to incur or make in the absence of that provision. But the power so conferred is not for the benefit of the Court of Wards itself but for the benefit of the persons specifically pointed out in the said clauses, and no question of exercising the power can arise unless its exercise is required or duly applied for on their behalf.

Even if the Court of Wards possessed the power claimed by it, its exercise of the alleged power is not, in the circumstances of the case, *bona fide* so as to preclude the High Court's interference.

Per Venkataramana Rao J.—Section 23 of the Court of Wards Act is enacted to enable the Court of Wards to make the necessary orders and arrangements in regard to the matters mentioned therein as incidental to and arising out of the management of the property vested in it. The section does not confer upon the Court of Wards any right or power in the sense that by the exercise of it the Court of Wards can interfere with the rights of others. The section does not take away the powers of the natural guardians of the minors mentioned in clauses (b) and (c) thereof, and the Court of Wards cannot impose its will on such guardians or prevent the Civil Court from disregarding such orders and arrangements made by the Court of Wards as are not to the benefit of the minors. In the

exercise of its powers, the Court of Wards is bound to conform to the wishes of the natural guardians of the minors mentioned in clauses (b) and (c) of section 23, and if it chooses to do anything in violation of their rights, it will be illegal and the natural guardians are entitled to seek the aid of the Court for the protection of their rights.

In respect of the minors mentioned in clauses (b) and (c) of section 23, the Court of Wards is under no compellable duty to make orders and arrangements in regard to their custody, residence, education and marriage. Even if the duty of the Court of Wards is viewed as a compellable duty, it is intended to be exercised for the benefit of the several persons mentioned therein and in fulfilment of the liability cast on the estate which the Court of Wards has taken charge of and when called upon to do so.

In the circumstances of the case it is not in the interests of the minor children of the petitioner that they should be sent to England for the purposes of their education; and, as (a) the rights of the natural guardian, the petitioner, are disputed on the ground that he cannot act, (b) there is no other legally constituted guardian, and (c) there is danger of the minors being removed out of the jurisdiction of the High Court and such a course is not beneficial to the minors, it is absolutely necessary for the High Court to interfere.

Julius v. Lord Bishop of Oxford, (1880) 5 App. Cas. 214, 224, 225, 241 and 244; *Westminster Corporation v. London and North Western Railway*, [1905] A.C. 426, 430 and 433; *Goldberg and Son Limited v. Mayor, etc., of Liverpool*, (1900) 82 L.T. Rep. 362; *Metropolitan Asylum District v. Hill*, (1881) 6 App. Cas. 193, 213; *The Queen v. Bishop of Oxford*, (1879) 4 Q.B.D. 245, 260; *The Queen v. Gyngall*, [1893] 2 Q.B. 232, 239; and *De Manneville v. De Manneville*, (1804) 10 Ves. Jun. 52, 63, 64; 32 E.R. 762, 767, referred to.

It is a recognised principle of English Courts that an infant should not, as a rule, be sent out of their jurisdiction.

Mountstuart v. Mountstuart, (1801) 6 Ves. Jun. 363; 31 E.R. 1095; *Campbell v. Mackay*, (1837) 2 My. & Cr. 31; 40 E.R. 552, referred to.

Per the Officiating Chief Justice and Venkataramana Rao J.—The wishes of the father are a paramount consideration which ought not to be slighted.

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Campbell v. Mackay, (1887) 2 My. & Cr. 31; 40 E.R. 552; *In re Agar-Ellis. Agar-Ellis v. Lascelles*, (1883) 24 Ch. D. 317, 329, referred to.

In the matter of Clause 17 of the Letters Patent, and the Guardians and Wards Act (VIII of 1890)

and

In the matter of 1. Raj Kumari Appala Kondaya Amba, 2. Yuvaraj Vijay Ram Gajapati Raj, 3. Raj Kumari Jaya Devi and 4. Raj Kumar Visveshwar Gajapati Raj, minors.

The facts of the case and the arguments of Counsel appear fully from the judgments of their Lordships.

Petitioner in person.

The Advocate-General (Sir A. Krishnaswami Ayyar) for Court of Wards.

K. Kuttikrishna Menon for second respondent.

T. R. Venkatarama Sastri for third respondent.

K. R. Vepa for *V. K. Thiruvenkatachari* and *S. Parthasarathy* for fourth respondent.

Cur. adv. vult.

JUDGMENT.

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VENKATASUBBA RAO OFFG. C.J.—By this petition the Raja of Vizianagram applies that the High Court may, in the exercise of its powers under the Letters Patent and such other powers it possesses, make an order restraining the Court of Wards from sending his minor children to Great Britain and, if necessary, appointing some suitable person as their guardian. The circumstances in which this application came to be made will appear from our preliminary order dated 7th May 1936, but for the sake of easy reference I shall briefly recapitulate them. Under section 15

of the Madras Court of Wards Act, the Local Government made a declaration that the petitioner was a disqualified proprietor and directed the Court of Wards to assume superintendence both of his person and property. The Raja immediately filed a suit in the Court of the Subordinate Judge of Vizagapatam, impeaching the validity of the order made by the Government and praying for a declaration that it was *ultra vires* and unauthorised. The petitioner, then learning that the Court of Wards was intending to send his minor children to England on 9th May 1936, forthwith applied to the Subordinate Judge for the issue of an injunction restraining it from doing so. It was towards the end of April 1936 that this application was made, when the Court of the Subordinate Judge was about to close for the summer recess, and the Judge therefore made the following provisional order :

“It is desirable that the children should not be sent away from India without intimation to the plaintiff, who is their natural father. . . . I therefore direct the defendant to inform the plaintiff fifteen days in advance of their intended departure, so that, if it is to happen in the summer recess of this Court, the plaintiff may move the High Court, if necessary, to grant an injunction. . . .”

The petitioner accordingly sought the protection of the High Court and LAKSHMANA RAO J., who heard the application, dismissed it, observing shortly that the suit itself *prima facie* appeared to be incompetent and no petition in such a suit could lie. From this order the petitioner filed an appeal, which came up before us in May last, just before the long vacation. I must observe that one of the curious features of this case has been that the petitioner has argued his case in person

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with a view to demonstrate, I believe, that the imputation that he is mentally unsound is wholly unfounded. Several questions were raised and strenuously argued and we found it necessary to adjourn the hearing to some date beyond the Court's recess. To this aspect we referred thus in our preliminary order already adverted to :

" We suggested that the case might lie over and be disposed of by the Vacation Judges during the recess. But we are told that the minors' passage has been booked and it is essential that they should be allowed to leave on the 9th. Consequently our suggestion that the Vacation Judges may dispose of the case cannot take effect. . . . Again, if the minors are to be sent out of the country as intended, they must, we understand, take train in an hour or two. The question, therefore, is, does the balance of convenience require that the minors should be permitted to sail at once or their departure, granting that eventually the Court of Wards succeeds, should be postponed for the present? "

The arguments covered much ground and, in view of certain questions of jurisdiction raised, the petitioner was allowed, in order to obviate any technical defect, to file a formal petition invoking our jurisdiction under the Letters Patent, and incidentally it may be observed, if necessary, that this Bench was specially constituted to deal with this matter. After the re-opening, the Raja has accordingly filed a petition, described to be both under the Letters Patent and the Guardians and Wards Act. The Court of Wards challenges the Raja's right to file the petition on the ground that, under the Court of Wards Act, it has itself become the legal guardian of the minor children. It urges, in the alternative, that, in regard to the four matters referred to in section 23 of the Court of Wards Act, namely, "the custody, residence, education and marriage" of the minors, it is

vested with a discretionary power, in the exercise of which it cannot be controlled by a Court of law, unless it be shewn that it has acted *mala fide*, i.e., fraudulently, corruptly or maliciously. It is then maintained that the petition is barred in virtue of section 50 of the Court of Wards Act. Finally, our jurisdiction is denied on the ground that the infants are residing at Vizagapatam, i.e., outside the local limits of the ordinary original civil jurisdiction of the High Court. With each of these matters I shall presently deal, but for the present it must be stated that the Raja vigorously contends that the proposed exercise of its discretion by the Court of Wards (granting that any such discretion is vested in it under the law) is capricious, unreasonable and oppressive. He maintains that he is an affectionate father, mentally quite sound, but that the action which the Court of Wards proposes to take is such as is likely to render a normal man insane. Referring to himself, he says that he was educated at Mayo College, Ajmere, and obtained the Chiefs' College Diploma, that he is a licensed Air Pilot, that he has extensively travelled throughout India and made short sojourns in England and on the Continent and that he has been permitted to possess modern fire-arms and ammunition and has obtained a motor car driving license. He says further that two competent doctors, one of whom belongs to the Indian Medical Service and is the Principal of the Medical College, Vizagapatam, have certified that he is free from any mental disorder. He goes on to say that his children are of tender age, the girls being fourteen and ten years old and the boys being of the ages of twelve

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and nine. He asserts with emphasis that the removal of the children will greatly imperil their well-being and what he urges in this respect is as follows :

"Of the children, the two boys are being educated at school in Vizagapatam and each of them has a whole-time Graduate tutor and the two girls are being taught by Roman Catholic European nuns, and I am enhancing the knowledge of the four to the extent I can. I see no sense in the children being separated from their countrymen and in their having no manner of education in their language. India is not a barbaric country; it has schools and colleges, some of which are as good as the best of them in England. Just as black bears cannot survive in the Arctic regions and white bears can, my children may not be able to survive the severe cold of the winter in England, while English children are generally able to do so. The severeness of the English cold is such that a large number of English people leave England and go to the south of France in the winter. The percentage of Indians of British India going for school education as compared with those going for collegiate and post-school study, is almost nil."

I have thought fit to quote this passage at some length, as it has a bearing on the question of the exercise of discretion to which I shall advert later on. Stress is also laid on the fact that the threatened removal of the children out of the jurisdiction would in itself furnish sufficient ground for our interference. To avoid any misunderstanding, I wish to observe that whether the father has become unfit to be the guardian of his minor children under section 19 (b) of the Guardians and Wards Act is a matter which would fall to be considered, if at all, at a later stage. For the present, therefore, I refrain from alluding to any allegations made against the petitioner, such as, that he is so erratic that the minors, if permitted to associate with him, are likely to be contaminated. There is one further matter I

must notice before I proceed to deal with the contentions raised. The nearest relations of the infants are their father, the petitioner, their mother, the Ranee, their uncle, the Maharajkumar of Vizianagram, and lastly their grandmother, the Dowager Ranee. The Court of Wards alleges that its decision was taken after consulting these four relations and that it received the approval of all excepting the father; but during the argument the proposal was condemned by every relation other than the mother, and in this connection I must remark that, although the petitioner was eager to argue in person even the intricate questions of law that this petition has raised, he found himself out of his depth, but the Dowager Ranee, who supported him, was ably represented by Mr. Vepa, a junior Advocate, whose industry and research were such that we obtained considerable assistance from his argument. Besides the Dowager Ranee and the Maharajkumar, there are other relations, though not so near (the petitioner's sister, grandfather and grandmothers), who filed affidavits expressing their disapproval. The reason for my referring to these facts is this. The Court of Wards insists that what really matters was the attitude taken by the relations when its decision was reached; but we pointed out in the course of the argument repeatedly that the paramount consideration being the welfare of the minors, if its decision required to be revised in the light of subsequent events, it ought not to hesitate to do so and should not allow any question of prestige to stand in its way. These shortly are the facts connected with this petition, and

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I shall now proceed to deal with the contentions raised.

The first contention that I shall examine is that based upon the terms of section 23 of the Court of Wards Act. It is urged that the rights possessed by the petitioner as the father in respect of his minor children came to an end consequent on the action taken by the Local Government under section 15. The superintendence was assumed not only of the property of the petitioner but also of his person; it is said that in such a case, the wards of the ward become virtually the wards of the Court of Wards. Whether such a far-reaching result inevitably follows from the provisions of the Act, is a question which needs careful examination. Does the Act, though not by express enactment or by necessary implication, nevertheless deprive the disqualified proprietor, and, as I shall show, even third parties sometimes, of valuable legal rights?—that in short is the question to be decided. Section 23 runs as follows :

“ The Court may make such orders and arrangements, as it may seem fit, in respect of the custody, residence, education and marriage—

(a) of any ward whose person is for the time being under its superintendence,

(b) of any minor child, minor brother, or minor sister of such ward, who, in the opinion of the Court, is entitled to maintenance at the charge of the ward's estate,

(c) of the ward's next male heir being a minor and also entitled to maintenance.”

It is maintained that the control of the Court of Wards over the specified minor relations of the ward in respect of the four matters mentioned here, namely, custody, residence, education and

marriage, is absolute and unfettered. The learned Advocate-General further suggests that these four incidents exhaust what is known as the right of guardianship, which consists of these four component parts, in other words, while the disqualified proprietor becomes the direct ward of the Court of Wards, his minor relations named in the section become the indirect wards of the Court. This contention is opposed to the entire scheme of the Act and is inconsistent with its provisions. Section 15 shows that it is the proprietor that is disqualified and it is *his* person or property alone over which the superintendence is assumed. Under section 19 the person that becomes a ward under the Court is the disqualified proprietor, and, if it is intended that his minor relations also should be the Court's wards, the section would have said so. Section 24, which immediately follows section 23 and along with which it should be read, dispels the idea that under the Act the disqualified proprietor and his minor wards are treated alike. While the section specifically provides for the appointment of a manager or guardian for the property or person of the proprietor himself, there is nothing there to suggest that similar powers are conferred over the person or property of the ward's minor relations. Further, there is no warrant for reading into the Act more than it actually enacts and, especially in matters concerning the rights of a subject, it would be wrong to hold that valuable rights are taken away by implication. The primary purpose of the Act is to preserve and safeguard the property of certain proprietors and, as ancillary to that main purpose, the Court of Wards

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is empowered to assume in some cases superintendence of their persons also. Section 9, the first of the group of sections dealing with this matter, makes it clear that the disqualification which the Act contemplates is that which renders the proprietor unfit to manage his property and not his person. In four places in this section reference is made to "property" as distinguished from "person". Then, section 16 declares in no uncertain terms that it is the safeguarding of the property with which the Act is primarily concerned; it emphasises the idea that the compelling factor that leads to the declaration is, that public interests demand that the proprietor's property should be managed by the Court. This being so, even were two constructions possible, the Court should prefer that which would leave unimpaired the rights of the ward in respect of matters not connected with his property over which the superintendence has been assumed. But the position here is much simpler, there being little or no ambiguity in the matter. Section 34 carefully enumerates the disabilities which the Act imposes upon the ward, but nowhere does it say that he is incapacitated from continuing to be the guardian of his own minor wards. Indeed, the present contention is opposed both to the spirit and the letter of the section. The section is expressed in a negative form but leads *inter alia* to the following positive results:

(i) A ward may make himself pecuniarily liable in respect of that part of his property not under the superintendence of the Court of Wards.

(ii) He may transfer or create any interest in such property or collect the rents and profits of such property.

(iii) He may enter into a contract of marriage; that is an unquestioned right he possesses, although as regards the expenses to be incurred, the Court of Wards in the interests of the estate has a right to fix the amount.

(iv) He can adopt or give permission to adopt with the consent of the Court of Wards, which, however, it cannot arbitrarily or capriciously withhold.

(v) Subject to the same restriction, he can dispose of his property by will.

There is nothing therefore either in the language or the purpose of the Act to show that a disqualified proprietor becomes legally incapacitated for all purposes; on the contrary, certain legal rights which he possessed previously are preserved to him unimpaired. Is it to be lightly assumed that a person, who the Act declares is capable of exercising such legal rights as making an adoption or executing a will, is to be treated, as has been suggested, as a "practical lunatic" and deprived of his powers of guardianship?

Section 9, it must be borne in mind, deals with four different categories of disqualified proprietors. Leaving out the case of women covered by clause (b) (which has no bearing on the present discussion), the proprietors falling under clauses (a) and (c), namely, minors and lunatics, should be carefully differentiated from those falling under clause (d). As regards the former two categories, certain disabilities attach to them under the general law; but the disqualified proprietors governed by clause (d), like the present petitioner, are created by the Act, by the provisions of which

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alone the extent and the nature of their disabilities must be determined. The only possible inference therefore to be drawn from the sections to which I have adverted is, that it would be contrary both to the scheme and the language of the Act to hold that the power of the disqualified proprietor over his children has been in any way affected or curtailed. The same result is arrived at in another way. I have shown that there is not a single provision which enacts, or from which it can be inferred, that the Court of Wards, by becoming the guardian of the disqualified proprietor, *ipso facto* becomes the guardian of his own wards. If the Court of Wards does not become their guardian, is there any reason to hold that the pre-existing rights have been altered or affected? That they must have some guardian cannot admit of doubt; it reasonably follows that the person who was their guardian previous to the proprietor being disqualified continues to be so. This raises a question as regards the rights of third parties also. The following illustration will serve to make that point clear. Suppose there are two minor brothers, of whom the elder is the holder of an impartible estate. Their parents are dead and their paternal uncle is their natural guardian. If the elder brother has been made a ward of the Court of Wards, does that put an end to the uncle's right of guardianship over the other minor? Here the uncle is not the disqualified proprietor but a third party, and the contention urged seems to assume that even such third party's powers are taken away. A construction which leads to such an anomalous result, no Court ought to accept.

My view based so far on the Court of Wards Act receives further support from the Guardians and Wards Act, with the relevant provisions of which I shall now proceed to deal. Section 19 provides (I quote only the material part) :

"Nothing in this Chapter shall authorise the Court (i.e., the Court of law) to appoint or declare a guardian of the person

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

This section removes from the jurisdiction of the Courts of the land the minor wards under the Court of Wards, but does not exclude the minor relations of such wards. The present contention would have been sound had section 19 contained a further clause to the following effect :

"(d) of any minor child, minor brother or minor sister of a ward under the Court of Wards".

Now, turning to section 41, the next relevant section, it enacts *inter alia* that the powers of a guardian of the person cease [section 41 (i) (b)] by the Court of Wards assuming superintendence of the person of the ward. It does not say, as it ought to have said if the present contention were right, that those powers cease "by the Court of Wards assuming superintendence of the person of the guardian of the minor ward"—for be it noted that a minor is competent to act as guardian of his own minor wife or child (*see* section 21 of the Guardians and Wards Act). Unless by express statute, no subject can be deprived of his rights under the law—I take this to be a fundamental principle. Here, the two relevant statutes to which I have referred, far from taking away the rights in question, contain positive indications

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which strongly suggest the very opposite. There is another part of section 19 very pertinent to the present enquiry. I quote again so much of it as is material :

" Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the person . . .

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor."

This shows that if the Court of Wards desires to put an end to the guardianship of the petitioner, it should, to achieve that object, institute a proper proceeding under this section, in which case it would be bound to show affirmatively that the father is unfit to be the guardian of the persons of his minor children. There is, however, in the Guardians and Wards Act, section 3, which saves the jurisdiction of the Court of Wards, and this brings us to the question, does section 23 of the Court of Wards Act curtail the powers of the father? If it does, nothing in the Guardians and Wards Act can derogate from the authority of the Court of Wards. That is the question which therefore remains now to be considered.

I have said that the learned Advocate-General has contended that the effect of section 23 is to make the Court of Wards the legal guardian of the minor relations of the ward specified there. That contention, I have held, is untenable and opposed to the purpose of the Act. The learned Advocate-General puts forward an alternative contention : granting that the Court of Wards has not the full rights of guardianship, section 23 confers upon it, at any rate, certain defined rights, in the exercise of which it cannot be controlled by a judicial tribunal. His argument involves

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that in respect of the four matters—custody, residence, education and marriage of the minors indicated—the rights which originally vest in the legal guardian become, by virtue of the section, transferred to the Court of Wards. If this contention is right, what remains in the legal guardian is a truncated right, no more in fact than a merely theoretical right, as the four ingredients referred to above constitute, without question, some of the most essential incidents of a right of a guardianship. In effect the argument is, if the Court of Wards is not the guardian in the strict sense of law, for all practical purposes it possesses that character. The provision, if properly understood, does not lend the slightest support to this contention. What is conferred upon the Court of Wards by clauses (b) and (c) of section 23 (with those clauses alone we are here concerned), is not a right, but a power, and a good deal of confusion has been imported into the argument by failing to distinguish the one from the other. The purpose of those clauses is merely to make that legal and possible which otherwise the Court of Wards would have no right or authority to do; it is empowered to incur charges or make disbursements, which it would have no right to incur or make in the absence of that provision. But the power so conferred is for the benefit of the persons indicated in the section. When a statute confers authority on some public body or person, in terms simply permissive or enabling (by the use of expressions, such as, "may" or "shall have power"), the question has often arisen whether the power so conferred is merely a discretionary power or has a compulsory force. The learned

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Advocate-General contends that every one of the enabling words in every clause of section 23 is to be construed as creating a duty, in other words, as mandatory. This may be granted, as it is not to his opponent's interest to contest this proposition. But what follows? Is the power to be regarded as having been conferred upon the Court of Wards for its own benefit, in which case the power may amount to a right, or for the benefit of others, namely, the persons specifically pointed out in the clauses in question? There can be no doubt, having regard to the scope and the object of the Act, that the second of these two alternatives is what is intended. Numerous statutes have made us familiar with instances where public bodies have been entrusted with powers for the benefit of persons specifically indicated, and it is incontestable that no question of exercising the power can arise unless, when the case arises, its exercise is duly applied for by the party for whose benefit the power is reposed. In *Julius v. Lord Bishop of Oxford*(1), Earl CAIRNS L.C. points out that in *Macdougall v. Paterson*(2) JERVIS C.J. stated the rule to be

"that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application" (page 224).

Earl CAIRNS L.C. himself expresses the idea thus :

"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which

(1) (1880) 5 App. Cas. 214. (2) (1851) 11 C.B. 755 : 188 E.R. 672.

they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised." (Page 225)

Lord BLACKBURN deals with the point in the following passages :

"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it, for the benefit of those who have that right, when required on their behalf." (Page 241)

"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to show that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power." (Page 244)

In deciding whether the intention of the Legislature is to grant a mere discretion or to impose a positive duty, it is pointed out in the judgments delivered in the case cited that regard should be had *inter alia* to the general object of the statute with reference to which the question arises. Similarly, for determining whether a power is reposed in a statutory body for its own benefit or for the benefit of certain specified persons or class of persons, it is of the utmost importance to consider what the object is which the Legislature may be presumed to have intended. The object of the Act is to preserve the estate of a disqualified proprietor; and how is this object achieved or furthered by the Court of Wards being enabled to assume control over his minor relations?

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its

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intention with irresistible clearness." (Maxwell on the Interpretation of Statutes, 7th Edn., page 71).

Why should it be assumed that, for no intelligible reason, a public body, whose function is to preserve the estate of A, is given the right to have the physical control of the persons of B or C or D? On the other hand, it would lead to no such injustice or absurdity to hold that a power has been conferred upon the Court of Wards to be exercised for the benefit of the minor relations when required on their behalf. Throughout in the argument, it was wrongly assumed that clauses (b) and (c) of section 23 conferred an indefeasible right on the Court of Wards, which it could exercise at its pleasure. The true effect of those clauses, as I have been endeavouring to point out, is to empower the Court of Wards to provide, when required, for the dwelling of the minor relations, such residence as it thinks fit, *and not* to enable it, even without being required, to thrust upon them a house in which they can be compelled to live; similarly, when called upon to provide for their education, to incur such charges as it may deem fit *and not*, even without an application for the exercise of the power, to compel them to attend a particular school or to pursue a particular course of studies. The point, as I conceive it, is really a simple one, but, owing to the confusion that has been imported, the matter has been argued at great length at the Bar. The reason for holding that when public officers are empowered to do certain things for a third person, the words are to be construed as mandatory is stated to be that the power is placed with the depositories, not for their benefit, but for the benefit of such third party, to meet the

demands of right (Maxwell on the Interpretation of Statutes, 7th Edn., pages 213 and 214). In the light of these principles, the meaning of clauses (b) and (c) of section 23 becomes perfectly clear. Certain minor relations of the disqualified proprietor are to be provided maintenance out of the estate, the more important incidents of what is shortly termed the maintenance right being set out in the section as comprising "custody, residence, education and marriage". The clauses confer on the Court of Wards "a legislative right and power" [per Lord PENZANCE in *Julius v. Lord Bishop of Oxford*(1)] to make arrangements for the purposes specified, if required, or if duly applied for, in other words, it makes legal and possible the incurring of the expenses and charging them to the estate. That is the scope and effect of the relevant clauses of the section, and it would be a perversion of the Act to call this power a right and to argue that in the exercise of that right the authority of the Court of Wards is absolute and unfettered. It will be seen that I have confined my remarks to clauses (b) and (c) alone, for the position under clause (a), which refers to the disqualified proprietor himself, is entirely different; the Court of Wards having been constituted his guardian by the Act, it possesses in relation to him, a legal right as opposed to a mere power. But that is a matter with which, as already observed, we are not concerned.

A brief reference to section 48 in this connection becomes necessary. It says:

" . . . no act done in the exercise of any discretionary power conferred by this Act shall be questioned in any Civil Court."

(1) (1880) 5 App. Cas. 214, 229.

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But how does any question of discretionary power arise in the case at all? As pointed out above, the power vested in the Court of Wards is not such as is available against the minors; that is confided to it for their benefit and for enabling it to charge the expenses to the estate.

Before leaving this subject, I must observe that some reliance has been placed upon section 67 of the Court of Wards Act, which provides that

“whoever, without the previous consent of the Court, abets the marriage of any of the persons specified in clauses (a), (b) and (c) of section 23 shall be liable, on conviction”

to a fine or imprisonment. It is said that this section by implication recognises the power of the Court of Wards in respect of, at any rate, the marriage of the persons mentioned. One of the persons referred to in section 23 is the disqualified proprietor himself [clause (a)]. I have already pointed out, while dealing with section 34, that it enacts that the disqualified proprietor's capacity to enter into a contract of marriage remains unaffected in spite of section 23. Thus, by entering into a contract of marriage, the disqualified proprietor himself does not violate any provision of law; but section 67 declares that any one abetting his marriage commits an offence and is liable to be punished. This section leads to a strange anomaly and hardly fits in with the scheme of the Act or its other provisions, and, abruptly occurring as it does in the chapter relating to penalties, cannot be treated as affecting the rights under the general law. We are not, however, concerned in this case with the marriage of any person and so section 67 is not really *evant*.

The learned Advocate-General has addressed a lengthy argument with a view to show that, where a public body has statutory powers conferred upon it with a discretion in regard to their use, its decision cannot be contested unless it has acted *mala fide*, that is, as he puts it, fraudulently, corruptly or maliciously [*Westminster Corporation v. London North Western Railway*(1)]. With this I shall presently deal, but, in view of the opinion already expressed by me, this question does not arise. When construing a statute of this sort, the *first* thing to ascertain is what powers the public body has been invested with; the *second* thing is to ascertain whether it has *bona fide* exercised those powers for the purposes for which the Legislature has conferred them [LINDLEY M.R. in *Goldberg and Son Limited v. Mayor, etc., of Liverpool*(2)]. I have held that the Court of Wards has not been confided the power which it claims; this being so, the second question, whether it has *bona fide* exercised the alleged power, does not arise. But granting for a moment that the power in question has been conferred on it with a discretion how it is to be used, I am prepared to hold, without the slightest hesitation, that those elements which would preclude our interference do not exist in the present case. Lord MACNAGHTEN declares in *Westminster Corporation v. London North Western Railway*(1), already cited:

“It is well settled that a public body invested with statutory powers, such as those conferred upon the Corporation, must take care not to exceed or abuse those powers. It must keep within the limits of the authority committed to it; it must act *in good faith and it must act reasonably*.” (page 430);

(1) [1905] A.C. 426.

(2) (1900) 82 L.T. Rep. 362.

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and the expression "acting reasonably" is explained later on as meaning "with judgment and discretion", and TURNER L.J. is quoted in support of this statement (page 433). Sir FRANCIS JEUNE in *Goldberg and Son Limited v. Mayor, etc., of Liverpool*(1), to which I have referred, defines the expression "*bona fides*" in terms particularly appropriate to the facts of the present case. The test according to him is, has the public body acted *bona fide* in the sense that it has fairly endeavoured to ascertain what is necessary or expedient, clearing its mind from personal motives and personal feeling? (page 367). I quite realise that the mere fact that another person might arrive at a different conclusion is no ground whatsoever for reviewing the decision of the public body in whom the discretion has been vested. But I wish to apply the two tests mentioned above—those laid down by Lord MACNAGHTEN and Sir FRANCIS JEUNE—with a view to see whether the decision of the Court of Wards is reviewable or not.

The Raja of Vizianagram belongs to an ancient family and is the foremost among the zamindars of the Presidency. The income his estate yields is about twenty-two lakhs, the highest in the province, and the peishcush amounts nearly to six lakhs. The petitioner's father's predecessor attained great distinction, was granted the personal title of Maharaja and created a G.C.I.E. The latter's immediate ancestor was made a K.C.S.I. and upon him was likewise bestowed the personal distinction of Maharaja (Gazetteer of the Vizagapatam District, pages 338 and 340). These facts I advert to for showing

(1) (1900) 82 L.T. Rep. 362.

that this family has attained a predominant position in the Presidency. That it has established itself in the affections and hearts of the public of the Northern Sircars, is common knowledge.

The petitioner protests with great force against his minor sons and daughters being sent to England. He maintains that he is deeply attached to his children, whose removal will cause him great mental anguish and imperil their own well-being and happiness. The action of the Court of Wards, he says, is almost without precedent, as never before has a boy or girl of tender age from the landed aristocracy been sent abroad for purposes of education. The proposal has roused the resentment of his nearest relations who feel that it is opposed to their cherished usages and traditions. His mother, the Dowager Rane, a lady greatly respected and the senior-most member of the family, and his brother, the Maharajkumar of Vizianagram, have filed statements condemning the proposed step in no uncertain terms. There are in this country many institutions where children of the status and position of the minors can be received and educated. One such institution is Mayo College, Ajmer, which, as the petitioner points out, His Majesty the King as the Prince of Wales described as "the Eton of India" (from the speech delivered at the Mayo College on 28th November 1921). Sir George Anderson, the Educational Commissioner with the Government of India, recently referred to "the record of achievement and the high position which the College now holds". Mr. D. G. H. De La Fargue, Secretary to the Agent to the Governor-General, Rajputana,

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refers to the "acute sense of the *esprit de corps* and pleasant atmosphere which pervades the whole College". "Apart from Ruling Princes and their relations, only the sons of landholders of particular ranks are eligible for admission." (See the Annual Report on the working of the Mayo College, Ajmer, for 1934-35). Another institution of the same kind is the Rajkumar College, Raipur, which turns out boys "well equipped to take charge of their States and Zamindaries". (See the report of Mr. Wilcock, Secretary to the Agent to the Governor-General, Eastern States, contained in the Annual Report on the Rajkumar College, Raipur, for 1934-35). There are three more such institutions in India and as regards them it has been observed that "in point of buildings, staffs and organizations these institutions approach English Public Schools". (See Sir Stanley Reed's Indian Year Book, 1935-36).

The petitioner mentioned various other grounds:

First, that a prolonged stay in England would make it difficult for the minors, upon their return here, to re-adapt themselves to Indian conditions.

Secondly, that the absence of instruction in the vernaculars would be highly detrimental to their interests.

Thirdly, that they would be strangers in their own land and would find their natural environment unsuited to them.

Fourthly, that the boys would lose touch with their tenantry, whose affections they would alienate—a serious handicap when they enter on the administration of the estate; and that in the

case of the girls the public would look upon the step with the utmost disfavour.

We find it difficult to ignore or resist any of these arguments. Not one of them has been answered by the Court of Wards, which simply maintains that it has a legal right which it cannot allow to be challenged. It has made one suggestion and no other, namely, that it is necessary that the children should be removed from the alleged pernicious influence of their father. This objection can be easily overcome. The father has expressed willingness to be subject to such restrictions as may be imposed upon him. We made it clear that we would be prepared to make such order as would have the effect of keeping the minors out of the reach of the petitioner, whose access to them would be carefully and strictly regulated. I have given this matter my most anxious consideration and feel constrained to say that, applying every test, the exercise of the power has not been reasonable or *bona fide*. In the words of Lord MACNAGHTEN, a public body entrusted with a statutory power must act "with judgment and discretion". It appears to me, I say so with great reluctance, that these two requisites are entirely absent. As against every near relation of the minors, the father, the uncle and the grandmother, the only person who favours the proposal is the minors' mother, who, for reasons not clear, seems disposed to prefer a sojourn abroad. It has been hinted that we should pay no regard to the wishes of the father, as he is addicted to abnormal and eccentric habits. On this we are not competent to form any judgment at present. But the

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petitioner has, as already stated, argued his case in person and his behaviour in Court has not shown the slightest signs of mental instability; on the contrary, he behaved with great dignity, moderation and restraint and his bearing and address were marked by refinement and courtesy. Even when serious imputations were made against him, he was not heard to make one harsh remark either against the Court of Wards or against his wife. For this part of the case, it may be assumed that circumstances exist which would induce the Court to interfere with the father's control, but that is not the point that is now relevant. The question is, the only ground alleged, namely, the possible contamination of the children, disappearing, is there any reason why the Court of Wards should transport the children to England, flouting the wishes of the father and the other near relations? I cannot but recall in this connection the pregnant observations of Lord MACNAGHTEN, who thus describes the position of public bodies entrusted with the exercise of statutory powers, involving the invasion of private rights :

"It seems to me that when a public body is exercising the statutory powers conferred upon it for the benefit of the public it is bound to have some regard to the interests of those who may suffer for the good of the community"; *Westminster Corporation v. London and North Western Railway*(1).

Here, assume for a moment that the Act has deprived the Raja in the public interests (section 16) of his legal rights; then as a matter of simple justice, his wishes and inclinations ought to count for something and not to be wholly

(1) [1905] A.C. 426, 433.

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disregarded. Even putting aside the father's wishes, in the children's interests, which must be the paramount consideration, their removal from the country at the most impressionable period of their lives seems very undesirable. Nor has anything been adduced to justify the attempt to remove them from the jurisdiction of the Courts of the province. However, as I have said, my view being that the Court of Wards does not possess the power claimed, the question whether the exercise of the alleged power is *bona fide* or not, does not arise. But, in view of the insistence with which this matter has been argued, I have had, with considerable reluctance, to come to the conclusion (should a finding on the facts become necessary) that the Court of Wards has not acted "*bona fide*" (I say so with sincere respect), as that term has been explained by Sir FRANCIS JEUNE, or "with judgment and discretion", in the words of Lord MACNAGHTEN.

It is next contended that section 50 of the Court of Wards Act renders the petition incompetent. It says *inter alia* that

"in all suits or proceedings in any Civil or Revenue Court the ward shall sue and be sued in his own name and the manager of his property appointed under section 24 . . . shall represent him, as next friend or guardian *ad litem* as the case may be".

A manager has been appointed by the Court of Wards under section 24 for the property of the petitioner and it may be mentioned that no guardian for the person has been so appointed. It is urged that a disqualified proprietor is wholly disabled from instituting any suit or proceeding, which can be filed by the manager alone on his

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behalf, in other words, that this section imposes upon the ward a total disability in regard to the institution of proceedings in Court. First, this contention involves that even where the superintendence of the Court is restricted to the ward's property, the alleged disability extends to proceedings relating to his person; it is unnecessary to enquire whether this result is intended. Secondly, it involves that the disability alleged attaches even to the property of which the Court, acting under section 19, has refrained from assuming superintendence; why this should be so, having regard again to the professed object of the Act, is somewhat difficult to follow. But I prefer for the present not to express any opinion on this question either. The contention involves, thirdly, that the extent of the disability is so great that it exists even where the intended suit or proceeding relates neither to his person nor property. This contention, in my opinion, ought not to prevail. A disqualified proprietor can under section 34 enter into a contract of marriage, as already pointed out; is it to be held that in spite of this, he cannot sue in respect of a breach of promise of marriage? Again, in matters relating to his status, why should he be disabled from filing proceedings intended to assert his rights? For instance, would it be proper to hold that the section is intended to preclude him from instituting a suit complaining against his expulsion from caste? To extend the alleged disability to proceedings of this sort, seems opposed to the scheme of the Act and outside its purview.

Apart from the implied intention of the Act, I should prefer to rest my judgment upon the

wording of section 50 itself. It enacts, to start with, that in all suits or proceedings the ward shall sue and be sued in his own name. This requirement has been here fulfilled. The difference between the language of this section and the provision in the Civil Procedure Code relating to suits by or against minors and persons of unsound mind, is most significant. Order XXXII, rule 1, of the Code provides that every suit by a minor shall be instituted in his name by his next friend and rule 2 goes on to say that where such a suit is instituted without a next friend, it is liable to be dismissed. Section 50 of the Court of Wards Act enacts a very different rule. After providing, as already stated, that the ward shall sue and be sued in his own name (that has been complied with here), it goes on to say that the manager of his property shall represent him as next friend or guardian *ad litem* as the case may be. The result, to my mind, appears to be that a petition, constituted as the one in the present case, cannot be held to be defective. The present section 50 repealed and amended a provision which ran thus:

"Every ward shall sue and be sued in the Civil Courts in the name of the District Collector specified in the notification under section 19 or the Collector appointed under section 46 as the case may be."

The language of the repealed section makes it imperative that the suit shall be brought in the name of the guardian, and the fact that the Legislature thought fit to repeal it and enact a new provision on entirely different lines ought not to be ignored. The need for the amendment that was made is illustrated by this case. It is inconceivable that the same person should have

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been intended to be both plaintiff and defendant, for that is the effect of the contention that has been put forward. The manager, who, it is urged, ought to have filed the present proceeding, is no more than a "servant" of the Court of Wards (section 31), "subject to its control" and "bound by its orders" (sections 24 and 28) and required by section 52 to obtain its previous authorization before representing a ward in any legal proceeding. My view of the section is this: a proceeding instituted by a male proprietor, not being a minor or a lunatic, is not a nullity, and the fact that the manager does not appear on the record as his next friend is a mere irregularity and is no ground for dismissing it. Ordinarily, the manager should represent him, and where that has not been done, the Court, acting reasonably and on proper grounds being shown, ought to give the parties an opportunity to cure the defect. But when, as in the present case, the proceeding is directed against the Court of Wards itself, to pursue the usual course would lead to an obvious absurdity, as it would be contrary to settled principles to permit the same person to figure both as plaintiff and defendant. And on the facts here, it would be idle to pretend that the servant of the Court of Wards can effectively represent the petitioner or adequately safeguard his interests. In my opinion, therefore, there is no substance whatever in the contention that the proceeding is barred by section 50.

If my conclusions so far are correct, it would inevitably follow that this application would have been allowed, had it been filed under the Guardians and Wards Act before the District

Court of Vizagapatam where the minors are residing; but it is maintained that as the petitioner has chosen to move the High Court which has no jurisdiction in the matter, his petition is incompetent and ought to be dismissed. After carefully considering the question, I feel compelled altogether to dissent from this view. Section 3 of the Guardians and Wards Act saves the power of the Chartered High Courts and there is also a provision in the Court of Wards Act (section 3) which similarly saves the High Court's jurisdiction. If we confine ourselves to the relevant provisions relating to infants in the various Charters of Justice, the question to my mind presents little difficulty. The argument has covered much ground, in my opinion quite unnecessarily. A careful scrutiny of the Charters will show that the Court is vested with different kinds of jurisdiction, sometimes restricted, sometimes extensive; and at the outset it seems to me that this distinction ought to be borne in mind. To illustrate my point, I may refer, taking the Madras High Court Charter of 1865, to a few clauses for showing that the extents of the jurisdictions vary. As regards the original civil jurisdiction, clause 11 declares that it shall not extend beyond certain prescribed local limits. By way of contrast, clause 34 may be referred to, which says that the High Court's testamentary and intestate jurisdiction is not subject to such territorial limitation. Again, provisions in regard to other jurisdictions, such as, criminal, admiralty and matrimonial, are entirely dissimilar. Now the question is, what is the extent of the High Court's jurisdiction in regard to

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infants? Clause 17 of the 1865 Charter says that the jurisdiction of the High Court in regard to infants within the Presidency of Madras is the same as that vested in it under clause 16 of the Charter of 1862; the jurisdiction under the latter provision is declared to be "that which is now vested in the said Supreme Court at Madras". Turning to the Charter of 1800 establishing the Supreme Court, the relevant provision is clause 32, the material part of which runs as follows:

"We do hereby authorize the said Supreme Court of Judicature at Madras to appoint guardians and keepers of infants and their estates according to the order and course observed in that part of Great Britain called England."

It will be observed that this clause confers plenary authority unlike several other clauses which occur in this Charter. In defining the ambit of jurisdiction, clause 4 uses words of extensive application. It says that the Court shall have (I quote the relevant portion)

"full power to exercise such civil, criminal, admiralty and ecclesiastical jurisdiction both as to natives and British subjects and be invested with such power and authority within the Fort St. George and the town of Madras and the limits thereof and the factories subordinate thereto and within the territories which then were or thereafter may become subject to or dependent upon the Government of Madras, as the Supreme Court of Judicature in Bengal is invested with, within the Fort William or the kingdoms and provinces of Bengal, Behar and Orissa".

I have set out a good part of this clause, as its language shows beyond doubt that, subject to the provisions that follow, the jurisdiction conferred, both as to territory and as to persons, is general and not restricted. Passing on to the succeeding clauses, each of them deals with a different kind of jurisdiction. In clause 21, for instance, there

is a reference to "British subjects" and to the powers possessed by the abolished Recorder's Court. Now, turning to the Charter of 1798 establishing that Court, we find in the clause dealing with the extent of civil jurisdiction, reference is made to "our subjects", which term is equivalent to "His Majesty's subjects", the expression occurring in (1797) 37 Geo. III, c. 142, in pursuance of which statute the aforesaid Charter was granted. To return to the 1800 Charter, the point I wish to make is this. Clause 4 defines the extent and ambit of jurisdiction and, as I have said, the words used there are perfectly general. Then follow several heads of jurisdiction, not in all cases of equal extent—some restricted, some not; but in the case of infants with which alone we are concerned, the jurisdiction conferred is plenary; for in clause 32, as already stated, there is no restriction either as to place or persons, as it provides in the most general terms that the Supreme Court, in the matter of appointing guardians for infants, is authorised to follow the same order and course, as that "observed in that part of Great Britain called England". It is further material to observe that the power and authority with which the Madras Supreme Court is invested under clause 4, already quoted, is similar to that possessed by the Supreme Court in Bengal; as regards the jurisdiction over infants, there is no difference whatsoever between the powers conferred on the Madras and the Calcutta Courts (Clause 25 of the Calcutta Charter, 1774). The learned Advocate-General contends that the Supreme Court's jurisdiction over infants is both as to territory and as to persons restricted in the

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same way as its original civil jurisdiction, in other words, that its jurisdiction is limited to the city of Madras and, outside the city limits, to European British subjects only. We are in effect asked to read into the clause relating to infants all the limitations that appear in the clause relating to original civil jurisdiction. I fail to see why we should depart from the plain meaning of the provision and read into it restrictive words which do not occur there. It is urged that the view that the High Court possesses a general jurisdiction over infants would lead to the result that the provincial Courts and the High Court possess a concurrent jurisdiction over them. But does the learned Advocate-General's argument avoid this result altogether? Even according to him, the jurisdiction over infants would extend beyond the city in the case of European British subjects, who undoubtedly under the Guardians and Wards Act are subject to the provincial Courts. The argument therefore based upon the supposed anomaly entirely falls to the ground. I agree with respect with the observations of WHITE C.J. who says :

"The jurisdiction in connection with the estates and persons of minors is, in my opinion, the jurisdiction which was exercisable by the Lord Chancellor in England acting for the Sovereign as *parens patriae* when the Supreme Court in Madras was instituted." ; *Annie Besant v. Narayaniah*(1).

The contention urged in that case was that the fact that the minors were outside the Presidency ousted the jurisdiction of the High Court. Here the minors are within the Presidency but outside the city, but for the purpose of the present

(1) (1913) 25 M.L.J. 661, 686.

argument that makes no difference. Referring to clause 32 of the Letters Patent of 1800, the learned CHIEF JUSTICE says :

"The language of this clause is quite general and is not qualified by any limitations as to persons or place such as we find in other clauses of these Letters Patent (see, for instance, clauses 4, 21, 22, 31 and 41) ;" *Annie Besant v. Narayaniah*(1).

There has been a good deal of discussion at the Bar as to what is meant by the expressions "British subjects" and "His Majesty's subjects", occurring in the various statutes and charters belonging to the period 1773 to 1824. It was then that the Recorders' Courts at Madras and Bombay and the Supreme Courts in the three Presidency-towns came into existence.

"Before the Government had passed from the Company to the Crown, it was a matter of doubt whether natives of India (excepting the island of Bombay which had once been a Crown possession) were 'British subjects', as that term was occasionally used in Acts of Parliament relating to India." (Halsbury's Laws of England, First Edn., Vol. X, page 588).

This has been a moot point on which divergent opinions have been expressed. It is sufficient to refer to the judgments of the Bombay High Court reported in *Ardasheer Cursetjee v. Perozeboye*(2) to show how widely eminent jurists and writers have differed on this question. YARDLEY C.J. in his judgment refers to the opinion of Sir Erskine Perry in support of his extended interpretation of the term "British subjects". JACKSON J., the other learned Judge, who places a narrower meaning on the expression, finds support in the opinion of Sir Charles Grey. Indeed it would be tedious and would serve no useful purpose to attempt a solution. As writers on Constitutional

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(1) (1913) 25 M.L.J. 661, 686.

(2) (1856) 6 M.I.A. 348.

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law point out, the Parliament deliberately avoided a precise definition of the term "British subjects", and the Act of 1813 (53 Geo. III, c. 155) for the first time expressly proclaimed the sovereignty of the Crown over the Company's possessions; then by the Charter Act of 1833 (3 and 4 Will. IV, c. 85) the territorial possessions of the Company were continued to it for twenty years "but in trust for His Majesty, his heirs and successors for the service of the Government of India" (Keith's Constitutional History of India, 1600-1935, pages 127 and 131). True, as observed by the Judicial Committee in another connection in *In re Southern Rhodesia*(1), if there is a conquest by the Company's arms, then by well settled constitutional practice, that conquest would be on behalf of the Crown. Equally unassailable is the proposition, that all persons born within the King's dominions, by whatsoever manner acquired, are natural-born British subjects. But this most fundamental principle of British nationality, the statesmen of the period shrank from asserting unequivocally, as they found it sometimes convenient, or even necessary, to recognize the formal overlordship of the Moghul Emperor. It is not possible to define exactly at what precise point of time sovereignty became applicable to the various territories which fell under the Company's control [*Mayor of Lyons v. East India Company*(2)].

Sir Courtenay Ilbert observes :

"Notwithstanding the declaration in the preamble to the Charter Act of 1813 . . . there was still room for doubt whether the native inhabitants of those possessions were British subjects within the meaning usually attached to that term by

(1) [1919] A.C. 211, 221.

(2) (1836) 1 M.I.A. 175, 274.

Acts of Parliament, and whether their status did not more nearly resemble that of natives of the territories in Africa which are under British protection but have not been formally incorporated in the British dominions." (Government of India Third Edn., page 411).

After the assumption of direct control by the Crown under 21 and 22 Vict. c. 106, the doubt as to sovereignty no longer existed and the Crown became the paramount power both in theory and in fact (*see* Halsbury's Laws of England, First Edn., Vol. X, page 588).

But how far is this discussion germane to the point at issue? As I have said, I am emphatically of the opinion, and I wish to repeat it, that in regard to the jurisdiction over infants, the relevant clause in the Charter, differing in this respect from several other clauses, recognises no kind of limitation. So, to my mind, the question as to who were British subjects possesses little importance. If I am correct in this view, the High Court possesses undoubted jurisdiction in regard to the minors, though not of British birth, resident outside the limits of the Presidency-town. But supposing that the jurisdiction of the Supreme Court over infants *was* confined to British subjects of British descent, what follows? The moment direct control was assumed by the Crown, every native of British India became *ipso facto* a British subject and from that time onwards nothing could hinder the Supreme Court from exercising jurisdiction over native Indian infants in the mufassal. To put it concretely, in 1856 it would be (I am granting this for the purpose of the argument) beyond the competence of the Supreme Court to assert jurisdiction over native Indian minors outside the city, but in 1859

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such a bar would no longer exist. This seems to my mind simple enough, for I stress once again that under clause 32 the jurisdiction is general and it contains no reference to British subjects; but if nevertheless the test of a person being a British subject is to be applied, the question is merely, at the material time is he a British subject or not? By section 8 of the Indian High Courts Act, the Supreme Court and the Courts of Sudder Adaulat and Foujdari Adaulat were abolished upon the establishment of the High Court and by section 9 the jurisdiction of the abolished Courts became, subject to certain limitations, vested in the High Court. What matters, therefore, is the power possessed by the Supreme Court at the time of its abolition and it was that power that the newly established High Court was vested with. If, as I have shown, the Supreme Court between the passing of the Government of India Act, 1858, and its abolition, could have exercised jurisdiction over native Indian infants in the mufassal, the High Court inherited its power and jurisdiction. This removes every possible doubt which, in spite of what I have already said, might still be supposed to exist on the point.

There is another aspect to which I may advert, making it, however, clear that it is not intended to seek any ground for my judgment in the remarks to be made in this connection. By clause 22 of the 1800 Charter, jurisdiction is conferred upon the Supreme Court over the inhabitants of Madras, irrespective of any question of race or birth. The petitioner, the Raja of Vizianagram, owns a valuable and spacious house at Madras, for which he pays the rates, keeps up an

establishment there and resides in it during his visits to the city at frequent intervals. That on these facts, which are not disputed, he would answer the description of an "inhabitant of Madras", does not admit of doubt. PAGE WOOD V.C. observes :

"Generally, if a party has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some years. If he keeps up an establishment in it, the place is still his residence; and thus he may be said to have his residence in two or three different counties,"; *Walcot v. Botfield*(1).

In *In re Moir. Warner v. Moir*(2) the legatee was bound under the terms of a will to reside in a certain house for at least six months in every year. In one year he actually resided for eighteen days only and in the year following for no more than twenty-four days. The question arose whether there was such non-compliance as would lead to a forfeiture. BACON V.C. observes that it is necessary, in order to comply with the conditions contained in the will, that the place should be kept up and goes on to say :

"Kept up it has been, for there is a staff of servants there and the man's horses and poultry are there. . . The defendant has resided there; he did take possession; he has complied in all respects with the reasonable interpretation of the will and there is no ground for saying that he has not done so." (Page 610).

These cases have been followed in India in *Anilbala v. Dhirendra*(3), where MOOKERJEE A.C.J. points out that some persons have more than one residence and that in respect of them the word

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(1) (1854) Kay 534, 543; 69 E.R. 226, 230.
(3) (1920) 32 C.L.J. 314.

(2) (1884) 25 Ch.D. 605.

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"reside" may be used in relation to either their personal or legal residence (*see* page 330). I have now shown that the Raja of Vizianagram would answer the description of an "inhabitant of Madras" occurring in clause 22 of the 1800 Charter. I have already said that at any rate subsequent to the Act of 1858, the Supreme Court would undoubtedly possess jurisdiction over the native inhabitants in the mufassal. But even prior to that year, the position of the inhabitants of Madras in virtue of clause 22 was different from that of the inhabitants of the rest of the Province; the Supreme Court's jurisdiction over them did not depend upon any question of nationality. I conceive, therefore, that the Supreme Court, acting upon the English analogy, would not have hesitated to assist a resident of Madras invoking its jurisdiction, in asserting his parental authority over his children resident in the mufassal. Indeed the question is not, who would have to move the Supreme Court, for, by whomsoever moved, it would have exercised jurisdiction over the infant children, though resident in the mufassal, of the inhabitants of Madras. In *In re Willoughby (an infant)*(1), the infant was born abroad but his paternal grandfather was a natural-born British subject and it was held that the Court had jurisdiction to appoint a guardian of such infant, although resident abroad. KAY J., whose decision was upheld by the Court of Appeal, observes :

"According to the principle of our law, the Sovereign as *parens patriae* is bound to look to the maintenance and education of his subjects. First the question is, whether this

principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment it is established by statute that the children of a natural-born father born out of the Queen's allegiance are to all intents and purposes to be treated as British-born subjects, of course it is clear that one of the incidents of a British-born subject is, that he or she is entitled to the protection of the Crown as *parens patriae*." (Page 328)

This case of course does not in terms apply; but if for "British subject" is substituted "inhabitant of British India", the parallel would be complete. The Court of Chancery would extend its protection to the child of a British subject, though resident abroad; thus the residence of the infant is immaterial. By analogy, in the case of an inhabitant of Madras over whom the Supreme Court had jurisdiction, it would extend the same protection to his children wherever resident.

For these reasons it seems to me that the contention that the High Court has no jurisdiction completely fails.

In the result, an injunction will issue restraining the Court of Wards from removing the minors out of the Province or otherwise interfering with them or exercising any sort of control over them, subject to the condition that directions of the High Court may be applied for, by any party interested, in regard to their removal to any place, within the limits of British India. The enquiry is adjourned for the purpose of ascertaining whether the petitioner has rendered himself unfit to continue to be the guardian of the minors in question, and for appointing, if necessary, in his place a suitable person as their guardian and for passing final orders.

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VENKATARAMANA RAO J.—This is an application under Clause 17 of the Letters Patent by the Raja of Vizianagram in the matter of his four minor children (i) for an order that he should have custody and control over the said children as their natural guardian, (ii) but if the Court deems it necessary, for preventing the children from being sent to the British Isles, that a guardian other than the petitioner should be appointed, for an order that his mother Sri Lalita Kumari Devi, the Dowager Rani Saheba of Vizianagram, be appointed as guardian and (iii) for other reliefs. The circumstances which have necessitated this application have been fully dealt with by my Lord the CHIEF JUSTICE and I do not therefore propose to recapitulate them.

This application is strongly opposed by the Court of Wards. At the outset an objection has been taken to its maintainability. The objection is formulated thus in the fourth paragraph of the affidavit filed by the Collector of Vizagapatam on behalf of the Court of Wards :

"The petitioner, being a ward of the said Court of Wards, is precluded from instituting Court proceedings without the consent of the Court of Wards or without intervention of a next friend."

The objection is based on section 50 of the Madras Court of Wards Act which runs thus :

"In all suits or proceedings in any civil or revenue Court the ward shall sue and be sued in his own name and the manager of his property appointed under section 24 or, if there is no such manager, the officer competent to act as manager under section 25 shall represent him, as next friend or guardian *ad litem* as the case may be."

In construing this provision and other provisions of the Court of Wards Act the scope and

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object of the Act has to be kept in view, viz., to conserve and preserve the properties of proprietors disqualified within the meaning of the Act. (*Vide* the preamble to the Madras Court of Wards Regulation V of 1804). The Act is not intended to override private rights. As observed by SULAIMAN J. :

"A ward with certain disabilities is a creation of law and can have no existence outside the law"; *Kaulpati Kunwar v. Ram Baran Singh*(1).

If a ward is a minor or a lunatic declared by a competent Court, he is incapable under the general law of acting by himself and has to be represented by a next friend or guardian as the case may be, but, if he is not, his incapacity must be such as is imposed by the Act. In defining the extent of the incapacity of a ward under the Oudh Land Revenue Act of 1876, the Privy Council in *Dhanipal Das v. Maneshar Bakhsh Singh*(2) make the following observations :

"From a perusal of the group of sections above referred to, their Lordships are of opinion that it was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited."

Their Lordships refused to read into the Act a curtailment of the proprietor's personal rights when they did not find it there. In this case, the Raja is neither a minor nor a person of unsound mind within the meaning of section 9 (a) or 9 (c) of the Act ; but, in the public interest, the Local Government appears to have declared the Raja

(1) (1932) I.L.R. 54 All. 954, 964 (F.B.).
(2) (1906) I.L.R. 28 All. 570, 580 (P.C.).

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a disqualified proprietor under section 9 (d). The only disabilities therefore that are imposed by the Act seem to be those enacted in section 34 of the Act. Examining the extent of those disabilities, it is seen they relate to his property over which the superintendence of the Court of Wards extends, the object being that by no act of his the said property should be imperilled. To this extent therefore his incapacity is thus defined. In other matters, it follows his capacity to act must remain unaffected. He can enter into a contract of marriage; he can adopt or make a will and the Court of Wards cannot withhold its consent except on specified grounds. He is not prevented from dealing with the property the superintendence of which has not been assumed by the Court of Wards nor from incurring any pecuniary liability in respect thereof. Therefore the words "in all suits or proceedings" must be construed with reference to the extent of disability imposed by the Act and, so construed, they must relate to the person and property of the ward. It is only in such cases, if at all, that an adult ward not of unsound mind may be said to be incompetent to sue or be sued in any proceedings without a next friend or a guardian. The application in this case relates neither to the person nor to the property of the ward but to the person of a third party who is not a ward and is therefore not barred by section 50 of the Act.

An examination of some of the cases decided with reference to analogous provisions in Acts *pari materia* seems to support this view. It has been held that in respect of property of a religious institution whereof a ward is a trustee, when

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there is no provision in the Court of Wards Act providing for the management of such property, a ward is competent to sue and to be sued without his being represented by a next friend or a guardian. In *Sri Thakurji v. Hira Lal*(1) the question arose with reference to the property of an idol whereof the ward was one of the trustees. It was contended that under section 55 of the United Provinces Court of Wards Act IV of 1912 the ward could not sue without a next friend. Section 55 of the said Act is in much wider terms than section 50, according to which

"no ward shall sue or be sued nor shall any proceedings be taken in the Civil Court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf".

But the contention was negatived. The learned Judges observed :

"That section has, however, no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. . . . He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager."

In *Krishna Pershad Singh v. Gosta Behari Kundu*(2) a question arose as to the representation of a minor ward in respect of certain property which the Court of Wards had not taken charge of. It was contended, relying on section 51 of the Bengal Court of Wards Act IX of 1879, that the only person competent to represent the ward was the Court of Wards and not the mother who made an application to set aside a sale of the said property as his next friend. It was held by

(1) (1922) I.L.R. 44 All. 634.

(2) (1907) 5 C.L.J. 434.

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MOOKERJEE J. that section 51 had no application to the case, and the Court of Wards was not entitled as a matter of right to represent the minor ward. This decision was confirmed by the Privy Council in *Krishna Pershad Singh v. Moti Chand*(1), wherein at page 649 occurs the following observation :

"It is clear that the Court of Wards did not in fact take over Gadi Gandey at any time. Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards, it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale. . . . The proceedings taken by her were therefore in order."

A similar view was taken by the Patna High Court in *Mohammed Abdus Salam v. Kamalamukhi*(2), wherein MULLICK and THORNHILL JJ. observe that, though section 51 of the Bengal Court of Wards Act IX of 1879 is enacted in very wide terms, judicial decisions have considerably restricted the very wide meaning sought to be attached to the section. They also seem to be of the opinion that in a case where the suit is in respect of property which is not in the actual possession of the Court of Wards, the suit may proceed against the proprietor alone. I may mention that, under the proviso to section 19, clause 2, of the Madras Act, it is in the discretion of the Court of Wards to assume or refrain from assuming the superintendence of any property which the ward may acquire otherwise than by inheritance. It cannot be urged that in respect of property of this description which

(1) (1913) I.L.R. 40 Cal. 635 (P.C.).

(2) (1918) 46 I.C. 316.

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the Court of Wards has not taken charge of, the ward would not be competent to sue or be sued without his being represented by the Court of Wards. The cases relied on by the learned Advocate-General do not militate against this view. In *Narindra Bahadur Singh v. Oudh Commercial Bank*(1), and, on appeal to the Privy Council, in *Narindra Bahadur Singh v. The Oudh Commercial Bank, Ltd.*(2), the question related to the property of the ward vested in the Court of Wards and in regard thereto it may be said he was incapable of acting. As the Court of Wards represented him, he was held to be bound by its act. Further, the decision also turned on the language of section 55 of the United Provinces Act IV of 1912. The observations in 46 I.C. 68 are too wide, if it is meant thereby that the moment a person is declared a ward of Court he becomes so to speak a minor or lunatic for all purposes. There is nothing in I.L.R. 43 All. 478 (P.C.) which supports these observations.

It is argued that in cases where the Court of Wards takes superintendence of the person the ward must be treated as a minor or a lunatic. I find however nothing in the Act which supports that contention either expressly or by necessary implication. The superintendence of the person is after all assumed only as ancillary to the main object of the Act, namely, the preservation of the property.

Under the general law, a person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for

(1) (1917) 46 I.C. 68.

(2) (1921) I.L.R. 43 All. 478 (P.C.).

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a suit (Order XXXII, rule 4, Civil Procedure Code). It cannot be said that an adult ward who is neither a minor nor a lunatic is incompetent to act under the said rule. The Raja in this case would thus be competent to represent his minor children and it will be idle to contend that nevertheless he in his turn should be represented by someone else as if he were a minor or a lunatic.

Again section 50 can obviously have no application in suits or proceedings to which the Court of Wards is a party. It seems to me impossible that in a proceeding against the Court of Wards the manager can represent the Raja. The proceeding in this case is initiated by the Raja against the Court of Wards in respect of a claim wholly dissociated from the person and property of the ward. Therefore also the application in its present form is perfectly competent.

I am also of the opinion that the contention that this application is not maintainable without the manager or other officer representing the Raja can be met successfully by a construction of section 50 which probably least affects personal or private rights. The section is made of two parts. The first lays down that the ward shall sue and be sued in his own name. So far, this application is in accordance with the statute. The second part lays down that the manager appointed under section 24 or the officer appointed to act as manager under section 25 shall represent him as next friend or guardian *ad litem* as the case may be. Now the expressions "next friend" and "guardian *ad litem*" are well known to procedural law, being expressions used in the Civil Procedure Code which was in force when

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the Court of Wards Act was passed. These expressions occur in Order XXXII of Schedule I, Civil Procedure Code, dealing with suits by or against minors and persons of unsound mind. Provision therein is made for representation of minors and lunatics by next friends when they are plaintiffs and by guardians *ad litem* when they are defendants. The Court of Wards Act contemplates minors and lunatics to become wards. [See section 9, clauses (a) and (c)]. A suit by or against such persons should conform to the provisions of the Civil Procedure Code, i.e., such persons should be represented by next friends or guardians *ad litem*. Consistent with the policy of the Act, what section 50 lays down is only this, that if in any suit or proceeding it is necessary under the general law of procedure that there should be a next friend or guardian *ad litem*, then the manager or other officer shall be such next friend or guardian, i.e., he will be a statutory next friend or guardian. In this view, several of the anomalies pointed out earlier will not arise and the personal rights of the ward will not be affected any more than expressly declared to be affected by section 34. This application therefore by an adult person who is neither a minor nor a lunatic nor a person so mentally infirm as to be unable to conduct his case is perfectly competent under the general law and there is nothing in section 50 which renders it incompetent.

Even assuming the Raja is not competent to maintain this application, it is open to this Court to take action under Clause 17 of the Letters Patent if it is brought to the notice of the Court that the interests of infants required to be

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safeguarded. Apart from the Raja, his mother, the Dowager Rani, has filed an affidavit intimating her willingness to be appointed guardian and further through her Counsel has requested this Court to appoint a proper guardian as the interests of the infants are in real danger unless adequate protection is given by this Court.

The next objection taken by the Court of Wards is that this Court has no jurisdiction "to receive and adjudicate upon an application relating to the guardianship of infants residing outside the ordinary original civil jurisdiction of this Honourable Court unless it be he is a European British subject". The jurisdiction of this Court over infants is conferred by Clause 17 of the Letters Patent, 1865, which runs thus :

"And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the Presidency of Madras, as that which was vested in the said High Court immediately before the publication of these presents."

What was thus vested by Clause 17 was what was vested under Clause 16 of the Letters Patent of 1862 which runs thus :

"And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court at Madras."

The power that was vested in the Supreme Court in this behalf under Clause 32 of the Madras Charter of 1800 is to this effect :

"And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for

Infants, and their estates, according to the Order and Course observed in that Part of Great Britain called England".

The question is, what is the order and course observed in England? The jurisdiction in regard to persons and properties of infants is that exercised by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown *virtute officii*. It has therefore its foundation in the prerogative of the Crown flowing from its general power and duty as *parens patriae*; see *Barnardo v. Mc Hugh*(1). This power is exercised even if the infant is residing outside the jurisdiction of the Court of Chancery [vide *In re Willoughby (an Infant)*(2), per COTTON L.J.] and arising out of the prerogative of the Crown it is not subject to any territorial limitation. All that is necessary is that at the time it is invoked the minor must be a subject of His Majesty. It is the same jurisdiction which is conferred by Clause 32. As pointed out by WHITE C.J. in *Annie Besant v. Narayaniah*(3) :

"The language of the clause is quite general and is not qualified by any limitation as to persons or place such as we find in other clauses of these Letters Patent."

There is nothing to prevent the jurisdiction being exercised over infants in the mofussal in the presidency provided they fulfil the requisite laid down above. Mr. Broughton in his book on the Civil Procedure Code of 1859 comments on Clause 16 of the Letters Patent of 1862 thus :

"The jurisdiction given by this clause seems, with the like clause of the Charter of the Supreme Court, to confer power and authority in those cases without respect to nationality." (1869, 8rd edn. Appx., page 29).

(1) [1891] A.C. 388, 395.

(2) (1885) 30 Ch.D. 324, 332.

(3) (1913) 25 M.L.J. 661, 684, 685.

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It is contended that Clause 32 must be deemed to be qualified by the clauses which define the extent of the jurisdiction, namely, Clauses 21, 22 and other clauses, and that they indicate that the jurisdiction of the Supreme Court is confined only to the City of Madras and over European British subjects in the mofussal. It will be seen that the Charter confers various jurisdictions, civil, criminal, ecclesiastical, admiralty, equity and testamentary, as well as jurisdiction over infants, idiots and lunatics. The extent of the jurisdiction in each case will have to be ascertained from the language used with reference to each.

In regard to the issue of *certiorari* to an officer in the mofussal, a similar contention was advanced with reference to Clause 8 of the Charter which like Clause 32 contains no limitation as to place or person. SADASIVA AYYAR J. repelled the same and observed thus in *In re Nataraja Iyer*(1) :

"I agree with NORMAN J., that, while as regards original, civil and criminal jurisdiction, the Letters Patent confined the jurisdiction of the Supreme Court to the Presidency-town, the powers of the Supreme Court as a Court of Judicature for the whole of the Presidency of Madras extend to the issuing of writs of *habeas corpus* and like prerogative writs into the mofussal also, provided that they are not issued so as to affect Courts. The fixing of the civil, criminal and other jurisdiction of the Supreme Court and inhabitants who do not owe undivided allegiance to the British Crown by Clauses 21, 22, 33, 34 of the Letters Patent cannot, in my opinion, limit the powers given by Clause 8."

This view has been followed in *Venkataratnam v. Secretary of State for India*(2) (*vide* the observations of VENKATASUBBA RAO J., as he then was, at page 989). It accords with the general

(1) (1912) I.L.R. 36 Mad. 72, 93. (2) (1929) I.L.R. 53 Mad. 979.

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principle to be observed in the exercise of a power arising out of the prerogative of the Crown conferred on a Court by virtue of a statute, viz., that it must have full effect unless there are precise words which limit or define its extent. There being thus no limitation of the power conferred on the Supreme Court under Clause 32, this Court has jurisdiction to appoint a guardian for an Indian infant residing in the mofussal if a proper case is made out.

Even otherwise, what is the scope and extent of the jurisdiction conferred by the other clauses of the said Charter of 1800? It is argued for the Court of Wards that the jurisdiction is only over a limited class of people, namely, all such persons as have been described and distinguished by the appellation of "British subjects" and employees under them, and inhabitants of Madras, and that the natives of India as such residing in the mofussal, not being "British subjects", would not come under any of these designated classes.

It may be a question how far the view propounded by the learned Advocate-General is correct, viz., that the natives of India without any exception were intended to be excluded from the class designated as "British subjects" in some places and "His Majesty's subjects" in other places in the legislation relating to India before 1858. No doubt several provisions suggest that their application was contemplated only in respect to those subjects of the British Crown who were natives or descendants of natives of Great Britain. But it must not be forgotten that these statutes were passed and charters granted during a period when the greatest uncertainty prevailed

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as to the exact position occupied by the native inhabitants of the Company's possessions in relation to the British Crown. It was with great hesitation that sovereignty was even theoretically asserted over the Company's dominions. Till a very late period, the fiction of the native subjection to the Moghul was kept up. The following passage from the Cambridge History of India, Vol. V, pages 594 and 595, gives an indication of the uncertainty :

"That Act (the Regulating Act) takes for granted the existence of British sovereignty in Calcutta and its immediate neighbourhood, but not apparently beyond. At best its language is hesitating and uncertain. A distinction appears between British subjects and the native-born inhabitants. The India Act of 1784 leaves the question still untouched, although it legislates for the full exercise of all sovereign powers in territory that in 1773 was clearly not yet a part of the dominions of the Crown. The Act of 1793 merely declared that all territorial acquisitions and their revenues were to remain in the possession of the East India Company for the next twenty years, thus leaving the question of sovereignty still open. Not until 1813 do we find the claim to sovereignty formally asserted. In the Act renewing the Company's privileges in that year the territorial acquisitions were continued under its control 'without prejudice to the undoubted sovereignty of the Crown of the United Kingdom, etc., in and over the same'. But at what moment that sovereignty came into being still remained a riddle."

To an English jurist of the period, therefore, the essential attribute of a British subject, viz., permanent and unquestioned allegiance to the Crown, was not perhaps very apparent in the native inhabitants of the factories or territories of the Company.

At the same time it is clear that divergent views were entertained by responsible persons. It has been held by the Supreme Court of Bombay

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that even native inhabitants of the Island of Bombay would be British subjects owing allegiance to the Crown within the meaning of that term in the Charter of the Supreme Court of Bombay. A striking exposition of the opposing views on the subject will be found in the judgments of YARDLEY C.J. and JACKSON J. in *Arda-sheer Cursetjee v. Perozeboye*(1). But YARDLEY C.J.'s opinion seems to be borne out by the provisions of the Charter of Charles II by which the Island of Bombay was granted to the East India Company. The following clause occurs therein :

"That all and every the persons, being *our subjects* (excluding, therefore, mere sojourners or aliens), which do or shall inhabit within the said port and island, and every of their children and posterity which shall happen to be born within the precincts and limits thereof, shall have and enjoy all liberties, franchises, immunities, capacities, and abilities of free denizens and natural subjects within any of our dominions, to all intents and purposes as if they had been abiding and born within this our kingdom of England."

The observation of PERRY J. thereon is instructive :

"This clause, it will be observed, expressly confers the rights of denizenship on all his Majesty's subjects which do or shall inhabit, and the rights of natural subjects on all who shall be born within, the island of Bombay."; Morley's Digest, Vol. II, page 340.

This is the view of writers on Constitutional Law. (See Taring, Halsbury's Laws of England, Vol. X, 1st Edn., page 588; Dodwell in the Cambridge History of India, Vol. V, page 589).

But any detailed investigation into this matter is perhaps unnecessary for the determination of the question in issue. The fundamental fact however remains that the essential requisite for

(1) (1856) 6 M.I.A. 348, 353 to 374.

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being designated as a British subject is permanent allegiance to the British Crown, an attribute which was apparently assumed to be wanting in the natives of India before 1858 though there are also instances suggesting a contrary inference.

After 1858, however, there cannot be any doubt that the natives of India would be included in the category of British subjects. Taring says in his article on Dependencies, Colonies and British Possessions (Halsbury's Laws of England, 1st Edn., Vol. X, page 588) thus :

"Before the Government had passed from the Company to the Crown it was a matter of doubt whether natives of India (except in the Island of Bombay which had once been a Crown possession) were 'British subjects' as that term was occasionally used in Acts of Parliament relating to India. Since the Government of India Act, 1858, this doubt can no longer exist, so far at least as natives of British India were concerned."

SADASIVA AYYAR J. in *In re Nataraja Iyer*(1) says :

"But when all the people became subject to the King's laws and the King's Courts instead of the Company's laws and Company's Courts, they must be entitled to invoke the King's prerogative vested in the Superior Courts for their protection."

It follows therefore that when Clause 16 of the Letters Patent, 1862, incorporates by reference the power vested in the Supreme Court over British subjects, that term would include also the new species of British subjects, the native subjects of the British Crown. It is to a case like this that the following canon of statutory construction well applies :

"The language of a statute is generally extended to new things which were not known and could not have been

(1) (1912) I.L.R. 36 Mad. 72, 95.

contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus and the thing which afterwards comes into existence is a species of it." (Maxwell on Interpretation of Statutes, 7th Edn., page 69).

The Charter of 1800 deals with the genus "British subjects". Even assuming that the only species then contemplated was the "European British subject", when the new species of Indian British subject came into existence in 1858, then the Charter will extend in its application to the new species as well.

I shall now advert to some of the facts and circumstances which support the conclusion that the Statutes and Charters of Justice of the period prior to 1858 dealt with British subjects or His Majesty's subjects as a genus with well-recognised characteristics, though, as pointed out, it is doubtful if the native subjects of the Company's territories were unequivocally treated as an accepted species of it. The Supreme Court was first established in India at Fort William in or about 1772 in pursuance of 13 Geo. III, c. 63. The said Act and the Charter issued in pursuance thereof formed the foundation for the Acts and Charters by which the Supreme Courts in other provinces were constituted with the same powers and jurisdiction. An English jurist of the period must be presumed to have been aware of the conception of the term "British subject" as then understood. Dicey states the Common Law view of English nationality which prevailed at least from the time of Edward III thus :

"English lawyers in the time of Edward III based the law of what we should now call 'British nationality' on one broad principle. . . . Any person, they held, who was born within the allegiance of the King of England was a natural-born

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British subject, whilst, on the other hand, no person was such a natural-born British subject unless he was born within the legiance of the King. The word 'legiance' . . . meant the duty of the King's subject to yield permanent obedience to the King and his claim in return for this obedience to receive the King's protection. Birth within the legiance was held to mean birth in territory subject to the King. . . . Over 500 years have elapsed since the death of Edward III, yet the most fundamental rule of British nationality remains all but absolutely unchanged. It is still true that almost every person born within the King's dominions or, to use an ordinary expression, within the British dominions, is a natural-born British subject."; *Vide* Dicey's Conflict of Laws, 5th Edn., pages 896 to 898.

Clause 67 of the Charter of the Supreme Court of Madras and Clause 80 of that of Bombay seem to indicate that this conception was kept in view. It was also understood at the time that inhabitants of territories acquired by conquest or cession would become subjects of the King when once received under the King's protection. [*Vide Campbell v. Hall*(1)]

Turning to 13 Geo. III, c. 63, the persons over whom jurisdiction was to extend were specified in sections 14 and 16. It will be seen that while defining the extent of the jurisdiction and the power under the Charter to be granted in pursuance of the Act, it states that the same "shall and may extend to all 'British subjects'". While defining the jurisdiction of the Supreme Court it states that the said Court shall have full power and authority over all "His Majesty's subjects" and persons employed under them. British subjects must have been used to have the same meaning as His Majesty's subjects, i.e., subjects

(1) (1774) 1 Cowp. 204, 208; 98 E.R. 1045, 1047.

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of the British Crown. His Majesty's subjects on the date of the Act comprised not only natives or descendants of natives of Great Britain but also natives or descendants of natives of its acknowledged colonies.

This view derives support from some of the clauses of the Charter issued in pursuance of the Act. Clause 13 of the Charter which gives effect to sections 14 and 16 of the Act describes the class of subjects as "our subjects" meaning His Majesty's subjects. Clause 19 of the Charter which defines criminal jurisdiction refers to them as "any of the subjects of us". Again in the conferment of the King's prerogative rights under sections 4 and 25 of the Charter, no definition of territory or person is mentioned but the power is stated to be that exercised by the Courts in England which it must be conceded extended over all His Majesty's subjects in the widest sense of the term.

One of the objects of the statute was to establish a Supreme Court of Judicature and the object of section 14 is to define its jurisdiction. One must presume that in establishing a Supreme Court for a presidency the intention of the Legislature will be to confer as wide a jurisdiction as possible. It will be seen that in the Statutes 37 Geo. III, c. 142 and 39 and 40 Geo. III, c. 79 the Recorders' Courts and the Supreme Courts were intended to have jurisdiction also "over the territories to be acquired" and on acquisition by conquest or otherwise natives of the said territories would become British subjects.

The question is not whether British subjects were intended to include the native inhabitants

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of India at the time of the passing of the said Act or Charters but whether the term "British subjects" was used only in the sense of natives or descendants of natives of Great Britain. If it is not the latter, the natives of India would become British subjects as and when they fulfil the requisites which are necessary to make them so and once they become British subjects the Supreme Court would have jurisdiction over them.

The interpretation put by the Calcutta Supreme Court even after 21 Geo. III, c. 70 seems to suggest that the test to determine who is a "British subject" within the meaning of the Charter of the said Court was allegiance to the British Crown. In *In the matter of M. K. Cachick*(1) the question arose whether Armenian Christians living in Cassimbazaar were British subjects within the meaning of the Charter. Three learned Judges of the Supreme Court decided they were, the ground of the decision being that "they do not acknowledge any other sovereign than the King of Great Britain".

Sir Charles Grey's opinion was whether the term "British subjects" comprehended natives of India or not, it would apply to all persons "having indefeasibly the character of the subjects of the British Crown". (*Vide* Cowell, Courts and Legislative Authorities in India, pages 37 and 38).

At page 412 of his book "The Government of India" Sir Courtenay Ilbert refers to Clarke's note to his Edition of 9 Geo. IV, c. 33 to show the conflicting opinions held with regard to the meaning of the term "British subjects", but from

(1) (1791) 1 Morton 139.

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the note itself it is clear that, whether it comprehended the natives of India or not, it included not only the natives or descendants of natives of Great Britain but also those of its acknowledged Colonies of whatever colour or race.

In 1813, Act 55 Geo. III, c. 155 was passed extending the Charter granted to the East India Company for another period of twenty years and by section 95 of the Act the undoubted sovereignty of Great Britain was for the first time asserted and declared in a statute. The legal effect of such a declaration would be in theory to make the natives of India the subjects of His Majesty. Sir Courtenay Ilbert, however, points out at page 411 of his book :

"Notwithstanding the declaration in the preamble to the Charter Act of 1813 . . . there was still room for doubt whether the native inhabitants of those possessions were British subjects within the meaning usually attached to that term by Acts of Parliament, and whether their status did not more nearly resemble that of natives of the territories in Africa which are under British protection, but have not been formally incorporated in the British dominions."

But from 1833 one may see clearly an indication to regard the natives of India as the subjects of His Majesty because of the increasing definiteness in the minds of the British statesmen to exercise in fact direct sovereign control over British possessions in the East. It was finally in 1858 that the Crown asserted direct control and assumed sovereignty both "in form and in fact". In unmistakable terms it was declared by section 1 of 21 and 22 Vic. c. 106 that the Government of territories vested in the Company in trust for Her Majesty shall cease and shall become vested in Her Majesty and India shall be

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governed "by and in the name of Her Majesty". The legal consequence of this direct assumption of sovereignty was that all the natives of India became British subjects or His Majesty's subjects and the above statute as well as subsequent statutes make this position abundantly clear.

Thus, if natives of India had become British subjects or His Majesty's subjects, they were certainly amenable to the jurisdiction of the Supreme Courts in and from 1858 till 1862 when those Courts were abolished. The language of Clause 16 of the Letters Patent of 1862 is very significant, viz., "now vested in the Supreme Court", i.e., in 1862. The learned Advocate-General combats this view by saying that to adopt it would be a violent construction, as all natives of India would be subject to the concurrent jurisdiction of both the Company's Courts and the Supreme Court. It is not possible to see what the difficulty is in subjecting them to such concurrent jurisdiction.

It is because of the confusion that may arise by having a plurality of jurisdiction that the High Courts Act was passed to systematise the judicial administration by abolishing the Supreme Courts and Saddar Dewani Adawlat Courts and defining the powers of the High Court.

The High Court has, therefore, under Clause 17 of the Letters Patent, 1865, jurisdiction to appoint a guardian of an infant residing in the mufassal and who is not a European British subject. This is the view taken by LORT-WILLIAMS J. in *In re Tarunchandra Ghosh*(1) and by WHITE O.J. and OLDFIELD J. in *Annie Besant v. Narayaniah*(2).

(1) (1929) I.L.R. 57 Cal. 533.

(2) (1913) 25 M.L.J. 661.

Considerable emphasis was laid by the learned Advocate-General on the decision of the Privy Council in *In re Bombay, Justices of*(1). According to him the Privy Council conclusively laid down therein that the Supreme Court of Bombay had no jurisdiction over the natives of India in the mufassal and the importance of the decision consisted in the fact that it was pronounced after the declaration of sovereignty in 55 Geo. III, c. 155 in consequence whereof every native of India would be a British subject. In my opinion, *Knapp's* case did not lay down the proposition contended for. The actual decision in that case so far as it relates to the present discussion was that the Supreme Court of Bombay had no jurisdiction to issue a writ of *habeas corpus* to one Moro Ragonath who was then residing in Poona outside the City of Bombay. One of the propositions enunciated in that decision was

"that the Supreme Court had no power or authority to issue a writ of *habeas corpus* except when directed either to a person resident within those local limits wherein such Court has a general jurisdiction or to a person out of such local limits who is personally subject to the civil and criminal jurisdiction of the Supreme Court".

The question still remains, who are personally subject to the civil and criminal jurisdiction of the Supreme Court? The actual ground on which the writ was held to be bad is not stated in the report of the Privy Council. It might have been on the ground alleged in the petition of Moro Ragonath that he was a relation of the Peishwa and at no time owed allegiance to the Crown and therefore not a British subject within the meaning

(1) (1829) 1 Knapp. 1; 12 E.R. 222.

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of the statute. If so, the decision is not against the view I have indicated. It may be that, according to the notion of sovereignty prevalent at the time with reference to the territorial acquisitions in India, as already pointed out by me, the Company's subjects were not treated as His Majesty's subjects and therefore Moro Ragonath was not treated as His Majesty's subject. If according to that decision the condition for the exercise by the Supreme Court of the Crown's prerogative is personal subjection to the civil and criminal jurisdiction of the Supreme Court, it follows the moment a native of India becomes personally subject to the said jurisdiction, he can seek the benefit of the said prerogative.

An argument was based by the learned Advocate-General on lunacy legislation. It is this : The jurisdiction of the High Court under the Letters Patent and of the Supreme Court under Clause 32 of the Charter of 1800 over lunatics and infants is the same ; Act XXXIV of 1858 and Act XXXV of 1858 and sections 37 and 62 of the Lunacy Act, IV of 1912 (an enactment consolidating the previous Acts) make it clear that the Supreme Court had not and the High Court has now no lunacy jurisdiction over Indians residing in the mufassal. Reliance is placed on *In the matter of Phanindrachandra Set(1)*, *Anilbala v. Dhirendra(2)* and *In the matter of the Petition of Jaundha Kuar v. The Court of Wards(3)* in support of this view. *In the matter of the Petition of Jaundha Kuar v. The Court of Wards(3)* is based on an alleged practice in the Calcutta High Court.

(1) (1930) I.L.R. 58 Cal. 919.

(2) (1920) 32 C.L.J. 314.

(3) (1881) I.L.R. 4 All. 159.

Both the decisions in *In the matter of Phanindrachandra Set(1)* and *Anilbala v. Dhirendra(2)* proceed on the assumption that Clause 14 of 13 Geo. III, c. 63 has the effect of confining the jurisdiction of the Supreme Court beyond the limits of Calcutta to British subjects, the subjects of the King of British birth, an assumption which I have shown is unfounded. The Lunacy Acts do not in my opinion bear out the view contended for. Referring to the Acts of 1858 and 1912, BEACHCROFT J., in *Anilbala v. Dhirendra(2)*, observes as follows :

"In none of them was any definition or limitation of the jurisdiction of the Supreme Court attempted. This may possibly have been due to the fact that the extent of that jurisdiction has always been uncertain and to a reluctance on the part of the Legislature to make any enactment which might interfere with it. . . There is then no provision in any of the three Acts which indicates the extent of the jurisdiction of the Supreme Court."

BEACHCROFT J. was only pointing out, what I already indicated, that the legislation regarding Courts of Justice was partly coloured by the prevailing notions of sovereignty in regard to the territorial acquisitions in India and the hesitancy and uncertainty which dominated the British statesmen in defining precisely the nature of the control of the Crown. In dealing with Clause 17 of the Letters Patent and section 25 of the Charter of the Supreme Court of Calcutta, BEACHCROFT J. again says :

"It would be necessary to examine historically the extent to which sovereign powers had been acquired by 1774 so as to justify the claim to legislation in respect of persons other than European British subjects living outside the town of Calcutta."

(1) (1930) I.L.R. 58 Cal. 919.

(2) (1920) 32 C.L.J. 314.

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Herein BEACHCROFT J. clearly assumes that subjection to the British Crown would be the basis for determining the extent of jurisdiction but having done so, in my opinion, he commits the mistake of thinking that British subjects must be confined for ever to European British subjects of the King and that section 25 must be controlled by other clauses of the Charter, a view which I have already shown is not well founded. Dealing with Act IV of 1912, MOOKERJEE J. in the same case remarks thus :

“It will be observed that section 38 does not formulate the test to be applied to determine whether a person is or is not subject to the jurisdiction of the High Court for purposes of judicial inquisition as to alleged lunacy. In this respect the law is left as it was under sections 1 and 8 of the Lunacy Act of 1858.”

Section 38 occurs in Chapter IV and the said chapter is mainly intended to deal with persons subject to the local limits of the jurisdiction of the High Court. This seems to be made clear by the fact that the High Court under section 43 of the said Act is also empowered to deal with persons outside the local limits of the jurisdiction of the Court which will be the jurisdiction under Clause 17 of the Letters Patent. The heading of Chapter IV also furnishes the key to the interpretation of section 38. The words in section 62 “not subject to the jurisdiction of the Supreme Court”, therefore, in my opinion, mean not subject to the local limits of the jurisdiction of the Supreme Court. A consideration of the provisions of Acts XXXIV and XXXV of 1858 also seems to support this view. Section 1 of Act XXXIV of 1858 is in general terms as it refers to “any person subject to the jurisdiction of the Court” and section 8

corresponds to section 43 which refers to “a lunatic beyond the local limits”. Sections 4, 6 and 8 seem clearly to indicate that the jurisdiction can be exercised beyond the local limits. The expression “not subject to the jurisdiction of the Supreme Court” in Act XXXV of 1858 can only be referable to the local limits of the jurisdiction of the Supreme Court. I am therefore of opinion that the jurisdiction over lunatics under Clause 17 of the Letters Patent was not meant to be affected by the said Acts.

Again, the legislation regarding the writ of *habeas corpus* was referred to as throwing light on the question under discussion. The legislation referred to is the enactment of sections 81 and 82 of the Criminal Procedure Code of 1872. Section 82 enacts :

“Neither the High Courts nor any Judge of such High Courts shall issue any writ of *habeas corpus*, *mainprise*, *de homine replegiando*, nor any other writ of the like nature, beyond the Presidency-towns.”

The contention is that the enactment was necessitated in consequence of the decision of NORMAN J. in *In the matter of Ameer Khan*(1) wherein he held that the High Court has authority to issue a writ of *habeas corpus* into the mufassal. It is argued that this enactment is thus a legislative declaration of the fact that the High Court did not possess any such jurisdiction. I am unable to follow this argument. All that the section says is that no High Court shall issue any writ as indicated therein. It may mean the Legislature was taking away the power which the High Court had, and but for that section

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(1) (1870) 6 Beng. L.R. 392.

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the High Court would always have the power to do so. A Full Bench of the Madras High Court in *In re Govindan Nair*(1) has taken the view that, apart from any legislation, the High Court has the power to issue a writ of *habeas corpus* to an Indian residing in the mufassal. It is not necessary for the purpose of the present case to go into the question whether *In re Govindan Nair*(1) was correctly decided or not. But *In re Govindan Nair*(1) is an authority in so far as it goes and it affirms the view taken in *In the matter of Ameer Khan*(2) and that of SADASIVA AYYAR J. in *In re Nataraja Iyer*(3), a view which has been consistently followed in this High Court up to now. This is also the view taken by the Bombay High Court in *Mahomedalli Allabux v. Ismailji Abdulali*(4) where it was held that the High Court was competent to issue a writ for the production of a person outside British India provided the Court was satisfied that the person was in the custody and control of a person within its jurisdiction. The learned Judges observe:

“The High Court still retains such powers as were granted by the Supreme Court Charter of 1823 as were not inconsistent with the Charter of 1865 or have not been taken away by subsequent legislation” (page 620).

It is contended by Mr. K. R. Vepa, who, on behalf of the Dowager Rani, presented the case of the petitioner very ably, that, even assuming the learned Advocate-General's argument to be correct in regard to the jurisdiction over persons residing in the mufassal, the Raja is a resident of Madras and he can invoke the jurisdiction of this Court for the protection of his parental rights and it is

(1) (1922) I.L.R. 45 Mad. 922 (F.B).
(3) (1912) I.L.R. 36 Mad. 72.

(2) (1870) 6 Beng. L.R. 392.
(4) (1926) I.L.R. 50 Bom. 616.

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immaterial where the children are residing so long as they are within this presidency. It cannot be disputed that the Raja is an inhabitant of Madras within the meaning of Clause 22 of the Charter of the Supreme Court of 1800. He has got a permanent home, “Admiralty House”, where he resides for a not inconsiderable portion of the year. He has got a regular establishment in Madras and pays taxes as a citizen. This would have been sufficient to entitle him to the protection of the Supreme Court. [*Vide* the cases referred to by MOOKERJEE J. in *Anilbala v. Dhirendra*(1).] The residence of the children is immaterial. Clause 17 of the Letters Patent does not impose the residence of the infant as a condition for the exercise of jurisdiction thereunder. As a father, the Raja is entitled to the custody of his children and if that right is infringed by one who is also subject to the jurisdiction of this Court, I do not see why he is not entitled to get the relief he seeks. It cannot be denied that the Court of Wards is subject to the jurisdiction of this Court and would have been subject to the jurisdiction of the Supreme Court. Under similar circumstances, in *Hope v. Hope*(2) Lord CRANWORTH L.O. made an order in respect of an infant residing in France against the mother, Mrs. Hope, on the ground that she submitted herself to the jurisdiction of the Court; see page 542. In *Annie Besant v. Narayaniah*(3) WHITE C.J. observes at page 686:

“If the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have

(1) (1920) 32 C.L.J. 314, 323. (2) (1854) 4 De. G.M. & G. 328; 43 E.R. 534
(3) (1913) 25 M.L.J. 661.

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been sufficient to the Court in England, I think the same facts *mutatis mutandis* would be sufficient to give jurisdiction here."

Again at page 687 :

"In the present case the statutory power as regards the appointment of guardians for infants is given with express reference to 'the order and course observed in that part of Great Britain called England'. The test seems to me, would the fact that an infant was resident out of England in itself deprive the Courts in England of power on the application of a father domiciled and resident in England to appoint a guardian of the person of the non-resident infant? The answer is surely 'no'."

I am therefore of opinion that on this ground also this Court has power in this case to exercise its jurisdiction under Clause 17 of the Letters Patent and give protection to the father and safeguard his parental rights.

It is also contended on behalf of the Court of Wards that after the passing of the Guardians and Wards Act, the only power the High Court has is that conferred by that Act and there is no power to act independently under the Letters Patent, and that under the Guardians and Wards Act the High Court cannot entertain an application in respect of an infant resident in the mufassal. I find it difficult to follow this argument. Reliance is placed on the definition of "District Court" and section 19 of the Act. Section 4, clause 4, defines "District Court" as follows :

" 'District Court' has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction."

But the jurisdiction of the High Court under Clause 17 of the Letters Patent is not in the

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exercise of its ordinary original civil jurisdiction and it is saved by section 3 which says that

"nothing in the Act shall be construed to take away any power possessed by any High Court established under the Statute 24 and 25 Vic. c. 104".

I may point out that it has been consistently held by the High Courts of Bombay, Calcutta and Allahabad that, apart from the Guardians and Wards Act, the High Court has jurisdiction to appoint a guardian for a minor; *In re Jairam Luxmon*(1), *In re Jagannath Ramji*(2), *In re Manilal Hurgovan*(3), *Narsi Tokersey & Co. v. Sachindranath Gajanan*(4), *In re Hari Narain Das*(5), *In re Bijaykumar Singh Buder*(6) and *In the matter of Govind Prasad*(7). The practice in this Court, so far as my experience goes, has been consistent with the view taken by the other High Courts. The argument based on section 19 of the Act is also absolutely untenable. Section 19 refers to a minor ward and not to the children of a minor ward. Section 3 occurs in one chapter and section 19 in another chapter and thus the saving clause is not affected by section 19.

The next argument of the learned Advocate-General is that section 23 of the Court of Wards Act makes the Court of Wards in effect the guardian of the children of the ward, that by section 3 of the Guardians and Wards Act the power and authority conferred by section 23 is saved and the High Court's jurisdiction to this extent must be deemed to have been taken away and that if it has got any power it can only appoint

(1) (1892) I.L.R. 16 Bom. 634.
(3) (1900) I.L.R. 25 Bom. 353.
(5) (1922) I.L.R. 50 Cal. 141.

(2) (1893) I.L.R. 19 Bom. 96.
(4) (1929) I.L.R. 54 Bom. 75.
(6) (1931) I.L.R. 59 Cal. 570.

(7) (1928) I.L.R. 50 All. 709.

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a guardian in respect of matters not covered by section 23 of the Act. This contention is also equally unsustainable. Section 4 of the Court of Wards Act defines a ward as a person who has been made a ward of the Court under section 19. Therefore the minor children are not wards within the meaning of the Act. It is only in respect of a ward that the Court of Wards under section 24 can appoint a guardian of his person and a manager in respect of his property. So it has no power to appoint a guardian for the person of his minor children. The Collector's power under the Act, under section 25, is only to do anything that might be done by a guardian. The powers of a guardian are only in respect of the ward and not in respect of his minor children. Thus there is nothing expressly provided in the Act which prohibits a Court appointing a guardian for the minor children of the ward. Has the power of a father as the natural guardian been taken away by the Act, and if so, to what extent? The father is a guardian by nature and nurture. His right to the custody and control of his children is absolute. His powers, unless taken away expressly or by necessary implication by statute or deprived by the Court, remain unaffected. So far as the Act goes, there is no express taking away of his right. Has there been such by plain intendment or necessary implication? It is contended that by section 23 it must have been necessarily intended to take away his rights in respect of the matters mentioned therein by virtue of the fact that the superintendence of his person has been assumed. The question therefore is, what is the scope of

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section 23? The section is enacted to enable the Court of Wards to make the necessary orders and arrangements in regard to the matters mentioned therein as incidental to and arising out of the management of the property vested in it. It does not clothe it with any power, as is contended for, in the sense that, by the exercise of it, it can interfere with the rights of others. It affords a statutory protection for certain orders and arrangements which it will be obliged to make when required to do so during the course of its management. The section says "may". The word "may" is *prima facie* enabling and permissive. Generally when coupled with a duty it is construed • as obligatory. In the *Bishop of Oxford's* case, both in the Court of Appeal, *The Queen v. Bishop of Oxford*(1), and in the House of Lords in appeal therefrom, *Julius v. Lord Bishop of Oxford*(2), there is a clear enunciation of the principles as to how words like "it shall be lawful" or "may" which are *prima facie* discretionary should be construed. In *Julius v. Lord Bishop of Oxford* (2), Earl CAIRNS L.O. says at page 222 :

"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power."

Lord SELBORNE in the same case observed thus at page 235 :

"The meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any

(1) (1879) 4 Q.B.D. 525.

(2) (1880) 5 App. Cas. 214.

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particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

In *The Queen v. Bishop of Oxford*(1) (the same case in the Court of Appeal) BAGGALLAY L.J. observed thus at page 558 :

"Such words may have different meanings in different sections of the same statute, or even in different portions of the same section ; and whether, in any particular section or portion of a section, they are to be regarded as compulsory or as importing a discretion, must depend, not only upon the immediate context, but also upon the object and general scope of the enactment."

Having regard to these principles, let me proceed to examine section 23. It contains three clauses : (a) deals with the ward, (b) deals with the minor relations of the ward and (c) deals with the legal heirs of the ward. The section provides for orders or arrangements being made in regard to four things, custody, residence, education and marriage. In so far as the ward, the superintendence of whose person the Court of Wards assumes, is concerned, he may be a minor or a lunatic or an adult who is neither but over whom for purposes of high policy, to use the language of the learned Advocate-General, it chooses to assume superintendence under section 15 of the Act. It will be seen that under section 27 the statute makes it imperative on the Court of Wards to provide in respect of the ward for all the above matters in virtue of its having taken over the property of the ward. One may therefore say that in so far as the ward is concerned, it is a compellable duty under the statute and "may" should be construed as

(1) (1879) 4 Q.B.D. 525.

obligatory. But can it be similarly said of the persons mentioned in clauses (b) and (c) of section 23? In my opinion, it cannot be. *Prima facie* clause (b) suggests that the Court of Wards is not bound to provide for all the minor's relations of the category mentioned in that clause but only for such persons who in the opinion of the Court of Wards are entitled to maintenance. It is only with reference to such persons that it can pass the orders or make arrangements. Thus the basis of the power or authority conferred is the obligation to provide for maintenance at the charge of the ward's estate, that is to say, in cases where the estate in the hands of the ward would have been liable if the Court of Wards had not assumed superintendence of the estate. But for the power conferred by section 23, the Court of Wards would have no right to do any of the things mentioned in section 23 with reference to them. In the exercise of its discretion the Court of Wards when called upon to do so may provide for a residence or suggest a particular marriage or a course of education and provide funds therefor or direct that a particular relation should be in charge of somebody and provide funds for his or her maintenance and keeping. This it will do having regard to the resources of the estate. It may be that its orders cannot be questioned in the sense it cannot be rendered liable therefor or be compelled to vary or alter them. But it does not follow that the Court of Wards can impose its will on the natural guardian who may be in charge of such minors or prevent the civil Court from disregarding such orders and arrangements made by the Court of Wards as are not to the benefit of the

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minors. To so construe would be to infringe the private rights of the natural guardian of such relatives or encroach on the powers of the Court to do what is best for the minors. One of the principles of statutory construction to be kept in view in this connection is thus stated by Lord WATSON in *Metropolitan Asylum District v. Hill*(1):

“Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights.”

Even viewed as a compellable duty, it is intended to be exercised for the benefit of the several persons mentioned in clauses (b) and (c) of section 23 and in fulfilment of the liability cast on the estate which the Court of Wards has taken charge of and when called upon to do so. COCKBURN C.J. in *The Queen v. Bishop of Oxford*(2) refers to an American decision which correctly enunciates the principle to be applied even construing “may” to have been used in an imperative sense:

“The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or *individual rights call for its exercise*—the language used, though permissive in form, is, in fact, peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, *not for their benefit, but for his*. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.”

(1) (1881) 6 App. Cas. 193, 213.

(2) (1879) 4 Q.B.D. 245, 260.

Where power is given by the word “may”, Lord BLACKBURN explains:

“It is merely enabling the donee to act and so may not inaccurately be said to be equivalent to saying he may act; yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the power to exercise the power when those who have the right call upon him so to do”; *Julius v. Lord Bishop of Oxford*(1).

When the power is exercised and the order or arrangement made in pursuance thereof, it is open to those who have invoked the power to take the benefit of the order or arrangement. The use of the word “order” therefore in section 23 does not indicate that it has any obligatory force on the person for whose benefit it was made. And the Court of Wards is not clothed with any right or power over the persons mentioned therein. Section 23 therefore in my opinion does not take away the powers of the natural guardians of the minors mentioned in clause (b) or (c). In the exercise of its powers, the Court of Wards is bound to conform to their wishes. If it chooses to do anything in violation of their rights it will be illegal and the natural guardians are entitled to seek the aid of the Court for the protection of their rights.

It has been repeatedly and persistently pressed upon us that dictated by a high policy section 23 clothes the Court of Wards with plenary powers and any order or arrangement made by it in the exercise of such a power should not be interfered with unless exercised maliciously, fraudulently or corruptly. The learned Advocate-General relied on a number of cases in which Courts have refused to interfere with the discretion of corporations

(1) (1880) 5 App. Cas. 214, 243.

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empowered by statute in the execution of works intended for public benefit. In my opinion these cases are irrelevant and have no bearing on the facts of this case. As pointed out already, there is no right or power conferred on the Court of Wards in the sense of an authority to interfere with the rights of others and no question of corruption or malice can arise in the alleged exercise of it.

The next question is whether the action of the Court of Wards in the purported exercise of its alleged powers is beneficial or detrimental to the interests of the minors so as to warrant this Court's interference.

In dealing with the nature of the jurisdiction over infants and to what extent the Court can control even the right of the father to the persons of his children or the education which he intends to impart to them, Lord ESHER M.R. in *The Queen v. Gynghall*(1), after discussing the scope of the Common Law jurisdiction regarding infants, proceeded to observe thus at page 239 :

"But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine right as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."

Lord ELDON L. C. in *De Manneville v. De Manneville*(2) says:

"The Court represents the King as *parens patriae*. . . . But Lord THURLOW's opinion went upon this: that the law

(1) [1893] 2 Q.B. 232.

(2) (1804) 10 Ves. Jun. 52, 63 to 65; 32 E.R. 762, 767.

imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred, in which the father was unable or unwilling to execute that duty, and, further, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual . . . Then, if there is jurisdiction, under what circumstances is it to be exercised? . . .

. . . Looking at the father's situation, and taking his own representation as to his inclination with regard to this child, upon the affidavits there is a fair suspicion of real danger, that the child may be removed out of this country. . . . Some method must be taken to secure to the Court, that the person of the child shall remain in this country."

The Raja says the Court of Wards is proposing to send his infant children, two boys of the ages of twelve and nine and two girls of the ages of fourteen and ten, out of the jurisdiction of this Court with the avowed object of giving them the benefit of public school education in Great Britain, but their object is to completely cut away all his relations with them. He submits that the course the Court of Wards intends to follow is not also in the interests of his infant children having regard to their situation in life and to their health, that education and residence in England are ill-suited to them and his wishes in respect thereof have been completely disregarded and that there are ample facilities in this country, where education can be imparted to them suited to their condition in life.

It is a recognised principle of English Courts that an infant should not be sent out of their jurisdiction. Of course it is not an inflexible rule and there are exceptions to it. But it is an invariable

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rule; vide *Mountstuart v. Mountstuart*(1). In *Campbell v. Mackay*(2) Lord COTTENHAM L.C. delivered himself to the same effect at page 553 (40 E.R.) :

"In the case of *Mountstuart v. Mountstuart*(1), Lord ELDON appears to have said that the Court never makes an order for taking the infant out of the jurisdiction. Subsequent decisions show that exceptions are sometimes made to the rule, but such exceptions are and ought to be very rare. Since I have held the Great Seal I have had reason to lament that the rule has not been more strictly adhered to."

Then he proceeds to make certain observations as to why an English infant should not be sent out of England for a permanent residence abroad which in my opinion would apply to the children of the Raja in the present case and completely bear out what the Raja and the Dowager Rani sought to impress upon us. They are to this effect :

"Independently of this well-established rule of the Court, and the principle upon which it proceeds, I am convinced that scarcely anything can be more injurious to the future prospects of English children, and particularly of English boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from their courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land." (40 E.R., at page 553.)

"In addition to all these considerations I find, in the present case, the most anxious wishes expressed by the father of these children that they should be settled in this country and

receive a purely English education. . . . It is needless to observe that the law, which permits the father to appoint the guardians of his children, will pay the highest respect to the expression of his wishes as to the mode of their education." (40 E.R., at page 553.)

The eldest boy is the legal heir to an impartial estate which is the biggest in this presidency and, situated as these boys and girls are, Lord COTTENHAM'S observations would exactly fit in, if I were to substitute for English boys and children Indian boys and children of a person of the position in life of the Raja of Vizianagram. No such "irresistible necessity" as would entitle a Court to disregard these considerations has been made out by the Court of Wards. It is not pretended that the children cannot get the necessary training and education suitable to their position in life in this presidency or in India. I am therefore clearly of opinion that it is not in the interests of these minor children that they should be sent to England for the purposes of their education.

It will also be seen from the observations of Lord COTTENHAM L.C. that the wishes of the father are a paramount consideration which ought not to be slighted. [Vide also the observations of BRETT M. R. in *In re Agar-Ellis*. *Agar-Ellis v. Lascelles*(1) at page 329 and also of BOWEN L.J. at pages 337 to 339]. The Court of Wards states it had to ignore the wishes of the father on account of his being its ward. It treats him practically as civilly dead. It says it consulted the relations and decided on the course it has taken in the interests of the children. It transpired however that except

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(1) (1801) 6 Ves. Jun. 363, 31 E.R. 1095.

(2) (1837) 2 My & Cr. 31, 40 E.R. 552.

(1) (1883) 24 Ch. D. 317.

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the mother, other relations, like the Dowager Rani, i.e., the mother of the Raja and the grandmother of the children, the sister of the Raja and the brother of the Raja, the Maharajkumar of Vizianagram, are against sending the children to England. What the Court of Wards says is some of them have changed their minds now but so far as it is concerned it has arrived at the decision and so long as it has acted under the provisions of the Court of Wards Act none can question its right to do so and what it has laid down must be carried out. But we cannot take the same view as the Court of Wards. On account of high policy the Court of Wards might have thought it expedient to assume the superintendence of the person of the Raja. The Raja is questioning the declaration made under the Act in a suit in Vizagapatam. It is unnecessary for us to express our view on the propriety of the action of the Local Government in making the declaration and whether the declaration can be questioned in view of section 48. For the purpose of the Court of Wards Act it may be open to the Court of Wards to treat the Raja as non-existent. But we cannot shut our eyes to what has been going on in Court. The Raja has conducted his case in person. He has done it with considerable sobriety and moderation and we have watched him carefully. It is difficult for any Court to treat him as a person of unsound mind. No Court of law would be justified in ignoring the wishes of the Raja as father and in not giving due weight to them. From what has transpired and the attitude of the Court of Wards the Raja's apprehension cannot be said to be unfounded, namely, that the minors are being

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sent away so that his relations with them would be permanently cut off and he be prevented from having any access to them for a considerable time to come. No Court of law could tolerate such a conduct. Therefore, when the rights of the natural guardian are disputed on the ground that he cannot act, when there is no other legally constituted guardian, when there is danger of the minors being removed out of the jurisdiction of this Court and when such a course is not beneficial to the minors, it is absolutely necessary for us to interfere. I therefore agree in the order proposed by my Lord the CHIEF JUSTICE.

Solicitor for first respondent: *The Government Solicitor.*

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APPELLATE CIVIL.

Before Mr. Justice Venkataramanu Rao.

PAKALAPATI VEERAYYA (PLAINTIFF), APPELLANT,

v.

DEVULAPALLI SOBHANADRI (DEFENDANT), RESPONDENT.*

*Indian Contract Act (XI of 1872), sec. 23—Criminal prosecution
—Withdrawal of—Part of consideration for promissory
note being—Enforceability of promissory note in case of.*

A promissory note was executed by the defendant in favour of the plaintiff on behalf of third parties who had launched a criminal prosecution against the defendant for cheating under section 420 of the Indian Penal Code. Part of the consideration for the promissory note was an agreement to withdraw

* Second Appeal No. 462 of 1932.

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the criminal prosecution and it was withdrawn accordingly. The offence under section 420 of the Indian Penal Code is not compoundable except with the permission of the Court before which the prosecution is pending but no such permission was obtained. In a suit upon the promissory note,

held that, as part of the consideration for the promissory note was the dropping of the criminal prosecution, it was unenforceable under section 23 of the Indian Contract Act.

It is enough if the dropping of the criminal prosecution formed part of the bargain. It need not have been the sole bargain.

Jones v. Merionethshire Permanent Benefit Building Society, [1892] 1 Ch. 173, and *Kamini Kumar v. Birendra Nath*, A. I. R. 1930 P.C. 100, relied upon.

Flower v. Sadler, (1882) 10 Q.B.D. 572, *Dwijendra Nath Mullick v. Gopiram Gobindaram*, (1925) I.L.R. 53 Cal. 51, and *Narasimhan Naidu v. Naina Pillai*, A.I.R. 1929 Mad. 7, distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 28 of 1931 preferred against the decree of the Court of the District Munsif of Bezwada in Original Suit No. 159 of 1930.

The second appeal arose out of a suit upon a promissory note dated 6th August 1924 executed by the defendant in favour of the plaintiff. The defendant and his father had effected a sale of immovable property in favour of one Seshayya and four others. On the date of the said sale there was a mortgage on the property which was not disclosed to the vendees. A decree was obtained on the footing of the said mortgage and the property sold in execution thereof and a suit was instituted for recovery of possession from the vendees. Complaining of the non-disclosure of the said mortgage, the vendees launched a criminal prosecution against the defendant and his father for cheating under section 420 of the Indian Penal Code. The defendant was anxious that the criminal prosecution should be withdrawn and he negotiated for an adjustment of the disputes between him and the vendees. Pending the final settlement of the matter, the defendant executed the suit promissory note for Rs. 500 in favour of the

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plaintiff, who had interested himself on behalf of the vendees, but finally an arrangement was come to which was embodied in a document, Exhibit V, dated 16th August 1924, in and by which it was arranged that a sum of Rs. 700 should be paid in full settlement of the disputes and that Rs. 200 should be paid immediately and the balance of Rs. 500 within a year from the date of the agreement to the plaintiff on behalf of the vendees and on failure to pay the same the vendees could have recourse to such civil proceedings as they might be advised to take. The criminal case against the defendant under section 420 of the Indian Penal Code was withdrawn on 16th August 1924, the date of Exhibit V. The offence under section 420 could be compounded only with the permission of the Court but no such permission was obtained. The defences to the suit were: (i) that the suit promissory note ceased to have any force after the matter was finally settled and (ii) that, in any event, as the suit promissory note was executed in consideration of the criminal case being withdrawn, it was unenforceable under section 23 of the Indian Contract Act.

P. Satyanarayana Rao for appellant.

V. Rangachari for respondent.

Cur. adv. vult.

JUDGMENT.

[His Lordship, after stating the facts of the case, the nature of the suit and the defences to it as stated above, found that Exhibit V was the final and concluded agreement between the parties; and that the rights of the parties must be regulated according to the terms of the said agreement and that the intention of the parties was that on the execution of Exhibit V the liability under the suit promissory note should be treated as not subsisting; held that, after the execution of Exhibit V, the suit promissory note was superseded and the plaintiff was not therefore entitled to sue upon it; and proceeded:—]

Even if I am not right in this view, it seems to me that the plea taken by the defendant that

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the promissory note was unenforceable under section 23 of the Indian Contract Act must prevail. On 4th August 1924 when the promissory note was executed and sent with the date 6th August 1924, there was admittedly a criminal prosecution pending which the defendant was anxious to get rid of. It seems to be also clear from Exhibit B that the plaintiff expected that the said case would be withdrawn even on 6th August 1924. The last sentence in that letter clearly indicates it. It runs thus:

"He said that he would get the case withdrawn, etc., on 6th August 1924 itself. Please get it arranged that it is withdrawn on that day itself. Kindly render this help without fail. Please reply."

It is thus apparent that the object of sending the promissory note was to enable the case being withdrawn on the faith of it. Again, Exhibit V also indicates that the sum of Rs. 700 was in settlement of all the disputes between the parties, not only the adjustment of the civil liability but the dropping of the criminal prosecution. No doubt Exhibit V does not specifically state so but it is very clear from the concluding portion of Exhibit V which provides that, in case of default of payment of Rs. 500 within a year, Rs. 200 should be appropriated towards the expenses of the criminal case. In fact the criminal case was withdrawn on 16th August 1924, the date of Exhibit V. Mr. Satyanarayana Rao relied upon a number of cases to show that where a transaction between the parties involves a civil liability as well as a criminal offence, a settlement of the civil liability is not vitiated by the fact that the criminal prosecution is also withdrawn. But I think the true rule is that where there is an

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existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. In *Jones v. Merionethshire Permanent Benefit Building Society*(1) LINDLEY L. J. points out:

"In order to amount to a defence on the ground of illegality there must be an agreement not to prosecute—an agreement as it is called to stifle a prosecution";

and, as BOWEN L. J. points out, reparation for an obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise, and it would be absurd to lay down as an impossible counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party injured. But what he emphasises is that the abstention from or the dropping of the criminal prosecution should not be made a matter of bargain. He observes:

"I agree with what Mr. Reid said, that the law certainly is not anxious to discourage reparation. But you must come back after reparation made to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and others? He must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the Court will not enforce."

(1) [1892] 1 Ch. 173.

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Therefore the test in each case is, did it form part of a bargain, namely, the dropping of the criminal prosecution? In this case, there can be no doubt that the object of the execution of the promissory note was the dropping of the criminal prosecution. It is enough if it formed part of the bargain. It need not have been the sole bargain. I think this is made clear by the recent decision of the Privy Council in *Kamini Kumar v. Birendra Nath*(1). There was a dispute as to title to a property. In regard thereto there was also a criminal prosecution launched. One of the parties was very anxious to have this criminal prosecution withdrawn. Then there was a reference to arbitration and an award thereupon and the civil dispute was settled and the criminal prosecution was in consequence withdrawn. It was found that the object of this reference and the award was to bring about a reconciliation including the dropping of the prosecution. Their Lordships during the course of the judgment observe :

"The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful and, if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful."

Their Lordships also point out that the agreement need not specifically state that part of the consideration was an agreement to settle the criminal proceedings but it is enough to give evidence from which the inference necessarily

(1) A.I.R. 1930 P.C. 100.

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arose that a part of the consideration is unlawful. In this case, the evidence makes it clear that part of the consideration was the dropping of the criminal prosecution in which all the vendees were interested. The decisions relied on by Mr. Satyanarayana Rao are all distinguishable. He relied strongly on *Flower v. Sadler*(1). In that case, no prosecution was launched or dropped, but there was a threat to take criminal proceedings and by means of that threat promissory notes were obtained in respect of a debt justly due. Therefore it was rightly pointed out that a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor. Even in that case, if there had been an agreement not to prosecute, the decision would have been different. The next case relied on by him is *Dwijendra Nath Mullick v. Gopiram Gobindaram*(2). It is not necessary to consider whether the actual decision can be supported but that decision does not conflict with the principle which I have stated. MUKERJI J., at page 62, stated :

"There is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute."

But he found in that case that the consideration or the object of the agreement was not the withdrawal of the criminal case. On that finding the decision may be correct. Mr. Satyanarayana Rao laid considerable emphasis on the decision of

(1) (1882) 10 Q.B.D. 572.

(2) (1925) I.L.R. 53 Cal. 51.

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JACKSON J. in *Narasimhalu Naidu v. Naina Pillai*(1). But that case can be distinguished on the following observation by the learned Judge :

"There is nothing against public policy if a person accused of breach of trust or misappropriation chooses to acknowledge the liability and refund the amount. And if after receiving the amount the complainant withdraws from the prosecution of his complaint it need not necessarily be presumed that there was a contract that he should do so."

It seems to me that if the learned Judge was of opinion that there was a contract to withdraw the prosecution, he would have decided the case differently. Therefore it is unnecessary to deal with some of the observations of the learned Judge which I think are not relevant for the decision of this case. There can be no doubt that in this case the offence must be deemed to be non-compoundable as the permission of the Court to compound was not obtained. Part of the consideration for the promissory note was the agreement to withdraw the criminal prosecution and therefore the promissory note is unenforceable.

In the result the second appeal fails and is dismissed with costs.

A.S.V.

(1) A.I.R. 1929 Mad. 7.

APPELLATE CIVIL.

Before Sir M. Venkatasubba Rao, Kt., Officiating
Chief Justice, and Mr. Justice Horwill.

AGA MIRZA NASARALI KHOYEE AND COMPANY
BY ITS SOLE PROPRIETOR, AGA MIRZA NASARALI KHOYEE
(PLAINTIFF), APPELLANT,

1936,
August 6.

v.

GORDON WOODROFFE AND COMPANY (MADRAS),
LIMITED (DEFENDANTS), RESPONDENTS.*

*Indian Sale of Goods Act (III of 1930), ss. 12, 13, 16, 17, 42
and 59—Patent defects and latent defects—What are—
Implied condition of "merchantability" contemplated by
sec. 16 (2)—Scope of—"Merchantable quality"—Mean-
ing of—"Quality warranted by contract being part of the
description of goods—"Condition" under sec. 12—
Buyer having a right to reject the goods on the ground of
breach of condition—Acceptance of goods by buyer—
Right of buyer to claim damages from seller.*

A contract for the sale of goods by description contained the following stipulations, viz., "goods to be fair average quality of description and to be passed by G.W. & Co., as such". G.W. & Co. inspected the goods before delivery and thereupon approved and accepted them in performance of the contract. The goods contained certain latent defects which were later on discovered when they were "put into work". In a suit by the seller for the price of goods sold and delivered to the buyer, the latter counter-claimed against the former for damages on the ground that the goods supplied did not fulfil the description in the contract.

Held: (i) The goods contained certain latent defects which a buyer of ordinary diligence and experience could not have detected by "due diligence in the use of all ordinary and usual means".

Drummond v. Van Ingen, (1887) 12 App. Cas. 284, followed.

(ii) The contract contained an express condition as to quality, with the result that the implied condition under

* Original Side Appeal No. 1 of 1936.

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section 16 (2) of the Sale of Goods Act, that the goods should be of "merchantable" quality, need not be invoked.

(iii) The express condition gave the buyer a higher right than he would possess under a contract where the warranty of "merchantability" implied by section 16 (2) had to be invoked, since in the latter case it does not extend to cases of patent defects.

(iv) Under the terms of the contract of sale it was not merely enough that the goods should be inspected and approved by G.W. & Co., but that the same should also be of "fair average quality of description".

Bird v. Smith, (1848) 12 Q.B. 786; 116 E.R. 1065, followed.

McClelland v. Stewart, (1883) 12 L.R. Ir. 125, distinguished.

(v) The term that goods shall be of "merchantable quality" is fulfilled when they do not differ from the normal quality of the described goods, including under the term "quality" the state or condition as required by the contract, and it is not sufficient that the goods are merely marketable or saleable, for, in the statutory sense, the significance of the word "merchantable" is relative, the test being, are the goods "merchantable" or not under the particular description in the contract?

Drummond v. Van Ingen, (1887) 12 App. Cas. 284, 287, 289 and 291; *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 100; *Bristol Tramways, &c., Carriage Company, Limited v. Fiat Motors, Limited*, [1910] 2 K.B. 831, 840, 841; *Jackson v. Rotax Motor and Cycle Company*, [1910] 2 K.B. 937, 945; and *Sumner Permain & Co. v. Webb & Co.*, [1922] 1 K.B. 55, followed.

(vi) The quality warranted under the contract being part of the description of the goods, the term in question, viz., "of fair average quality of description", became a condition under section 12 of the Sale of Goods Act, and though the buyer had a right to reject the goods, yet inasmuch as the buyer had accepted the goods, he could treat the breach of the condition only as breach of warranty and sue the seller for damages under section 59 of the Sale of Goods Act.

APPEAL from the judgment and decree of MOCKETT J., dated 30th October and 15th

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November 1935 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 325 of 1932.

The following relevant facts in this appeal have been taken from the judgment of the trial Judge, MOCKETT J. :

The appellant was the plaintiff in the lower Court and he sued the defendants (respondents) to recover Rs. 10,421-14-10, being the price of goods sold and delivered by him to the respondents under two contracts dated 7th October 1931. The respondents admitted the two contracts, the sale and delivery of the goods and their liability to pay the said sum, but filed a counter-claim for two sums, viz., Rs. 2,477-1-7 and Rs. 7,944-13-3, which in the aggregate had the effect of wiping out the suit claim. The material portions of the first contract of sale were: "Rs. 20,000 dry salted Malabar sea salt cure, all primes, payment as usual goods to be fair average quality of description and to be passed by Messrs. Gordon Woodroffe & Co. (defendants—respondents) as such". The second contract also contained similar terms for 10,000 skins marked all seconds. Of these, the appellant delivered 11,175 skins under the first contract and 2,311 skins in respect of the second contract but failed to deliver the balance. Gordon Woodroffe & Co. inspected the goods before delivery and thereupon approved and accepted them in performance of the contracts. The goods contained certain latent defects which were later on discovered when they were "put to work" by a purchaser in England. The respondents counter-claimed the sum of Rs. 2,477-1-7 as damages for non-delivery of the

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remaining skins and Rs. 7,944-13-3 as the amount which they had to pay to their buyers in England as damages owing to the defective quality of the goods supplied by the appellant.

*V. Radhakrishnayya and S. Ramaswami Ayyan-
gar* for appellant.

S. Doraiswami Ayyar for respondents.

Cur. adv. vult.

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OFFG. C.J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO Offg. C.J.—On the important questions of law relating to the sale of goods which this appeal raises, able arguments have been addressed to us by the Counsel on both sides. The suit has been brought for the price of certain skins sold, and the defendants have counter-claimed for damages on the ground that the goods supplied do not fulfil the description in the contract. The plaintiff, against whom damages have been awarded by the learned trial Judge, has filed this appeal.

The contract is obviously not for sale of specific goods, and this has been conceded by Mr. Radhakrishnayya for the appellant. We must therefore proceed upon the footing that the sale was by description and that the contract is governed by section 16 of the Indian Sale of Goods Act. The first question that arises is, what is the effect of the stipulation in the contract that runs thus :

“ To be fair average quality of description and to be passed by Messrs. Gordon Woodroffe & Co., Ltd., Madras, as such.” ?

In other words, does it, upon a true construction, mean that, if the goods are passed by Messrs. Gordon Woodroffe & Co., there is an end to the matter, or, does the clause impose a further condition,

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namely, that the goods should in addition be of the quality mentioned? The case which both sides have strongly relied upon is *Bird v. Smith*(1). The contract there was for sale of iron rails

“ to be inspected and certified as then agreed upon between the parties and to be equal in quality to any rails made in Staffordshire ”.

It was urged there, as here, that the goods had been inspected before delivery and thereupon approved and accepted in performance of the agreement. It was held that this was a bad plea, as being no complete answer to the declaration. Lord DENMAN C.J., who delivered the judgment of the Court, declares that there were two stipulations, each being in its terms distinct, in other words, that in addition to the provision for inspection and approval, there was an absolute warranty for quality to guard against defects which inspection could not discover. The position in the present contract is very similar, indeed the only difference is that the order of the terms is reversed. Here the first term related to the quality, the second to the inspection; whereas in the case cited, after the stipulation for inspection and approval came the undertaking as to the quality. The question is ultimately one of construction and, as observed in *Bigge v. Parkinson*(2), if it could be gathered from the contract that the articles were to be supplied to the satisfaction of the buyers or their agents, so that they were to be the sole judges whether the articles answered the description or not, such an undertaking would be inconsistent with the absolute condition implied by the law. On the

(1) (1848) 12 Q.B. 786; 116 E.R. 1065.
(2) (1862) 7 H. & N. 955; 158 E.R. 758.

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facts of that case, the contention by the defendant that the express condition in the contract excluded any implied condition was overruled. *M'Clelland v. Stewart*(1), strongly relied upon by Mr. Radhakrishnayya, is distinguishable and does not contravene the principle enunciated in *Bigge v. Parkinson*(2). Turning to the clause in question, to construe it reasonably, we must give effect to what must be regarded the decisive word "and" occurring in it; the superadding of the provision as to inspection does not reduce the importance of the independent undertaking as to the quality.

In support of the contention that, the goods having been passed by the buyers, they could no longer rely upon any defect later discovered in regard to the quality, another argument is put forward, namely, that the clause should not be so construed as to cast too heavy a burden on the vendor. The argument is put thus: the contract of sale being conditional on the goods being approved by the buyers, they are constituted, as it were, judges in their own cause; that is onerous enough; why should the Court further so construe the contract as to superadd to this term, the absolute condition as to quality? But, as observed by COCKBURN C.J. in *Stadhard v. Lee*(3),

"the duty of the Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are

(1) (1883) 12 L.R. Ir. 125.

(2) (1862) 7 H. & N. 955; 158 E.R. 758.

(3) (1868) 3 B. & S. 364; 122 E.R. 138.

clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not." (Benjamin on Sale, 7th Edn., page 605).

Mr. Radhakrishnayya next contends that this contract should be considered with reference to the surrounding circumstances. But in the case of a document which is plain and unambiguous, the intention of the parties should be gathered from the language of the document itself.

Then comes the question as to the quality of the goods supplied, which must be considered in two aspects. First, if section 16 (2) applies and there is an implied condition that the goods shall be of merchantable quality, was that condition complied with? secondly, if the express provision in the contract "to be fair average quality" should prevail, did the goods answer that description? On the evidence on the record, our finding on this point must be against the plaintiff, the vendor. There has been some dispute as to the meaning of the word "merchantable" occurring in the Sale of Goods Act. It is not sufficient that the goods are marketable or saleable (that is no doubt the dictionary meaning of the word) for in the statutory sense the significance of the word "merchantable" is relative, the test being, are the goods merchantable or not under the particular description in the contract? The same idea may be expressed differently by stating that the term that the goods shall be of merchantable quality is fulfilled, when they do not differ from the normal quality of the described goods, including under the term "quality" the state or condition as required by the contract; see

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Drummond v. Van Ingen(1), *Grant v. Australian Knitting Mills, Ltd.*(2), *Bristol Tramways &c., Carriage Company, Limited v. Fiat Motors, Limited*(3), *Jackson v. Rotax Motor and Cycle Company*(4) and *Sumner Permain & Co. v. Webb & Co.*(5).

The appellant's Counsel then contends that the defects, such as they were, were patent or discoverable defects and that the proviso to section 16 (2) which, he urges, governs the contract, protects the seller. He relies upon certain passages in Mr. Cook's deposition and at first sight they seem to support him. But if his evidence is read as a whole and critically examined, it shows beyond doubt that the true condition of the skins could not have been ascertained at Madras by such examination as dry salted skins are generally subjected to. There is one circumstance which places the matter beyond doubt. When the skins were first inspected at Northampton, Mr. Cook not only approved the goods but complimented Mr. Taylor on their excellent quality. (This incidentally disproves the theory that the skins became deteriorated after they had been taken delivery of at Madras and before they reached England). What then emerges from the evidence of the various witnesses, through which we have been carefully taken? No reasonable examination of the skins in their dry salted state could have revealed the defects; only when the skins were "put into work", i.e., "put into water", was their true condition discovered. On the question as to what are discoverable, as distinguished from

(1) (1887) 12 App. Cas. 284, 287, 289, 291.

(3) [1910] 2 K.B. 831, 840, 841.

(2) [1936] A.C. 85, 100.

(4) [1910] 2 K.B. 937, 945.

(5) [1922] 1 K.B. 55.

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latent, defects, the decision of the House of Lords in *Drummond v. Van Ingen*(1), already cited, contains a valuable pronouncement. As Lord HERSCHELL observes, the implied warranty will be excluded as regards any defects which a buyer of ordinary diligence and experience would have detected by "due diligence in the use of all ordinary and usual means"; what is due diligence depending upon the circumstances (page 294). If merchants possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden one as distinguished from a patent defect (see Lord MACNAGHTEN at page 297). Clause 2 of section 16 and the proviso thereto run thus:

"Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The language of this proviso may be usefully compared with section 17 which deals with sale by sample. That enacts:

"In the case of a contract for sale by sample there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."; section 17 (2) (c).

Though these two clauses are worded differently, there can be little doubt that they are intended to convey the same meaning; in other words, the defects contemplated in section 16 are

(1) (1887) 12 App. Cas. 284.

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those "apparent on reasonable examination" within the meaning of section 17. In this connection, we must observe that Lord HERSCHELL, while dealing with the implied condition as to any defects, makes no distinction between inspection of bulk or of sample, although in the case under discussion the sale was by sample (see page 294). Then again, in *Grant v. Australian Knitting Mills, Ltd.*(1) to which we have already referred, the sale was not by sample, but yet Lord WRIGHT, delivering the judgment of the Judicial Committee, in dealing with the question of patent defects, uses language which more or less occurs in the section relating to sale by sample (see page 100). On the question as to what are discoverable defects, these two decisions, one of the House of Lords and the other of the Judicial Committee, are of binding authority, and it is unnecessary to enquire whether a different principle has been laid down in the cases relied on by Mr. Radhakrishnayya, namely, *Thornett & Fehr v. Beers & Son*(2) and *Pinnock Bros. v. Lewis and Peat, Ltd.*(3).

This brings us to the question, what is the effect of section 16 (2) read along with the proviso? As Mr. Doraiswami Ayyar contends, the combined effect of the clause and the proviso is that the implied condition extends to merchantability less patent defects. From our finding that the defects in the present case were not patent or discoverable, the conclusion follows that the seller, who under the section is answerable for latent defects, remains liable. Granting then

(1) [1936] A.C. 85.

(2) [1919] 1 K.B. 486.

(3) [1923] 1 K.B. 690.

that section 16 (2) applies, we must hold that the defendants are bound to succeed.

Mr. Doraiswami Ayyar urges in the alternative (thereby taking a higher stand), relying on the clause extracted above, that here is an express condition as to quality, and that being so, it is unnecessary to invoke section 16 (2). In our opinion, this contention also is well founded. Section 16 (4) reads thus :

"An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

Now, what is the express condition here? that the goods shall be of "fair average quality". That clearly is inconsistent with the condition arising by implication, namely, that, although the goods are warranted merchantable, discoverable defects are excluded. The position therefore comes to this, that the express condition gives the purchaser a higher right than he would possess under a contract where the terms would be merely implied in law. The next step in the argument is that the buyer might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although he would be precluded from rejecting the goods. That is, Mr. Doraiswami Ayyar urges, what has precisely happened here. The provisions of law relevant to this argument are sections 12, 13, 42 and 59, of the Indian Sale of Goods Act. The quality warranted being part of the description of the goods, the term in question becomes a condition under section 12. Next, it follows from section 13 that, when the buyer has accepted the goods, he can treat the breach of a condition only as a breach of

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warranty. In the present case the defendants accepted the goods within the meaning of section 42, for, after the skins had been delivered to them, they "put them into work", an act inconsistent with the ownership of the seller. Now comes section 59, the last of the four sections to which we have referred. Where the buyer elects, or is compelled as here, to treat any breach of a condition as a breach of warranty, though he is not entitled to reject the goods, he has a right to sue the seller for damages. It is this right which by the counter-claim the defendants are seeking to enforce. They are entitled to do so and on this ground also our judgment must be for the defendants.

As to the measure of damages, out of 18,000 skins supplied, 3,920 were found tainted. 1,483 of these were perfectly worthless and no question arises. As to the balance, the only question is, were the defendants in the circumstances bound to sell them by auction for estimating the loss? When the skins were "put into work", the salt would no longer be there to arrest the putrefaction. How could one reasonably expect that such skins would find a market? In the circumstances, though the evidence on the point is somewhat obscure and unsatisfactory, we are not prepared to differ from the learned trial Judge.

As to the costs of the action, the question is not what we consider right, but whether there are grounds to justify our interfering with the learned Judge's discretion. There is something to be said, as the appellant's Counsel urges, against the conduct of Messrs. Gordon Woodroffe & Co. It was their servant who, by agreement, was

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employed by the plaintiff to cure the skins. Again, the case is one of a string of contracts and much of the trouble has arisen by reason of their having wrongly represented to their buyers that the skins were of their "own cure". In spite of these facts, we do not feel that we ought to disturb the trial Judge's order.

In the result, the appeal fails and is dismissed with costs.

The memorandum of objections is not pressed and is likewise dismissed with costs.

Solicitors for respondents—*Messrs. King and Partridge.*

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APPELLATE CIVIL.

Before Mr. Justice Cornish.

THE SALEM MUNICIPALITY BY ITS COMMISSIONER
(DEFENDANT), PETITIONER,

v.

S. G. BHAKTHAVATSALU NAIDU (PLAINTIFF),
RESPONDENT. *

Madras District Municipalities Act (V of 1920), sec. 350—Suit for damages for illegal distress against municipality—Cause of action in—Illegal distress, not a continuing injury from date of seizure till date of restitution—Continuing injury—What amounts to.

On account of some arrears of tax a municipality distrained a cart belonging to a certain person on 16th April 1934 and returned the cart to him on 7th November 1934, in pursuance of certain proceedings before a Magistrate, where the distraint

* Civil Revision Petition No. 1275 of 1935.

1936,
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was declared illegal on 7th July 1934. That person gave notice of suit on 18th October 1934 and filed a suit for damages against the municipality on 18th January 1935 for illegal distress.

Held that the suit was barred by section 350 of the Madras District Municipalities Act.

Held further that the cause of action was the act of illegal distress and it was not a "continuing injury" from the date of seizure till the date of restitution.

Harrington (Earl of) v. Derby Corporation, [1905] 1 Ch. 205, followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the finding of the Court of the District Munsif of Salem dated 15th July 1935 and made in Small Cause Suit No. 202 of 1935.

P. Chakrapani Ayyangar for petitioner.

Respondent was unrepresented.

JUDGMENT.

The petitioner is the Salem Municipality. On account of some arrears of tax the municipality distrained a cart belonging to the respondent. The distraint was made on 16th April 1934. This distraint was declared illegal in some proceedings before a Magistrate on 7th July 1934, and the cart was returned to the respondent on 7th November 1934. The respondent brought a suit to recover damages for illegal distress. He gave notice of the suit on 18th October 1934, and the plaint was filed on 18th January 1935. The question is whether the suit is or is not barred by section 350 of the Madras District Municipalities Act. The lower Court held that it was not barred, and that the respondent was entitled to damages.

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Section 350 enacts that no suit for damages shall be instituted against a municipal council in respect of any act done in pursuance of the Act until the expiration of one month after a notice has been delivered at the municipal office stating the cause of action, the relief sought, the name and the place of abode of the intending plaintiff; and the plaint shall contain a statement that such notice has been so delivered. Sub-section 2 provides that every such suit shall be commenced within six months after the date on which the cause of action arose or, in case of a continuing injury or damage, during such continuance, or within six months after the ceasing thereof. If the cause of action was the act of illegal distress, as I think it was, the suit was out of time. The plaintiff, however, has sought to get over this obstacle by alleging in his plaint that the cause of action arose when the illegal seizure was made, and on the "subsequent days when it was illegally and wrongfully distrained without being returned". In other words, he sought to make the act of illegal seizure a continuing injury until the return of the cart on 7th November 1934. Upon the meaning of the words in sub-section 2 of section 350 "in case of a continuing injury or damage", there are authorities available on the meaning of the words "in case of continuance of injury or damage" in the Public Authorities Protection Act, 1893. It is obvious that the language of sub-section 2, section 350, of the Madras Act was modelled upon the English Act, and therefore any authoritative interpretation of the words occurring in the English Act is of great assistance in the interpretation of the

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words in section 350 of the Madras Act. In *Carey v. Metropolitan Borough of Bermondsey*(1) the LORD CHANCELLOR, Lord HALSBURY, said that the words "continuing injury or damage" meant the continuance of the act which caused the damage; and in *Harrington (Earl of) v. Derby Corporation*(2) BUCKLEY J. observed:

"The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time, or repeated, it may be, from day to day."

In my judgment the act which caused injury to the respondent was the municipality's illegal seizure of his cart. His cause of action was that illegal act. It was not an injury which continued from the date of the seizure till the date of restitution. It follows that the respondent's suit, not being commenced within six months after his cause of action arose, ought to have been dismissed. It is accordingly dismissed, and this civil revision petition is allowed with costs throughout.

G.B.

(1) (1903) 67 J.P. 447.

(2) [1905] 1 Ch. 206, 227.

APPELLATE CIVIL.

Before Mr. Justice Cornish.

THE CO-OPERATIVE CREDIT SOCIETY OF ARUNGUNAM
VILLAGE BY ITS PRESIDENT, SATAGOPACHARI
(PLAINTIFF), APPELLANT,

1936,
September 22.

v.

CHINNASWAMI UDAYAN (SECOND DEFENDANT),
RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 181—Applicability of, to applications to enforce in Court an award under rule 14 (5) of the statutory rules framed under the Madras Co-operative Societies Act (VI of 1932).

Article 181 of the Indian Limitation Act applies to applications to enforce in Court an award made in accordance with the procedure laid down by rule 14 (5) of the statutory rules which have been framed under the Madras Co-operative Societies Act.

APPEAL against the order of the District Court of Chingleput, dated 10th October 1933 and made in Appeal Suit No. 63 of 1933 preferred against the order of the Court of the District Munsif of Chingleput, dated 3rd February 1933 and made in Executive Petition No. 1674 of 1932 in Claim No. 80 of 1927-28.

K. E. Rajagopalachari for appellant.
C. Krishnamachari for respondent.

JUDGMENT.

The appellant is the Co-operative Credit Society of Arungunam. It obtained an award under the provisions of the Madras Co-operative

* Appeal Against Appellate Order No. 74 of 1934.

CO-OPERATIVE
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Societies Act against the respondent for a sum of money. The award was made on 30th January 1928. The application to enforce the award was made by the Registrar of Co-operative Societies to the Court on 15th January 1932. The only question in this appeal is whether the application is time-barred. Admittedly it is, if article 181 of the Limitation Act governs it. But the argument is that the application, not being one under the Civil Procedure Code, the Limitation Act has no application. The application to enforce the award was made in accordance with the procedure laid down by rule 14 (5) of the statutory rules which have been framed under the Madras Co-operative Societies Act. The particular course taken by the Registrar in the present case was under rule 14 (5) (b) which says :

"On application to the Civil Court having jurisdiction over the subject-matter of the decision or award, that Court shall enforce the decision or award as if it were a decree of the Court."

It is clear that the application is made to the Court to exercise its functions as a Court. But the argument is that, admitting that the application is made to the Court, it is not an application made to the Court under the Civil Procedure Code, but is an application made under the provisions of the Madras Co-operative Societies Act. There is no doubt upon the case law that article 181 of the Limitation Act only relates to applications under the Code. But if these cases are examined it will be found that they refer to applications to the Court to order something which the Court has no power to order or to do under the Civil Procedure Code ; e.g., an application for probate to the Court

under the Probate and Administration Act [*Bai Manekbai v. Manekji Kavasji*(1)], or for an order under the special rules of the High Court for recovery of costs by a solicitor [*Wadia, Gandhi & Co. v. Purshotam*(2)], or an application by a liquidator under section 186 of the Indian Companies Act for an order upon the contributories of the company to pay debts [*Hansraj Gupta v. Official Liquidators of Dehra Dun etc. Company*(3)]. In each of these instances the remedy given by a particular Act is enforceable in the manner provided by that Act and not by the machinery of the Civil Procedure Code. In the present case the application is to the Court to exercise its execution jurisdiction as if the award was a decree. I think that means that it is to be executed in the same manner as decrees are executed under the Code. In fact, a Court has no other power than that which is conferred upon it by the Code to put its execution machinery in motion. In my judgment this case is hardly distinguishable from *Sambasiva Mudaliar v. Panchanada Pillai*(4). There, an application was made in pursuance of section 40 of the Revenue Recovery Act which provides that, on production of a sale certificate by the purchaser, the Court shall cause a proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to him by a decree of the Court. The same argument was raised there, as here, that the application was not one made under the Civil Procedure Code. But it was held that, inasmuch as the application to

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(1) (1880) I.L.R. 7 Bom. 213. (2) (1907) I.L.R. 32 Bom. 1.
(3) (1902) I.L.R. 54 All. 1067 (P.C.). (4) (1907) I.L.R. 31 Mad. 24.

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the Court was to put in motion the machinery of the Code, it was an application under the Code. This reasoning seems to be decisive of the present appeal. The appeal accordingly fails and is dismissed with costs.

G.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Varadachariar, Mr. Justice Burn and Mr. Justice Pandrang Row.

1936,
November 16.

THE RAJA OF VIZIANAGRAM, REPRESENTED BY HIS
NEXT FRIEND, THE ESTATE COLLECTOR APPOINTED UNDER
THE COURT OF WARDS ACT (PLAINTIFF),
PETITIONER,

v.

DINDI CHINA THAMMANNA (DEFENDANT),
RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 88—"Intermediate landholder"—Holder of inam in zamindari, if an, from whom zamindar can claim to recover cess paid by him to Government—Test as to—Suit by zamindar to recover from inamdar as intermediate holder cess paid by zamindar to Government—Limitation—Indian Limitation Act (IX of 1908), art. 120—Applicability of—Interest prior to date of plaint in such suit—Zamindar's right to.

In regard to the question whether the holder of an inam in a zamindari can be dealt with as an "intermediate landholder" from whom the zamindar can claim to recover the whole or a portion of the cess paid by the zamindar to Government under section 88 of the Madras Local Boards Act, the decisive fact is not whether the inam is a pre-settlement inam or post-settlement inam but whether even in the case of a pre-settlement inam the lands have been excluded from or included in the

assets of the zamindari when the permanent settlement was made. The scheme of the Local Boards Act is that where the inam lands have not been included in the assets of the zamindari the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder. The possession of the land itself by the inamdar does not preclude his being an intermediate landholder within the meaning of section 88 because the first proviso to that section contemplates cases where the intermediate landholder may or may not have a right of occupancy. For an inam to come within that proviso it is not necessary that payment of kattubadi, jodi, poruppu or quit-rent should be provided for in respect of the inam.

Bhupathi Raju v. Subba Rao, (1931) I.L.R. 55 Mad. 646, referred to.

A suit by a zamindar for the recovery of the whole or a portion of the cess paid by him to Government from the holder of an inam in the zamindari on the ground that the inamdar is an "intermediate landholder" within the meaning of section 88 of the Madras Local Boards Act is governed by article 120 of the Indian Limitation Act of 1908. In such a suit the zamindar is not entitled to interest on the amount sued for prior to the date of the plaint.

PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the District Munsif of Vizagapatam in Small Cause Suits Nos. 1373, 1372, 1378, 1370, 1371, 1376, 1375 and 1374 of 1932, respectively.

The facts of the case and the arguments of Counsel appear sufficiently from the judgment of the Full Bench.

S. Venkatesa Ayyangar for petitioner.

G. Lakshmananna and *G. Chandrasekhara Sastri* for respondents.

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* Civil Revision Petitions Nos. 1063 to 1070 of 1933.

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VARADA-
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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The point arising for decision in these petitions is whether the holder of a pre-settlement inam in a zamindari can, under any, and, if so, what, circumstances be dealt with as an “intermediate landholder” from whom the zamindar can claim to recover the whole or a portion of the cess paid by the zamindar to Government under section 88 of the Madras Local Boards Act.

So far as we are able to gather from the materials now before us, the inam to which these petitions relate seems to have been granted long prior to the permanent settlement and in some of the reports filed in the case the purpose of the inam is described as “Veeti Koluvu”. This expression has not been very much elucidated either by the translation of it in Brown’s Dictionary or by the translation adopted by the District Munsif. We prefer to leave it in the vernacular form so that the matter may be better investigated by the lower Court to which we are remanding these cases. It appears from the evidence—and on that circumstance one of the chief contentions raised by the defendants in the lower Court was based—that the holders of these inams are in actual occupation of the land. It was accordingly contended that they cannot be regarded as intermediate landholders within the meaning of section 88. It has been held in *Bhupathi Raju v. Subba Rao*(1) that the possession of the land itself by the inamdar does not preclude his being an intermediate landholder within the meaning of section 88 because the first proviso to

(1) (1931) I.L.R. 55 Mad. 646.

that section contemplates cases where the intermediate landholder may or may not have a right of occupancy. In *Bhupathi Raju v. Subba Rao*(1) the inamdar no doubt held a *darimilla* or post-settlement inam; but it does not appear to us that the decisive fact is whether the inam is a pre-settlement inam or post-settlement inam but whether even in the case of a pre-settlement inam the lands have been excluded from or included in the assets of the zamindari when the permanent settlement was made. The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the zamindari the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder.

In the plaint as originally filed the suit inam was described as a *darimilla* inam but the written statement pointed out that the inam had been granted long before the permanent settlement. The plaint apparently made a mistake on account of the way in which the estate accounts have referred to this inam. Some time after the written statement was filed and the mistake was pointed out, an application was filed on behalf of the plaintiff to amend the plaint (Interlocutory Application No. 291 of 1933 and similar applications in the rest of the batch), but the District Munsif dismissed it. We do not think that

(1) (1931) I.L.R. 55 Mad. 646.

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in the circumstances the amendment petition really attempted to change the cause of action. We accordingly allow the amendment to be made as prayed for but in the circumstances we also think it right to allow an opportunity to the defendants to raise any additional pleas that they may think fit to raise with reference to the plaint thus amended. The lower Court will then decide the question whether or not the suit inam lands had been excluded from the permanent settlement. There is an observation in the District Munsif's judgment that the Freese Report shows that they have been excluded. From the portion now made available to us we do not think that it is so. Mr. Lakshmanna, the learned Counsel for the respondent, has not been able to draw our attention to any such portion in the report. That observation of the District Munsif will accordingly be ignored and the question tried afresh.

Mr. Lakshmanna suggested that there is some lacuna in section 88 of the Local Boards Act and that pre-settlement inams even if they had been included in the assets should not be held to be covered by the expression "undertenure created, continued or recognised by a landholder", in the first proviso to section 88 because, according to him, those three words must be held to refer only to post-settlement grants. It does not appear to us that these words are in their natural meaning so limited nor have we been shown any reason why, having regard to the policy of the permanent settlement and the scheme of the Local Boards Act, such pre-settlement inams should be excluded from assessment or the zamindar be made to pay the whole cess in respect thereof.

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A further point was made by Mr. Lakshmanna that it is only when payment of kattubadi, jodi, poruppu or quit-rent is provided for in respect of any inam that it will come under that proviso. We do not think that it is the proper construction. All that the proviso enacts is that where kattubadi, jodi, poruppu or quit-rent is in fact paid, one half of the cess calculated with reference to such payment shall be deducted and the balance will be the amount which the landholder is entitled to recover from the intermediate landholder. Where no such payment is made, the landholder will be entitled to recover the cess from the intermediate landholder without any such deduction.

The other question dealt with in the judgment of the District Munsif is one of limitation. He has held the suits to be barred in respect of certain items on the footing that such a suit is governed by the three years' rule of limitation. We see no warrant for applying the three years' rule. The suit is not one for rent nor is it based on any contract express or implied. It is to enforce a liability created by statute. In such a case the course of decisions in this Presidency has been to the effect that the suit will be governed by article 120. In this view no portion of the suit claim will be barred by limitation.

The plaintiff claims interest on the amount sued for. We see no basis on which the plaintiff can claim interest prior to the date of the plaint. The plaintiff will only be entitled to interest at six per cent per annum (on such amount as may be decreed in his favour) from and after the date of the plaint.

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The decrees of the Court below are set aside and the cases sent back for re-trial in the light of the above observations. In the circumstances there will be no order as to costs in these civil revision petitions. Costs in the lower Court will be provided for in the revised decrees.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Varadachariar, Mr. Justice Burn and
Mr. Justice Pandrang Row.

1936,
November 17.

THE BOARD OF COMMISSIONERS
FOR
THE HINDU RELIGIOUS ENDOWMENTS, MADRAS,
(FIRST RESPONDENT), PETITIONER,

v.

P. V. R. RATNASAMI PILLAI AND TEN OTHERS
(PETITIONERS 1 TO 6 AND 9 TO 12 AND SECOND
RESPONDENT), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927),
sec. 84—Decision of Endowments Board that a temple
was an excepted temple under definition as it stood in
Act II of 1927—Bar to Board holding that it is not an
excepted temple under definition in Amending Act of
1930, if.*

A decision of the Hindu Religious Endowments Board in 1927 to the effect that a temple was an "excepted temple" within the meaning of the definition as it stood in the Madras Hindu Religious Endowments Act of 1927 is no bar to its holding, after the Amending Act of 1930, that the temple is not an excepted temple according to the new definition substituted by the Amending Act.

* Civil Revision Petition No. 2001 of 1934.

In the nature of things, the Board could have given a decision in 1927 only with reference to the definition as it then stood and the finality attached by section 84 of the Act to such a decision can also have relation only to that definition. A decision that an institution satisfies a particular definition cannot mean a decision that it must satisfy the new definition.

There is no scope in such a case for the application of the rule against retrospective operation, because there is really no question of any interference with a vested right or impairing obligations which have come into existence under a previous state of the law. There is nothing like a recognised legal right or category of right known to general jurisprudence that is connoted by the expression "excepted temple". The case is only one of a grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation.

Rajagopala Chettiar v. H.R.E. Board, (1933) 40 L.W. 288, overruled.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of West Tanjore at Tanjore dated 21st August 1934 and made in Original Petition No. 221 of 1933.

The facts of the case and the arguments of Counsel appear sufficiently from the judgment of the Full Bench.

P. V. Rajamannar for petitioner.

K. V. Srinivasa Ayyar for respondents.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is a revision petition asking this Court to revise the order passed by the District Judge of West Tanjore on an application presented to him under section 84 of the Madras Hindu Religious Endowments Act. The point raised in the case had been decided by CORNISH J., adversely to the Board, in another case,

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Rajagopala Chettiar v. H.R.E. Board(1); as the correctness of that decision was challenged on behalf of the petitioner, this case has been directed to be posted before this Bench for determination of the question.

The Hindu Religious Endowments Act of 1927 defined an "excepted temple" in certain terms in clause 5 of section 9. By an Amending Act of 1930 a new definition has been substituted. Some time in 1927, the temple, to which this application relates, was held by the Board to be an "excepted temple" within the meaning of the definition as it stood in the Act of 1927. After the Amending Act of 1930 had been passed, the Board has held that according to the new definition this temple is not an excepted temple. Against this latter decision of the Board the trustees of the temple filed the application out of which the present revision petition arises. The learned District Judge set aside the order of the Endowments Board on the grounds: (i) that the former decision of the Board has become final and (ii) that the Amending Act IV of 1930 cannot take away the right acquired by the trustees under that decision as there are no words expressly declaring the Act retrospective.

The argument that the former decision has become final could not be and was not seriously pressed. In the nature of things, the Board could have given a decision in 1927 only with reference to the definition as it then stood and the finality attached by section 84 to such a decision can also have relation only to that definition. Properly understood, the decision merely means that the

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institution was an excepted temple within the meaning of Act II of 1927. It cannot be suggested that it is not open to the Legislature to vary that definition. On such variation, the question for determination will be whether the institution is an excepted temple within the meaning of the new definition. A decision that an institution satisfies a particular definition cannot certainly mean a decision that it must satisfy the new definition.

On behalf of the respondents, more serious reliance has therefore been placed upon the argument that by reason of the former decision the trustees had acquired a vested right which could not be affected by the amendment of the law, in the absence of words in the Amending Act making the amendment retrospective in its operation. It is this contention that receives support from the decision of our learned brother CORNISH J. in *Rajagopala Chettiar v. H.R.E. Board*(1). The matter has been argued at some length on behalf of the respondents and we have carefully considered the decision of the learned Judge. We have come to the conclusion that there is no scope here for the application of the rule against retrospective operation, because there is really no question of any interference with a vested right or impairing obligations which have come into existence under a previous state of the law.

There is nothing like a recognised legal right or category of right known to general jurisprudence that is connoted by the expression "excepted temple". It was merely a grouping or classification adopted by the Legislature in 1925 as a

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convenient method of referring to a certain class of temples with a view to lay down certain rules in relation thereto in the body of the Act. No doubt, as long as the Act stood in that form, temples which fell in the category of excepted temples were intended to be dealt with in a particular way and temples comprised in the category of non-excepted temples were intended to be dealt with in another way. But it does not seem to us reasonable to suggest that there was a kind of guarantee that, once the Legislature has thought fit to say that a particular temple will be dealt with in a particular manner, it should never afterwards be dealt with in a different manner. There is no question in the present case calling for the determination of the rights and liabilities of parties *in respect of any acts done already*, i.e., during the time the old Act was in force. The question is merely what is to be the method of supervision over the particular temple after the amendment has come into force and what are its liabilities in the future in the matter of contribution and so on. The cases referred to in the judgment of CORNISH J., namely, *Lemm v. Mitchell*(1) and *Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi*(2), as well as the decisions in *Ramakrishna Chetty v. Subbaraya Iyer*(3) and *Tirumalaisami Naidu v. Subramanian Chettiar*(4), which were cited in the course of the arguments before us, are not in our opinion applicable here. They clearly relate to rights which had accrued to parties under the previous state of the law and we have no doubt

(1) [1912] A.C. 400.

(3) (1912) I.L.R. 38 Mad. 101.

(2) (1927) L.R. 54 I.A. 421.

(4) (1916) I.L.R. 40 Mad. 1009.

that the general principle of construction in such cases is that a vested or accrued right is not *prima facie* affected by a change of the law in the absence of express words or necessary implication to the contrary. But, as we have endeavoured to show, there is really no question of vested right in any sense known to the general law here but only a grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation.

We are accordingly unable to follow the decision in *Rajagopala Chettiar v. H.R.E. Board*(1). We are of opinion that the learned District Judge was in error in thinking that the order of the Board was erroneous on the grounds given by him in the fifth paragraph of his judgment. The order is accordingly set aside and the case remanded to the District Court to be dealt with on the merits. The costs of this revision petition will be costs in the cause.

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(1) (1933) 40 L.W. 288.

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CHARIAR J.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Burn, Mr. Justice King and Mr. Justice Venkataramana Rao.

1936,
November 25.

SRI VUPPALAPATI SURYANARAYANESWARA JOGI
JAGANNADHARAJU AND ANOTHER (DEFENDANTS 2 AND
3), APPELLANTS,

v.

THE RAJA OF VIZIANAGRAM, REPRESENTED BY THE ESTATE
COLLECTOR OF VIZIANAGRAM APPOINTED UNDER THE COURT
OF WARDS ACT (PLAINTIFF), RESPONDENT.*

Water—Riparian owner—Right of—Tank and stream supplying water to it both belonging to plaintiff and defendants—Stream itself fed by tributary streams rising entirely in defendants' village and having their course entirely with defendants' lands—Plaintiff's right to flow of water in customary manner to tank through the stream and the tributary streams which feed it—Interference by defendants with—Actionable wrong, if—Tributaries natural streams whose water flows in well-defined channels.

A tank in a village in the plaintiff's zamindari received a supply of water from a stream called Pedda Gedda which took its rise in a jeroyti village of the zamin and passed through the defendants' mokhasa village. During its passage through the defendants' village the Pedda Gedda received tributary supplies from four streams which took their rise entirely within the defendants' village and whose course was entirely with the defendants' lands. It was found that the tank and the Pedda Gedda belonged both to the plaintiff and to the defendants and that the water of the tributary streams flowed in well-defined channels and that those were natural streams.

Held that the rights of the defendants, whatever they might be, were subject to the right of the plaintiff to have the water of the Pedda Gedda and its tributaries flow in the customary manner down to him and that interference with such

* Second Appeals Nos. 1060 and 1061 of 1932.

flow was an actionable wrong, especially in a case where the flow was totally cut off.

Perumal v. Ramasami, (1887) I.L.R. 11 Mad. 16, referred to.

APPEALS against the decrees of the District Court of Vizagapatam in Appeal Suits Nos. 426 and 442 of 1929 respectively preferred against the decrees of the Court of the District Munsif of Vizianagram in Original Suits Nos. 505 and 284 of 1927 respectively.

The facts of the case and the arguments of Counsel appear sufficiently from the judgment of the Full Bench.

S. Subramania Sastri, P. Somasundaram, S. Kasturi Seshagiri Rao, S. Ramamurthi and P. Suryanarayana for appellants.

S. Venkatesa Ayyangar for respondent.

The JUDGMENT of the Court was delivered by BURN J.—The defendants are the appellants. The plaintiff, the Raja of Vizianagram, filed two suits, Original Suits Nos. 284 of 1927 and 505 of 1927, the subject of which was the supply of water to a tank called Vooracheruvu in the village of Kottavalasa in the Vizianagram Zamindari. The facts have been fully stated by the learned District Munsif and by the learned District Judge. The two suits were tried together by consent of both parties. The zamindar's complaint was that the defendants had interfered with the supply of water to Vooracheruvu which it received through a stream called Pedda Gedda. This stream takes its rise in a jeroyti village of the zamin and passes through the defendants' mokhasa village. During its passage through the defendants'

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village, it was receiving tributary supplies from four streams which take their rise entirely within the defendants' village. In or about 1924 the defendants intercepted the courses of three of these streams and put up a long bund so as to form a tank, thereby cutting off the supply of water which was formerly flowing through these tributaries into the Pedda Gedda. In Original Suit No. 284 of 1927 the plaintiff prayed for a mandatory injunction to compel the defendants to remove the obstruction to the courses of the natural streams. Original Suit No. 505 of 1927 was concerned with the course of the same stream further south. It was alleged by the plaintiff that the course of the stream had been diverted towards the west and that this diversion caused damage to Survey Numbers 17, 18, 19 and 20 of Kottavalasa and also to the Malapalli Survey Number 21-B. The plaintiff prayed for a direction in this suit that the defendants might be compelled to close the portion of the channel newly diverted towards the west and to restore it to its original condition. The learned District Munsif dismissed both the suits holding that the rights claimed by the plaintiff were rights of easement and that the plaintiff must fail because those rights had been interrupted more than two years before the suits were filed. On appeal, the learned District Judge disagreed with the learned District Munsif on this point of law and granted the plaintiff the mandatory injunctions which he sought. His finding with regard to the applicability of section 15 of the Easements Act has not been challenged before us in appeal.

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In Second Appeal No. 1060 of 1932, Mr. Somasundaram, who appears for the appellants, concedes that the findings of fact are against him and does not seriously press this appeal. It is found as a fact that the course of the stream was diverted towards the west and that the diversion has caused damage to the plaintiff's lands and in these circumstances it cannot be said that the injunction given by the learned District Judge is in any way wrong. Mr. Somasundaram has addressed almost the whole of his argument to the question of the blocking up of the tributary streams with which Original Suit No. 284 of 1927 was concerned. As to this, it is found by both the lower Courts that the tank Vooracheruvu and the stream Pedda Gedda which supplies it belong both to the plaintiff and to the defendants. Mr. Somasundaram has criticised the learned District Judge for describing the plaintiff as a "riparian owner" of the stream. We do not think that much turns upon the adjective "riparian". It was definitely admitted by the defendants in their written statements in both the suits that the plaintiff and the defendants were both owners of the tank and of its feeder called Pedda Gedda. It is also found as a fact that the water of the tributaries was flowing in well-defined channels and that these were natural streams. That being so, the plaintiff is entitled to have the water flowing in its accustomed course not only through the Pedda Gedda but also through the tributaries which feed it; vide *Perumal v. Ramasami*(1). Mr. Somasundaram relied upon the fact that

(1) (1887) I.L.R. 11 Mad. 16.

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these tributaries rise on the defendants' lands and that the course of them is entirely with the defendants' lands. But this does not really improve his position, since, according to his own admission, he is a riparian owner and his rights are limited to those of a riparian owner. The cases which have been quoted by Mr. Somasundaram lay down that a riparian owner is not entitled to impound the water flowing in defined natural channels but is entitled only to use it as it passes. The rights of the defendants, whatever they may be, are subject to the right of the plaintiff to have the water of the Pedda Gedda and its tributaries flow in the customary manner down to him. The learned District Judge is quite right in holding that interference with such flow is an actionable wrong, especially in a case like this where the flow is totally cut off. We think the view of the law taken by the learned District Judge is correct.

The injunction granted by the learned Judge orders that the bund of the tank newly put up by the defendants shall be breached at the points in the Commissioner's plan marked I, II, III and IV in order to allow the water to flow in its usual courses. The plan shows that, if breaches are effected in the bund at these points, the object will be achieved. The injunction granted by the learned Judge in Original Suit No. 284 of 1927 seems to us therefore to be proper.

In the result, both the appeals are dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

MODEBOYINA RAGHAVALU (COMPLAINANT), PETITIONER,

1936,
November 6.

v.

ODURU NARASA REDDI AND EIGHT OTHERS
(ACCUSED), RESPONDENTS.*

Code of Criminal Procedure, (Act V of 1898), sec. 204 (3)—Summons case—Non-payment of witness batta by complainant—Dismissal of complaint—Competency of.

In a summons case a Magistrate has got power under section 204 (3), Criminal Procedure Code, to dismiss a complaint when the complainant fails to pay witness batta

Korapulu v. Monappa, (1882) I.L.R. 5 Mad. 160, and *Amirthammal v. Ratnasami Padayachi*, 1933 M.W.N. 1266, distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Second-class Magistrate of Gudur, dated 24th September 1935 and made in Calendar Case No. 328 of 1935.

K. Subramanyam for petitioner.

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

ORDER.

The petitioner brought a summons case and after the appearance of the accused he was given three days' time to pay witness batta in order that his witnesses might be summoned. As the batta was not paid the Magistrate dismissed the

* Criminal Revision Case No. 887 of 1935 (Criminal Revision Petition No. 817 of 1935).

RAGHAVALU v. NARASA REDDI. complaint purporting to act under section 204 (3), Criminal Procedure Code.

It is contended here that section 204 (3) does not apply to non-payment of witness batta, and *Korapulu v. Monappa*(1) has been cited to that effect. That was a case under the old Code when there was no section corresponding to section 204 (3) of the present Code. The Magistrate purported to dismiss the complaint under section 205 of that Code, which resembles section 247 of the present Code. Section 247 provides for the acquittal of the accused in cases of non-appearance of the complainant. It was held in that case that section 205 did not apply. There seems to be no reason to think that the power given to the Magistrate under section 204 (3) does not apply to non-payment of witness batta. This sub-section gives the Magistrate power to dismiss the complaint when the complainant fails to pay any process fees or other fees. The section is therefore quite wide enough to include non-payment of witness batta. My attention has been drawn to the judgment of BURN J. reported as *Amirthammal v. Ratnasami Padayachi*(2). There, in a warrant case, after the charge had been framed, the attendance of the witnesses for the complainant was necessary in order that they might be further cross-examined. It was held that in such a case the complainant should not be compelled to pay process fees. It followed that if he was not bound to pay process fees the complaint should not be dismissed for non-payment of those fees. Clearly that case has no application to the present case,

(1) (1882) I.L.R. 5 Mad. 160.

(2) 1933 M.W.N. 1266.

which is a simple summons case where process fees were payable at the very commencement of the proceedings. The learned discussion of BURN J. in that case would have been unnecessary if the petition could have been dismissed on the simple ground alleged in this petition.

I therefore find that the order of the Magistrate was correct and accordingly order that this petition be dismissed.

V.V.C.

PRIVY COUNCIL.

R. T. RANGACHARI, APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL, RESPONDENT.

J.C.*
1936,
December 8.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Public servant—Dismissal—Right of suit—Government of India Acts, 1915 and 1919 (5 and 6, Geo. V, c. 61 and 9 and 10, Geo. V, c. 101), sec. 96-B—Indian Pensions Act (XXIII of 1871), secs. 4 and 6—Dismissal after pension received—Right to declaration in suit.

After a departmental enquiry into charges against a Sub-Inspector of Police, the District Superintendent of Police decided that the charges should be dropped and that the Sub-Inspector should be allowed to retire on an invalid pension. As a result, the Sub-Inspector had retired and drawn pension for two and a half months.

Thereafter the same charges were reconsidered and the Sub-Inspector, who had been appointed by the Inspector-General of Police, was dismissed from service by the Deputy

* Present: LORD ROCHE, SIR SHADI LAL and SIR GEORGE RANKIN.

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Inspector-General to whom power of dismissal had been delegated and, as a consequence, the Sub-Inspector was deprived of his pension.

In a suit by the Sub-Inspector for a declaration that he was not liable to be removed from the service subsequent to his retirement,

held: (i) In substance the claim was for a declaration that he was entitled to a pension and the Court was prohibited from entertaining the suit by the Pensions Act of 1871 and there was no repugnancy in section 96-B of the Government of India Act from which a repeal of sections 4 and 6 of the Pensions Act could be implied.

(ii) The proviso to section 96-B of the Government of India Act is of statutory force and stands on a different footing from rules; a dismissal, therefore, of a person by an authority subordinate to one who appointed him is inoperative.

Venkata Rao v. Secretary of State for India (page 532 *infra*) referred to.

APPEAL (No. 14 of 1936) in *forma pauperis* by special leave from a decree of the High Court in its appellate jurisdiction (December 19, 1933) which affirmed a decree of the High Court in its original jurisdiction (October 17, 1930).

The judgment of the High Court is reported in (1934) I.L.R. 57 Mad. 857.

The material facts are stated in the judgment of the Judicial Committee.

Parikh for appellant.—Section 32 (2) of the Government of India Act, 1915, is not a limiting section. It corresponds to section 65 of the Act of 1858 (XXI and XXII Vict., c. 106).

If the service is one of contract, the East India Company could have been sued, assuming it was not a term of the contract that dismissal might be at pleasure. Rule 351 of the Civil Service Regulations has been validated by Parliament and a pensioner can be deprived of his pension only under this rule. [Reference was made to *P. & O.S.N. Co. v. Secy. of State for India*(1) and *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(2).]

(1) (1861) 5 Bom H.C.R. (Appx.) 1.

(2) (1932) I.L.R. 59 Cal. 1289.

Where there is a contract a suit will lie. An act of state has been defined in *Eshugbayi Eleko v. Government of Nigeria* (*Officer Administering*)(1). [Reference was made to Sir Courtenay Ilbert's *Government of India* (2nd Edn.), page 154, Chapter III, Indian appointments, section 20; *Ram Das Husra v. Secretary of State for India in Council*(2); *Shenton v. Smith*(3); *Gould v. Stuart*(4); *Young v. Waller*(5) and *Young v. Adams*(6).]

Section 96-B (1), added by the Act of 1919, does not authorise the Secretary of State to make rules affecting the jurisdiction of the Courts.

The effect of section 96-B (4) is that all rules when made and confirmed have statutory effect and full effect should be given to them as part of the statute. It brings in Rule 351 of the Civil Service Regulations. It applied to all in the service at the time and became part of their contract. Section 96-B (5) was inserted by the Act of 1925. It has no application in this case.

As a pensioner, the appellant is not in the service and the words "at pleasure" in section 96-B (1) do not apply. The section is applicable only to those in the service. Assuming it did apply, the words "at pleasure" are limited by the other provisions of the Act and the Rules. There is a restriction on the exercise of the "pleasure". "At pleasure" is used in other sections, e.g., 96-D. The expression is used in a qualified sense. Before the Act, the Rules had not statutory effect. If the Legislature intended to oust the jurisdiction of the Courts it would have done so in clear words as it has done in other cases. The Secretary of State has no power to make rules ousting the jurisdiction of the Courts. Delegation by him is subject to limitations and the Council has no power under section 96-D to limit the jurisdiction of the Courts. Rules under section 96-B (2) and (4) are on the same footing. The Rules cannot take away the jurisdiction of the Courts. In so far as the Pensions Act is inconsistent with the Rules, it is impliedly repealed. It is made a part of the Rules by section 96-B (4). [Section 84 (1) was referred to.] Every rule is made legal and a breach of it gives a

(1) [1931] A.C. 662, 671.

(3) [1895] A.C. 229, 234.

(5) [1898] A.C. 661.

(2) (1912) 18 C.W.N. 106.

(4) [1896] A.C. 575.

(6) [1898] A.C. 469.

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right of recourse to the Courts. Pensions under the Pensions Act were not legally enforceable under the Rules: they now are. The Courts below were in error in finding that a declaration that the appellant was wrongly dismissed would affect the liability of Government to pay the pension, directly or indirectly. [*Robert Fischer v. The Secretary of State for India in Council*(1) was referred to.] He is entitled to the declaration because he can claim nothing else. He cannot claim an order against the Government for payment of the pension. Another ground on which the Courts below have dismissed his suit is that he had a right of appeal which he did not exercise. The Rules do not say that he could not go to the Court if he did not appeal. The jurisdiction of the Court is always there. It has not been taken away. [Reference was made to *Satish Chandra Das v. Secretary of State for India*(2), *J. R. Baroni v. Secretary of State for India in Council*(3), *The Secretary of State for India in Council v. D'Attaiides*(4) and *Bimalacharan Batabyal v. Trustees for the Indian Museum*(5).]

Majid following.—Both the Courts below have held that a competent authority found that the charges against the appellant were not made out. He was in receipt of an invalid pension and he could not be deprived of it on the ground that charges were pending against him or on finding subsequently that those charges were made out. The Pensions Act does not apply to pensions earned by service, but deals with pensions granted *ex gratia*. Assuming he is entitled to a pension, he is entitled to a declaration and to consequential relief. Service involves a right to pension under the Regulations. If he is disabled by section 6 of the Pensions Act from invoking the jurisdiction of the Courts in the matter of pension, he would still be entitled to damages by way of compensation.

Dunne K.C. and *Wallach* for respondent.—In this case there was an enquiry, finding and report. The question raised is whether the appellant could be dismissed after he received a pension, the contention being that he was not then in service. There is no question of dismissal in this case. The question is whether the Government could stop his pension. [Reference

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was made to the Pensions Act, sections 1, 4 and 6.] The words of section 4 are very wide. Under section 6 the Court shall not make a decree. That means that the Government reserves to itself all jurisdiction in the matter of pensions. There is no limitation to any particular class of pensions as has been suggested in the argument for the appellant. The Government of India Act of 1919 is in no way repugnant to the Pensions Act. The East India Company, were both traders and sovereigns. It is submitted that a suit could not have been brought against the Company for wrongful dismissal of a public servant, that is, one employed by the Company in the exercise of its sovereign powers under the Company, and until the Act of 1919, it is clear that the tenure under which public servants held office was at the pleasure of the Crown and no suit would lie against the Company or the Crown for wrongful dismissal. Section 96-B, inserted by the Act of 1919, preserves the tenure. It specifically says that civil servants hold at pleasure. The words cannot be whittled down or limited by implication. Rule 16 gives a right of appeal, not of suit. After the enquiry, whatever the finding, there is still the power to dismiss at pleasure. [Reference was made to the Public Servants Inquiry Act of 1850.] No legal character or right to property is claimed here, so no declaration can be made under section 42 of the Specific Relief Act.

Section 96-B (1) of the Government of India Act says that no person shall be dismissed by any authority subordinate to that which appointed him. It is doubtful whether there can be a delegation where the words of the statute are specific. The Pensions Act, section 6, would apply to a case where a man has received a pension and it is withheld.

Parikh in reply.—Under section 32 (2), in all cases where a cause can be shown an action against the Secretary of State will lie. The section does not limit the right.

The JUDGMENT of the Judicial Committee was delivered by LORD ROCHE.—This is the appeal of the plaintiff in the action against a decree of the High Court of Madras, in its appellate jurisdiction, dismissing an appeal against a decree of the High Court in its original jurisdiction whereby the

LORD ROCHE.

(1) (1898) L.R. 26 I.A. 16; I.L.R. 22 Mad. 270.

(2) (1926) I.L.R. 54 Cal. 44. (3) (1929) I.L.R. 8 Ran. 215.

(4) (1934) I.L.R. 12 Ran. 556; A.I.R. 1934 Ran. 381.

(5) (1929) I.L.R. 57 Cal. 231.

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action of the plaintiff had been dismissed and judgment had been entered for the defendant.

The facts giving rise to the litigation are as follows : Prior to and in the month of July 1927 the appellant was a Sub-Inspector of Police in the Presidency of Madras. Certain charges of irregular and improper conduct in the execution of his duties as a police officer were made against him and were the subject of an official enquiry conducted by a Mr. Charsley, an Assistant Superintendent of Police for the district in which the appellant was serving. This enquiry was held in the manner required by rule XIV of the Statutory Rules, 1924, Nos. 354 and 355 (the Civil Services Classification Rules), made under section 96-B (2) of the Government of India Act, 1919. Mr. Charsley had concluded his enquiry on 7th September. At that date the Acting District Superintendent of Police was a Mr. Kalimullah who had taken charge of the district in August and continued in charge until the latter part of October, when he was succeeded by a Mr. Loveluck. The appellant had for some time prior to 7th September been in bad health and on that date, when Mr. Charsley finished the enquiry, the appellant had applied to him in the following terms : "I beg to submit that I am growing worse with my hernia and I am unfit for further service. I pray that I may kindly be placed before the District Medical Officer for being invalided." This request was transmitted to Mr. Kalimullah by Mr. Charsley with a statement : "He (the appellant) may be sent before the District Medical Officer with a requisition. It appears to be true that he has a bad rupture. I have completed

the enquiry against him." On 9th September there was an important conference between Mr. Charsley and Mr. Kalimullah as to the course to be adopted with regard to the appellant. The result seems to their Lordships to be now quite clear, and their Lordships agree with the findings of both Courts below which are in substantial agreement in all material respects. Two courses were under consideration : disciplinary action such as dismissal on the one hand and on the other retirement for health reasons on pension. Mr. Charsley's view was adverse to the appellant and he thought that the charges were established and so informed Mr. Kalimullah ; but he recognised, as was the fact, that the decision rested with Mr. Kalimullah and not with him. Mr. Kalimullah after giving the matter careful consideration, and after full discussion with Mr. Charsley, arrived, in all good faith, as both Courts have found, at the decision that the evidence was doubtful and inconclusive and that the charges should be dropped and that accordingly the appellant, subject to a medical certificate, which on the known facts it was anticipated would be granted, should be allowed to retire on grounds of health and that an invalid pension should be awarded to him. There is no dispute that Mr. Kalimullah was fully competent so to drop the charges and to come to the determination to which both Courts have found that he did come with perfect honesty. Mr. Charsley quite properly bowed to the decision though safeguarding himself with a statement that he would send in his report. He did so on 2nd October and like the view he orally expressed on 9th September it was adverse to the appellant.

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Meanwhile on 16th September a medical certificate was granted and on 13th October the pension roll was signed by Mr. Moore, the Deputy Inspector-General of Police, sanctioning the granting of an invalid pension of Rs. 41 a month, and on 4th November the appropriate authorisation for payment of the pension to date from 17th September was issued from the office of the Accountant-General. Mr. Moore had been told by Mr. Charsley on 9th September about the charges against the appellant and of Mr. Kalimullah's view that he should nevertheless be invalided out of the service. The appellant in fact retired from the service and his pension was paid to him for the months of September, October and November. The trouble which arose with regard to it subsequently was due to the following circumstances: Mr. Charsley's report had been put aside in the office and not brought before Mr. Kalimullah by his subordinates. Had it been so brought before him there is no probability that he would have altered the decision or the course of action upon which he had determined upon the same material on 9th September, but he might, and apparently ought to, have made a record of his decision in respect of the report and this he did not do. Accordingly, when he went out of office and Mr. Loveluck succeeded him and saw the report, there was not unnaturally both suspicion and trouble. The adverse view of Mr. Charsley in writing was given more weight than the unrecorded reasons of Mr. Kalimullah for forming a more lenient and more cautious judgment as to the extent to which the charges made could be or were supported by reliable

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evidence. The view taken was that the report ought to have been put before the pensions authorities or before the Deputy Inspector-General who was asked to authorize the pension. Their Lordships are not in a position to say whether this view is correct as a matter of departmental practice, but it is clear that if there was a neglect of proper procedure it was not due to any want of good faith. As has been already stated, the then Deputy Inspector-General, Mr. Moore, was told, according to Mr. Charsley, of his enquiry and of his view of the matter and of his proposed report. This, however, was not so plain at the time as it has now become and indeed was probably unknown to Mr. Loveluck who succeeded Mr. Kalimullah and to Mr. Filson who by this time had succeeded Mr. Moore. The upshot was that the pension was first suspended for further consideration and that on 28th February 1928 Mr. Filson issued an order purporting to remove the appellant from the service from the date upon which he was invalided. The grant of pension was also annulled or put an end to. The appellant memorialized the Government of Madras against this decision basing his prayer for relief from the cancellation of the order stopping his pension upon the simple ground that the matter had been decided by a competent authority and could not be re-opened. There was a discussion at the time whether the appellant's proper procedure under the rules should not have been by appeal rather than by memorial, but on the argument before their Lordships no point was made of this and it was agreed that the substantial matter was brought before Government by the

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appellant's memorial and that relief was refused and that a further memorial to the Government of India was withheld by the Madras Government pursuant to a discretion vested in it by the material rules. The present action was then brought.

The first question is, has the appellant suffered a wrong, that is to say, is his complaint well founded in fact? If it is, then a second question arises, namely, is the wrong actionable and ought the appellant to have succeeded in this action?

The answer to the first question seems to their Lordships plainly to be in the affirmative. It is not contended that rule 351 of the Pensions Rules relating to conduct had any bearing on the matter or justified withdrawal of the pension. But their Lordships appreciate that, for reasons which have already been indicated, irregularity or slackness of procedure may have given rise to suspicions of good faith which the investigation of the subject in this action has, or ought to have, entirely removed. In these circumstances the case becomes a case in which after Government officials duly competent and duly authorized in that behalf have arrived honestly at one decision, their successors in office, after the decision has been acted upon and is in effective operation, purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained. It

follows that in their Lordships' view the appellant had, and has, every right to complain of the stoppage of the pension as a breach of the rules relating to pensions. Both Courts below so held and their Lordships are in entire agreement with their decision on this point.

The second point as to the right of action therefore arises. Both Courts below have decided that the Courts cannot give the relief prayed and that the action fails. The main ground of their decision is that the action is one which, by virtue of the provisions of the Pensions Act of 1871, a civil Court is prohibited from entertaining. It is necessary to see precisely what the relief claimed was and to see what the relevant statutory provisions are. By the plaint the appellant prayed a decree for a declaration that the plaintiff was not liable to be removed from the service subsequent to his retirement and also claimed damages and other relief. At the trial all claims except that for a declaration were dropped. The trial Judge thought he could not and ought not to make such a declaration and the Judges on appeal were of the same opinion. In both Courts the conclusion was reached that in substance the claim was for a declaration that the appellant was entitled to his pension and so, in their Lordships' judgment, it was. Section 4 of the Pensions Act (No. XXIII of 1871) reads as follows :

"Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and, whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted."

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Section 6 which empowers a civil Court in certain circumstances to take cognizance of certain matters as to pensions provides as follows :

“ . . . but (the Court) shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.”

The Courts below held that having regard to the essential nature of this action it was within the prohibitions above set out. It was hardly disputed before their Lordships that this would be the correct view, but for the enactment of the Government of India Act of 1919. The main force of the argument for the appellant was directed to the support of a proposition which may be shortly stated as follows : By the terms of section 96-B of the Act of 1919 the pensions rules are made statutory and of the same force as if they were set out in the statute itself : also by the terms of the section, persons in the civil service of the Crown in India hold office not simply at pleasure but on the terms set out both in the section and in all the rules made thereunder including the pensions rules : further it was said that since a statutory right is thus created between the Crown and the servant it is necessarily to be implied that any provisions in any antecedent statute repugnant to the terms of the statute creating such right are repealed or rendered inapplicable to such a case. With regard to the first part of this argument, namely, as to the effect of the Act of 1919 and in particular as to whether it confers a right of action to enforce the rules made thereunder, their Lordships, in giving their advice to His Majesty in Appeal No. 15 of 1936 [*Venkata*

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Rao v. Secretary of State for India(1)] which was argued at the same time as this appeal, will have to enter more at length into their reasons for rejecting such an argument. It is sufficient to say here that in their Lordships' opinion it is untenable. The next step seems even more difficult for the appellant and their Lordships are quite unable to hold that by reason of any repugnancy and implied repeal the provisions of the Pensions Act are rendered inapplicable to the present action.

There is, however, another point raised and in the Courts below decided adversely to the plaintiff which has given their Lordships considerable anxiety. Section 96-B contains the following proviso :

“ But no person in that service (the civil service of the Crown) may be dismissed by any authority subordinate to that by which he was appointed.”

The purported dismissal of the appellant on 28th February 1928 emanated from an official lower in rank than the Inspector-General who appointed the appellant to his office. The Courts below held that the power of dismissal was in fact delegated and was lawfully delegated to the person who purported to exercise it. Counsel for the respondent candidly expressed a doubt as to the possibility of maintaining this view and indeed it is manifest that if power to delegate this power could be taken under rules it would wipe out a proviso and destroy a protection contained not in rules but in the section itself. Their Lordships are clearly of opinion that the dismissal purporting to be thus ordered in February was by reason of its origin bad and inoperative.

(1) Page 532 *infra*.

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Their Lordships have most anxiously considered whether some relief by way of declaration to this effect should not be granted. It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. It is plainly necessary that this statutory safeguard should be observed with the utmost care and that a deprivation of pension based upon a dismissal purporting to be made by an official who is prohibited by statute from making it rests upon an illegal and improper foundation. But, although their Lordships differ in this important matter from the reasoning and conclusions of the Courts below, they are not on the whole prepared to direct that a declaration on this point should be made. The questions of fact and law are now decided and a declaration could have no greater effect than the decision itself. After this lapse of time and having regard to his health no one suggests that the appellant can now be restored to his office and the matter of pension and the responsibility of doing right in that regard rests with the Government. Accordingly, their Lordships agree in the view of the Courts below that no order or declaration should be made in this action. It was urged that unless the rights of the appellant could be enforced by action the provisions of section 96-B and of the rules to which force was thereby given would be nugatory and useless. Their Lordships cannot take that view. They cannot doubt that the charter and the pledge contained in the statute and in the consequential rules are generally observed and fulfilled and

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though in this instance, for reasons which are comprehensible but as now appears are insufficient, this has so far unfortunately not proved to be the case, there is yet both time and opportunity for the appropriate action to be taken by the executive now that the important questions of principle are disposed of.

Their Lordships are dealing with various other and minor points which arose in this case, such as the effect of section 32 of the Government of India Act of 1919, in their judgment in Appeal No. 15 of 1936 [*Venkata Rao v. Secretary of State for India*(1)] and it is unnecessary to repeat the observations there made.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appeal was in *formâ pauperis* and there will be no order as to costs.

Solicitor for appellant: *G. K. Kannepalli.*

Solicitor for respondent: *The Solicitor, India Office.*

C.S.S.

PRIVY COUNCIL.

R. VENKATA RAO, APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS]

Public servant—Dismissal—Government of India Acts, 1915 and 1919 (5 and 6, Geo. V, c. 61 and 9 and 10, Geo. V, c. 101), sec. 96-B—Civil Service Classification Rules—Rules 13 to 16 and 28—Disregard of procedure prescribed by the Rules—Right of suit.

Section 96-B of the Government of India Act expressly states that persons in the civil service hold office during pleasure.

The terms of the section contain a statutory and solemn assurance that the service, though at pleasure, will not be subject to capricious or arbitrary action and will be regulated by rule but do not import a special kind of employment with an added contractual term that the rules are to be observed.

The dismissal of a civil servant in utter disregard of the procedure prescribed by the rules framed under the section will not, therefore, give a right of action for wrongful dismissal.

Shenton v. Smith, [1895] A.C. 229, *Gould v. Stuart*, [1896] A.C. 575, *Satish Chandra Das v. Secretary of State for India*, (1926) I.L.R. 54 Cal. 44, *J.R. Baroni v. Secretary of State for India in Council*, (1929) I.L.R. 8 Ran. 215, *Bimalacharam Batabyal v. Trustees for the Indian Museum*, (1929) I.L.R. 57 Cal. 231, and *P. & O.S.N. Co. v. Secy. of State for India*, (1861) 5 Bom. H.C.R. (Appx.) 1, referred to.

APPEAL (No. 15 of 1936) by special leave in *forma pauperis* from a decree of the High Court in its appellate jurisdiction (December 19, 1933) which affirmed a decree of the Court made in its ordinary original jurisdiction (August 26, 1930).

* Present: LORD ROCHE, SIR SHADI LAL and SIR GEORGE RANKIN.

The judgment of the High Court is reported in *VENKATA RAO v. SECRETARY OF STATE FOR INDIA* (1934) I.L.R. 57 Mad. 857.

The material facts are stated in the judgment of the Judicial Committee.

Subba Rao for appellant.—Section 96-B of the Government of India Act was introduced by the Act of 1919 to safeguard the rights of civil servants. Government can dismiss a civil servant only for reasons under the Civil Service Classification Rules, Rule XIII. The procedure laid down must be followed. Under Rule XIV there must be an enquiry. The form of enquiry is prescribed. The words “at pleasure” in section 96-B of the Act have a limited meaning, e.g., no one can be dismissed by an authority subordinate to the one by which he was appointed. Some meaning must be given to the words “subject to the provisions of this Act and the rules”. They impose a limitation on the pleasure. In *Shenton v. Smith*(1) there were regulations, but no rules having statutory effect. [Reference was made to *Coker v. The Queen*(2).]

The rules under the Act are given statutory effect. The object is to ensure an enquiry by Government and the effect is that where there is no enquiry, the public servant would have a right of recourse to the Court. The law before 1919 is conveniently summarized in *Ram Das Hazra v. Secretary of State for India in Council*(3). Whenever there is a breach of statutory rules there is a right to a declaration that there has been a breach.

Dunne K.C. and *Wallach* for respondent.—This is a claim for damages for wrongful dismissal. The appellant had a right of appeal against his dismissal and he appealed. His memorial to Government is, in effect, an appeal. He is bound by the statutes and the rule “at pleasure” applies to him. Assuming the rules as regards enquiry before dismissal were not followed, under Rule XVI he had a right of appeal, not a right of suit. If he can be dismissed at pleasure there is no wrongful dismissal.

Subba Rao in reply, referred to section 32 of the Act and the cases referred to in the judgment of the High Court.

The JUDGMENT of the Judicial Committee was delivered by LORD ROCHE.—This is an appeal LORD ROCHE.

(1) [1895] A.C. 229.

(2) [1898] 16 New Zealand L.R. 193.

(3) (1912) 18 C.W.N. 106.

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against a decree, dated 19th December 1933, of the High Court of Judicature at Madras in its appellate jurisdiction, affirming a judgment of the High Court in its original jurisdiction dismissing the action of the present appellant, the plaintiff in the action. The action was one claiming damages for wrongful dismissal from Government service, and the questions involved were whether the dismissal was in fact wrongful and in breach of the material rules of the service and, if so, whether the suit for damages was maintainable.

The facts of the case were these : The appellant in May 1924 was a reader in the Government Press, Madras, and as such reader held office in the civil service of the Crown in India. In May 1924 he fell under suspicion of being concerned in a leakage of information in respect of pleader-ship examination papers. The appellant consistently and stoutly denied the charge. The matter was investigated and at first the appellant was directed to vindicate his character in a Court of law. He proceeded to do so by action for libel against a candidate for examination who was said to have informed against him. In this action he ultimately got judgment by default for nominal damages. But before the case was determined the appellant was on 23rd August 1924 suspended and on 22nd September dismissed from the service. An appeal to the Madras Government by memorial was rejected. The present suit was brought on 17th December 1927. In the plaint, as in the memorial to Government, the appellant, in addition to his arguments as to innocence in fact, complained that the dismissal was contrary to the statute inasmuch as it was not preceded by any

such enquiry as is prescribed by Rule XIV of the Civil Services Classification Rules made thereunder. The material section of the statute (Government of India Act, 1919) is section 96-B, which reads as follows :

“(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty’s pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor’s province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the Governor of the province in order to obtain justice, and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorize the Indian Legislature or Local Legislatures to make laws regulating the public services :

Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be

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regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

(4) For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section.

(5) No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-section (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed :

Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision."

Amongst the rules made or confirmed under the above section are certain Classification Rules of which the following are the most material :

" XIII. Without prejudice to the provisions of any law for the time being in force, the Local Government may for good and sufficient reasons—

- (1) censure,
- (2) withhold promotion from,

- (3) reduce to a lower post,
- (4) suspend,
- (5) remove, or
- (6) dismiss

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any officer holding a post in a provincial or subordinate service or a special appointment.

XIV. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conclusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

XV. A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule XIII in regard to officers of the subordinate services.

XVI. Every officer against whom an order may be passed under rules X, XIII and XV, and who thinks himself wronged thereby, shall be entitled to prefer at least one appeal against such order.

XXVIII. The Secretary of State may call for any appeal withheld by the Local Government or the Government of India which under the rules may be made to him and may pass such orders as he considers fit; the Governor-General in Council may send for an appeal withheld by the Local Government which under the rules may be made to him, and may pass such orders as he considers fit."

The respondent's written statement alleged that rule XIV was substantially complied with and also raised questions of law as to the right of dismissal at pleasure and as to the suit not being maintainable. The matter first came before BEASLEY J.

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who treated it as coming before him on a preliminary issue which assumed that no enquiry in accordance with rule XIV had in fact been held. Thinking quite rightly that the questions of law were of the greatest importance, the learned Judge referred the matter to a Full Bench. When the case came on before the Full Bench the defendant's Counsel said that he was prepared to prove that an enquiry had been held which complied substantially with the provisions of rule XIV and asked for an opportunity of establishing that defence. This was granted and the case was sent back and was heard by WALLER J. He took the evidence and after so doing found as follows :

"There was, it is true, some sort of enquiry, but it was most certainly not of the sort prescribed by the rule. I say nothing about the omission to frame a charge; it being clear that the plaintiff knew perfectly well what the charge against him was; but in every other respect the enquiry was defective. Witnesses were examined but not in the presence of the plaintiff and he seems to have been dismissed mainly on the strength of a written statement made by one Sitaramayya not in his presence. I find that the requirements of rule XIV were not satisfied."

The learned Judge decided the questions of law against the appellant and dismissed the suit, but decided that in the circumstances the costs should be borne by the defendant. The appeal against this decision was heard at the same time as the appeal in *Rangachari's* case(1) in which their Lordships have just pronounced judgment. The Court consisting of BEASLEY C.J. and BARDSWELL J. agreed with the Court below on the question of fact saying that the procedure prescribed by the rule was not followed at all. But as they also agreed with the Court below on the questions of law they dismissed the appeal.

(1) Page 517 *supra*.

On the issue of fact which was expressly raised by the defendant their Lordships think that the findings of the Courts below were abundantly justified and were indeed inevitable. A most definite and salutary rule was disregarded in most essential respects and the contention which was in effect that what was done was "well enough" is a contention mischievous in tendency and ill-founded in fact. An excuse was made that the procedure prescribed was not followed because there was no power to compel the attendance of witnesses not in Government service. This excuse was not accompanied by any allegation or proof that an attempt to secure the attendance of such witnesses was made and that the attempt had failed.

Their Lordships now pass to consider the questions of law raised in the appeal. The contention for the appellant was and is that the statute gives him a right enforceable by action to hold his office in accordance with the rules and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. The respondent's contention, and the decision of the Courts below, is that there is no such actionable right conferred by the statute.

There are two decisions of this Board much discussed in the Courts below which state the principles to be applied to cases such as this. The first is *Shenton v. Smith*(1) relied upon by the respondent and the other is *Gould v. Stuart*(2) relied upon for the appellant. In the first case, Dr. Smith held office in the Government

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(1) [1895] A.C. 229.

(2) [1896] A.C. 575.

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medical service in Western Australia and relied upon certain rules and regulations of the service as an essential part of his contract of service. He was dismissed and brought an action for damages which failed. Upon appeal to Her Majesty in Council, Lord HOBHOUSE, in giving their Lordships' judgment, said :

"It appears to their Lordships that the proper grounds of decision in this case have been expressed by STONE J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind . . . As for the regulations, their Lordships again agree with STONE J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants."

A special case such as was contemplated in the above cited passage occurred in *Gould's* case where the Board, consisting of three members two of whom had sat in *Shenton's* case, held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were "inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure".

The question is: does the present case fall into the general category defined and illustrated by *Shenton's* case or the more exceptional category defined and illustrated by *Gould's* case? On the facts it stands somewhere between the two cases

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inasmuch as here the rules are expressly and closely related to the employment by the statute itself. In these circumstances difference of judicial view in India has manifested itself. There are decisions favourable to the present appellant in *Satish Chandra Das v. Secretary of State for India*(1), in *J. R. Baroni v. Secretary of State for India in Council*(2) and to some extent also in *Bimalacharan Batabyal v. Trustees for the Indian Museum*(3). On the other hand both Courts in the present case have adopted the contrary view. In their Lordships' opinion the judgments in the Courts below express the correct view. The reasons which have led their Lordships to this conclusion may be shortly stated. Section 96-B in express terms states that office is held during pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave and pensions and very many other matters. Inconvenience is not a final consideration in a matter of construction but it is at least worthy of consideration, and it can hardly be doubted that the suggested

(1) (1926) I.L.R. 54 Cal. 44.

(2) (1929) I.L.R. 8 Ran. 215.

(3) (1929) I.L.R. 57 Cal. 231.

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procedure of control by the Courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion. There is another consideration which seems to their Lordships to be of the utmost weight. Section 96-B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that subsection 5 in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. It is said that this is to treat the words "subject to the rules" appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's* case. They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious therefore that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that Government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done.

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Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the Governments concerned, and the fact that there happen to have arisen for their Lordships' consideration two cases, where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear from the evidence, as they similarly held in *Rangachari's* case, their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action. To give redress is the responsibility, and their Lordships can only trust will be the pleasure, of the executive Government. Their Lordships in these circumstances and taking this view of the effect of section 96-B of the statute do not deem it necessary to discuss at length certain other grounds assigned for their conclusions by the Judges in the Courts below. Their Lordships, however, deem it right to say that as at present advised they do not think that the Public Servants Inquiry Act of 1850 has any bearing on this action or upon *Rangachari's* action. These appellants do not seem to be servants falling within the scope of that Act, nor does a stipulation that the absence of an enquiry under that Act is not a bar to the removal of a servant constitute any reason why the absence of an enquiry under these rules should not be a bar to removal. The reasoning of the Courts below as to section 32 of the Government of India Act, 1919, and its effect and bearing on

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these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body, if any, to be sued. If it had appeared that the plaintiff's service under the Act of 1919 was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the contract of service would not have been available to the plaintiff. Breach of contract by the Crown can in England be raised by petition of right. The fact that for a different reason—namely that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the Company does not in their Lordships' view conclude the matter either under clause 2 of section 32 of the Act or on the reasoning of Sir BARNES PEACOCK in *P. & O. S. N. Co. v. Secy. of State for India*(1).

For these reasons their Lordships will humbly advise His Majesty that this appeal, which by special leave was brought in *forma pauperis*, should be dismissed. There will be no order as to costs.

Solicitor for appellant : *G. K. Kannepalli.*

Solicitor for respondent : *The Solicitor, India Office.*

C.S.S.

(1) (1861) 5 Bom. H.C.R. (Appx.) 1.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Varadachariar, Mr. Justice Burn
and Mr. Justice Pandrang Row.*

POLPAKARA MANAKKAL VIROOPAKSHAN
NAMBUDRIPAD (PLAINTIFF), APPELLANT,

1936,
November 16.

v.

PULIPRE TARWAD KARNAVAN AND MANAGER
CHEMBU NAYAR (DECEASED) AND FOUR OTHERS
(DEFENDANTS 1, 17, 18 AND 11 AND LEGAL REPRESENTATIVE
OF FIRST DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Mortgage—Redemption—Second suit for—Maintainability of—Execution of decree in first suit allowed to become barred—Effect of—Transfer of Property Act (IV of 1882), sec. 60—Melcharthdar—Redemption of kanam—Suit for—Execution of decree in, allowed to become barred—Jenmi's subsequent suit for redemption of same kanam—Maintainability of—Execution of decree in prior suit applied for by him.

In a suit instituted in 1923 by the assignee of a melcharthdar a decree for possession was passed conditional on payment of a certain sum of money for compensation for the improvements effected by the tenant. The decree-holder did not deposit the amount and take possession. Some months after the date of the decree, he sent a notice to the jenmi stating that the suit had been instituted really at the instance of the jenmi and calling upon the jenmi to take steps to deposit the compensation amount and recover possession. The jenmi applied to the Court for extension of time to pay the money and extension was granted on two occasions. A third application made by him for further extension of time was rejected and the execution of the decree was allowed to become barred. In 1927 the jenmi instituted the suit out of which the second appeal arose for redemption of the properties in the possession of the kanamdars. The question for decision was whether the proceedings taken in the suit of 1923 operated as a bar to the suit

* Second Appeal No. 1416 of 1931.

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of 1927, the alleged bar being based on two grounds: (i) on general principles laid down in *Vedapuratti v. Vallabha Valiya Raja*, (1901) I.L.R. 25 Mad. 300 (F.B.), and (ii) in view of the special provisions in the Malabar Compensation for Tenants' Improvements Act.

The jenmi was a defendant in the suit of 1923 but it did not appear that his right to execute the decree in it was adjudicated upon by the Court. It was not contended that the melcharth itself was a benami transaction and that the jenmi was in substance and truth the plaintiff in the suit of 1923. The period of the melcharth had not expired when the suit of 1927 was instituted.

Held (i) that the proceedings taken in the suit of 1923 did not operate as a bar to the suit of 1927 and (ii) that the jenmi's right to maintain the suit was not affected by the circumstance that the period of the melcharth had not expired when that suit was instituted because (a) that period had expired during the pendency of the appeal and (b) the melcharthdar had precluded himself from recovering possession in pursuance of the decree in the suit of 1923.

In the ordinary course the jenmi will not be precluded from instituting a suit merely because he was one of the defendants in a former suit instituted by the melkanamdar for redemption of the kanam; and the mere fact that the jenmi applied for extension of time in the suit of 1923 will not by itself suffice to create in him a disability which would not otherwise arise under the law.

Raman Namboodri v. Achutha Pishurodi, (1904) I.L.R. 35 Mad. 42, and *Veerappudayan v. Muthukarappan Thevan*, (1913) 24 M.L.J. 534, referred to.

Unless as contemplated by section 60 of the Transfer of Property Act the right of redemption has been extinguished in one of the modes contemplated by the statute, the mere fact that a decree for redemption obtained on a former occasion has not been executed will not prevent the mortgagor from maintaining a subsequent suit for redemption.

Raghunath Singh v. Hansraj Kunwar, (1934) I.L.R. 56 All. 561 (P.C.), followed.

The principle of the decision in *Vedapuratti v. Vallabha Valiya Raja*, (1901) I.L.R. 25 Mad. 300 (F.B.), adopted in *Nynam Vestil Mayan Kutti v. Valappilakath Kunhammad*,

(1917) 34 M.L.J. 167, that even assuming that after a decree for redemption the relationship of mortgagor and mortgagee continues, a second suit for redemption will nevertheless not lie, can no longer be maintained in the face of the decision in *Raghunath Singh v. Hansraj Kunwar*, (1934) I.L.R. 56 All. 561 (P.C.). The other ground suggested in *Vedapuratti v. Vallabha Valiya Raja*, (1901) I.L.R. 25 Mad. 300 (F.B.), namely, the bar by *lis pendens*, will not avail when by reason of the bar of limitation or from some other cause relief can no longer be had by proceedings taken in the former suit.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 136 of 1929 (Appeal Suit No. 342 of 1929, District Court, South Malabar), preferred against the decree of the Court of the District Munsif of Ponnani in Original Suit No. 677 of 1927.

The facts of the case and the arguments of Counsel appear sufficiently in the judgment.

K. Kuttikrishna Menon for appellant.

K. P. Raman Menon for respondents.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This case has been posted before this Bench in consequence of a contention raised on behalf of the appellant that the decision of the Full Bench in *Vedapuratti v. Vallabha Valiya Raja*(1) should not be followed after the decision of the Privy Council in *Raghunath Singh v. Hansraj Kunwar*(2). The second appeal arises out of a suit instituted by a jenmi for redemption of properties in the possession of the kanamdar. Various objections were raised, of which it is necessary to refer only to those raised by issues 1 and 3.

(1) (1901) I.L.R. 25 Mad. 300 (F.B.). (2) (1934) I.L.R. 56 All. 561 (P.C.).

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The third issue was framed with reference to what happened in Original Suit No. 670 of 1923 on the file of the Ponnani Munsif's Court. That suit was instituted by the assignee of a melcharthdar who is the seventeenth defendant in the present suit. A decree for possession was passed in that suit conditional on payment of a certain sum of money for compensation for the improvements effected by the tenant. The decree-holder, however, did not care to deposit the amount and take possession. Some months after the date of the decree, he sent a registered notice to the jenmi which has been marked Exhibit VI in the present case, wherein he stated that the suit had been instituted by him really at the instance of the jenmi and he accordingly called upon the jenmi to take steps to deposit the compensation amount and recover possession. We are not in a position to say if and how far the allegations in Exhibit VI are true. It is however in evidence that the jenmi made two or three applications for extension of time to deposit the compensation amount, as he was under the impression that if he did not do so, his right might once for all be extinguished. On two occasions extension seems to have been granted, but on the third occasion his application for further extension of time was rejected by order dated 7th September 1925. No reasons have been stated for the rejection. It has been contended in the Courts below and before us, on behalf of the kanamdars, that these proceedings taken in Original Suit No. 670 of 1923 operate as a bar to the present suit on two grounds: (i) on the general principles laid down by a Full Bench of this Court in *Vedapuratti v. Vallabha Valiya*

Raja(1) and (ii) in view of the special provisions in the Malabar Compensation for Tenants' Improvements Act.

It has not been disputed that in the ordinary course the jenmi will not be precluded from instituting a suit merely because he was one of the defendants in a former suit instituted by the melkanamdar for redemption of the kanam. The Courts below recognise that the decisions in *Raman Namboodri v. Achutha Pishurodi*(2) and *Veerapudayan v. Muthukarappan Thevan*(3) are against any such contention. But it has been argued that because the present plaintiff applied to the Court in Original Suit No. 670 of 1923 for extension of time to pay the money and extension was granted on two occasions, he must be held to have put himself in the position of the plaintiff in that suit and therefore to be governed by the principle laid down in *Nynam Veetil Mayan Kutti v. Valappilakath Kunhammad*(4) and that if he had allowed his remedy by way of execution to become barred, he would not be entitled to bring a second suit. The decision in *Nynam Veetil Mayan Kutti v. Valappilakath Kunhammad*(4) was based upon the principle of *Vedapuratti v. Vallabha Valiya Raja*(1) and on that ground dissented from the earlier decision in *Chowakkaran Keloth v. Karuvalote Parkum*(5).

We are unable to agree with the contention that merely because the jenmi applied for extension of time in Original Suit No. 670 of 1923, he must be precluded from maintaining a second

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(1) (1901) I.L.R. 25 Mad. 300 (F.B.).
(2) (1904) I.L.R. 35 Mad. 42. (3) (1913) 24 M.L.J. 534.
(4) (1917) 34 M.L.J. 167. (5) (1914) 29 I.C. 559.

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suit. It does not appear from the record that his right to execute the decree in Original Suit No. 670 of 1923 was adjudicated upon by the Court. The mere fact that he expected that if he deposited the money he might be able to take possession will not by itself suffice to create in him a disability which would not otherwise arise under the law. Nor do we think that the statements made in Exhibit VI by the plaintiff in Original Suit No. 670 of 1923 can operate as a legal assignment to the jenmi of the decree obtained by the plaintiff in Original Suit No. 670 of 1923. It has not been contended—and Exhibit VI cannot be regarded as evidence—that the melcharth itself was a benami transaction and that the jenmi was in substance and truth the plaintiff in the former litigation.

As regards the objection based upon the principle of *Vedapuratti v. Vallabha Valiya Raja*(1) that, even assuming that after a decree for redemption the relationship of mortgagor and mortgagee continues, a *second* suit for redemption will nevertheless not lie, it seems to us that that view can no longer be maintained in the face of the decision of the Privy Council in *Raghunath Singh v. Hansraj Kunwar*(2). Their Lordships point out that unless as contemplated by section 60 of the Transfer of Property Act the right of redemption has been extinguished in one of the modes contemplated by the statute, the mere fact that a decree for redemption obtained on a former occasion has not been executed will not prevent the mortgagor from maintaining a subsequent suit for redemption. The judgments in *Vedapuratti v.*

(1) (1901) I.L.R. 25 Mad. 300 (F.B.).
(2) (1934) I.L.R. 56 All. 561 (P.C.).

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Vallabha Valiya Raja(1) themselves refer to the conflict of judicial opinion on the point that existed prior thereto and the view now laid down by their Lordships of the Judicial Committee seems rather to approve of the opinion which the Full Bench overruled in *Vedapuratti v. Vallabha Valiya Raja*(1). We are unable to agree with the contention of the learned Counsel for the respondents that, because *Vedapuratti v. Vallabha Valiya Raja*(1) has not been in terms overruled by their Lordships, it must still be taken to be good law. So far as we can gather from the report, the Full Bench decision seems to have been cited before their Lordships. In any event, the way their Lordships stated the points for consideration clearly indicates that the ground of *res judicata* on which the Full Bench rested their conclusion was intended to be dealt with by their Lordships. At the top of page 567 they observe:

“If the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships’ opinion, no ground for saying that the old decree operated by way of *res judicata* so as to prevent the Courts, under section 11 of the Code of Civil Procedure, from trying the present suit.”

After this expression of opinion by their Lordships, it is not possible to maintain that the ground of decision adopted by the Full Bench in *Vedapuratti v. Vallabha Valiya Raja*(1) is any longer available. The other ground suggested in *Vedapuratti v. Vallabha Valiya Raja*(1), viz., the bar by *lis pendens* will not avail when by reason of the bar of limitation or from other causes relief can no longer be had by proceedings taken in the former suit.

(1) (1901) I.L.R. 25 Mad. 300 (F.B.).

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So far as the decision in *Nynam Veetil Mayan Kutti v. Valappilakath Kunhammad*(1) is based not merely on the principle of *Vedapuratti v. Vallabha Valiya Raja*(2) but upon the special provisions of the Malabar Compensation for Tenants' Improvements Act, which do not contemplate a preliminary decree and a final decree and which contain indications in section 6 that the right conferred by the decree should be worked out only by proceedings in execution, it may be a question how far that view can be maintained after the judgment in *Raghunath Singh v. Hansraj Kunwar*(3); but it is not necessary for us to decide that point in this case because, as we have already observed, the present plaintiff was not the plaintiff in the former suit and cannot therefore be held to be precluded from maintaining the present suit.

As regards the objection raised by the first issue, namely, that during the period of the mel-charth the plaintiff has no right to maintain the present suit, there are two answers to it: (i) that even that period has expired during the pendency of the appeal and (ii) apart from that, on the principles recognised in *Raman Namboodri v. Achutha Pishurodi*(4), the jenmi will be entitled to maintain the present suit, because the mel-charthdar has precluded himself from recovering possession in pursuance of that decree.

The result is that the second appeal is allowed and the decree of the District Munsif restored with costs here and in the lower appellate Court.

A.S.V.

(1) (1917) 34 M.L.J. 167. (2) (1901) I.L.R. 25 Mad. 300 (F.B.).

(3) (1934) I.L.R. 56 All. 561 (P.C.).

(4) (1904) I.L.R. 35 Mad. 42.

REFERENCE UNDER THE INDIAN STAMP ACT (II OF 1899).

Before Mr. Justice Varadachariar, Mr. Justice Burn and
Mr. Justice Pandrang Row.

THE SECRETARY TO THE BOARD OF REVENUE,
SEPARATE REVENUE, MADRAS, PETITIONER,

1936,
November 17.

v.

RM. PL. N. RM. ALAGAPPA CHETTIAR AND ANOTHER,
RESPONDENTS.*

*Indian Stamp Act (II of 1899), sec. 2 (15)—Partnership—
Dissolution of—Deed of, also dividing partnership assets
between partners—Instrument of partition, if—Stamp duty
payable on deed.*

The question was whether a document was liable to be stamped as an instrument of partition or as a deed of dissolution of partnership. The document was an award by arbitrators and purported to direct a partition of two firms between the five parties to the deed named therein. Of those five parties Nos. 1 to 3 were undivided members of a family. No. 4 was their distant and separated coparcener and No. 5 was a stranger. The arbitrators after examining the parties orally and looking into the accounts assigned by casting lots one of the firms with all its assets and liabilities to the first group of parties, Nos. 1 to 3, and the other firm to the parties Nos. 4 and 5.

Held that the document was liable to be charged to stamp duty as an instrument of partition.

Partners can be regarded as joint owners of the partnership property and a document by which they divide the partnership assets between themselves amounts to an instrument of partition; the fact that such division is part of a scheme for the dissolution of the partnership does not prevent the deed being chargeable to stamp duty as an instrument of partition.

An instrument is an instrument of partition within the meaning of sec. 2 (15) of the Indian Stamp Act whether the allotments are made to each individual sharer or as between

* Referred Case No. 5 of 1935.

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several sub-groups of sharers all of whom together originally owned the properties in common. The real point for consideration is whether the original common ownership has ceased to exist or not.

Christie v. Commissioners of Inland Revenue, (1866) L.R. 2 Ex. 46, and *Phillips v. Commissioners of Inland Revenue*, (1867) L.R. 2 Ex. 399, relied on.

Venkataratnam v. Subba Rao, (1926) I.L.R. 49 Mad. 738, and *Samuvier v. Ramasubbier*, (1931) 60 M.L.J. 527, referred to. *Choturam v. Ganesh*, (1901) 3 Bom. L.R. 132, approved.

Annamalai Chetti v. Annamalai Chetty, (1919) 10 L. W. 67, distinguished.

CASE stated under section 57 of the Stamp Act II of 1899 by the Board of Revenue (Separate Revenue), Madras.

The material facts of the case and the arguments of Counsel appear in the judgment.

Government Pleader (K. S. Krishnaswami Ayyangar), and N. Srinivasa Ayyangar for petitioner.

K. Rajah Ayyar, V. Ramaswami Ayyar and N. G. Krishna Ayyangar for first respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The nature of the document with reference to which this reference under section 57 of the Stamp Act has been made is briefly described as follows in paragraph 2 of the Board's reference:

"It is an award by arbitrators and purports to direct a partition of two firms (A.L.R.M. of Nattanjana and A.L.R.M. of Kayan in Burma) between the five parties to the deed named therein. Of these five parties, Nos. 1 to 3 are undivided members of a family, No. 4 is their distant and separated coparcener and No. 5 is a stranger. The arbitrators after examining the parties orally and looking into the accounts have assigned by casting lots the A.L.R.M. Firm at Nattanjana with all its assets and liabilities to the first group of parties Nos. 1 to 3 and the other firm at Kayan to the parties Nos. 4 and 5."

The document was executed in Burma on a stamp paper of Rs. 5 as a deed of dissolution of partnership. The Collector of Ramnad was of opinion that the document should be stamped as an instrument of partition.

The Board's reference indicates the difficulty which the Board felt in agreeing with the Collector's view. In section 2, clause 15, of the Stamp Act, an instrument of partition is defined as

"any instrument whereby co-owners of any property divide or agree to divide such property in severalty",

and it includes also

"an award by an arbitrator directing a partition".

Having regard to the meaning of the word "severalty" as given in the Concise Oxford Dictionary, the Board thought that the division could be said to be one in "severalty" only if the allotments had been made to each individual sharer and not when the allotments were made as between several sub-groups of sharers all of whom together originally owned the properties in common. We do not think there is any force in this distinction. The true antithesis is between the original common ownership and the subsequent cessation of *that* common ownership. Whether the substituted ownership is created by way of allotments to each individual amongst the original common owners or to groups of individuals is not really the point for consideration but whether the original common ownership has ceased to exist or not.

Before us, however, the objection has been stated in a different form by Mr. K. Rajah Ayyar who appears for the party. He contended that there being a special article, namely, Article No. 46,

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providing for an instrument of dissolution of partnership, there is no reason why the document in the present case should be held to fall by a strained construction under the definition of an instrument of partition. This argument ignores the provision in section 6 of the Stamp Act which enacts that wherever an instrument is so framed as to come within two or more of the descriptions in Schedule I and the duties chargeable thereunder are different, that document will be chargeable only with the higher of such duties. It is therefore no argument to say that the instrument in question is one relating to the dissolution of a partnership if, according to its terms, it also falls under the definition of an instrument of partition. The decisions in *Christie v. Commissioners of Inland Revenue*(1) and *Phillips v. Commissioners of Inland Revenue*(2) indicate that even according to the English practice where a dissolution of partnership is carried out by a document which in form effects an assignment of a partner's share to another partner, the document is charged to stamp duty as a "conveyance". This shows that the fact of its being part of a scheme for the dissolution of a partnership does not prevent its being chargeable to stamp duty under other heads as well, if the terms of the document fall under some other head.

Mr. Rajah Ayyar next contended that the document is not an instrument of "partition" because it would not be proper to regard partners as *co-owners* of the partnership property. The alternative views on this question have been

(1) (1866) L.R. 2 Ex. 46.

(2) (1867) L.R. 2 Ex. 399.

stated in *Venkataratnam v. Subba Rao*(1) and *Samuvier v. Ramasubbier*(2) respectively. As pointed out in the latter case, there was a specific provision in section 253 of the Contract Act declaring the partners to be the "joint owners" of the partnership property in the absence of any contract to the contrary. It will not, therefore, be correct to say that partners cannot be regarded as joint owners of the partnership property. It is true that the wording of section 14 of the Partnership Act of 1932 is slightly different, but it does not appear to us that it was intended to indicate any difference in principle. (See Lindley on Partnership, Book III, Chapter V, section 1). Mr. Rajah Ayyar instanced the possibility of a person being a working partner without any share in the partnership property, but this involves no inconsistency with the above conception because the conception of co-ownership will be only in proportion to their shares in the partnership and is always qualified by "contracts to the contrary", if any. The difficulty in applying the conception of co-ownership to individual items of partnership assets is no reason against applying that description to the net assets of the partnership on a dissolution. Section 265 of the Contract Act was worded in a form suggesting that it was for the Court to distribute the net assets as amongst the partners; but section 46 of the Partnership Act of 1932 puts it clearly as a right of the partners to claim to have the surplus distributed amongst them or their representatives according to their rights. There is, in our opinion, accordingly, no inherent incompatibility between the

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(2) (1931) 60 M.L.J. 527.

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conception of co-ownership and the position of partners. On what basis the valuation is to be made for the purpose of assessing stamp duty is a matter on which we are not called upon to express any opinion.

Our attention was drawn to the case of *Annamalai Chetti v. Annamalai Chetty*(1), where a Bench of this Court laid down that no partner has a right to claim a division of any specific item of partnership property. This case does not touch the question whether, taking the partnership assets as a whole, the partners are co-owners or not. On the other hand, in *Choturam v. Ganesh*(2), where an arrangement had been made between partners dividing certain items of partnership assets between themselves without dissolving the partnership, a Bench of three Judges held that the document amounted to an instrument of partition. We do not see any reason for applying a different principle merely because such an allotment takes place as part of a scheme of dissolution.

Our answer to the reference is that the document is liable to be charged to stamp duty as an instrument of partition.

V.V.C.

(1) (1919) 10 L.W. 67.

(2) (1901) 3 Bom. L.R. 132.

REFERENCE UNDER THE INDIAN STAMP ACT (II OF 1899).

*Before Mr. Justice Varadachariar, Mr. Justice Burn and
Mr. Justice Pandrang Row.*

THE SECRETARY TO THE BOARD OF REVENUE,
SEPARATE REVENUE, MADRAS, REFERRING
OFFICER, PETITIONER,

1936,
November 19.

v.

MADURA MILLS COMPANY LTD., RESPONDENT.*

*Indian Stamp Act (II of 1899), sec. 2 (10)—“Conveyance”
under—Agreement to convey merely or—Company—Shares
in—Issue of, by allotment—Nature of transaction—Stamp
duty payable in respect of—Allotment made pursuant to
transaction.*

By an arrangement between two companies, the Madura Mills Ltd., and Harveys Ltd., it was agreed that 20,000 fully paid-up shares in the Madura Mills should be allotted to the Harveys in consideration of an allotment by the latter to the former of Rs. 1,000 fully paid-up shares of Harveys as well as of an agreement to do ginning for the Madura Co. at a certain specified rate for a period of ten years. The original agreement was only oral but its substance was embodied in resolutions recorded in the books of both the companies. A statement embodying the above particulars was filed by the Madura Mills before the Registrar in Form VII under section 104 of the Indian Companies Act. There was also produced an agreement of a prior date bearing a twelve-anna stamp. The question was whether, on the footing that an allotment had in fact been made when the statements were filed before the Registrar, the reciprocal allotment amounted to a sale and the transaction was therefore liable to stamp duty as a “conveyance” within the meaning of the definition in section 2 (10) of the Indian Stamp Act.

Held that the contract of which the particulars were recorded in Form VII did not amount to a “conveyance” and

* Referred Case No. 6 of 1935.

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that Form VII was properly treated by the parties as an "agreement".

When a company is for the first time issuing shares, there is no question of property already possessed by the company being thereby transferred to the allottee. Whatever may be the exact nature of the right which the allottee acquires between the date of allotment and the date of the entry of his name in the register, the issue of the shares to him by allotment cannot be regarded as amounting to a "transfer of property" by the company to him.

CASE stated under section 57 of the Indian Stamp Act (II of 1899) by the Secretary to the Board of Revenue (Separate Revenue), Madras, dated 18th June 1935.

The material facts of the case and the arguments of Counsel appear in the judgment.

Government Pleader (K. S. Krishnaswami Ayyangar) and K. S. Champakesa Ayyangar for petitioner.

S. Doraiswami Ayyar for respondent.

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The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The question arising for decision in this reference relates to the stamp duty payable on a certain form filed with the Registrar under section 104 of the Indian Companies Act.

By an arrangement between the Madura Mills Ltd., Madura, and Harveys Ltd., Tuticorin, it was agreed that 20,000 fully paid-up shares in the Madura Mills should be allotted to the Harveys in consideration of an allotment by the latter to the former of Rs. 1,000 fully paid-up shares of Harveys as well as of an agreement to do ginning for the Madura Co. at a specified rate for a period of ten years. It is stated that the original arrangement was only oral, but its substance has

been embodied in resolutions recorded in the books of both the companies. Under section 104 of the Indian Companies Act it is required that where a contract relating to the issue of shares fully paid-up otherwise than in cash has not been reduced to writing, the company shall, within one month after the allotment, file with the Registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing. A statement embodying the above particulars was accordingly filed by the Madura Mills before the Registrar on 29th August 1933. There was also produced an agreement dated 26th August 1933 bearing a twelve-anna stamp.

The language of the agreement dated 26th August 1935 is calculated to suggest that the allotment had not yet been made but was intended to be made *in future*. Similar language appears in some of the other papers also before us. This is scarcely reconcilable with the scheme of section 104 of the Indian Companies Act, nor with the records in the case of what actually happened. The Collector's letter to the Board of Revenue shows that Harvey's shares were allotted on or before 1st August 1933 and the Madura Mills' shares were allotted on 2nd August 1933. Mr. Doraiswami Ayyar therefore agreed that we might deal with the case on the footing that an allotment had in fact been made when the statements were filed before the Registrar. He nevertheless maintained that this makes no difference so far as the present question is concerned because he contended that the allotment of shares

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will not amount to a "conveyance" within the meaning of the definition in section 2, clause 10, of the Stamp Act. There are other provisions made in the Stamp Act with reference to letters of allotment as well as share certificates. The question in the present case arises not with reference to the letter of allotment itself but as to the *consideration* for such allotment, when the allotment has been made as of shares fully paid-up otherwise than in cash. Section 104 contemplates that the consideration for such allotment may be either a contract of sale or a contract for services or the consideration may be in other forms. The stamp duty payable will therefore vary according as the consideration consists of a sale of property or of an agreement of any other kind.

The Collector who referred the matter to the Board for opinion was apparently inclined to think that the reciprocal allotment must be regarded as amounting to a sale and therefore the transaction was liable to stamp duty as a conveyance. Before the Collector as well as before the Board, reliance seems to have been placed on the decision of the Lahore High Court in *Bhola Ram & Sons, Ltd. v. The Crown*(1) in support of the argument that where a transaction does not amount to a conveyance but is merely an agreement to convey, the document does not require to be stamped as a conveyance. The facts in that case are not quite analogous to those of the present but there can be very little doubt as to the correctness of the general principle therein recognised. See also *In re Swadeshi Cotton Mills Co., Ltd.*(2). The Board's reference inciden-

tally mentions another argument advanced before it on behalf of the party, namely, that there was no question of conveyance here because the transaction did not relate to immovable property. There is no substance in that argument, as the Board themselves observe, because the definition of conveyance in the Stamp Act will apply as much to the transfer of movable as to the transfer of immovable property.

Before us, Mr. Doraiswami Ayyar put his argument on two grounds. He contended that though the allotment was complete it did not by its very nature amount to a "transfer of property" within the meaning of the definition of conveyance, because the company cannot be regarded in any sense as the *owner* of its own shares, so that when it issues or allots shares it cannot be said to be *transferring property*. It is one thing to say that shares are property in the hands of a *shareholder* (e.g., section 28 of the Companies Act), but it is a wholly different position when the shares are being for the first time issued by the company itself. Alternatively, he contended that even if there should be any possibility of regarding this transaction as in the nature of a "sale" of shares, it would not amount to a "conveyance" unless property has passed thereunder, that according to the definition of "goods" in the Sale of Goods Act, shares are "goods", that under section 4 of the Sale of Goods Act, a "contract of sale" is nothing more than an "agreement to sell", until the property in the goods to be sold passes, and that under section 18, where there is a contract of sale of "unascertained" goods no property is transferred

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(1) (1934) I.L.R. 15 Lah. 501.

(2) (1932) 30 All. L.J. 394.

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to the buyer unless and until the goods are ascertained. In the present case, at the time of the oral arrangement the particulars of which were filed before the Registrar, there had been no appropriation of any *specified* shares in either company to the other company in pursuance of the allotment and he accordingly maintained that the transaction could not amount to anything more than a mere "agreement to sell" within the meaning of section 4 of the Sale of Goods Act. Reliance was placed in this connection on the observations of the Judicial Committee in *Maneckji Pestonji v. Wadilal Sarabhai & Co.*(1). In the view that we take on the first question, it does not seem to us necessary to express any opinion on the second.

On the first question, the learned Government Pleader did not dispute the proposition that a company cannot be regarded as holding its own shares. But he nevertheless suggested that there is nothing wrong in regarding the company as *owning* the shares which it issues and in that sense it may be possible to bring the case within the definition of "conveyance" in the Stamp Act. We find it difficult to follow this distinction. As we have already observed, it is no doubt true that in the hands of a shareholder, a share is property and when a shareholder exchanges his shares with another it may be possible to regard the transaction as amounting to a transfer whether by way of exchange or conveyance—*cf. Coats v. Inland Revenue Commissioners*(2). But when the company is for the first time issuing shares, it seems to us that there is no question of *property*

(1) (1926) I.L.R. 50 Bom. 360 (P.C.).

(2) [1897] 2 Q.B. 428.

already possessed by the company being thereby *transferred* to the allottee. Whatever may be the exact nature of the right which the allottee acquires between the date of allotment and the date of the entry of his name in the register, it is difficult to regard the issue of the shares to him by allotment as amounting to a "transfer of property" by the company to him. On this ground, we must hold that the contract of which the particulars were recorded in Form VII did not amount to a "conveyance" and that Form VII was properly treated by the parties as an "agreement".

Attorneys for respondent: *King and Partridge*.
A.S.V.

APPELLATE CIVIL.

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

SAMBASIVA REDDI (RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER OF SOUTH ARCOT
(PETITIONER), RESPONDENT.*

*Provincial Insolvency Act (V of 1920)—Subordinate Court—
Insolvency originating outside territorial jurisdiction of—
Petition under ss. 53, 54 and 4 of Act presented to
District Court in—Transfer by District Judge of, to Sub-
Court—Validity of—Jurisdiction of latter Court to deal
with petition—Notification by Local Government under
sec. 3 of Act—Effect of.*

Where a petition presented to the District Court at Cuddalore under sections 53, 54 and 4 of the Provincial Insolvency

* Appeal Against Order No. 97 of 1934.

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Act was transferred by the District Judge to the Subordinate Court of Cuddalore on the strength of a notification issued by the Local Government under section 3 of the Act but it appeared that the insolvency in question originated outside the territorial jurisdiction of that Subordinate Court,

held that the order of transfer of the petition by the District Judge to the said Subordinate Court was *ultra vires* and that the latter Court had no jurisdiction to deal with the matter.

Premchand Indoji v. Gopalappa, (1923) 45 M.L.J. 689, followed.

APPEAL against the order of the Court of the Subordinate Judge of Cuddalore dated 7th December 1933 in Interlocutory Application No. 6 of 1933 in Insolvency Petition No. 6 of 1930 on the file of the District Court of South Arcot (Interlocutory Application No. 450 of 1932 in Insolvency Petition No. 6 of 1930 on the file of the District Court of South Arcot).

T. R. Srinivasan for appellant.

S. Annamalai for respondent.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—This civil miscellaneous appeal arises from the following circumstances. The Official Receiver of South Arcot presented to the District Court at Cuddalore a petition under sections 53, 54 and 4 of the Provincial Insolvency Act to set aside two mortgages. The learned District Judge transferred that petition to the file of the Subordinate Court of Cuddalore which dealt with the petition and it was declared that the two mortgages in question were fraudulent and void as against the Official Receiver under sections 53 and 54 of the Provincial Insolvency Act. Hence this civil miscellaneous appeal. When the matter was first argued before us, we took the point that the

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Subordinate Judge of Cuddalore had no jurisdiction to entertain the petition at all and, as there seemed to be at that time some doubt regarding the local limits of the jurisdiction of that Court and we wished to know how the petition came to be transferred by the District Court to that Subordinate Court, we adjourned the matter, requesting the District Judge to report the circumstances in which the Subordinate Judge came to try and decide the petition and also what the insolvency jurisdictions of the District and the Subordinate Courts are respectively and under what notification of the Government the Subordinate Court has been given insolvency jurisdiction. The matter now comes before us on the report of the District Judge at Cuddalore. He reports that the Subordinate Court, Cuddalore, was from 1st November 1913 invested with local jurisdiction over the whole of Cuddalore, Chidambaram and Vriddhachalam Taluks of the South Arcot District and that this was by notification at page 1796 of Part II of the *Fort St. George Gazette*, dated 28th October 1913. Then, as regards the insolvency jurisdiction, he reports as follows:

“Under G.O. No. 1731, Law (General), dated 5th June 1924, communicated in High Court's Dis. No. 1254 of 1924, published at page 650, Part I, of the *Fort St. George Gazette*, dated 10th June 1924, all Subordinate Courts in the Presidency were invested with jurisdiction under the Provincial Insolvency Act in respect of all petitions presented by creditors. Ever since then, the District Court has been exercising insolvency jurisdiction over the entire district while the Sub-Court was exercising concurrent jurisdiction over the three taluks of Chidambaram, Vriddhachalam and Cuddalore over which it had territorial jurisdiction.”

He adds that his predecessor, in order to give work to the Additional Subordinate Judge,

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transferred the petition in question to him and that was how the Subordinate Court came to hear and decide the petition.

The question is whether the District Judge had any power to transfer this petition to the Subordinate Judge of Cuddalore. It is common ground that this insolvency was outside the territorial jurisdiction of that Subordinate Court, that is to say, it originated in some place outside the local limits of the jurisdiction of that Court. The question therefore is whether the Provincial Insolvency Act gives any power to the Local Government by notification to give jurisdiction to a Subordinate Court, which, otherwise and apart from the notification, has no insolvency jurisdiction whatsoever, to deal with and dispose of insolvency matters which originate in some place which is not within the local limits of the jurisdiction of that Court. The notification in question was issued under section 3 of the Provincial Insolvency Act which reads as follows :

“The District Courts shall be the Courts having jurisdiction under this Act.

Provided that the Local Government may, by notification in the Local Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.”

In pursuance of the powers given under that section, the Local Government issued the notification in question. We have heard a full argument upon this point and our attention has been drawn to a decided case of this Court which seems to us to be directly in point. Quite apart from that

authority, it seems to us to be quite clear from the words of the section itself that the Act does not invest a subordinate Court with jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. The words in the section

“shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act”

seem to us to be conclusive of this matter. Nevertheless, it has been contended on the other side that the words “the local limits of its jurisdiction” apply only to original insolvency matters and that the District Court has power by reason of the Civil Procedure Code to transfer any matter including insolvency matters to a subordinate Court, and section 5 (2) is invoked in support of this contention. In our view, that sub-section affords no assistance because the words there, viz., “subject to the provisions of the Insolvency Act” qualify the whole section. It must be borne in mind that a subordinate Court has no jurisdiction whatsoever in insolvency and it is only by reason of section 3 and notifications issued thereunder that it gets any jurisdiction. If no notification had been issued by the Local Government, then clearly the Subordinate Court of Cuddalore could not have dealt with insolvency matters at all. This position was clearly indicated in *Premchand Indoji v. Gopalappa*(1), a decision by SPENCER and DEVADOSS JJ. The headnote of that case is as follows :

“Under section 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with

(1) (1923) 45 M.L.J. 689

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a creditor's petition in the absence of any notification of the Local Government investing subordinate Courts with jurisdiction over such class of cases. In a case in which there was no such notification the District Judge's order transferring a petition to the Sub-Court for disposal was *ultra vires*."

We consider this case to be directly in point, although, in our view, having regard to the very clear words of section 3 of the Act, no authority is required. For these reasons, we are clearly of the opinion that the order of transfer by the District Judge of this petition to the Subordinate Court was *ultra vires* and that the Subordinate Court had no jurisdiction at all to deal with this matter. We have taken this objection ourselves which we consider to be decisive of this appeal and therefore the order before us must be set aside and the District Judge must be directed to take the case on his file and dispose of it according to law. In view of the fact that no objection was taken by the appellant to the jurisdiction of the Subordinate Court to entertain the petition and the objection was taken by ourselves, we direct the appellant to bear his costs of this appeal. The Official Receiver will get his costs out of the estate.

A.S.V.

APPELLATE CIVIL.

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

C. M. RAJU CHETTY (RESPONDENT), APPELLANT,

v.

O. C. RAJU CHETTY AND ANOTHER
(APPLICANTS), RESPONDENTS.*

1936,
October 28.

Lunacy (Supreme Courts) Act (XXXIV of 1858)—Lunatic—Committee of—Liability to file accounts in Court—Committee spending moneys of lunatic without sanction of Court—Power of Court to sanction such payments retrospectively—Principles governing the exercise of.

The Committee of a lunatic failed to file in Court the accounts of the estate for a period of twenty-one years and had also spent large sums out of the estate without the sanction of the Court. On an application for directions the Court ordered the Committee to file the accounts and get them passed. The accounts were filed by the Committee and the Passing Officer disallowed considerable sums on the ground that it was beyond his province as Passing Officer to ascertain how far they were properly allowable since they were expended for the benefit of persons other than the lunatic. The first Court sanctioned the expenditure under the circumstances holding that the Court had power to sanction payments retrospectively in proper cases.

Held on appeal (i) that, though it is reprehensible on the part of a Committee not to file the accounts and to expend moneys out of the estate without the sanction of the Court, yet, the Court has a discretion to sanction expenditure which has been made by the Committee without the previous sanction of the Court having been obtained, although such discretion ought only to be exercised when the reasons are very strong, and (ii) that, in the administration of the property of a lunatic, the first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the

* Original Side Appeal No. 26 of 1936.

RAJU CHETTY household of the lunatic and, finally, the Court should not refuse to do on behalf of the lunatic what the lunatic himself would have done if of sound mind.

APPEAL from the order of LAKSHMANA RAO J., dated 11th November 1935 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1451 of 1935 in Original Petition No. 95 of 1910.

The facts of the case and the arguments of Counsel appear sufficiently in the judgment.

V. Ramaswami Ayyar for *A. B. Nambiar* for appellant.

S. Doraiswami Ayyar for *V. Radhakrishnayya* for respondents.

Cur. adv. vult.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—This is an appeal from an order of LAKSHMANA RAO J. upon an application by the Committees of the estate of one Maragadammal, a lunatic, to sanction certain items of expenditure incurred by them since their appointment, for which the previous sanction of the Court had not been obtained. The expenditure was sanctioned by our learned brother. Hence this appeal.

The facts of the case are that one Alagappa who died in 1903 had a wife named Angammal who died in 1909. He had three daughters, Ammakannu who married Manicka Chetty, Maragadammal the lunatic, and Panchaksharammal. Ammakannu died before Alagappa and after her death Maragadammal was given in marriage to Manicka Chetty. This was in the lifetime of Alagappa. Ammakannu and Manicka Chetty had two children, namely, Balasundaram

and Rajammal. Alagappa made a will leaving some of his property to the lunatic, and in that will directed her to continue to live with Balasundaram, who was then living, and his widow, Angammal, Panchaksharammal and Rajammal (Ammakannu's daughter) as one family. This the lunatic did. Angammal died, as already stated, in 1909 and thereafter the lunatic continued to live with the survivors of the family. Manicka died in 1913 and she then lived with his children, Balasundaram and Rajammal, and Panchaksharammal, until Balasundaram's marriage, when she was taken to live in his house. In 1910 Maragadammal was found to be a lunatic and Manicka Chetty, her husband, was appointed Committee of her person and estate. The order of appointment has an important bearing on this matter. That order stated that the estate consisted of the property known as "Abbotsbury" and that the Committee was empowered to apply its rent for its upkeep and the maintenance of the lunatic and her family. As before mentioned, Manicka Chetty died in 1913 and his brother, Govindarajulu Chetty, applied to be appointed as Committee. That application was opposed and the Official Trustee was appointed. He declined to act and by an order dated 20th January 1914 the present Committees, the elder sister, Panchaksharammal, and O. C. Raju Chetty, the husband of Rajammal (the daughter of Manicka Chetty and Ammakannu), were appointed Committees of the estate, and the powers given by the Lunacy (Supreme Courts) Act of 1858 were conferred upon them, and they were directed to submit half-yearly accounts. Nothing was said regarding the

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RAJU CHETTY maintenance of the lunatic or her family and
RAJU CHETTY. the Committees thought that the rents of
BEASLEY C.J. "Abbotsbury" were to be applied therefor as before; and it cannot be said that they were unreasonable in so thinking. Most unfortunately the two Committees did not file any accounts at all from the date of their appointment until the date of the present proceedings—a period of nearly twenty-one years. This failure on their part is sought to be excused on the ground of inexperience, O. C. Raju Chetty, the second Committee, being only twenty-two years of age on the date of his appointment. The failure to file accounts is undoubtedly most reprehensible, particularly so, because during the interval a large expenditure was incurred by the Committees without the sanction of the Court having been obtained previously. The appellant here, C. M. Raju, is the husband of Ohinnathayammal, one of the sisters of Alagappa, and in 1934 he presented an application to the High Court asking for directions to the Committees to file and pass their accounts and an enquiry as regards the management of the estate of the lunatic and charging the second Committee with various acts of misfeasance and malfeasance and serious neglect of duty and stating that a sum of Rs. 31,715-13-7 ought to be surcharged against him and praying for his removal from office; and on 3rd May 1934 an order was made directing the Committees to file their accounts by 14th August 1934 and get them passed. An account was filed accordingly on 14th August 1934 relating to the period from 25th June 1913 to 5th August 1934. The accounts were gone into by the Passing Officer, an order

having been made previously on 3rd May 1934 by **RAJU CHETTY**
STONE J. directing that the appellant was to have **RAJU CHETTY.**
BEASLEY C.J. inspection of all accounts. According to the Passing Officer's report, although an affidavit had been filed by the appellant objecting to the correctness of the entries in the accounts and to the propriety of the expenditure, after the items of receipts and disbursements were gone into with the vouchers in the presence of the appellant and his Advocate, the correctness of the accounts was not disputed but only the propriety of the expenditure was objected to. The Passing Officer allowed some of the expenditure incurred but disallowed the remainder which amounted to a considerable sum on the ground that it was beyond his province as Passing Officer to ascertain how far the expenditure was properly allowable and that the Court alone could sanction the expenditure, having regard to the fact that it was for the benefit of persons other than the lunatic. He accordingly disallowed the following items of expenditure, viz., Balasundaram's account Rs. 7,411-8-9, maintenance Rs. 28,140-0-0, charities performed Rs. 956-0-0, presents to relations Rs. 1,027-4-9, and miscellaneous items Rs. 3,953-4-0, making a total of Rs. 41,488-5-6. He also found that there was a balance in the Committees' hands, in addition to the expenditure disallowed, of Rs. 4,683-8-6. Before us the objection to the expenditure under the heads of "charities performed", "presents to relations" and "miscellaneous items", was not pressed, the expenditure under the other two heads only being objected to. **LAKSHMANA RAO J.** sanctioned the expenditure under all the before-mentioned heads, although the sanction of the Court had not

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"The *bona fides* of the applicants who are managers without remuneration was not disputed nor was it seriously contended that the amount spent was excessive or unreasonable";

and, as before stated, the accuracy of the account was admitted before the Passing Officer. Taking the amount spent on Balasundaram till 1923 and the maintenance of the lunatic and her household, LAKSHMANA RAO J. applies the principles that the first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the household of the lunatic and states that the final principle is that the Court should not refuse to do on behalf of the lunatic what the lunatic himself would probably have done. We are satisfied that the learned Judge has correctly stated the principles. In *In re Darling (a Person of Unsound Mind)*(1), the head-note of which reads as follows :

"It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged",

it was held that, there being nothing to show that the lunatic would have done what the Court was asked to sanction, the mere fact that the collaterals were in humble circumstances and had difficulties in providing themselves with necessities was not sufficient to justify the Court in

(1) (1888) 39 Ch.D. 208.

granting the application, and that it must be refused. The principles upon which Courts should act are set out by COTTON L.J. on page 211, and it is stated by him that Courts sometimes make considerable allowances for persons who have legal claims upon a lunatic such as a son or a daughter and also for persons who have moral claims upon him and that the cases do show however that the Court has sometimes made an allowance to collaterals. He then states as follows :

"I pass over those cases in which an allowance has been made by the Court in favour of a person who is the next successor to the lunatic's estate, for it is the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate and, where the successor is in such a position as not to be able to obtain an education suitable to his prospects, the Court will, no doubt, make an allowance, and sometimes has made a very considerable one.

Here the lunatic had several cousins, who happen to be his next of kin, and while sane he made small allowances to some of them; and the Court, acting on the principle that the Court will do for the lunatic what the lunatic would have done himself if of sound mind, has continued these allowances.

But we are now asked to sanction an increase of the allowance to some of these persons, and also to sanction further allowances to others of them. Now to make such an order would, in my opinion, be contrary to the principles on which the Court acts in administering the property of a lunatic."

BOWEN L.J. said :

"The Court has always considered that its jurisdiction to make allowances to collaterals ought to be exercised with the utmost jealousy. The case of successors to property depends on a different principle. But in cases of collaterals who are not successors, the Court ought only to do that which the lunatic would have done himself if he had been of sound mind. If it could be shown that the lunatic would have done

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RAJU CHETTY that which we are asked to do, that would be a different matter. In my opinion the evidence falls short of doing that.”

BEASLEY C.J. Therefore, in England, Courts may sanction an allowance to be paid to a person who is not the lunatic where such person is the next heir or successor to the lunatic's estate, and to collaterals if they are the next of kin, or if not, if the lunatic if of sound mind would have made such an allowance, for which of course there must be some evidence. Balasundaram, it must be noted, is the next heir to the lunatic's estate. In *In re Frost*(1) weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. JAMES L.J. on page 702 said :

“In this case it appears highly probable that if the alleged cousins do not establish their claim to be next of kin no one else will. Considering this, and considering their poverty, the evidence of the intention of the lunatic to do something for them, and the amount of her income, which far exceeds anything that can ever possibly be required for her own wants, I think that I may venture to make the order asked, which will do no more than what the lunatic herself probably would have done had she continued sane.”

In *In re Sparrow (a Person of Unsound Mind)*(2) a lunatic, aged sixty-four, was tenant for life of certain real estates, of which his nephew, aged twenty-eight, was tenant in tail in remainder, producing a considerable yearly income. The nephew had been found heir-at-law and one of the next of kin of the lunatic. The Court, upon the nephew's petition, directed an allowance

(1) (1870) 5 Ch. App. 699.

(2) (1882) 20 Ch.D. 320.

of £500 per annum to be made to him out of the surplus income of the lunatic after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of the petitioner charging the estate with the repayment of the sums received in respect of such allowance; and in subsequent proceedings the allowance of £500 was increased by £200. On the other side a number of English cases were cited by the appellant in support of his contention that the trial Judge ought not to have sanctioned this expenditure, because it had been incurred without the previous sanction of the Court. The argument indeed went to the length of stating that under the English decisions there was a definite prohibition against the granting of such sanction. The cases referred to, upon examination, certainly do not establish the latter proposition, and, as regards the former, are merely instances where the Courts have, on the facts of those cases, refused to give sanction. One of these is *In the matter of Sir James Langham, a lunatic*(1), where a Committee, who, having been authorized by the Court to expend a certain sum in rebuilding a farm house, expended half as much again in building one of a larger size on a different site, was not allowed the excess even though what he had done appeared to be beneficial to the estate. This case was stated by Lord COTTENHAM L.C. to be an extreme case, because the Court had given the Committee leave to enter into a particular contract and he took upon himself to enter into quite a different one involving

(1) (1847) 2 Ph. 299; 41 E.R. 958.

RAJU CHETTY much greater expense. The Lord Chancellor
 RAJU CHETTY. stated that such conduct was setting the Court at
 BEASLEY C.J. defiance. In *Ex parte Marton*(1) the petition was
 presented by the Committee of the estate of a
 lunatic, tenant in tail, with remainders over to
 the Committee and others, praying to be allowed
 for expenditure upon the estate made without
 any previous application, alleging that great
 improvements had been made. Lord ELDON ex-
 pressed his regret that the Court had in a hard
 case been induced to relax the rule not to allow
 any expenditure made without previous applica-
 tion, the consequence of which was that the Com-
 mittees never made application, and added that as
 there was that instance he would see what could
 be done in that case which appeared fair, desiring
 it to be understood that in future expenditure
 made without a previous application would never
 be allowed. This threat he subsequently carried
 out in the next case reported in the same volume,
 namely, *Ex parte Hilbert*(2), where the Committee
 of the estate of a lunatic, tenant for life, had
 expended the amount of £6,000 upon the estate
 and as to £4,000 without an application. Lord
 Chancellor ELDON said that such a thing could
 not be permitted. I do not understand these
 cases as stating that there is a definite prohibition
 against retrospectively sanctioning expenditure,
 regardless of every consideration which would
 show that such sanction ought to be granted.
 Indeed, *Ex parte Hilbert*(2) shows that there had
 been exceptional cases. In our view, Courts do
 have a discretion to sanction an expenditure

(1) (1805) 11 Ves. Jun. 397; 32 E.R. 1140.

(2) (1805) 11 Ves. Jun. 398; 32 E.R. 1141.

which has been made without the previous sanc-
 tion of the Court having been obtained, although
 such discretion ought only to be exercised where
 the reasons are very strong, because Courts in
 such matters as this ought to have a discretion to
 do thereafter that which they are empowered to
 allow on applications made in the first instance.
 That the Court had the power to sanction the
 expenditure in question here on an application
 made to it for permission to do so is we think
 clear, having regard to the cases already referred
 to by Mr. Doraiswami Ayyar on behalf of the
 respondents. The learned trial Judge allowed the
 expenditure retrospectively, because Balasunda-
 ram is the next heir to the lunatic and because in
 his opinion there was evidence that the lunatic
 herself, if of sound mind, would have made the
 expenditure, namely, the education and main-
 tenance of Balasundaram and the family she was
 living with. There is certainly evidence that the
 lunatic preferred to live with Balasundaram and,
 as before stated, the testator himself so directed.
 We think that the learned Judge was justified in
 holding that the lunatic herself would have made
 that expenditure. The expenditure on the main-
 tenance and education of Balasundaram can
 clearly be supported on the ground that he was
 the next heir of the lunatic; see the observations
 of COTTON L.J. in *In re Darling (a Person
 of Unsound Mind)*(1), already referred to. There
 is another important fact as well, and it is that
 in the first order of 1910 appointing Manikka
 Committee of the lunatic, there is a direction

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(1) (1888) 39 Ch.D. 208, 211.

RAJU CHETTY ^{v.} RAJU CHETTY. BEASLEY C.J. that the income from the property "Abbots-bury" is to be spent on its upkeep and the maintenance of the lunatic and his family, and Balasundaram obviously was one of the family. It is true that the subsequent order does not contain any such direction. In fact it contains no specific direction as to the application of the income, but it can be read as reasonably supplementing the previous order of 1910, and it is made on the same original petition. Against this, the only thing that is urged, although its importance cannot be minimized, is that for twenty-one years the Committees never rendered any accounts at all. This, as we have stated earlier in this judgment, is a most reprehensible thing. If no case has been referred to in which such laches as this were in evidence, it is because it is almost impossible to imagine that there can have been any similar case before; and if the objection which is founded upon this deplorable neglect is to be overruled, it is because of strong exceptional circumstances. These are: that no damage whatever seems to have been done to the lunatic's estate, that the accuracy of the accounts was, after due inspection by the appellant, not questioned, that the *bona fides* of the Committees was not questioned thereafter, that the original order appointing the Committees authorises an expenditure on the maintenance of the family, that Balasundaram is the next heir, that the testator himself from whom the lunatic got her property desired her to live with Balasundaram and the other members of the family as one family, and that there is evidence upon which the learned trial Judge could reasonably hold that the lunatic herself, if

of sound mind, would have made the expenditure in question. Having regard to all these matters and in view of our opinion that the trial Court has a discretion in such matters, can it be said that, having regard to the considerations put forward on behalf of the Committees, the learned trial Judge has wrongly exercised his discretion, and that nevertheless and despite all these matters he ought to have refused sanction? In other words, ought he to have punished the Committees for not having filed and passed the accounts for twenty-one years by surcharging them with this expenditure and undoubtedly driving the second Committee to insolvency? In our opinion, in view of the exceptional circumstances of this case, the trial Judge was justified in exercising his discretion in the manner he did, and it follows that this appeal must be dismissed.

On the question of costs, we think that, as the appellant has failed, he must bear the costs of this appeal. It was one thing to carry this matter up to the stage of enquiry and into the trial Court. Not having succeeded there, we see no real justification for his pursuing the matter further. As he has chosen to do so and has failed, it is only right and proper in our opinion that he should bear the costs of the appeal.

The Committee must apply on the Original Side for the direction of the Court for the investment of surplus income in his hands.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Venkataramana Rao.

KOTI VISWANATHAM (PETITIONER), APPELLANT,

v.

PANDIRI SATYANANDAM AND SIX OTHERS
(RESPONDENTS 1 TO 4, 6, 8 AND 9), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIII, r. 5—
Agreement referred to in—Champtous agreement neces-
sarily, if—Agreement made with reference to or in view of
intended suit or appeal, if—O. XLIV, r. 1.*

The agreement referred to in rule 5 of Order XXXIII of the Code of Civil Procedure, the provisions of which order are applicable by virtue of Order XLIV, rule 1, of the Code to appeals also, need not necessarily be one of a champtous character. It is also not necessary that the agreement should be one made with reference to or in view of the intended suit.

The principle underlying the provision (Order XXXIII, rule 5) is that a person ought not to be allowed to sue in *forma pauperis* after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made.

Bai Chandaba v. Kuver Saheb Bapu Saheb, (1893) I.L.R. 18 Bom. 464, *Mansa Puri v. Harbhagat Puri*, (1916) 37 I.C. 172, and *Abdul Jabbar v. Sanu Bibi*, A.I.R. 1934 Cal. 740, dissented from.

Hanifa Bai v. Haji Siddick Bui Meanji Sait, (1906) I.L.R. 30 Mad. 547, referred to.

APPEAL under Clause 15 of the Letters Patent against the order of BURN J. dated 3rd February 1936 and made in Civil Miscellaneous Petition No. 4696 of 1934—petition presented to the High Court for leave to appeal in *forma pauperis* against the decree of the Court of the Subordinate

* Letters Patent Appeal No. 20 of 1936.

Judge of Rajahmundry in Original Suit No. 62 of 1926. VISWANATHAM
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M. S. Ramachandra Rao for appellant.
G. Lakshmana for respondents.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This is a Letters Patent Appeal from the order of BURN J. refusing leave to the appellant to file his appeal in *forma pauperis*. The facts, so far as they are relevant, may be shortly stated. The suit related to certain logs of timber, which the plaintiff claimed by virtue of an agreement with the first set of defendants. The fifth defendant was the rival claimant, who alleged that the logs belonged to him and had been transferred to the sixth defendant. The lower Court negatived the claim of the fifth and sixth defendants and decreed the plaintiff's suit. The applicant before BURN J. was the fifth defendant, who applied for leave to file the appeal in *forma pauperis*. Pending the action, the logs were sold and the sale proceeds were brought into Court and the fifth defendant, reciting that some monies were due from him to the sixth, transferred to him such interest as he possessed in the proceeds. The point to note is, that the transfer was not made with reference to any intended appeal, having been effected, as stated above, even before the judgment was delivered by the Court below.

The provision of law which governs the question is Order XXXIII, rule 5, Civil Procedure Code (the provisions of Order XXXIII being applicable by virtue of Order XLIV, rule 1, to appeals also) which runs thus :

"The Court shall reject an application for permission to sue as a pauper— . . .

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(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter."

It is contended for the appellant that the agreement referred to here must be of a champertous character, the idea being that the provision is aimed against bargains tending to promote litigation, such bargains being immoral in a legal sense. First, it must be pointed out that the English law in regard to champerty and maintenance does not apply in India, for it has been laid down that an agreement being champertous is not of itself sufficient to render it void, but must be shown, in addition, to be contrary to public policy. Further, it is to prevent payment of court-fee being evaded that this provision has been enacted, and it matters little therefore with what purpose the agreement has been entered into—whether it is an honest or *bona fide* one or of an improper character seems an irrelevant factor, quite outside the scope of the enquiry. There is no need to read into the section the suggested limitation, which does not find a place there. The principle underlying the provision is that a person ought not to be allowed to sue in *forma pauperis* after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made. In other words, as was observed in *Hanifa Bai v. Haji Siddick Bui Meanji Sait*(1) (where, however, this point was not raised or considered), the question would be, whether, at the date of the institution of the suit, there was a subsisting agreement falling within the provision.

(1) (1906) I.L.R. 30 Mad. 547.

In one case in Bombay, one in Allahabad and one in Calcutta, a different view has been taken without much discussion [*Bai Chandaba v. Kuver Saheb Bapu Saheb*(1), *Mansa Puri v. Harbhagat Puri*(2) and *Abdul Jabbar v. Sanu Bibi*(3)], but with great respect we are unable to agree with these decisions.

It is next contended that the agreement here does not offend against the provision, as it was not made in view of the intended appeal. The argument is, that from the use of the word "proposed" it should be inferred that what the section refers to, is an agreement the party enters into having the suit in contemplation. That does not appear to be the natural meaning of the words. Is there an agreement or not referring to the subject-matter of the proposed suit?—that is the only question, and there is no warrant for assuming that the agreement should be one made with reference to or in view of the intended suit. Rule 9, which relates to the dispaupering of the plaintiff, throws some light on the question. Under that rule, for a plaintiff being dispaupered, all that need be shown is that he has entered into an agreement of the character described with reference to the subject-matter of the suit, and it is noticeable that the word "proposed" does not occur there. It is difficult to believe that rule 5 embodies a different principle from rule 9, the object of both the rules being to produce the same result. In the Allahabad case mentioned above, *Mansa Puri v. Harbhagat Puri*(2), the learned Judges adopted the construction of the

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(1) (1893) I.L.R. 18 Bom. 464.

(3) A.I.R. 1934 Cal. 740.

(2) (1916) 37 I.C. 172.

VISWANATHAM v. SATYANANDAM. word "proposed" now contended for; they seem to have arrived at the result by holding that if the agreement was to be champertous, it would necessarily be with reference to the suit in contemplation. As already stated, we are unable to agree with this view.

Leave to appeal in *forma pauperis* has therefore been rightly refused.

The question then remains, whether the learned Judge's order refusing to give the appellant time to pay the requisite court-fee can be upheld. That the Court has power under section 149, Civil Procedure Code, to grant such time, cannot be disputed. We have carefully gone through the facts and it has not been shown that there was want of *bona fides* on the part of the appellant; nor can it be suggested that the party who ought to have filed the appeal was the sixth defendant, the transferee, and not the fifth. The parties might reasonably have thought that the findings against the sixth defendant could not be successfully attacked in appeal, but that, so far as the fifth defendant was concerned, the point he could urge was altogether different. We are therefore of the opinion that the appellant ought to have been given time for payment of the court-fee; four days' time is accordingly granted from this date.

Mr. Lakshmanan for the respondents suggests that our order may work hardship upon him unless one of two courses is adopted, either the sixth defendant should be brought on the record as appellant, or the respondent should be allowed to apply for security for costs. Mr. M. S. Ramachandra Rao for the appellant believes that the

sixth defendant may be willing to come on the record as an appellant. If such an application is made, it will be allowed; if not, Mr. Lakshmanan will be at liberty to apply for security for costs. When applications are made in this behalf, they shall be posted before this Bench.

We direct the appellant to pay Rs. 103 (the costs awarded by the order under appeal) to Mr. Lakshmanan in one month from this date. If default is made, it will be treated as equivalent to failure to comply with an order for security for costs and the respondent will be at liberty to take appropriate steps.

We make no order as to costs in this appeal.

A.S.V

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Stodart.

SENDATTIKALAI PANDIA CHINNATHAMBIAR
(DECEASED) AND ANOTHER (PLAINTIFF AND NIL), APPELLANTS,

1936,
October 2.

v.

SANGILI VEERAPPA PANDIAN alias THANGASWAMI
AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 36—Apportionment
—Impartible estate—Rent payable by occupancy tenants of
—Rent accrued during lifetime of holder of estate but
realised after her death—Apportionable between heirs of
that holder, if—Principle of sec. 36—Applicability of.

The Rani of Sivagiri estate died on 23rd November 1916 about five months after the commencement of fasli 1326 and was succeeded by the plaintiff who was accordingly entitled

* Appeal No. 485 of 1930.

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to the whole of the income accruing from the estate after her death. With regard to the income that accrued from the estate in fasli 1326 up to the date of the death of the Rani, the decree passed in appeal in a suit brought by the plaintiff held that the said income was the Rani's property and that the plaintiff and defendants 2 to 6 in that suit were entitled to it as her heirs. The rents due from occupancy tenants of the estate for fasli 1326 were payable in instalments beginning in December, the month following the death of the Rani, and were realised only after her death. On a question arising as to whether the rents due from occupancy tenants of the estate for the five months in fasli 1326 up to the date of the death of the Rani were apportionable between the plaintiff and defendants 2 to 6 or whether the plaintiff was exclusively entitled to the whole of the said rents,

held that the principle of section 36 of the Transfer of Property Act applied to the case on grounds of justice, equity and good conscience, and that the rents in question were apportionable between the plaintiff and defendants 2 to 6.

Lakshminaranappa v. Melothraman Nair, (1902) I.L.R. 26 Mad. 540, *Kunhi Sou v. Mulloli Chathu*, (1912) I.L.R. 38 Mad. 86, *Rangiah Chetty v. Vajravelu Mudaliar*, (1917) I.L.R. 41 Mad. 370, *Aparna Debi v. Sree Sree Shiba Prashad Singh*, (1924) I.L.R. 3 Pat. 367, and *Shivaprasad Singh v. Prayag-kumari Debee*, (1933) I.L.R. 61 Cal. 711, followed.

Phirozshaw Bomanjee v. Bai Goolbai, (1923) I.L.R. 47 Bom. 790 (P.C.), distinguished.

Rents payable by occupancy tenants stand on a different footing from rents payable on dates certain in respect of ordinary leases. In theory the landlord and the tenant are co-owners. When the landholder receives his rent in money, the time when it is made payable is fixed by custom with a view to the convenience of the occupancy tenant and not in pursuance of any contractual agreement between the parties. The landholder becomes entitled to his rent—considered as a sum paid in commutation of his share of the produce—even while the crops are on the ground.

APPEAL against the order of the Court of the Subordinate Judge of Tuticorin dated 5th September 1928 and made in Interlocutory

Application No. 1102 of 1921 in Original Suit No 27 of 1914.

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A. S. Viswanatha Ayyar for second appellant.

S. Ramaswami Ayyar for first and second respondents.

K. S. Rajagopalachari for *K. Rajah Ayyar* for fifth and sixth respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff in Original Suit No. 27 of 1914 on the file of the Court of the Subordinate Judge of Tuticorin (the petitioner in the lower Court) is the appellant. The appeal arises out of an application for passing a final decree in that suit. In Original Suit No. 27 of 1914 the plaintiff as reversioner claimed for himself the Zamindari of Sivagiri on the death of the then zamindar, Ramalinga, who died in the year 1914. The claim was made against the mother of the zamindar who took possession of the zamindari on his death. Along with this suit was tried another suit, Original Suit No. 48 of 1914, the plaintiff in which admitting the right of the Rani claimed that he was the next reversioner entitled to the zamindari on her death. The Rani died on 23rd November 1916 while the suits were in progress and the plaintiff in Original Suit No. 48 of 1914 was then made the second defendant in Original Suit No. 27 of 1914. The decrees passed in these two suits were appealed against to the High Court and the judgments are reported as *Gurusami Pandiyan v. Pandia Chinna Thambi-ar*(1). For the purpose of this appeal it is enough to say that the High Court held that the Rani

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succeeded to the zamindari in preference to the plaintiff and that the income accruing from it during her lifetime was her property and that after her death the plaintiff, as one of her heirs, can claim only one-sixth of what was left. The decree of the lower Court was modified by the High Court giving to the plaintiff as one of her heirs only one-sixth share in her estate, including the profits that accrued from the impartible estate up to her death, he of course being entitled to the whole of it thereafter. In the partible properties and in the outstandings and in the past profits that accrued during the Rani's lifetime, there was a declaration that the plaintiff and defendants 2 to 6 are each entitled to one-sixth share and a final partition decree was ordered to be drawn up by the Subordinate Judge regarding them. It is not necessary to refer to the other portion of the decree; see *Gurusami Pandiyan v. Pandia Chinna Thambiar*(1) (at page 34).

In the present case we are concerned only with the partition of the income which the Rani was entitled to, on account of the land revenue and leases from topes and forests for fasli 1326. It may be mentioned that a receiver was in possession of the property during the lifetime of the zamindarini. Fasli 1326 commenced from 1st July 1916, and, as the Rani died on 23rd November 1916, we are concerned with five-twelfths of the income due to the Rani which amounted to Rs. 21,079. The plaintiff claimed that the rents and profits of the estate for fasli 1326 including that part of them which remained unrealised at the death of the Rani should go with

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the estate and should be paid to him. The respondents contended that the said rents and profits should be divided, part going to the personal heirs of the Rani (of whom the plaintiff is one) in proportion to the period during which the Rani was in possession, namely from 1st July 1916 to 23rd November 1916. On one calculation the plaintiff gets the whole; on respondents' calculation he gets, as co-heir with defendants 2 to 6, only one-sixth of the income which is attributable to the aforesaid period. The lower Court in drawing up its final decree decided in respondents' favour holding that the plaintiff had withdrawn his objections at the stage when the Commissioner's report came up for consideration. It is now agreed that the plaintiff never did this. On the plaintiff's appeal we have to decide the question as one of first instance.

The rents and profits of the estate in the fasli in question consisted of money due by lessees of topes and forests and money due as rent from occupancy ryots in respect of their lands. It is now agreed that the former became payable at the beginning of the fasli and are divisible in the proportion stated by the respondents. Then remain the rents due by occupancy tenants which became payable in instalments beginning in December, the month following the death of the Rani. We may say at the outset that whatever rule may be applicable to rents payable on dates certain in respect of ordinary leases, the rents payable by occupancy tenants stand on a different footing. In theory landlord and tenant are co-owners. The rents payable by the latter represent a share of the crop and there are still estates

(1) (1920) I.L.R. 44 Mad. 1.

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where the landlord takes his share by division of the actual grain at the threshing floor. Where the landlord—properly called the landholder in the case of such estates—receives his rents in money, the time when it is made payable is fixed by custom with a view to the convenience of the occupancy tenant and not in pursuance of any contractual agreement between the parties. In this view it might be said that the landholder becomes entitled to his rent—considered as a sum paid in commutation of his share of the produce—even while the crops are on the ground.

The plaintiff contended in the lower Court—and the same contention is urged before us—that he is entitled to the whole income, the ground being that, in law, the income for the fasli cannot be apportioned.

The law as to the apportionment of periodical payments, on determination of the interest of the person entitled, is provided for in India in section 36 of the Transfer of Property Act, which runs as follows :

“In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.”

In England under the common law there was no apportionment in respect of time except in the case of interest which accrued from day to day. As to rent and other periodical payments, the contract being considered as distinct and entire, no apportionment was allowed ; see the

judgment of Lord ELDON in *Ex parte Smyth*(1) and the note appended to the report by Mr. Swanston. This rule in England was altered by the Apportionment Act of 1870, section 2 of which says :

“From and after the passing of this Act all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.”

The law enacted in section 36 of the Transfer of Property Act is limited to transfers *inter vivos* and does not, strictly speaking, apply to cases of devolution of interest on succession. It is therefore argued that inasmuch as section 36 does not apply in terms, the law of apportionment applicable to the present case is the old English common law under which there cannot be any doubt that apportionment in the case before us is impossible. But in a series of cases of this Court, though section 36 was held inapplicable, the principle underlying the section has been applied consistently on the ground of equity and good conscience. In *Lakshminaranappa v. Melothraman Nair*(2) a tenant for life leased immovable property to tenants at a rent which was payable in half-yearly instalments. Four days before an instalment was due, the tenant for life died, and the assignee of his interest sued the tenants for the rent. It was held that he was entitled to recover. SUBRAHMANIA AYYAR J. pointed out :

“It seems to me, therefore, that in the absence of a specific rule applicable to cases like the present in this country, we are entitled to follow the broad and just principle

(1) (1818) 1 Swans. 337 ; 36 E.R. 412.

(2) (1902) I.L.R. 26 Mad. 540.

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underlying the English Statute Law culminating in the Apportionment Act of 1870, . . . and hold that, as a matter of equity and good conscience, the plaintiff in this case is entitled to the apportionment made by the decree of the Lower Appellate Court, . . .”

DAVIES J., without relying on the broad principle of equity referred to by SUBRAHMANIA AYYAR J., held that the plaintiff was entitled to recover on the ground that the half-yearly instalment had fallen due prior to the death of the tenant for life, though the right to sue for it might not have accrued until four days after. In *Kunhi Sou v. Mulloli Chathu*(1) it was held that an assignee from a lessee is entitled to claim as against the lessor apportionment of rent accruing due after the date of assignment to him up to the time of a transfer (if any) of his interest as assignee to a third person. The learned Judges pointed out, after referring to the statutory law and the Common law of England, that in India there is no reason for not applying to rent the principle adopted in England in the case of interest. In *Rangiah Chetty v. Vajravelu Mudaliar*(2), a decision of three Judges, it was pointed out that though, according to section 2 (d) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease. The decision in *Aparna Debi v. Sree Sree Shiba Prashad Singh*(3),

(1) (1912) I.L.R. 38 Mad. 86. (2) (1917) I.L.R. 41 Mad. 370.
(3) (1924) I.L.R. 3 Pat. 367.

in which the law of apportionment was allowed by the Patna High Court, was a case of devolution of interest on succession. So also was the case of *Shivaprasad Singh v. Prayagkumari Debee*(1) where in an elaborate judgment, after referring to the English and the Indian cases already cited, the learned Judges came to the conclusion that though section 36 of the Act would not apply to the case before them, yet on the ground of equity apportionment might be allowed. In that case, the question was “whether the plaintiffs (the widows) were entitled to rents and royalties which fell due during the lifetime of Raja Durga Prasad”. The Raja died on 7th March 1916 before the year was out and rents and royalties had not then fallen due to him; and the decision turned upon the question whether such rents and royalties could be apportioned under the Act. The learned Judges held that the “plaintiffs are entitled to such rents and royalties due up to the date of the death of Raja Durga Prasad”, that is to say, till 7th March 1916, and no distinction was made between agricultural tenancies and colliery leases both being treated on the same footing. In all these cases the principle underlying section 36 of the Transfer of Property Act was applied on grounds of justice, equity and good conscience.

The Counsel for the appellant says that the above cases should now be held to have been wrongly decided in the light of the Privy Council decision in *Phirozshaw Bomanjee v. Bai Gool-bai*(2). In that case, after stating that the English

(1) (1933) I.L.R. 61 Cal. 711. (2) (1923) I.L.R. 47 Bom. 790 (P.C.).

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Apportionment Act of 1870 does not apply to India, nor do any of the earlier English Apportionment Acts, and that it is common ground that the principle which applied in that case was that of the original English law as it stood apart from statute, their Lordships observed as follows :

"The older English law on the subject was stated by Lord ELDON in *Ex parte Smyth*(1) and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settler, with full power of disposition, to exclude its practical consequences."

And then their Lordships began to consider "whether there is not in the trust deed language which, by implication, imports that apportionment was directed by the settler to take place". The learned Judges in *Shivaprasad Singh v. Prayagkumari Debee*(2) distinguished the Privy Council case on the ground that what was decided in the case was a question of intention as evidenced by a deed of settlement as to whether income derived from rents and shares was apportionable *de die in diem* though they felt the force of the admission made by the parties before their Lordships that the law of apportionment applicable to India was the old law in England. They were

(1) (1818) 1 Swans. 337; 36 E.R. 412.

(2) (1933) I.L.R. 61 Cal. 711.

also of opinion that the old English law of non-apportionment was not applicable to the case before them "which was not a case between persons standing in the relation of lessor and lessee or of persons who were bound by covenants relating to payment of rent at stated intervals". In the case before us also, it is hardly proper to describe, as already pointed out, the zamindar and the persons from whom the payments are due as persons standing in the position of lessor and lessee. Having regard to the special features of the case in the Privy Council we are not inclined to hold that the previous decisions of this Court which have been uniform should be considered to be overruled by that decision. Following those decisions and the decisions in *Shivaprasad Singh v. Prayagkumari Debee*(1) and *Aparna Debi v. Sree Sree Shiba Prashad Singh*(2), we hold that the principle of section 36 of the Transfer of Property Act will apply to the present case on grounds of justice, equity and good conscience and that the decision of the lower Court is right. The appeal is dismissed with costs of respondents 1, 2, 5 and 6.

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v.v.c.

(1) (1933) I.L.R. 61 Cal. 711.

(2) (1924) I.L.R. 3 Pat. 367.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Horwill.

1936,
October 7.

SREEMADH DEIVASIGAMANI PONNAMBALA DESIKAR, HEAD OF TIRUVANNAMALAI MUTT AT KUNNAKKUDI, RAMNAD DISTRICT (SECOND PLAINTIFF), APPELLANT,

v.

RAJA SRIMATHU MUTHU VIJAYAREGUNATHA DORAISINGAM *alias* GOURI VALLABHA TEVAR, ZAMINDAR OF SIVAGANGA, THROUGH THE ESTATE COLLECTOR, SIVAGANGA, AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Survey and Boundaries Act (VIII of 1923), sec. 14—Boundary dispute between two neighbouring estates—Suit contemplated by section—Who are proper parties—Omission to add ryots as parties—Dismissal of suit—Validity of.

In a dispute between one estate holder and a neighbouring estate holder in respect of the boundary between the two estates, the estate holders are the persons *prima facie* interested in the dispute within the meaning of section 14 of the Survey and Boundaries Act and as such the omission to add the ryots of the said estates as parties in the first instance to a suit contemplated by the said section is not such a defect as necessitates the dismissal of the suit.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Devakottai in Original Suit No. 105 of 1927.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellant.

S. T. Srinivasagopalachari for first respondent.

B. Sitarama Rao for *N. G. Krishna Ayyangar* for second respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a

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* Appeal No. 415 of 1932.

suit filed by the Pandarasannadhi of the Kunnakudi mutt for the purpose of getting a decision by an appellate Survey Officer, dated 22nd September 1924, set aside in some respects. There are two villages which may be referred to as M. and A. M. belongs to the Kunnakudi mutt of which the plaintiff is the Pandarasannadhi and is a dharmasanam village in the Sivaganga estate. A. belongs to a devasthanam in the Sivaganga estate and the zamindar is the trustee thereof. The second defendant is an alienee from the zamindar.

Survey operations were started in the locality in 1922 or 1923. It is not clear from the records whether the proceedings were started when Act IV of 1897 was in force or after Act VIII of 1923 came into force. It may be a question of some difficulty whether, in dealing with the effects of the survey, the Court should apply the provisions of Act IV of 1897 or those of Act VIII of 1923. There is reason to think that there is some marked difference between the two Acts in respect of the effect of the survey, if a suit is not brought within three years allowed by the Act. We do not pursue that question further because in the present instance the suit was undoubtedly filed within three years of the decision of the appellate Survey Officer.

In the plaint as originally framed only the zamindar was the defendant, the second defendant was later on impleaded as an alienee from the zamindar subsequent to the institution of the suit. There is a statement in paragraph 9 of the plaint that

"the lands in dispute are warapat punja lands in the holding of the various pattadars of the village and there have

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been for a long number of years exchange of pattas and muchilikas in respect of the suit lands and the mutt as well as the lessees from the mutt have been in enjoyment of the same by collecting the waram, etc., due to them."

In the written statements, filed in January 1928 by the first defendant and in February 1929 by the second defendant, objections on the score of non-joinder were taken. The objection in paragraph 13 of the first defendant's written statement is general and does not specify who the ryots are that were asked to be joined. In the second defendant's written statement, paragraph 6 puts it more specifically that the plaintiff should have impleaded the tenants who according to him were in possession under him. The issues raised the question of non-joinder in various forms, but the question was not dealt with in the first instance nor for more than a couple of years after the written statements had been filed.

A large mass of documentary evidence was filed in the case and a number of witnesses have been examined on both sides. On 11th July 1932, it appears from the B. Diary that arguments were heard on issues 3, 5, 6 and 7, which were apparently regarded as preliminary issues. We are constrained to observe that it is a pity that these preliminary arguments had not been thought of at a much earlier stage, before time was spent on recording so much evidence. After hearing these preliminary arguments an order was passed on the non-joinder issue on 1st August 1932. The learned Judge held that, both on general considerations and by virtue of section 14 of the Survey and Boundaries Act, the ryots of the two villages who were said to be in possession and enjoyment of several items of the property in

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dispute were necessary parties to the suit. Time was accordingly given to enable the plaintiffs to apply to implead them. Interlocutory Application No. 1096 of 1932 was accordingly filed. That application came on for hearing in September 1932 and the learned Judge then held that, as the non-joinder of the persons proposed to be added was fatal to the maintainability of the suit and they were proposed to be added as defendants only after the three years' period of limitation had expired, it was not proper to allow them to be joined as parties to the suit at that stage. The result was that the learned Judge dismissed the suit. Hence this appeal by the plaintiff.

The order of the learned Judge has been supported by Mr. Sitarama Rao on the ground that, under sections 13 and 14 of Act VIII of 1923, a decision of the Survey Officer demarcating a boundary is conclusive not merely between the parties to a dispute before the survey authorities (as was held under the Act of 1897) but as against all persons interested in that boundary line, and it could not therefore have been the intention of the Legislature that a suit under section 14 could be instituted without impleading *eo nomine* all persons who may be interested in that boundary line. It may also be mentioned that in Act IV of 1897 there was an explanation to section 13 to the effect that,

"where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under parties so litigating".

This provision has been replaced in section 14 of the present Act by the following clause :

"The plaintiff in such suit shall join as parties to it all persons whom he has reason to believe to be interested in the boundary which is the subject of the suit."

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Mr. Sitarama Rao contends that the result of this substitution is that, if any persons whom the plaintiff must have believed to be interested in the boundary in question are not impleaded, the whole suit must fail, because it will not be possible to correct the Survey Officer's determination only as against some of the persons interested, while leaving it in force as against other persons.

Mr. Sitarama Rao may be right to this extent that it is desirable to have before the Court all persons interested in the boundary in question; but we think it will be reading too much into that provision to say that the omission to implead any person so interested is necessarily fatal to the suit. The very language in which that clause is couched, by reference to the reasonable belief of the plaintiff as to the persons interested, is against the extreme contention put forward by Mr. Sitarama Rao. It must also be remembered that the Survey and Boundaries Act deals with the survey of lands in estates as well as lands in ryotwari areas. In applying section 14 to survey of lands in estates there are, it seems to us, other considerations also to be borne in mind. Within an estate, there may be various grades of cultivators possessing various rights as against the holder of the estate. There may be cultivators of private lands, there may be persons in possession of non-occupancy lands and of occupancy lands, of service tenures and so on. There may also be waste lands in the estate. It is one thing to postulate that, between the holder of the estate on the one hand and the various persons in occupation of a particular piece of land in the estate on the other, there are varying interests and tenures;

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but it does not seem to us to be the correct principle that, in a dispute between the holder of the estate and the holder of any neighbouring estate in respect of the boundary between the two estates, the tenants or cultivators under the holder of either estate are *prima facie* persons interested within the meaning of this part of section 14, at any rate not to the extent that their non-joinder should be regarded as fatal to the maintainability of the suit. It has been decided with reference to the language of the Permanent Settlement Regulation that for various purposes the registered proprietor is the owner of the area comprised in the settlement, and in recent cases from Calcutta, the Privy Council have laid down that he is the owner even to the extent of being regarded as the person entitled to the rights to minerals in the land (*cf.* section 7 of the Madras Estates Land Act). We are therefore inclined to think that, in a dispute between one estate holder and a neighbouring estate holder, in respect of the boundary between the two estates, the estate holders are the persons *prima facie* interested in the dispute within the meaning of section 14. It is significant in this connection to note that when the survey now in question was conducted the only persons who appeared in response to the notice under section 6 were the plaintiff and the zamindar. In this view, the learned Judge seems to us to have gone too far in holding that the omission to add the ryots as parties to the suit in the first instance was such a defect as necessitated the dismissal of the suit.

It is true that the application to add the ryots as parties was made after the lapse of three years

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from the date of the Survey Officer's decision. But in view of the principle laid down in *Guru-vayya v. Dattatraya* (1) that circumstance will not of itself justify either the dismissal of the application to implead them or the dismissal of the suit. We would therefore direct that Interlocutory Application No. 1096 of 1932 be ordered as prayed for. We would also set aside the decree of the lower Court dismissing the suit and remand the case for disposal on the merits. We cannot however help thinking that this situation has been brought about by the plaintiff himself and might well have been avoided if he had taken steps earlier to file the suit or had impleaded the ryots in the ordinary course. We accordingly direct that up to this stage all costs incurred shall be respectively borne by the parties themselves. There will be a refund of court-fee on the memorandum of appeal.

G.R.

(1) (1903) I.L.R. 28 Bom. 11.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Horwill.

KOTTA VENKATARAJU GARU (PETITIONER—APPELLANT),
APPELLANT,

1936,
November 10.

v.

MAHARAJA OF PITTAPURAM AND FIVE OTHERS
(RESPONDENTS), RESPONDENTS. *

Practice—Restoration of cases dismissed for default—Principles governing—Non-appearance of practitioner—Cases dismissed for default on ground of—Restoration of—High Court—Cases dismissed in—Restoration of.

In dealing with applications for the restoration of cases dismissed for default of appearance, the Court has to consider the position of the party concerned rather than the conduct of the members of the Bar, though it may sometimes be difficult to dissociate the one from the other. A litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs. Where the non-appearance is due to the default of the Counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in appearance before the High Court, because it may sometimes happen that the party is not present in Court at all, having entrusted his case to Counsel in the High Court. The party's interests should not be irreparably prejudiced by reason of every default on the part of Counsel.

Arunachela Ayyar v. Subbaramiah, (1922) I.L.R. 46 Mad. 60, and *Raja Ajai Verma v. Baldeo Prasad*, (1929) I.L.R. 52 All. 536, referred to.

Observations in *Abdul Azis v. The Punjab National Bank, Ltd.*, (1928) I.L.R. 10 Lah. 570, 578 and 579, referred to as to

* Letters Patent Appeal No. 89 of 1936.

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what will constitute "sufficient cause" for non-appearance in cases of default of appearance by Counsel engaged in a case.

APPEAL under Clause 15 of the Letters Patent against the order of CORNISH J., dated 14th August 1936 and made in Civil Miscellaneous Petition No. 2676 of 1936, petition for setting aside the order of dismissal for default and to restore Second Appeal No. 848 of 1932 preferred to the High Court against the decree of the District Court, East Godavari at Rajahmundry, in Appeal Suit No. 81 of 1930 (Land Suit No. 2 of 1930 on the file of the Court of the Deputy Collector of Cocanada, Headquarters Division).

V. Suryanarayana for appellant.

Advocate-General (Sir A. Krishnaswami Ayyar) for respondents.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This Letters Patent Appeal has been preferred against an order of CORNISH J. refusing to restore Second Appeal No. 848 of 1932 which was dismissed under Order XLI, rule 17, Civil Procedure Code, as the appellant's Counsel did not appear when the case was called. In support of the application, a verified petition has been filed by the Counsel engaged in the case and it is there stated that at the time the second appeal came on before our learned brother, the Counsel was actually engaged in arguing a case before another Division Bench, that he did not make other arrangements for the second appeal because he expected the case before the Division Bench to be over earlier but that to meet all contingencies he had asked a representation to be made to our learned brother, if the case should be reached earlier, that he was actually engaged

before another Bench and that he would be before CORNISH J. in a few minutes.

When the matter came on before us on a previous occasion, a question had been raised by the office whether the appeal was competent without leave granted by the learned Judge himself. Mr. Suryanarayana maintained that as this was not an order relating to the appellate decree itself no leave was necessary under the terms of Clause 15 of the Letters Patent. But, as the point was not free from doubt, we preferred to allow the case to stand over to enable Mr. Suryanarayana to apply to CORNISH J. himself for leave. Leave has since been obtained.

We think it proper to refer here to the observations made by the learned Judge at the time that he granted leave because these observations make it clear that, while it might be true that Mr. Suryanarayana had made proper arrangements for his difficulty being represented to the learned Judge, there was some mistake in carrying out these instructions so that the learned Judge was not properly informed of the exact situation. His observations leave little doubt in our mind that, if only the matter had been properly placed before the learned Judge, this unfortunate situation would not have arisen.

The application was not opposed even before the learned Judge; and before us it has been very fairly stated on behalf of the respondents that they do not oppose the appeal. In these circumstances, we have less difficulty in dealing with the matter than we should otherwise have. We would only point out that, in dealing with applications of this kind, the Court has to consider the position

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of the party concerned rather than the conduct of the members of the Bar, though it may sometimes be difficult to dissociate the one from the other. As regards the position of the party, it was observed in *Arunachela Ayyar v. Subbaramiah*(1) that a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs; where the non-appearance is due to the default of the Counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in appearance before this Court, because it may sometimes happen that the party is not present here at all, having entrusted his case to Counsel here [cf: *Raja Ajai Verma v. Baldeo Prasad*(2)]. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of Counsel.

From the point of view of the duty of the members of the Bar, we have no doubt that every endeavour will be made to maintain and if possible improve upon the traditions of cordiality between the Bench and the Bar and that no endeavour will be lacking on the part of the members of the Bar to facilitate the disposal of work before the Court as far as possible. In this view we strongly commend to the profession the remarks made by

(1) (1922) I.L.R. 46 Mad. 60.

(2) (1929) I.L.R. 52 All. 536.

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CORNISH J. in his note*. It is difficult to lay down any general rule as to what will constitute "sufficient cause" for non-appearance in cases of default of appearance by Counsel engaged in a case. The observations of JAI LAL J. in *Abdul Aziz v. The Punjab National Bank, Ltd.*(1) seem to us, if we may say so, to lay down a safe guide in matters of this kind. With these remarks we allow the appeal and direct the restoration of Second Appeal No. 848 of 1932. There will be no order as to costs either in the Letters Patent Appeal or in the application before CORNISH J.

A.S.V.

(1) (1928) I L.R. 10 Lah. 570, 578 and 579.

* In view of the difficulty suggested by VARADACHARIAR and HORWILL JJ. I give leave to appeal. But I think it right that I should formally state my reasons in writing, which I stated orally, for my refusal to allow the civil miscellaneous petition. The case was posted third in the list after a part-heard case and some applications to excuse delay. When it was called on nobody was present on behalf of the appellant. After some delay, during which the Advocate was sent for, a clerk came and said that the Advocate was engaged in another Court. I pointed out in dismissing the civil miscellaneous petition that an Advocate so placed could have done one of three things: he might have got some friend to inform the Judge when he came into Court of his difficulty and asked for the case to be passed over; or he might have come to the Judge in his room; or he might have written a note to the Judge. But the Advocate did none of these things. He considered it sufficient after the case had been called on to send a clerk. It seemed to me that submission to such treatment was tantamount to allowing an Advocate to dictate to the Court when and where he should appear.

APPELLATE CRIMINAL.

Before Mr. Justice Mockett and Mr. Justice Lakshmana Rao.

1936,
December 15.

IN RE T. VARADARAJULU NAIDU, ACCUSED.*

Code of Criminal Procedure (Act V of 1898), sec. 476—Suit on the original side, High Court—Offences under secs. 471 and 466, Indian Penal Code, found committed during trial of—Complaint under sec. 476, Criminal Procedure Code, in respect of—Judge of High Court, other than trial Judge, if competent to file a complaint as required by sec. 195, Criminal Procedure Code.

In a suit on the original side of the High Court, the trial Judge found that two documents were fabricated by one of the defendants and used by him knowing them to be such. In the absence of the trial Judge, the Officiating Chief Justice in the exercise of the ordinary original jurisdiction passed an order under section 476, Criminal Procedure Code, directing the Registrar to make a complaint under section 471 read with section 466, Indian Penal Code, which was accordingly done. On an objection taken to the validity of the complaint,

held, that the Officiating Chief Justice had jurisdiction to pass the order under section 476, Criminal Procedure Code.

The complaint required by section 195, Criminal Procedure Code, is the complaint of the Court in which the documents were given in evidence and not of the trial Judge only, and there is nothing to prevent any Judge of the High Court from dealing with the matter.

Bai Kasturbai v. Vanmalidas, (1925) I.L.R. 49 Bom. 710, approved.

CASE REFERRED for the opinion of the High Court, under section 432 of the Criminal Procedure Code, by the Chief Presidency Magistrate, Egmore, Madras, in his Letter R.O.C.C. No. 1405/36, dated 9th October 1936.

* Criminal Revision Case No. 777 of 1936 (Case Referred No. 50 of 1936).

K. V. Ramaseshan for Crown Prosecutor (T. S. Anantaraman) for the Crown.

A. S. Sivakaminathan for accused.

The JUDGMENT of the Court was delivered by LAKSHMANA RAO J.—This is a reference by the Chief Presidency Magistrate, Madras, and the questions referred are :

(i) Whether the complaint preferred in pursuance of an order passed by the Officiating Chief Justice on an office note is an order passed by the Court within the meaning of section 476, Criminal Procedure Code.

(ii) Whether the Officiating Chief Justice could pass an order under section 476, Criminal Procedure Code, in a case where no orders were passed under section 476, Criminal Procedure Code, either by the trial Judge or his successor or the appellate Bench that decided the Original Side Appeal against the judgment and decree in Civil Suit No. 542 of 1931.

(iii) Whether the Officiating Chief Justice could be deemed to be the successor to the trial Judge who decided Civil Suit No. 542 of 1931 in the exercise of original civil jurisdiction.

The facts are set out in the order of reference and briefly stated they are that during the trial of Civil Suit No. 542 of 1931 on the file of the High Court, two documents, dated 10th March 1928 and 10th May 1928, purporting to be certified copies of orders, dated 2nd March 1928 and 26th April 1928, alleged to have been passed in Original Petition No. 38 of 1928, were filed on behalf of one of the defendants. The trial Judge, the present Chief Justice, found that the documents were fabricated and used by Varadarajulu Naidu, one of the defendants in the suit, knowing them to be such, and the matter was under the directions of the trial Judge reported to the police for necessary action. The police filed a charge sheet against

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Varadarajulu Naidu under section 471 read with section 466, Indian Penal Code, and he was committed to the High Court Sessions for trial. There was however no complaint in writing by the High Court as required by section 195 of the Code of Criminal Procedure, and the order of committal was quashed by CORNISH J. on the ground that the offence under section 471, Indian Penal Code, cannot be taken cognizance of except on the complaint of the Court in which the documents were given in evidence. The original side office then put up a note to the Officiating Chief Justice setting out the entire facts, and the Officiating Chief Justice passed an order under section 476 of the Code of Criminal Procedure directing the Registrar to make a complaint under section 471 read with section 466, Indian Penal Code. The complaint was filed accordingly and process was issued to the accused. Objection was taken by him to the validity of the complaint and hence this reference.

The order was in terms passed under section 476 of the Code of Criminal Procedure and the real question is whether the Officiating Chief Justice had no jurisdiction to pass the order. The complaint required by section 195 of the Code of Criminal Procedure is the complaint of the Court in which the documents were given in evidence and not of the trial Judge, and, as pointed out in *Bai Kasturbai v. Vanmalidas*(1), when a suit is tried by a Judge of the High Court, the term "Court" occurring in the section must be taken to mean "the High Court". There is nothing to prevent any Judge of the High Court from dealing with the

(1) (1925) I.L.R. 49 Bom. 710.

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matter though as a matter of convenience this would seldom be done, and the matter was in this case placed before the Officiating Chief Justice, as the trial Judge was absent at the time. The Court may, under section 476 of the Code of Criminal Procedure, make the complaint on application made to it or otherwise, and it need not hold a preliminary enquiry. Notice to the person proceeded against is not essential, and it is apparent from the order itself that it was passed by the Officiating Chief Justice in the exercise of ordinary original jurisdiction. There is therefore no substance in the contention that the Officiating Chief Justice had no jurisdiction to pass the order under section 476 of the Code of Criminal Procedure, and Questions 1 and 3 do not arise. The proper course for the accused was to appeal against the order under section 476 of the Code of Criminal Procedure, and it is strange that objection should have been raised and permitted before the Magistrate. The reference is answered accordingly, and the records will be retransmitted to the Chief Presidency Magistrate for proceeding with the case according to law.

v.v.c.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Venkatasubba Rao, Mr. Justice
Cornish and Mr. Justice Venkataramana Rao.

1936,
October 20
and
November 6.

P. P. P. CHIDAMBARA NADAR (PETITIONER—PLAINTIFF),
APPELLANT,

v.

C. P. A. RAMA NADAR (DECEASED) AND THREE OTHERS
(RESPONDENT—EIGHTH DEFENDANT AND HIS LEGAL
REPRESENTATIVES), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), art. 182 (2)—Applicability
—Civil revision petitions—Art. 182 (5)—Application in
accordance with law—Legal representative—Application
against—Application in accordance with law, if and when
—Art. 182 (5)—“Final order” within meaning of—Order
rejecting execution application, if.*

Held by the Full Bench.—Article 182 (2) of the Indian Limitation Act applies to civil revision petitions also. When, therefore, a revision petition is filed in the High Court against the decree of a subordinate Court and is dismissed, the date of the order in revision made by the High Court furnishes, under article 182 (2), the starting point of limitation for the execution of the decree.

The term “appeal” in article 182 (2) is not used in a restrictive sense so as to exclude revision petitions and the expression “the appellate Court” in the said article is not confined to a Court exercising appellate, as opposed to, revisional powers.

Subramania Pillai v. Seethai Ammal, (1911) I.L.R. 86 Mad. 135, overruled.

Held by the Division Bench.—Where the only defect in an execution application praying for execution against a person as the legal representative of another is that in the appropriate column the person who is the legal representative is not mentioned as the legal representative, the application cannot be said to be one not in accordance with law.

* Appeal Against Order No. 295 of 1933.

Abdul Kharim Sahib v. Lakshmanaswami, (1927) 27 L.W. CHIDAMBARA
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An order rejecting an execution application is a “final order” within the meaning of article 182 (5) of the Indian Limitation Act.

An order would be a final order within the meaning of article 182 (5) if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on the merits.

Kesavuloo v. Official Receiver, West Tanjore, I.L.R. [1937] Mad. 112, considered.

APPEAL against the order of the Court of the Subordinate Judge of Madura, dated 9th February 1933 and made in Execution Petition No. 322 of 1932 in Original Suit No. 71 of 1920, First Additional Sub-Court, Madura.

The facts of the case and the arguments of Counsel appear sufficiently from the opinion of the Full Bench and the judgment of the Division Bench delivered after the expression of opinion by the Full Bench.

The appeal came on for hearing before STONE and PANDRANG ROW JJ. when the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This appeal against an order of the Additional Subordinate Judge of Madura made in an execution petition raises a point of some little difficulty which can be expressed as follows:—A decree was passed on 24th November 1924 in Original Suit No. 71 of 1920 on the file of the First Additional Subordinate Judge of Madura. Later on a revision petition was put in in the High Court and that revision petition was dismissed on 3rd November 1927. An execution petition was put in on 24th June 1929 which was rejected on 18th November 1929 and it was admittedly within time if article 182 (2) of the Limitation Act applied. There was another execution petition on 26th September 1929 with which we are not concerned. The

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present petition, in respect of which this appeal is filed, was filed on 16th November 1932. If the earlier petition filed on 24th June 1929 and rejected on 18th November 1929 was in time—and it would admittedly be in time if the revision petition falls under article 182 (2) of the Limitation Act—the present petition would be in time.

Article 182 (2) is in the following words: “(Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal”. The starting point where there has been an appeal, is the date of the final decree or the order of the appellate Court or the withdrawal of the appeal.

It was decided by a Bench of this Court in *Subramania Pillai v. Seethai Ammal*(1) that the word “appeal” referred to in article 182 (2) of the Limitation Act does not include a revision under section 115 of the Code of Civil Procedure or under section 25 of the Provincial Small Cause Courts Act or even under the Charter Act. That case, so far as we can see, is absolutely on all fours with this case and it is that decision that raises the doubt that we feel in this matter and, out of respect for the learned Judges who decided that case, we think it necessary to refer this point to a Full Bench in order to set at rest this important point. We feel a difficulty in following that case because, *inter alia*, the Privy Council in *Nagendranath De v. Sureshchandra De*(2) at page 5, in a matter under article 182 (2) of the Limitation Act, made the following observations:

“There is no definition of ‘appeal’ in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptance of the term, and that it is no less an appeal because it is irregular or incompetent.”

A Bench of this High Court in *Subramania Pillai v. Seethai Ammal*(1), already referred to, arrived at the conclusion they did, because they were of opinion that the word “appeal” was not used in a more extended sense in article 182 than it was in articles 150 to 157 and that because in these latter articles

(1) (1911) I.L.R. 36 Mad. 135.
(2) (1932) I.L.R. 60 Cal. 1; L.R. 59 I.A. 283.

distinctions were made between suits, appeals and applications, it could not be contended that an appeal would include a revision petition. We apprehend that the learned Judges were there saying in fact that as it is quite clear that under the Code of Civil Procedure a revision petition and an appeal are not the same thing—as under section 115 of the Code of Civil Procedure, a revision petition only lies where an appeal does not lie—and as in articles 150 to 157 under the heading “appeals” under the Civil Procedure Code, the Limitation Act deals with appeals in the same sense as it is used in the Code of Civil Procedure, therefore it must be assumed that in article 182 (2) where the word “appeal” is used *simpliciter*, it must be given the same meaning as is given in articles 150 to 157.

In the passage cited from the judgment of the Judicial Committee it is equally plain that the Judicial Committee regarded an application by way of revision as an appeal in the ordinary acceptance of the term. We feel that it is reasonably plain, bearing in mind the wording of section 115 of the Code of Civil Procedure, that a distinction for the purpose of the Code is drawn between a revision petition and an appeal, for it is there stated that a revision petition only lies where an appeal does not lie. The judgment of the Judicial Committee indicates that the word “appeal” has a wider meaning in article 182 than it bears in the Code of Civil Procedure.

And the same broad view of the meaning of the term “appeal” seems to have been taken by their Lordships in *Rex v. Nat Bell Liquors, Ltd.*(1), though they were not dealing with a revision petition under the Indian procedure but with an appeal from a Provincial High Court to the Supreme Court of Canada upon a motion for a writ of *certiorari*.

The Secretary of State for India in Council v. British India Steam Navigation Company(2) also in our opinion points the same way.

It may be material to bear in mind the various cases, namely, *Chappan v. Moidin Kutti*(3), *Venkatragayya Appa Row v. Murala Sriramulu*(4) and *Siddalingana Gowd v. Bhimana Gowd*(5), where it has been held that a Court hearing a revision petition is acting as an appellate Court.

(1) [1922] 2 A.C. 128.
(2) (1911) 13 C.L.J. 90, 93, 94.
(3) (1898) I.L.R. 22 Mad. 68, 80 (F.B.).
(4) (1912) 17 I.C. 593.
(5) (1934) 41 L.W. 138.

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In *Raja of Ramnad v. Kamid Rowthen*(1) Lord DUNEDIN made the following observations: "From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i.e., a civil revision petition, was preferred." That is an observation made in the course of a case in which a revision petition was treated as an appeal in the ordinary acceptation of the term.

It is further in our opinion a matter to be borne in mind that the clauses in the Limitation Act relating to applications do not apply to revisions according to the wording of article 182; see *Muthu Chettiar v. Narayanan Chettiar*(2).

One is faced with the further difficulty:—If a revision petition is not an appeal for purposes of article 182 (2) the following position arises. The period of limitation is entirely different accordingly as the revision petition succeeds or fails. If it succeeds, the result would be that there would be a review of judgment or the decree would be amended and where that is the case, article 182 (3) or (4) would presumably apply. If it fails, we think there is a *casus omissus* because the revision petition could not be construed as an application within the meaning of article 182 and clauses 3 and 4 will not apply. Clause 2 will not apply because it is not an appeal. This seems to be a very unfortunate state of affairs which would leave the party affected in complete uncertainty until the revision petition is disposed of.

In these circumstances, as the matter is one of some general importance and as *Subramania Pillai v. Seethai Ammal*(3) has decided a case absolutely on all fours with the present case and as the Bench is one for which we have the greatest respect, we think it would be better to have this matter set at rest by a Full Bench rather than have conflicting decisions.

The question referred is: Whether article 182 (2) of the Limitation Act applies to civil revision petitions as well or only to appeals in the narrower sense of that term as used in the Code of Civil Procedure.

ON THE REFERENCE—

B. Sitarama Rao and P. N. Appuswami Ayyar for appellant.

(1) (1926) I.L.R. 49 Mad. 335, 339; L.R. 53 I.A. 74.
(2) (1927) I.L.R. 51 Mad. 672. (3) (1911) I.L.R. 36 Mad. 135.

K. V. Srinivasa Ayyar for respondents 2 to 4.
Our. adv. vult.

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The opinion of the Full Bench was delivered by VENKATASUBBA RAO J.—The facts have been fully set forth in the order of the referring Judges and need not be recapitulated. The short question is, whether, when a revision petition is filed, it is permissible to hold, under article 182 (2) of the Limitation Act, that the date of the order in revision made by the High Court furnishes the starting point; in other words, whether the term "appeal" is used in a restrictive sense so as to exclude revision petitions and the expression "the appellate Court" is to be confined to a Court exercising appellate, as opposed to, revisional powers. The only considered decision directly bearing on the point is *Subramania Pillai v. Seethai Ammal*(1), which places a restrictive interpretation upon the word "appeal" but, as the learned Judges who have referred the question rightly point out, that decision is inconsistent with the view expressed in numerous authoritative decisions as to the true meaning of the terms "appeal" and "appellate Court".

The view taken by the learned Judges in *Subramania Pillai v. Seethai Ammal*(1) necessitated, if we may say so with respect, their adopting a somewhat curious line of reasoning. They were faced with the difficulty, what should be the starting point when the revision petition fails, and what, when it succeeds? Logically, from their conclusion that the word "appeal" does not include "revision", in neither event

(1) (1911) I.L.R. 36 Mad. 135.

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should an order upon a revision petition give rise to a fresh starting point. But they were driven to hold that when the revision petition is dismissed, time runs from the original decree or order but when it succeeds, not from the original, but from the fresh decree or order, either under clause 1 or clause 4. This involves a certain contradiction, as the learned Judges felt compelled to have recourse to the same clause for two dissimilar purposes; when the revision petition is dismissed, time would run from the original decree or order under clause 1; when it is allowed, under the same clause, from the fresh decree or order. Moreover, by a sort of fiction, the learned Judges held that where the original order is modified as is sometimes done in revision, it must be treated as having been amended, with the result that clause 4 is brought into play. It seems in our opinion somewhat artificial to hold that modifying an order in revision amounts to amending it, when, as is well known in our processual law, the word "amendment" does not embrace correction by a superior Court. There is yet a further difficulty revealed by the judgment of WALLIS J., as he then was, his decision being the one that was upheld in *Subramania Pillai v. Seethai Ammal*(1). He is constrained to hold that a revision petition may furnish not only two but three starting points, all of them falling under clause 1:

(i) Where it is simply dismissed, time runs from the date of the original decree;

(ii) where it is dismissed with costs, from the date of the original decree so far as that

(1) (1911) I.L.R. 36 Mad. 135.

decree is concerned and from the date of the order of the High Court, so far as it relates to costs;

(iii) where the decree is modified in revision, from the date of the decree as modified.

It seems to us that such a straining of words as has led to these contradictory and inconsistent results must, if possible, be avoided.

In *Chappan v. Moidin Kutti*(1) six learned Judges had to consider the question whether under Clause 15 of the Letters Patent as it stood before the amendment of 1919 an appeal lay from the judgment of a single Judge passed in the exercise of revisional jurisdiction. Clause 15 enacted that an appeal lay to the High Court from the judgment of one Judge of the High Court or one Judge of a Division Court pursuant to section 13 of the Charter Act. Now, turning to the last-mentioned section, it provided for the exercise by the Judges of the High Court of the original and appellate jurisdictions vested in that Court. This raised the question whether revisional jurisdiction was comprised within the term "appellate jurisdiction" as used in section 13, for, if it did not, no appeal would lie under Clause 15 of the Letters Patent. was held by a majority of the Judges that an appeal did lie, provided the order amounted to a "judgment". SUBRAHMANIA AYYAR J., in the course of his judgment, points out what the true meaning of the expression "appellate jurisdiction" is. That may be exercised in a variety of forms and may be invoked sometimes as a matter

(1) (1898) I.L.R. 22 Mad. 68 (F.B.).

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of right and sometimes subject only to certain specified conditions or limitations, such, for instance, as those prescribed in the provision in the Code relating to the revisional powers of the High Court; but, as SUBRAHMANIA AYYAR J. goes on to observe, no such limitation, however much it may circumscribe the exercise of the power, touches the intrinsic quality of the power itself (page 81).

The wording of Clause 39 of the Letters Patent has given rise to a similar question. It enacts that an appeal lies to the Privy Council from a final judgment or order passed by the High Court *on appeal*, and that led to the question whether an order made by the High Court in the exercise of its revisional jurisdiction or powers of superintendence, came within the purview of that clause. MOOKERJEE and COX JJ. held in *The Secretary of State for India in Council v. British India Steam Navigation Company*(1) that such an order, though made in revision, is appealable as there is no ground for construing the word "appeal" used in Clause 39 in a narrow sense. MOOKERJEE J., after referring to various authorities, quotes Lord WESTBURY in *The Attorney-General v. Sillem and others*(2) who observes that the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. The learned Judge also points out, after referring to Story's Constitution (Vol. II, sections 1760 to 1766), that the characteristic of an appeal is the revision of the judicial proceeding of an inferior Court, so that the mode in which

(1) (1911) 13 C.L.J. 90.

(2) (1864) 10 H.L.C. 704.

that power is exercised is wholly immaterial (page 94).

That a remedy by way of revision does not differ in essence from a right of appeal (the only difference being in the mode in which the power is exercised) has often been declared by the Judicial Committee. In *Raja of Ramnad v. Kamid Rowthen*(1) their Lordships, referring to a civil revision petition, thus observe:

"From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i.e., a civil revision petition, was preferred to the High Court of Madras."

See also *Bajinath Sahai v. Ramgut Singh*(2). In *Nagendranath De v. Sureshchandra De*(3) the question as to what amounted to an appeal under article 182 (2) arose, and the language of their Lordships, in view of the present question raised, though it does not directly bear upon it, is both suggestive and significant. The facts of that case are somewhat complicated, but for the present purpose it is sufficient to state that there were two sets of mortgagees—the appellants on the one hand and Madan Mohan and his son, described as respondents Nos. 24 and 27, on the other. As between them there was a dispute in regard to a sum of Rs. 4,467 and that was decided in favour of the appellants. Madan Mohan, as one of the decree-holders, applied for a final mortgage decree and in doing so, he again claimed as against the appellants, his co-decree-holders, the sum which had already been disallowed. The Subordinate Judge on 24th June 1920 delivered

(1) (1926) I.L.R. 49 Mad. 335; L.R. 53 I.A. 74.
(2) (1896) I.L.R. 23 Cal. 775, 784 (P.C.).
(3) (1932) I.L.R. 60 Cal. 1; L.R. 59 I.A. 283.

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his judgment, again negating Madan Mohan's claim, and passed a final decree for the sale of the mortgaged properties. The decree was drawn up on 2nd August 1920, but properly dated as of 24th June. On 27th August 1920 Madan Mohan presented an appeal to the High Court, not from the decree of the Subordinate Judge, which in truth it was, but from what was wrongly alleged to be an order made on 24th June. As his objection was only to the decision, in so far as it related to his claim against the other decree-holders, he joined them alone as parties to the appeal and not the judgment-debtors. The appeal, though irregular in form, as not being an appeal against the decree of the Subordinate Judge, and though insufficiently stamped, was admitted and heard by the Court, and in the result, it was dismissed, both on the ground of irregularity and upon the merits, and the dismissal was embodied in the decree of the High Court dated 24th August 1922. The appellants on 3rd October 1923 presented an application for execution of the decree against the judgment-debtors. It was contended for the latter that the three years were to be calculated from 24th June 1920, in which case the application would be manifestly out of time; it would, on the other hand, be within time if the critical date was that of the decree of the High Court of 24th August 1922; and the decision of the question depended upon whether Madan Mohan's appeal, which was dismissed on the latter date, was an appeal within the meaning of article 182 (2). Their Lordships held that any application by a party to an appellate Court to set aside or revise a decree

or order of a Court subordinate thereto is an "appeal" within the meaning of that provision, even though

- (a) it is irregular or incompetent or
- (b) the persons affected by the application to execute were not parties or
- (c) it did not imperil the whole decree or order.

It is only the first of these three points that is now material and it is with the words used by their Lordships in this connection that we are here concerned.

"There is no definition of 'appeal' in the Code of Civil Procedure", they observe,

"but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptance of that term and that it is no less an appeal because it is irregular or incompetent."

True, much importance cannot be attached to the word "revise" in this passage, as their Lordships were not adverting to what is technically known as a revision petition; but the view, that there is no essential difference between a remedy by way of appeal and by way of revision, is considerably reinforced by the passage in question and its value becomes all the greater when we bear in mind that their Lordships made these observations in construing the very provision with which we are now concerned.

The only serious objection urged against this view is, that in one and the same Act the same word ought not to be construed in two different senses and that, as the word "appeal" has a

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narrower meaning in articles 150 to 157, it would be wrong to give it an extended sense in article 182. But as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognised that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part (Craies's Statute Law, IV Edn., page 153). We think we have shown that cogent reasons exist in the present case and, what is more, the word "appeal" within the ordinary acceptance of that term bears not the narrower but the extended meaning.

Our answer to the question referred is therefore in the affirmative.

The appeal came on for final hearing after the expression of the opinion of the Full Bench and the Court (PANDRANG ROW and VENKATARAMANA RAO JJ.) delivered the following

JUDGMENT.

VENKATA-
MANA RAO J.

VENKATARAMANA RAO J.—The question in this case is whether the execution application dated 16th November 1932 filed by the plaintiff is barred by limitation. For the disposal of the same, a few dates of the prior proceedings may be relevant. They are: 24th November 1924, the date of the decree; 24th June 1929, the date of the application for execution; 3rd November 1927, the date of the order of the High Court dismissing the revision petition presented against the decree; and 16th November 1932, the date of the present application for execution. When this matter came up on a prior occasion for

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hearing before STONE J. and my learned brother, the question was whether the starting point for the execution of the decree would be the date of the dismissal of the revision petition in the High Court. *Subramania Pillai v. Seethai Ammal*(1) held that it would not. As a doubt was felt as to the correctness of that decision, the matter was referred to a Full Bench. The Full Bench has now decided that the term "appeal" in article 182, clause 2, of the Limitation Act would include revision and therefore the order dismissing the revision petition would be the final order within the meaning of that article. In the order of reference the learned Judges observed that if the application dated 24th June 1929 was in time, the present application would be in time. From the order it would mean that the only question that was raised and argued before the Division Bench was that if the starting point for limitation be the date of the dismissal of the revision petition, there will be no question of limitation. But Mr. Srinivasa Ayyar now contends that he had no opportunity on the prior occasion to contend that the application dated 24th June 1929 would not save limitation even it be held that under article 182 (2) of the Limitation Act the term "appeal" would include revision. He is now permitted to argue that question subject to his filing an affidavit to the effect that he had not the said opportunity on the prior occasion. He has now raised two questions, namely, (i) the application dated 24th June 1929 is not in accordance with law and (ii) there was no final order within the

(1) (1911) I.L.R. 36 Mad. 135.

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meaning of article 182, clause 5, and therefore the present application would be barred by limitation in any event.

The contention regarding the first point is put thus. The present execution application is to recover a sum of Rs. 1,400 odd from the eighth defendant as the legal representative of the first defendant against whom there was a decree for the said sum solely. On the date of the prior execution application dated 24th June 1929, the first defendant was dead; the sixth defendant who was recognised as his legal representative was also dead; the eighth defendant was not brought on record as the legal representative of defendants 1 and 6 and there was no application for execution against him in respect of the sum now sought to be recovered; thus the application would not be in accordance with law within the meaning of article 182, clause 5, of the Limitation Act. It seems to me that this contention is untenable. Looking into the execution application it will be seen that in the cause-title against the name of the first defendant it is stated that he was dead. A similar entry is made against the name of the sixth defendant and at the end of the array of the defendants, the following note is added that the legal representative of defendants 1 and 6 is Rama Nadar, thus indicating that Rama Nadar is sought to be added as the legal representative of defendants 1 and 6. Then, turning to the column, "Name of the judgment-debtor against whom the decree is to be executed", it is stated "O. P. A. Palani Kumaru Nadar and others"; "and others" would certainly include Rama Nadar. Therefore the application is in substance one to have the

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decree executed also against the legal representative of the first defendant and the sixth defendant. The law does not require an application to bring on record a person as the legal representative of a defendant. All that is necessary for a valid execution petition against the legal representative is that the execution application must pray for execution against a person as the legal representative of another. That in my opinion is complied with in the present application. It is not every defective application that can be said to be an application not in accordance with law. The only defect that can be alleged in this application is that in the appropriate column Rama Nadar was not mentioned as the legal representative. It was laid down in *Abdul Kharim Sahib v. Lakshmanaswami*(1) that an application which contains defects such as these cannot be said to be an application not in accordance with law. The decree, it will be noticed, is a joint decree within the meaning of the explanation to article 182 of the Limitation Act. The decree provides that in respect of outstandings all the partners should collect the amounts and the amount should be distributed between them. In addition to this there is a decree for a specified sum against the first defendant. In *Pattannayya v. Pattayya*(2) it was held that a decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly, even though some other relief may be given against the defendants separately, so that if in respect of the joint

(1) (1927) 27 L.W. 475.

(2) (1925) 50 M.L.J. 215.

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reliefs an application for execution is made against one of them, it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against them solely. If the principle of that decision is to be applied to this case, even assuming that no relief was sought against the eighth defendant as the legal representative of the first defendant, the application of 24th June 1929 would nevertheless be an application in accordance with law and save limitation.

The next question is whether there is a final order within the meaning of article 182 of the Limitation Act, because under the amended article it is not the date of the execution application that saves limitation but the final order thereon. Mr. Srinivasa Ayyar contends that there is not, relying very strongly on a recent decision reported as *Kesavuloo v. Official Receiver, West Tanjore*(1). In that case the actual decision was that an order returning an execution application would not be a final order even in cases where the application is not re-presented. I may notice that there is also authority for the view that it would be—*vide* the judgment of my learned brother reported as *Mottaya Padayachi v. Rajagopalan*(2) and also of STODART J. reported as *Shanmuga Pathar v. Swaminatha Pathar*(3). It is unnecessary to express my opinion on this question, whether the order returning an execution application in cases where it is not re-presented would be a final order, because it is unnecessary for the disposal of this case. In my opinion, an order would be a final order within the meaning

(1) I.L.R. [1937] Mad. 112.

(2) 1936 M.W.N. 547.

(3) 1936 M.W.N. 547.

of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on the merits. I agree with my learned brother when he says :

"I do not think it can be contended reasonably that the Legislature intended that where the Court chose to pass certain orders which were not final in the sense that they did not deal with the merits of the application, it was to be held that there was no final order within the meaning of the amended article." ; *Mottaya Padayachi v. Rajagopalan*(1).

There is nothing in the decision in *Kesavuloo v. Official Receiver, West Tanjore*(2) which runs counter to this view. In fact, VENKATASUBBA RAO J. at page 341 observes :

"The words 'final order' imply that the proceeding has terminated so far as the Court passing it is concerned."

He cites with approval the decision in *Kadiresan v. Maung Sanya*(3) where it was held that an order made on an execution application closing the case for want of non-compliance with certain requirements would be final. In that case, it was closed at the request of the party. What happened in this case was that the Court rejected it, thus terminating the proceeding. Therefore the order of rejection in this case would be a final order within the meaning of article 182, clause 5, of the Limitation Act and therefore the present application is not barred by limitation. We therefore reverse the decision of the lower Court and remand the case for disposal in accordance with law.

PANDRANG ROW J.—I agree and I wish to say a few words. When the matter originally came up

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(1) 1936 M.W.N. 547.

(2) I.L.R. [1937] Mad. 112.

(3) A.I.R. 1933 Ran. 87.

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before STONE J., as he then was, and myself, it appears to have been admitted clearly that if the petition presented in June 1929 was in time, there was nothing else to be done but to allow the appeal and remand the petition for disposal. If certainly the points that are now raised and which have been dealt with by my learned brother had then been raised before us, it is difficult to believe that we would have troubled the Full Bench for an opinion before deciding the points now raised by the respondents. The respondents' Advocate however assures us that it was not that he raised these points but that he had no opportunity to raise them. If this means that he was not called upon at all, it is not supported by the preamble to the order of reference which shows that he was heard. What exactly the learned Advocate means I am unable to say ; but, as he has given us the assurance that he would undertake to file an affidavit in support of what he has said and in view of the fact that the questions raised are questions of law, we have thought it desirable in the interests of justice to allow the points to be raised and decided instead of refusing him any opportunity to raise them.

As regards the question whether the execution petition filed in June 1929 is in accordance with law, I have nothing to add to what my learned brother has said. As regards the other point whether the order thereon dated 18th November 1929 is a final order, the respondents' Advocate relied upon a recent decision of a Bench reported as *Kesavuloo v. Official Receiver, West Tanjore*(1).

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Indeed, it was hinted by Mr. Sitarama Rao that it was this subsequent decision which was pronounced after we made the order of reference that is responsible for the raising of the point at present. That decision no doubt supports in some respects the argument of the respondents' Advocate. Apart from this, I have given my anxious consideration to that decision because that decision purports to disapprove of my decision in *Mottaya Padayachi v. Rajagopalan*(1). It is with unfeigned sorrow that I express my inability to change my opinion on the point. I do not wish to say anything more on this subject because my learned brother is prepared to base his decision, with which I agree, on what I would call the narrow ground that the order in that case was of a different tenor from the order in the present case and also that there are certain observations in that decision which are themselves sufficient to lead to our present conclusion. In fact, in that Bench decision there are two definitions—a positive and a negative definition—of a final order. At page 116 it is stated that

“when an order is made returning a petition, it does not deal judicially with the matter of the petition and cannot therefore be regarded as final”.

The other definition is given at page 119 thus :

“The words ‘final order’ imply that the proceeding has terminated so far as the Court passing it is concerned.”

This latter definition is sufficient to conclude the point raised in this case against the respondents. I have looked into the decisions of the Judicial Committee relied upon in *Kesavuloo v. Official Receiver, West Tanjore*(2). I do not think

(1) 1936 M.W.N. 547.

(2) I.L.R. [1937] Mad. 112.

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they decide the present question. They deal with the question as to what is a final order or decree in an appeal within the meaning of article 182, clause 2, and it was held that where an appeal fails by reason of the non-compliance with the rules of procedure prescribed or is dismissed for want of prosecution, there is no order or decree of the appellate Court in which the decree of the Court below is merged and that all that remains is only the decree of the Court from which the appeal is preferred. In the present case, we are dealing with an order which rejected the execution application. That order of rejection certainly put an end to the petition so far as the Court is concerned. It was conceded before us by the Advocate for the respondents that if a petition is dismissed because it is not pressed, the order would be a final order. I do not see why the substitution of the word "rejected" for "dismissed" should make any difference in deciding whether the order is final or not. Similarly, if an execution petition is dismissed for default, the order would also be a final order. On the other hand, if the other definition is strictly applied, it may be contended that there was no judicial determination of the matter involved in the application and therefore there was no final order. I am unable to accept this as a correct interpretation of the words "final order" found in article 182 (5) of the Limitation Act. In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point for limitation. I concur in

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the view expressed by my learned brother that in this case there was a final order, and that order being one dated 18th November 1929 the subsequent petition filed in 1932 was in time. That petition must therefore be remanded to the Court below for disposal according to law.

We think, in the circumstances of this case and especially in view of the fact that this case necessitated a reference to a Full Bench and an argument before the Full Bench and a further argument after the Full Bench opinion was delivered, that a special fee should be allowed in this appeal. The Advocate's fee is fixed at Rs. 150. The contesting respondents 2 to 4 must pay the costs of the appellant in this appeal and bear their own costs. Their costs in the Court below will be within the discretion of the Court below.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Varadachariar, Mr. Justice Burn and
Mr. Justice Pandrang Row.

1936,
November 26.

ARUMUGHAM CHETTY AND TWO OTHERS (FIRST DEFENDANT
AND NIL), APPELLANTS,

v.

Y. PR. KR. V. SUBRAMANIAM CHETTI AND TWO OTHERS
(PLAINTIFFS 2 TO 4), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), sec. 105—Lease—
Impartible zamindari—Arrangement between junior mem-
ber and holder of—Holder transferring to junior member
the right to enjoy immovable property in perpetuity in
consideration of latter giving up his present and future
right of maintenance and agreeing to pay some amount
annually—If a lease—Oral arrangement—Validity of.*

The transfer of a right to enjoy immovable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the latter will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money does not constitute a lease within the meaning of section 105 of the Transfer of Property Act and is therefore effective though oral.

Per BURN J.—Whether a transaction is a lease or not would vary according to the circumstances of each case, though on the facts of the present case the transaction does not amount to a lease within the meaning of section 105 of the Transfer of Property Act, since the transaction was in its essence a provision for the maintenance of the junior member.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Sivaganga in Original Suit No. 10 of 1923 (Original Suit No. 12 of 1920 on the file of the Court of the Subordinate Judge of Sivaganga).

* Appeal No. 103 of 1925.

The facts of the case and the questions of law involved appear fully in the Order of Reference to the Full Bench.

This appeal came on for hearing when the Court (STONE and VARADACHARIAR JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

STONE J.—This appeal raises a question of some considerable difficulty and general importance and a number of questions, largely of fact, which are only of importance to the present case. My learned brother and I are of the opinion that the first question should be referred to a Full Bench and we therefore formulate the question to be considered and state the facts and the points that appear to arise as leading up to it.

The policy underlying the Transfer of Property Act appears to be not to require a transfer of property to be in any particular form except in those cases in which the Act expressly requires the transfer to be in writing; see section 9.

One kind of transfer so required to be in writing is, subject to certain exceptions, a lease of immovable properties.

The term "lease" is a term having a very definite meaning in English law and a meaning by no means the same as "lease" as used in the Transfer of Property Act. In considering whether a transaction requires, as being a "lease", to be in a particular form, i.e., in writing, one has therefore not to have in mind whether it is a "lease" in the English law sense but whether it is a "lease" as defined by section 105 of the Transfer of Property Act.

That section is worded as follows:

"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent."

I have italicised the words that raise some of the difficulties.

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With the above may be contrasted the definition of a "sale" contained in section 54 :

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

It will be noticed that elsewhere in the Transfer of Property Act when speaking of transfers by way of "sale" of "immovable property" the terms "buyer" and "seller" are used. These terms in English jurisprudence are usually restricted to the transaction of sale of goods, the terms vendor and purchaser being applied to sales of land. In other particulars it may be that the terminology of the Transfer of Property Act is different from that adopted in English law.

In the present case one is concerned with the following facts :

The property in question belonged at all material times to an impartible zamindari.

The zamindar made an oral grant of a village, part of the said zamindari, to a junior member.

Under the Hindu law relating to impartible estates, junior members of an impartible zamindari have very restricted rights. One such right is the right to maintenance. At one time (indeed at the time of the oral arrangement here in question) it was thought that the zamindar's powers of alienation were restricted. Decisions have since considerably modified the law as it was thought to be in the eighties of the last century. Those decisions were considered recently by RAMESAM J. and one of us in *Ulagalum Perumal Sethurayar v. Subbalakshmi Nachiar*(1).

The term of the above-mentioned oral grant was unlimited. It was a grant made in lieu of maintenance, present or future. It was a grant which imposed an obligation upon the grantee, viz., to pay annually a sum of Rs. 800.

It was a grant that conferred a benefit upon the grantee, viz., the right to enjoy a certain village, that is, the income thereof. That income, after the Rs. 800 had been paid, amounted in later years to Rs. 1,200 per annum.

The above are our conclusions of fact as to the terms of this oral arrangement. They are conclusions derived from inferences, and such inferences are largely based upon the probabilities of the case rather than upon evidence that can be wholly accepted

of the words used in any conversations which transmitted from mouth to ear the terms of this arrangement.

It is impossible to say whether this arrangement was come to at one time, or whether the zamindar was first pressed for maintenance and then agreed, in consideration of that claim being given up, to make a grant, on favourable terms, of the village, and whether thereafter and in performance of that contract the suggested transfer was put forward by the zamindar and accepted by the junior member, or whether the whole thing was settled at one time, the zamindar agreeing to grant and the junior member agreeing to receive the right to enjoy the income from the village, the junior member, in consideration thereof, giving up his claim to maintenance, present or future, and agreeing to pay Rs. 800 a year.

This uncertainty as to fact is mentioned because it may be thought to be material, in considering whether a transfer falls within the Transfer of Property Act, to consider the transfer itself, not, it may be, the wider arrangement of which the transfer is one part. On the other hand it may be thought that in considering whether an arrangement falls within any of the defined terms, e.g., the term "lease", one must look at the arrangement as a whole.

We therefore find that it is not proved that the grant was separately arranged, nor is it proved that the grant was not separately arranged. We infer that the grant was made following upon, or, alternatively, as an integral part of, a family arrangement of the nature above indicated.

In *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*(1) the material facts, on the present point, were as follows :—

A zamindar executed a usufructuary mortgage by way of lease for nineteen years to one R.C. The debt increased. R.C. died leaving his heir, one L.C., who made a new arrangement with the zamindar, the zamindar's brother and the brother's son (the heir) and another son. The zamindar was to receive a sum down (borrowed from L.C. and added to the debt), transfer the zamindari to the heir, and receive maintenance from him at Rs. 250 per annum. The mortgagee, in lieu of interest, took eighteen villages on usufructuary mortgage, paying peishoush and road-cess to Government and maintenance at Rs. 270 per mensem to the zamindar.

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Thus the transaction appears to have been a family arrangement plus a settlement with a stranger-mortgagee involving usufructuary mortgage of part of the zamin to the mortgagee and the transfer of the whole of the zamin to an heir in return for maintenance to be paid partly by the mortgagee and partly by the heir.

It was assumed (at page 384) that such a transfer must be by a registered deed. The transfer in question (at page 384) would appear to be the transfer of the zamin to the heir.

In *Varada Pillai v. Jeevarathnammal*(1) one question was whether A, a woman, had disposed of the suit properties during her lifetime. She and R, another woman, were registered owners of two moieties and they jointly presented a petition to the Collector in which they recited that they had given away two villages as stridhanam to D and asking for the villages to be transferred in the name of D. The petition concluded: "The said D shall hold and enjoy them with power to alienate, etc.". The Collector granted the petition and registered the transfer accordingly.

The Privy Council observed at page 249 :

"It was not contended before the Board that the above transactions effected a valid gift of the property to D; for such a gift must, under section 129 of the Transfer of Property Act, be made by registered deed."

In *Madam Pillai v. Badrakali Ammal*(2) it was held by a Full Bench of this High Court that a transfer of property by a husband to his wife to be enjoyed by her during her lifetime in discharge of future maintenance is not a gift or sale and may be made without writing.

This decision appears largely to turn upon the meaning given to the word "price" (see *per* SCHWABE C.J. at page 617). A reference to the Oxford Dictionary will show that price has as its primary meaning "money, or the like paid for something". "Payment" can be made partly in goods; *Saxty v. Wilkin*(3). That decision seems to show that if the transfer, though part of a family arrangement, had been of the ownership of property in return for a money payment, instead of in return for the relinquishment of a maintenance claim, it would have

been a sale requiring to be in writing. In the present case a further difficulty arises owing to the fact that in section 105 "price" and "money" are both used.

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KUMARASWAMI SASTRI J., however, in that case raised the wider question, also now raised in this case, viz., whether, if the transaction is treated as a settlement of family affairs, it need be in writing. He stresses the fact that partition under Hindu law can be made without any document.

COUTTS TROTTER J. observes that

"a trained English lawyer would never use the word 'price' unless it be to connote something other than the frequently familiar phrase 'valuable consideration'".

The trouble we feel with this kind of reason is that the Transfer of Property Act is constantly using expressions that an English lawyer would not use in England, e.g., buyer and seller of land. The reason may be to prevent English decisions which turn upon the use of words of art being applied in India where similar words have different meanings. Clearly "lease" in the Transfer of Property Act means something different from "lease" as used in the English law of landlord and tenant. In *Zamindar of Poluvaram v. Maharaja of Pittapuram*(1) BEASLEY C.J. and CURGENVEN J., at pages 170, 171, 179 and 180, followed the above decision and adopted the meaning given to the word "price", BEASEEY C.J. also relying on this point upon *Queen-Empress v. Appavu*(2) and upon *Samaratmal Uttamchand v. Govind*(3). In *Made Gouda v. Chenne Gouda*(4) OGDERS J. cited with approval NAPIER J.'s decision in Second Appeal No. 225 of 1920 where he considers the decision in *Girhi Rani Misrani v. Chandra Lal Kanth*(5):

"I know of no authority for the proposition that the formal requirements of the Transfer of Property Act can be avoided by calling a transaction by a particular name under the Hindu law."

ODGERS J. had, however, there to consider a transfer quite different to anything here, the transfer being to a stranger, though part and parcel of a wider transaction involving partition between members of the family.

(1) (1930) I.L.R. 54 Mad. 163. (2) (1885) I.L.R. 9 Mad. 141.
(3) (1901) I.L.R. 25 Bom. 696. (4) (1925) 49 M.L.J. 150.
(5) (1912) 17 C.W.N. 62.

(1) (1919) I.L.R. 43 Mad. 244 (P.C.).
(2) (1922) I.L.R. 45 Mad. 612 (F.B.).
(3) (1843) 11 M. & W. 692. 152 ER 654.

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The other cases cited, such as *Abhiram Goswami v. Shyama Charan Nandi*(1) and *Venkatachariar v. Rangasami Aiyar*(2) which deal with the difference between a conveyance of ownership and the grant of the right to enjoy in perpetuity and the existence of the incidents of leasehold terms in the latter case including that of forfeiture in the case of a perpetual lease, do not carry the matter further.

There thus appears to be an almost complete absence of authority on the question. We put on one side the fact that the plaint speaks of a perpetual lease. One has to use some expression when speaking of an arrangement and the question is not whether this transaction amounts to a lease in some sense but whether it amounts to a lease in the sense of the Transfer of Property Act.

We notice that in the case of the other grants by this zamindar to junior members which are evidenced in writing the sum reserved is called *poruppu* and the terms of transfer suggest the grant of an absolute estate rather than the giving of a lease, i.e., confer the power of sale. These other grants only appear as leases in that an annual payment is reserved. We have no reason to doubt that the oral arrangement was similar in nature.

In these circumstances we refer for the opinion of the Full Bench the following question :

"Whether the transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money, amounts to a lease within the meaning of the Transfer of Property Act, so as to be without effect unless in writing registered, or whether such a transaction should be regarded as a family arrangement and, if so, whether it is effective though oral."

As to the remaining questions I have had the advantage of reading the judgment of my learned brother with which I agree and to which I have nothing to add.

VARADACHARIAR J.—This is an appeal by the first defendant against the decree directing delivery of possession to the

(1) (1909) I.L.R. 36 Cal. 1003 (P.C.).

(2) (1918) 36 M.L.J. 532.

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plaintiffs of a village called Kiranur in the Sivaganga zamindari and payment of mesne profits. The plaintiffs claimed title either as lessees or as purchasers from one Singa Dorai to whose father, it is alleged, this village was given by a former zamindar absolutely, on a perpetual lease, by way of maintenance, as the result of a family arrangement shortly before the whole zamin was leased to certain European lessees in May 1887. The first defendant claimed to be in possession as a usufructuary mortgagee from the zamindar's daughter, Vengu Nachiar, who, in turn, claimed to have acquired the rights of one Sivachidambara under a term-lease granted by the European lessees, to enure up to the middle of 1918. By another transaction which, the plaintiffs allege, was entered into by the zamindar on behalf of the said Vengu Nachiar, a leasehold interest created by the plaintiff's predecessor in title and enuring only up to the middle of 1909 had been acquired by the zamindar, and the present suit was instituted in December 1919 on the footing that the European lessees had no power to grant the lease relied on by the first defendant and that the first defendant, by virtue of his claim under Vengu Nachiar, was entitled to remain in possession only up to the middle of 1909, under the other lease. The first defendant contested the truth and validity of the permanent lease arrangement set up by the plaintiff, insisted on the validity of the lease granted by the European lessees and also raised pleas of adverse possession and *jus tertii*. The plaintiffs in turn contended that the first defendant was estopped from disputing the right set up by the plaintiffs in themselves and their predecessors in title.

Of the issues framed in the lower Court, issue (iv) raised the question of the truth and validity of the permanent lease, issue (iii) related to the right in which Vengu Nachiar got into possession, issue (v) raised the plea of adverse possession, issue (vi) covered the plea of *jus tertii* and issue (ix) related to estoppel pleaded by the plaintiffs. The learned Judge overruled the pleas of limitation and *jus tertii* and found in favour of the plaintiffs on the truth and validity of the permanent lease. As to estoppel, he was of opinion that, in one view, the first defendant would be estopped, but as he had found in the plaintiffs' favour on the question of title, he thought it unnecessary to pursue the question of estoppel further. In the arguments before us all the above pleas have been pressed by the one side or the other.

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It will be convenient to state at the outset certain facts which are practically beyond dispute. Prior to 1877 the Sivaganga zamindari was held by Rani Katama Nachiar and she had made numerous alienations by way of permanent leases and term leases. In a dispute as to whether her own children or her elder sister's son was to succeed to the zamindari, the latter, named Dorasinga Tevar, was held entitled to succeed. As many of the zamin villages were in the possession of alienees, the new zamindar had to take steps to recover possession thereof and he found it convenient to create new leases, presumably on favourable terms, and leave it to his lessees to institute suits against the Rani's alienees. One such lease by the new zamindar was Exhibit A relating to the suit village. It was for a period of fifteen faslis from 1st July 1880 and provided for payment of Rs. 800 per annum to the zamindar. This leasehold interest was assigned to the zamindar's wife by Exhibits A-1 and A-2 in 1882 and in 1883, it is said, the zamindar's wife made a grant of this interest to one of her junior sons by name Vadugayya Tevar. By Exhibit A-3, dated 13th February 1886, the remaining term of this lease was assigned by Vadugayya to one Krishnan Chetti of Sivaganga. It was for a cash consideration of Rs. 700 and the assignee was directed to pay to the zamindar the rent of Rs. 800 per annum reserved under the original lease. It was also provided that, on the expiry of the lease, i.e., at the commencement of fasli 1305, the assignee should give up possession of the village to the zamindar. Krishnan Chetti accordingly continued in possession down to 30th June 1895; what happened between him, the zamindar and the European lessees between 1st July 1895 and 29th March 1896 will be discussed later on, as it is one of the matters in dispute between the parties.

The zamindar who granted the lease under Exhibit A had five sons, the eldest of whom would succeed to the zamindari in due course. Being anxious to make proper provision for the maintenance of the other sons, the zamindar executed a will, Exhibit N, on 21st July 1882. Some question seems to have been raised in the lower Court against this will; but the finding in favour of the will has not been assailed before us. It would appear from Exhibit N that at that time the sons were being given every month whatever was required for their maintenance and the will provided that this practice should

continue unless any of the sons was unwilling so to receive. In that contingency, the will directed that a village called Tiruvalur should be given to Vadugayya Tevar for his maintenance and other villages were similarly indicated for the other sons. The zamindar's idea was that each of the sons should be in a position to get about Rs. 100 a month from the villages to be granted to them, but as the villages might yield not exactly that amount but something more as net income, it was suggested that out of the net income, Rs. 1,200 per annum should be deducted as for maintenance and the balance settled as *poruppu* payable by the grantee to the zamindar. This arrangement for payment of *poruppu* has an important bearing on the question of law raised in the case, namely, the necessity for a registered document to evidence the alleged family arrangement of 1887; its nature will be more fully discussed when dealing with that question.

The zamindar's will (Exhibit N) further shows that he thought Rs. 100 a month too low an allowance for his sons but as the zamindari was then heavily indebted, he could not provide a more liberal allowance at that time. Clause (v) of the will accordingly directed that as soon as the loans were discharged and the zamindari came to a good condition, the eldest son should give for the maintenance of each of the other four sons, villages likely to yield an additional net income of Rs. 1,200 per annum and the villages so granted should be enjoyed hereditarily. This clause has a material bearing on the probability or otherwise of the alleged family arrangement of May 1887, because, by the European lease then entered into, the zamindar was making arrangement for the discharge of all his debts. In this clause also, the fixing of a *poruppu* after allowing for a net income of Rs. 1,200 per annum is contemplated.

Though the will contemplated Tiruvalur being given to Vadugayya Tevar only after the testator's death, he seems to have preferred to make the grant in his own lifetime and accordingly executed Exhibit XIX (b) on 11th August 1882. It is described as a perpetual lease at Rs. 900 per fasli. There is no word in the original corresponding to the word "rental" in the opening portion of this document in the printed record. The grantee is directed to recover possession at his own cost from Katama Nachiar's alienees and to hold the village from son to grandson and so on with powers of alienation by gift,

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sale, etc. The amount of Rs. 900, it may be noticed, is made up of Rs. 693-2-6 for rent and Rs. 206-13-6 for probable road-cess. The significance of these provisions will also be later on adverted to. In January 1883 the same zamindar made further provision for Vadugayya Tevar by Exhibit XIX (c) which is described as a permanent lease of Thavasikudi at a rental of Rs. 74 made up of Rs. 50 being *Guthagai* (or rent) and Rs. 24 road-cess. The other terms are similar to those in Exhibit XIX (b) and it may be mentioned that both Exhibit XIX (b) and Exhibit XIX (c) purport to have been given on account of the grantor's affection for the grantee.

The zamindar, Dorasinga Tevar, died in July 1883 and was succeeded by his eldest son Periaswami alias Udayana Tevar. The efforts which were made to raise a loan of a large sum of money on favourable terms so as to conveniently discharge the numerous debts owing from the estate resulted in the arrangement commonly spoken of as the European lease, whereby a European syndicate advanced a loan of about seventeen lakhs to the zamindar on condition that it should be liquidated by their enjoying the zamindari for a term of twenty-two years. This was subsequently extended by ten years, in consideration of a further advance. As the law relating to the powers of the holder of an impartible estate was even then not considered free from doubt, the European lessees desired that the zamindar's younger brothers should assure them that the lease arrangement would be accepted by the brothers as binding upon themselves. This circumstance is of some importance as it is relied on by the plaintiffs to show the reason and the occasion for the grant of the suit village to Vadugayya Tevar at this time. As already stated, the previous zamindar had expressed a desire that Vadugayya should be given Rs. 1,200 per annum in addition to Tiruvalur. Judging from the road-cess of Rs. 24 provided for in Exhibit XIX (c), Thavasikudi would not at that time have sufficed to secure anything like Rs. 1,200 to Vadugayya Tevar. Now that the eldest brother was giving away the whole zamindari to the European lessees for a long term, it was only natural that Vadugayya should have claimed a further provision for himself; and the requisition of the European lessees that all the brothers should join in assuring the validity and binding character of the lease would have given him a convenient opportunity for insisting upon his claim being satisfied.

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A point was sought to be suggested before us, based apparently upon the print of Exhibit B-2 in the records, that Vadugayya Tevar had not in fact joined in giving the assurance and hence there is no force in this last argument of probability. No such point seems to have been raised in the Court below and Exhibit B-2 is somewhat misleading. The lease was drawn up both in English and in Tamil and both the copies seem to have been registered. The signature sheet in the English copy is not found in the copy now on record, but it is reasonably clear from the Registrar's endorsement on the English copy that Vadugayya must have joined in giving the assurance. The assurance is expressly provided for in clause XXXI of the lease and it is hardly likely that the European lessees would not have insisted on Vadugayya signing the document in token of his being bound by that assurance.

The scheme of Exhibit B-2, the European lease, was that the lessees should enjoy the whole zamindari, but by clause XXV it was provided that "the leases given to the uterine brothers, etc., of the zamindar mentioned in Schedule C are not to be interfered with by the (European) lessees beyond collecting the *poruppus* or rent already fixed on their respective leases". Schedule C is headed "list of pannai lands, etc., allotted Villagewar and Endalwar, for the maintenance of the relatives" of the zamindar; and in that schedule we find that, against Vadugayya's name, the suit village Kiranur is mentioned in addition to Tiruvalur and Thavasikudi. This *prima facie* supports the plaintiffs' contention that about this time there must have been an arrangement between the zamindar and Vadugayya by which Kiranur was allotted for the latter's maintenance. On behalf of the appellant, the learned Advocate-General suggested that the reference may possibly be to the term lease, Exhibit A. It is not possible to accept this suggestion. The term lease was not in favour of Vadugayya at all and much less was it an allotment for maintenance. It is true that Vadugayya's mother, when she obtained an assignment under Exhibits A-1 and A-2 of the remainder of that term, gave it to Vadugayya, but, as Vadugayya had parted with it in 1886 under Exhibit A-3, he had no interest in it on the date of Exhibit B-2. The *prima facie* inference in the plaintiffs' favour arising from Schedule (c) of Exhibit B-2 cannot therefore be held to have been rebutted.

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The subsequent conduct of Vadugayya's widow on the one hand and of the zamindar on the other is more consistent with the truth of the arrangement than otherwise.

[His Lordship discussed the evidence and proceeded : —]

We concur in the learned Judge's conclusion that the grant of the suit village to Vadugayya Tevar, on the terms alleged in paragraph 6 of the plaint, is true in fact.

Proceeding now with the narration of events as they bear on the other questions raised in the case, Vadugayya's widow died somewhere about 1889 and the zamindar applied to get himself appointed as guardian of the person and property of the three minor sons of Vadugayya. For reasons which it is not possible to gather from the present record, this attempt was resisted by the maternal relations of the minors and a maternal uncle (tenth witness for the plaintiffs) and a stranger were ultimately appointed guardians. It is not unlikely, as surmised by the learned Subordinate Judge, that this caused some chagrin to the zamindar; and that will, in some measure, explain his further moves in respect of the suit village. When the term under Exhibit A came to an end in June 1895, the zamindar tried to enter upon possession of this village. It is difficult to believe that he would have honestly thought that he had a right to do so, for even on the assumption that the story of the permanent grant of this village to Vadugayya is not true, it was the European lessees that would have been entitled to deal with it, because the exception in Schedule C to their lease read with clause XXV limited their rights in the suit village only so long as the lease to Vadugayya's branch continued. It is therefore not unreasonable to assume that the zamindar's interference must have been dictated by other reasons. On the other hand, he could scarcely have ventured only to assert his rights in the face of any determined attitude that the European lessees might take in the matter. He accordingly began by persuading some of the ryots in the village to side with him and execute a muchilika (Exhibit II), purporting to act on behalf of all the ryots. The correspondence that passed between him and the village officers at this time shows that he sought their aid in reducing the village into possession. Krishnan Chetti, who, for a small consideration, had obtained under Exhibit D the right to continue in possession for fourteen years from July 1895, was shrewd enough to know the weak point in the zamindar's case, and he managed

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to get from the European lessees a lease, Exhibit I, in the name of his natural brother. The argument advanced on behalf of the appellants that this assertion of right by the European lessees negatives the truth of the alleged perpetual grant of 1887 has very little force; on the other hand the fact that the European lessees executed Exhibit I for the same *poruppu* of Rs. 800 payable under the alleged perpetual grant and never attempted to claim anything like a full rent probalises the story of the maintenance grant. We agree with the learned Subordinate Judge that this was only a move on the part of Krishnan Chetti to checkmate the zamindar in his attempts to take possession of the village.

Once Krishnan Chetti had armed himself with Exhibit I, the zamindar who dared not assert any claim as against the European lessees had to come to terms with Krishnan Chetti; hence we find four documents coming into existence in March 1896. It is sufficient to refer here to two of them, Exhibit I (a) and Exhibit D-3. The zamindari account Exhibit L and Krishnan Chetti's account Exhibit H, whose reliability there is no reason to doubt, establish that Krishnan Chetti on the one side and the zamindar acting in the interests of his daughter, Vengu Nachiar, on the other side, were the real parties to these documents, though Exhibit I (a) purports to be between Vengu Nachiar and Sivachidambara, the natural brother of Krishnan Chetti, and Exhibit D-3 purports to be between Krishnan Chetti and Krishna Raju, a servant of the zamindar. It is clear that Krishnan Chetti received a consolidated sum of Rs. 7,500 as consideration for all these four documents and left the field free for the zamindar.

From Exhibit I (a) as well as from Exhibit L it would appear that these transactions of 29th March 1896 must have been intended by the zamindar almost from the beginning for the benefit of his daughter, Vengu Nachiar. But it is not possible to say if ever she got directly into possession or management. The zamindari accounts filed in the case suggest that the actual management of the village was looked after by the zamindar's men. In a written statement filed by Vengu Nachiar in January 1913 (Exhibit P) she stated that the zamindar gave this village to her *permanently* in September 1896; but the acquisition under Exhibit D-3 as well as under Exhibit I (a) was only of a short-term interest and this is all

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that she purported to mortgage under Exhibit III to the first defendant and his elder brother. For reasons which will presently appear, care was taken in Exhibit III to refer only to the right obtained under Exhibit I (a) and not to the right under Exhibit D-3. It is not disputed that the first defendant has been in possession since the date of Exhibit III. After the institution of this suit he obtained from the Court of Wards, acting on behalf of the present zamindar, a fresh lease of the suit village under Exhibit IV for a term of thirteen years; but it is unnecessary to make any further reference to this transaction as it cannot affect the determination of the suit.

On the facts above stated, it has been contended on behalf of the appellants that the title, if any, of the plaintiff and his assignor has been extinguished by adverse possession, as Vengu Nachiar and the first defendant have all along ignored the alleged right of Krishnan Chetti and the plaintiff's assignor. On the other hand it has been contended on behalf of the respondent that even if the alleged permanent grant for maintenance should be held to be untrue in fact or inoperative in law, the plaintiff's assignor must be held to have acquired a title by adverse possession and that the first defendant is, in any event, estopped from denying the title of the plaintiff's assignor without surrendering possession. We are unable to accede to any of these contentions.

Dealing first with the appellants' contention, it must at the outset be observed that there is a considerable body of authority to the effect that possession by a stranger should not be held to be adverse to a lessor as long as there is a term outstanding, because the lessor would not *prima facie* be entitled to sue for possession before the expiry of the term. (See the discussion in pages 1633 to 1636 of Mitra's Limitation, 6th Edn.) The observations in *Ambalapana Chetty v. Singaravelu Udayar*(1) must be understood in the light of the fact that the lease in that case was one from year to year and not for a definite term (see page 681). Assuming however that a lessor could sue a stranger for possession and therefore the stranger's possession could become adverse to the lessor in cases in which the tenant has been *dispossessed* by the stranger under a claim hostile both to the tenant and to the lessor, the facts of the present case will not suffice to attract the operation of

(1) 1912 M.W.N. 669.

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that rule. Whatever the motives or intentions of the zamindar might have been, he preferred to acquire the rights of Krishnan Chetti even under Exhibit D and was in that sense in possession as an assignee of the term. The fact that Vengu Nachiar was a party only to Exhibit I (a) and not to Exhibit D-3 and purported in Exhibit III to claim only under Exhibit I (a) and made no reference to Exhibit D-3 cannot in law affect the true position. As already stated, it is clear from the documentary evidence and the probabilities of the case that the rights under Exhibit D as well as the rights under Exhibit I were acquired by the zamindar for the benefit of Vengu Nachiar and if any suit for possession had been instituted by Krishnan Chetti or the plaintiffs' assignor against Vengu Nachiar or her assignees, it could certainly have been met by setting up the rights under Exhibit D-3. The observations in *Periya Aiya Ambalam v. Shunmugasundaram*(1) and *Yamunabai Narayan v. Lagmanna Basanna*(2) could be invoked only if there had been a trespass against or unlawful interference with the tenant's possession and not where the tenant's rights are acquired by a third person.

In support of the plea of estoppel, the respondents contend that Krishnan Chetti, who had taken Exhibit D, would be estopped from denying his lessor's title and that Vengu Nachiar being the real assignee under Exhibit D-3, she and the first defendant claiming under her could be in no better position. In dealing with this question, it must be remembered that the plea of estoppel is material only in the view that the alleged maintenance grant is not true and operative, for otherwise the plaintiff can succeed on the title itself. If the grant is not true or operative in law, the title must in July 1895 be deemed to have vested either in the zamindar or in the European lessees. If Krishnan Chetti obtained possession under Exhibit D and let the zamindar or Vengu Nachiar into possession under Exhibit D-3, there will be considerable force in the plea of estoppel. The decisions of the Privy Council in *Bilas Kunwar v. Desraj Ranjit Singh*(3), *Currimbhoy and Company, Limited v. Creet*(4) and *Pandit Chandrika Prasada v. B., B. & C. I. Ry. Co.*(5) deal with such a case. The

(1) (1913) I.L.R. 38 Mad. 903 (F.B.). (2) (1918) 52 I.C. 770.

(3) (1915) I.L.R. 37 All. 557 (P.C.). (4) (1932) I.L.R. 60 Cal. 980 (P.C.).

(5) (1935) 68 M.L.J. 552 (P.C.).

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respondents rely upon the decision of the majority in *Venkata Chetty v. Aiyanna Goundan*(1) and contend that the rule of estoppel as between landlord and tenant is not limited to cases where the tenant is let into possession under a particular lease but may also apply to cases where a person executes a lease or otherwise attorns to a lessor. But the qualifications recognised by the learned Judges in that case clearly show that the rule cannot avail the respondents in the present case. Under Exhibit A-3 Krishnan Chetti became the assignee of the rights under Exhibit A and that was a lease by the zamindar himself. Exhibit A-3 therefore directed him to surrender possession to the zamindar at the beginning of July 1895. The initial estoppel, if anything, was thus in favour of the zamindar and it might well be contended that Krishnan Chetty's duty was to surrender possession to the zamindar or those *validly* claiming under him. Exhibit D though executed in 1889 was to come into effect only from 1st July 1895 and if the permanent grant there asserted on behalf of Vadugayya's sons were true and valid, Krishnan Chetti could have continued in possession under it even after the expiry of the term under Exhibit A. But on the assumption that the lessors under Exhibit D had no title, the position would be that Krishnan Chetti had merely entered into a contract of lease under the mistaken impression that Vadugayya's sons had a title. When the time came for the lease to take effect he became aware that his lessors had no title and accordingly took Exhibit I from the European lessees. There is one error in the judgment of the learned Subordinate Judge in this connection. He observes that Krishnan Chetti *attorned* to the sons of Vadugayya. As stated already, no rent was payable under Exhibit D to the sons of Vadugayya and beyond the taking of Exhibit D and its subsequent assignment by Exhibit D-3, the record shows no other act which can be construed as amounting to an attornment by Krishnan Chetti to Vadugayya's sons. The lease which Krishnan Chetti took under Exhibit I from the European lessees naturally provided that on the expiry of its term he must give up possession to the zamindar. In these circumstances there seems to be no scope for the application of the rule of estoppel as between Krishnan Chetti and Vadugayya's sons. He may well plead that he took Exhibit D under a

(1) (1916) I.L.R. 40 Mad. 561 (F.B.).

mistake as to the lessor's title; at the worst, he may plead a constructive eviction by title paramount and it is immaterial that he did not actually surrender the possession which he obtained under Exhibit A-3 and not under Exhibit D; see *Alaga Pillai v. Ramaswami Thevan*(1).

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But even assuming, for the sake of argument, that there may be estoppel as between Krishnan Chetti and Vadugayya's sons, it does not necessarily follow that the same estoppel will bind Vengu Nachiar and those claiming under her. As stated already, care had been taken to make Vengu Nachiar a party only to Exhibit I (a) under which the right obtained under the European lessees was assigned. The fact that as a possible weapon of defence the zamindar, acting in the interests of Vengu Nachiar, took care to buy up any claim that Krishnan Chetti might have under Exhibit D cannot be held to bring Vengu Nachiar into privity with Vadugayya's sons so as to create an estoppel between them. In Exhibit D-3 the parties took care to say that Vadugayya was "said to be a lessee" of Kiranur. It may be that between July 1895 and March 1896 there was something like a scramble for possession between the zamindar and Krishnan Chetti and the story now put forward on behalf of the defence that the zamindar was in possession hostilely to Krishnan Chetti even before the date of Exhibits D-3 and I (a) may not be wholly true. The lands were in the occupation of tenants and each was trying to collect such rent as he could. In this sense it may even be held that possession passed only in March 1896 from Krishnan Chetti to the zamindar or to Vengu Nachiar. But it is not correct to assume that Krishnan Chetti's possession between July 1895 and March 1896 was only in the character of lessee from Vadugayya's sons, because he had also obtained Exhibit I from the European lessees though in his brother's name. There is even less justification for assuming that Vengu Nachiar obtained possession in March 1896 in a right traceable to the title of Vadugayya's sons as lessors notwithstanding the fact that she took care to obtain an assignment only of the rights under Exhibit I and never claimed to rely on any title acquired under Exhibit D-3. Pressed to its logical result, the respondents' argument would bind Vengu Nachiar and the first defendant by a twofold estoppel, one in favour of the plaintiffs' assignor and

(1) (1925) 49 M.L.J. 742.

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the other in favour of the zamindar and the European lessees; the question of title will thus in effect be set at large.

The plea of title by adverse possession put forward on behalf of the respondents also rests on the assumption that Vengu Nachiar and the first defendant must be deemed to have held possession from 1896 on behalf of Vadugayya's sons. For the reasons given in dealing with the question of estoppel, we are unable to accept this assumption and this claim of title in the plaintiffs by adverse possession is accordingly untenable. The appellants' plea of *jus tertii* rests upon the execution of Exhibit XIV in August 1900 by Pattanachami, one of the sons of Vadugayya, and of Exhibit XV in March 1901 by the plaintiffs' vendor, Singa Dorai, conveying their shares in the suit village to their father-in-law and wife respectively. The alienees under these documents never came forward to assert any rights thereunder and the documents have remained paper transactions. The learned Subordinate Judge has also held that the alienations were invalid as the executants were minors at the time. For proof of their age, he has mainly relied upon the statement of their age in Exhibit D. The learned Advocate-General has questioned the correctness of the statements in Exhibit D on the strength of the evidence of the tenth witness for the plaintiffs. It does not seem to us right to read that evidence as meaning that the age was given by a clerk. The recitals said to have been given by a clerk must refer to the terms of the document. As to the calculation based upon the witness's statement that there was a difference of two or two and a half years between the first two sons, we do not think much importance ought to be attached to a vague statement of that kind when the witness's recollection is far from precise, as shown by the fact that he first stated the age of Singa Dorai to be five at the time of Exhibit D and had later on to correct himself when he found that according to the horoscope, Exhibit J-2, the age of the last boy must have been about six and a half years at the time of Exhibit D. The age of the last boy as given in Exhibit D corresponds to his age as *per* the horoscope Exhibit J-2; when this is so, we see no reason for thinking that the statement of the ages of the other two boys in Exhibit D is not correct. The plea of *jus tertii* was therefore rightly overruled by the learned Subordinate Judge.

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It remains to deal with one more question of law raised on behalf of the appellants. It has been contended that, even if the arrangement alleged in the plaint be true in fact, it is inoperative in law as it has not been embodied in a registered deed as required by section 105 of the Transfer of Property Act. The Court below has held, and it has been maintained before us on behalf of the respondents, that the arrangement, though subject to the payment of a *poruppu*, is not a lease within the meaning of section 105, because the maintenance of Vadugayya was the consideration therefor and the transaction is in substance a grant subject to a burden. In addition to *Madam Pillai v. Badrakali Ammal*(1) (relied on before the lower Court), respondents' learned Counsel has drawn our attention to the decision in *Zamindar of Polavaram v. Maharaja of Pittapuram*(2) by way of analogy. The learned Advocate-General replies that, even taking these decisions to be correct, they do not really touch the present question, because the definition of a "lease" is not restricted to cases where a "price" is paid; he argues that the idea of making a provision for maintenance can at best only constitute the "motive" for the arrangement and if the parties chose to adopt a form of arrangement which falls within the definition of a "lease" in the Transfer of Property Act, the forms prescribed by law must be followed. He relies on the fact that the plaint itself speaks of the interest as being in the nature of a perpetual lease; and the admitted reservation of *poruppu* is, according to him, indistinguishable from a reservation of "rent", though it may be a favourable rent.

As we propose to refer this question to a Full Bench for an authoritative decision on the point which is bare of authority, it is not necessary to do more than to indicate some of the considerations that may bear on the decision of the question. It may not be correct to speak of "maintenance" only as a motive in this case. The grantor was the holder of an impartible estate and the grantee was his brother for whose maintenance the zamindar was bound to make provision both as a matter of law and under the terms of his father's will. "Maintenance" would therefore be part of the "consideration" for the transfer and the question will therefore arise, on the analogy of the decisions in *Madam Pillai v. Badrakali Ammal*(1) and *Zamindar*

(1) (1922) I.L.R. 45 Mad. 612 (F.B.). (2) (1930) I.L.R. 54 Mad. 163.

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of *Polavaram v. Maharaja of Pittapuram*(1), whether a transaction for which the "consideration" is something in addition to the categories specified in section 105 will fall under that section. Further, that section speaks of a transfer "in consideration of" money paid or promised, etc.; could it have been intended to apply to a transaction whose avowed purpose is the provision of "maintenance" and a *poruppu* is fixed apparently because the village set apart for the purpose yields more than the proposed maintenance amount? The provisions of Exhibit N are significant in this connection, as showing that this is just the kind of arrangement that the father contemplated being made for the maintenance of the junior sons. Undue stress ought not to be laid on the description of the tenure in the plaint and in some of the documents as a perpetual lease; the suit transaction was admittedly oral and could at the inception have borne no particular description. The description "perpetual lease" might have been used for want of any other compendious expression by which a tenure of the kind intended could be referred to. On the other hand paragraph 6 of the plaint speaks of the village having been granted *absolutely* on perpetual lease; and when one turns to documents like Exhibits XIX (b) and XIX (c), it will be noticed that the arrangement is stated to have been made on account of the great affection that the grantor bore to the grantee and the language of conveyance employed in these documents, viz., that the grantee, his heirs and assignees should enjoy the village from son to grandson and so on, with powers of gift, sale, exchange, etc., with *Ashta Bhoga Dasa Swamya*, etc., treasures, minerals and so on, is much more apposite to an absolute grant (except for the reservation of a *poruppu*) than to the creation of a lease in the ordinary sense. As between the zamindar and his son or brothers, it is not ordinarily to be assumed that the relationship of landlord and tenant was intended to be constituted.

The reference to *poruppu* in these transactions remains to be dealt with. It may not always be accurate to translate it as "rent" in the sense in which that term is known to the law of landlord and tenant. It is one of the anomalies of Indian law that in the attempt to translate vernacular terms into corresponding English equivalents, the connotations of the

(1) (1930) I.L.R. 54 Mad. 163.

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words in the English law are unconsciously imported. For instance, the inappropriateness of defining the relationship between a zamindar and his ryot in terms of the law of landlord and tenant has often been pointed out and yet the payment made by the ryot to the zamindar still continues to be spoken of as "rent". In *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(1) WALLIS C.J., referring to inams held subject to payment of *jodi*, *kattubadi* or *poruppu*, speaks of the payment as a "small rent" and describes the tenures as being of the character of a permanent lease. It may be right enough to hold that such tenure-holders are not *owners* or *proprietors* within the meaning of Madras Act I of 1876; but, with all respect, it will not be correct to assimilate the position of the grantor and the grantee in such cases to that of "landlord" and "tenant". In the Indian law "under-tenure" is not the same as "tenancy".

The learned Advocate-General relied on the decision of the Judicial Committee in *Maharaja of Jeypore v. Rukmini Pattamahdevi*(2) as an instance where their Lordships have applied the principle of law of "forfeiture" to similar tenures thereby indicating that they regarded the relationship as one of landlord and tenant. It may be observed that in that case the rent reserved was in their Lordships' opinion the principal matter (see page 601) and after all they say (at page 600) that they went at length into this aspect of the law of forfeiture, though it had not been raised in India, only because it was argued with much insistence at the Bar. As they found against the alleged denial of title, it ought not to be assumed that they would have applied the law of landlord and tenant to the case. The other portion of their Lordships' judgment, where reference is made to *Forbes v. Meer Mahomed Tuquee*(3), relates to what are known as grants burdened with a service. Even in such cases, the grantor is allowed a right of *resumption* in cases of contumacious refusal of service, but such "resumption" is not identical with the "forfeiture" known to the law of landlord and tenant.

"*Poruppu*" is defined in Wilson's Glossary as a low or quit-rent levied from lands originally granted in inam or rent-free. Its connotation is thus not identical with that of "rent"

(1) (1914) I.L.R. 38 Mad. 1128, 1130. (2) (1918) I.L.R. 42 Mad. 589 (P.C.).
(3) (1870) 13 M.I.A. 438.

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in the law of landlord and tenant. (See also Nelson's *Madura Manual*, Part IV, pages 39, 121, 139, 140 and 191.) The cases of *Vizianagaram Maharaja v. Suryanarayana*(1) and *Vizianagaram Maharajah v. Sitaramarazu*(2) show that it was not uncommon for zamindars in this Presidency to insist on a payment of kattubadi by grantees of inams from a prior zamindar. The tenure in such cases will be an inam and not a tenancy. Whether as a matter of sentiment or as a result of the supposed prohibition against alienation in the Permanent Settlement Regulation, grants whether by way of reward for past services or by way of maintenance were sometimes made in the southern zamindaries not by an absolute alienation but by the creation of an under-tenure. In such cases provision was sometimes made for the payment of a *poruppu* to cover the peishoush on the village granted [see *Vencataswara Yettiapah Naicker v. Alagoo Mootloo Servagaren*(3)], and also Exhibit W-1 in the present case where the *poruppu* was fixed at the *Nijudhi* or assessment for the alienated village; see also *Fischer v. Secretary of State for India in Council*(4), where the terms of Exhibit D in that case are set out, and the way that document was construed by the Privy Council in *Robert Fischer v. The Secretary of State for India in Council*(5). Relying on the statement in paragraph 6 under the title "family arrangements", in Halsbury's *Laws of England*, Vol. XV, the learned Advocate-General contended that by calling a translation a "family arrangement" the requirements of the law as to necessary formalities cannot be dispensed with. But unlike the Statute of Frauds, the Transfer of Property Act adopts it as a general principle in section 9 that a transfer may be made without writing in every case in which a writing is not expressly required by law. Hence, the question in this country has always been whether the transaction under consideration falls within one or other of the particular categories specified in the various chapters of that Act.

I concur with my learned brother in referring this question of law, in the terms stated in his judgment, for the opinion of a Full Bench.

(1) (1885) I.L.R. 9 Mad. 307 (P.C.). (2) (1895) I.L.R. 19 Mad. 100.
(3) (1861) 8 M.I.A. 327, 330, 331. (4) (1896) I.L.R. 19 Mad. 292, 297.
(5) (1898) I.L.R. 22 Mad. 270, 283 (P.C.).

ON THE REFERENCE—

Advocate-General (Sir A. Krishnaswami Ayyar) for second appellant.

V. Ramaswami Ayyar for third appellant.

V. Subramania Ayyar for second respondent.

Respondents one and three were unrepresented.

Cur. adv. vult.

The OPINION of the Court was delivered by VARADACHARIAR J.—My answer to the question referred is that the transaction does not constitute a lease within the meaning of section 105 of the Transfer of Property Act and is therefore effective though oral. The reasons in support of this conclusion have been set forth in the concluding portion of the judgment delivered by me when referring the question to a Full Bench and I have very little to add. The learned Advocate-General laid some stress on the fact that the decision in *Zamindar of Polavaram v. Maharaja of Pittapuram*(1), referred to by me in that judgment, has since been reversed by the Judicial Committee in *Zamindar of Polavaram v. Maharajah of Pittapur*(2). This does not affect the basis of my judgment, because, as I understand their Lordships' decision, they do not express disapproval of the principle of law applied by the High Court in *Zamindar of Polavaram v. Maharaja of Pittapuram*(1) as derivable from the judgment of the Full Bench in *Madam Pillai v. Badrakali Ammal*(3). The Judicial Committee hold that on the facts of the case before them it was not reasonable to hold that there was any *other consideration in addition to the price fixed for the sale.*

(1) (1930) I.L.R. 54 Mad. 163. (2) (1936) I.L.R. 59 Mad. 910 (P.C.).
(3) (1922) I.L.R. 45 Mad. 612 (F.B.).

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The High Court held that the promise by the vendee not to question the validity of the execution sale, under which the vendor had purchased other properties as well, constituted an additional item of consideration. But the Judicial Committee point out that as the period of thirty days allowed by law for questioning the execution sale had already expired, "this promise was valueless". Their further observation that at best the promise only resembled other *covenants* which any sale may contain has no bearing upon the present case. It is sufficient to say that, in winding up the discussion of this question, their Lordships emphasise the fact that both parties intended the transaction in question to be a sale and "in substance it was nothing but a sale". Applying this test, I am unable to hold that the transaction now before us was intended by the parties to be a lease or was in substance a lease.

PANDRANG ROW J.—I agree.

BURN J.

BURN J.—I find considerable difficulty in answering the question in the form in which it has been propounded. It does not seem to me to be possible to state the answer to the question in general terms. It seems to me quite conceivable that the transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money might amount to a lease within the meaning of the Transfer of Property Act, so as to be without effect unless in writing registered. I see much force in the

contention of the learned Advocate-General that, if a transaction is in fact a lease as defined in section 105 of the Transfer of Property Act, the requirements of the law regarding registration cannot be evaded merely by calling it a family arrangement. I think the answer would have to vary in accordance with the circumstances of each case. It seems to me not impossible to imagine a case of a junior member of a family of the holder of an impartible zamindari who might be himself interested in agriculture. If the holder of the zamindari transferred to him a portion of the zamindari in consideration of a premium with or without an annual rent reserved, one condition being that the junior member should withdraw his claim for maintenance, such a transaction might very well be a lease. The question however was argued before us with reference to the facts of the particular case and, considering it from that point of view, I have no difficulty in holding that the transaction in question was not a lease within the meaning of section 105 of the Transfer of Property Act. I do not think the learned Advocate-General was right in contending that the provision for maintenance was merely the motive for the transaction. It appears to me that the transaction itself was in its essence a provision for maintenance for the junior member. It is found as a fact that the amount of the *poruppu* or quit-rent was due to the mere accident that the annual value of the village granted happened to be Rs. 800 more than the amount thought suitable for the maintenance of the junior member. In other words, the payment of the *poruppu* was not the consideration for the grant to the junior

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member of the right to enjoy the village. On the facts found it seems to me quite clear that the zamindar was concerned solely with the provision for maintenance and was not making a lease. If the annual income from the village had been estimated at precisely Rs. 1,200 there would have been no question of *poruppu* and it would have been impossible to suggest that the transaction was a lease. The transaction appears to me to be in its essence of the nature of a grant of inam land. The facts deducible from the documents which were executed in the case of the other members of the family indicate that the zamindar considered himself to be making an out and out grant rather than a lease.

G.R.

APPELLATE CRIMINAL—FULL BENCH.

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

1936,
December 2.

IN RE MUTHU MOOPAN AND ANOTHER (ACCUSED),
PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), ss. 195 (1) and 403 (1)—Acquittal of an offence for which sanction under section 195 (1) (a) necessary, but not obtained—Subsequent trial for same offence after sanction obtained—Barred, if.

Where a Magistrate, who, though empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, is prevented by section 195, Criminal Procedure Code, from taking cognizance of the offence except

* Criminal Revision Case No. 327 of 1936 (Criminal Revision Petition No. 302 of 1936).

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on the complaint of the public servant concerned or of some one to whom he is subordinate, acquits the accused, after framing a charge and recording defence evidence, on the ground that the requisite complaint had not been filed, his trial, charge and judgment of acquittal are all void under section 530, Criminal Procedure Code; and section 403 (1), Criminal Procedure Code, is no bar to the trial of the accused for the same offence on a complaint filed by the public servant concerned.

Quaere as to the meaning of the word "*competent*" in section 403 (1), Criminal Procedure Code. Conflict of authority on the point noticed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Magistrate of Perundurai, dated 2nd April 1936 and made in Calendar Case No. 46 of 1936.

The material facts of the case appear from the judgment of KING J.

The case first came on for hearing before BURN J. who made the following

ORDER:—

This case should, I think, be posted before a Bench. The previous acquittal by the Sub-Magistrate, Erode, was not upon the merits, though a charge was framed and defence evidence recorded. It was based on the ground that there was no complaint by the public servant or by any one to whom the public servant was subordinate. In that case it seems clear that the Sub-Magistrate, Erode, had no jurisdiction to do *anything*; all his proceedings were null and void *ab initio* and could not be held to be a "trial" barring a second trial under section 403, Criminal Procedure Code. Vide *Ravanappa Reddi, In re*(1). The Sub-Magistrate, Erode, on this reasoning was merely wasting paper when he wrote out his order of acquittal; he could no more acquit than he could convict.

This point was not considered in *In re Ganapathi Bhatta*(2). That decision itself has been dissented from in the High Courts of

(1) (1931) I.L.R. 55 Mad. 343, 345.

(2) (1911) I.L.R. 36 Mad. 308.

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Allahabad in *Emperor v. Husain Khan*(1) and Patna in *Sheikh Mohammad Yasin v. King-Emperor*(2) and needs reconsideration in view of *Ravanappa Reddi, In re*(3).

Hence I think this case should be decided by a Bench.

The case came on for hearing before a Bench and the Court (MOCKETT and LAKSHMANA RAO JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The petitioners were charged by the police with an offence under section 353, Indian Penal Code, on the report of the Revenue Inspector of Modakurichi and they were acquitted after trial on the ground that the offence disclosed by the evidence was one under section 186, Indian Penal Code, which, under section 195, Criminal Procedure Code, cannot be taken cognizance of by any Court except on the complaint in writing of the Revenue Inspector or some other public servant to whom he is subordinate. The complaint out of which this revision petition arises was then filed by the Revenue Inspector and the question for decision is whether the previous acquittal operates as a bar to the present trial. This depends upon the competency of the Court which acquitted the petitioners to try the offence under section 186, Indian Penal Code, and, as pointed out by our learned brother BURN J. in the order of reference, there is a conflict of authority on the point. The decision in *In re Ganapathi Bhatta*(4) which is in favour of the petitioners has been expressly dissented from in *Emperor v. Ambaji Dhakya*(5), *Sheikh Mohammad Yasin v. King-Emperor*(2) and *Mohendra Nath Sahu v. Emperor*(6) and the Calcutta and Allahabad Courts also have taken a contrary view. In the circumstances we consider it desirable to have an authoritative pronouncement on the point. We would therefore refer the case to a Full Bench.

ON THE REFERENCE—

K. Desikachari for petitioners.—The words “Court of competent jurisdiction” occurring in section 403 (1), Criminal

(1) (1916) I.L.R. 39 All. 293.

(3) (1931) I.L.R. 55 Mad. 343, 345.

(5) (1928) I.L.R. 52 Bom. 257.

(2) (1926) I.L.R. 5 Pat. 452.

(4) (1911) I.L.R. 36 Mad. 308.

(6) A.I.R. 1934 Pat. 411.

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Procedure Code, refer to the character and status of the tribunal as construed in *In re Ganapathi Bhatta*(1). Sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent to the institution of proceedings before the tribunal. The schedule to the Code of Criminal Procedure and the power given by the Legislature to the Court decide the jurisdiction of the Court. Here, the Sub-Magistrate of Erode is competent to try the offence. The want of sanction as required by section 195 (1) (a), Criminal Procedure Code, is only an illegality; it does not affect or take away the jurisdiction of the Court to try the offence. The accused here have been acquitted previously by a Court competent to try them and they cannot be tried again, as section 403 (1), Criminal Procedure Code, is a bar to a subsequent trial.

The other High Courts, no doubt, put a wider construction on the words “competent jurisdiction”. The Madras High Court in the Full Bench case of *In re Rathnavelu*(2) does not adopt that view. Section 537, Criminal Procedure Code, as it stood before the amendment (Act XVIII of 1923), indicates that there can be a Court of competent jurisdiction even though there is prohibition against taking cognizance of the case for want of sanction under section 195, Criminal Procedure Code, and that the Legislature does not intend that the provisions of section 195 should affect the jurisdiction of the Court. So the words “competent jurisdiction” in section 403 (1) should be held to bear the same interpretation as in section 537, Criminal Procedure Code.

[KING J.—Section 537 deals with conviction. Section 403 (1) deals with acquittal. The difference between the two sections is pointed out in *Emperor v. Jivram Dankarji*(3). The omission of clause (b) in section 537 is deliberate.]

A Court may be acting illegally and against the provisions of the statute, but it cannot on that account be said to have no jurisdiction. The view adopted in *In re Ganapathi Bhatta*(1) is the correct one.

Parakat Govinda Menon for Public Prosecutor (L. H. Bewes) for the Crown:—All the other High Courts have given a wider interpretation to the words “Court of competent jurisdiction”

(1) (1911) I.L.R. 36 Mad. 308.

(2) (1933) I.L.R. 56 Mad. 996 (F.B.).

(3) (1915) I.L.R. 40 Bom. 97.

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in section 403 (1), Criminal Procedure Code. The jurisdiction of the Court does not merely refer to the character and status of the tribunal to try the offence, but also refers to want of jurisdiction on other grounds. The construction put in *In re Ganapathi Bhatta*(1) is a narrow one and it should be brought into line with the uniform view adopted by the other High Courts which is more reasonable and correct.

Section 28, Criminal Procedure Code, describes the offences cognizable by each Court. That section begins with "subject to the other provisions of this Code", etc. Section 195, Criminal Procedure Code, mentions certain offences, cognizance of which can be taken only on the complaint of the public servant concerned or of some public servant to whom he is subordinate. The offence under section 186, Indian Penal Code, is one of such offences. To take cognizance of it, the requirements of section 195, Criminal Procedure Code, must be complied with. Without taking cognizance—which is the first step in every case—the Court can neither inquire nor try. Therefore, the order of acquittal made by a Court, before which there is no legal complaint, is not an order by a Court of competent jurisdiction. And unless the acquittal is by a Court of competent jurisdiction, the plea of *autrefois acquit* in a subsequent prosecution, is no bar.

K. Desikachari in reply.—Sections 246 and 254, Criminal Procedure Code, suggest that a Court, even though it should not have taken "cognizance" of an offence, can convict in proper cases. It supports the view taken in *In re Ganapathi Bhatta*(1). Section 530, Criminal Procedure Code, in the several clauses therein seems to differentiate between power to take cognizance and other prohibitions. It does not oust the Court's jurisdiction in this case.

[In the course of the arguments, the following cases were referred to: *Ravanappa Reddi, In re*(2); *Emperor v. Husain Khan*(3); *Sheikh Mohammad Yasin v. King-Emperor*(4); *Emperor v. Ambaji Dhakya*(5); *Mohendra Nath Sahu v. Emperor*(6); *Abdul Rashid v. Harish Chandra*(7); *Banerjee v. Bepin Behary Ghose*(8); *Shankar Tulsiram v.*

(1) (1911) I.L.R. 36 Mad. 308.
(3) (1916) I.L.R. 39 All. 293.
(5) (1928) I.L.R. 52 Bom. 257.
(7) A.I.R. 1929 All. 940.

(2) (1931) I.L.R. 55 Mad. 343.
(4) (1926) I.L.R. 5 Pat. 452.
(6) A.I.R. 1934 Pat. 411.
(8) A.I.R. 1926 Cal. 691.

Kundlik Anyaba(1); *Emperor v. Jiwan*(2); *Emperor v. Menghraj Devidas*(3); *Kolandaswami Pillai v. Rajaratna Mudaliar*(4); *Sidh Nath Awasthi v. Emperor*(5); *King Emperor v. Krishna Ayyar*(6); and *Lalit Chandra Chanda Chowdhury v. Emperor*(7)].

Cur. adv. vult.

ORDER.

KING J.—On 10th September 1935 the Revenue Inspector of Modakurichi firka, Coimbatore District, made a complaint to the police under section 353, Indian Penal Code, against two accused, Mari Moopan and Muthu Moopan. A charge sheet was filed by the police before the Sub-Magistrate of Erode, who, after hearing the prosecution evidence, came to the conclusion that a *prima facie* case was made out not under section 353 but only under section 186. He thereupon framed a charge under that section and took the evidence for the defence. When the case came to be argued the plea was raised for the accused that the trial was illegal as section 195 (1) (a) of the Criminal Procedure Code enacts that no Court shall take cognizance of an offence under section 186, Indian Penal Code, except upon the complaint of the public servant concerned or some other public servant to whom he is subordinate. The Sub-Magistrate upheld this plea and acquitted the accused. The Revenue Inspector thereupon filed his complaint in person before the Court and the case was transferred to the file of the Sub-Magistrate of Perundurai. The

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(1) (1928) I.L.R. 53 Bom. 69. (2) (1914) I.L.R. 37 All. 107.
(3) (1919) 66 I.C. 657. (4) (1929) 58 M.L.J. 579.
(5) (1929) I.L.R. 57 Cal. 17. (6) (1901) I.L.R. 24 Mad. 641.
(7) (1911) I.L.R. 39 Cal. 119.

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accused petitioned the District Magistrate to withdraw the prosecution, urging that having already been acquitted of the offence they could not under the provisions of section 403 (1), Criminal Procedure Code, be tried for it again. The District Magistrate refused to withdraw it. They then raised their plea of *autrefois acquit* before the Sub-Magistrate. He naturally, with the District Magistrate's order before him, refused to entertain it. The accused have accordingly filed this revision petition in the High Court, and, as there is a conflict of authority on the point in issue, the petition has been referred to a Full Bench.

The material portion of section 403 (1) runs as follows :

"A person who has once been tried by a Court of competent jurisdiction for an offence and
acquitted of such offence, shall, while such
acquittal remains in force, not be liable to be tried again for the same offence".

The conflict of authority is concerned with the expression "Court of competent jurisdiction". In Madras it has been held [vide *In re Ganapathi Bhatta*(1)] with reference to the similar expression "competent to try" in sub-section (4) of section 403, that it refers only to the character and status of the tribunal, which means that a Second-class Magistrate, like the Sub-Magistrate of Erode, is always "competent" to try a "second-class case", such as an offence under section 186, Indian Penal Code. Four other High Courts on the other hand, Bombay, Calcutta, Allahabad and Patna, take the wider view that a Court which tries an offender on a complaint which it is forbidden by

(1) (1911) I.L.R. 36 Mad. 308.

the Code to entertain unless certain conditions are satisfied acts without jurisdiction.

I do not think it necessary to examine these cases, or to come to any final conclusion on the meaning of the word "competent" in section 403, Criminal Procedure Code. I prefer to approach the problem from a slightly different direction. The accused in this case are being prosecuted for an offence. They say they have already been acquitted of that offence. Is that acquittal valid; does it "remain in force"; has it ever had any force; can a Court take any notice of it?

The answer to these questions is in my opinion clear and is apparent at once on a perusal of section 530 of the Code. According to that section, if any Magistrate "not being empowered by law in this behalf" tries an offender his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, but was he empowered to try these offenders for this particular offence? Clearly not, for section 195, Criminal Procedure Code, prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void. His charge was void. His judgment of acquittal was void. There is nothing which the accused can compel the Court to recognise in support of a plea under section 403.

I accordingly hold that the order of the Sub-Magistrate of Perundurai refusing to drop the proceedings against the accused is right, and would dismiss this petition.

MUTHU
MOOPAN,
In re.
KING J.

MUTHU
MOOPAN,
In re.

PANDRANG
ROW J.

BEASLEY C.J.—I agree.

PANDRANG ROW J.—I agree and wish only to add that the conclusion we have come to is in consonance with the rule of English law on the subject laid down in *Rex v. Marsham. Pethick Lawrence, Ex parte*(1) by AVORY J. as follows :

“It is clear that in order to plead such a plea effectually—either a plea of *autrefois acquit* or *autrefois convict*—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd Edition, Volume I, page 455, that ‘the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him’.”

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

1937,
January 20.

AMINA BIBI (PLAINTIFF), PETITIONER,

v.

KADIR BATCHA ROWTHER (DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), sec. 7 (v)—Sec. 7 (iv) (c)—Applicability—Insolvent—Gift prior to insolvency in favour of his wife by—Property covered by, and taken possession of by Official Receiver as part of insolvent's estate—Donee's suit for declaration of her title to, and for possession of—Relief of possession—Mode of valuing—Court-fee payable in respect of.

The plaintiff sued for a declaration that a certain property gifted to her by her husband, who subsequently became an insolvent, was her property and for possession of the property

which had been taken possession of by the Official Receiver as part of the estate of her insolvent husband. AMINA BIBI v. KADIR BATCHA.

Held that the consequential relief of possession must be valued according to section 7 (v) and not according to section 7 (iv) (c) of the Court Fees Act and that the plaintiff must pay court-fee under section (7) (v) upon the total value of the property involved.

The strong current of opinion in the Madras High Court is in favour of the view that where the consequential relief is such as to fall directly under some other section of the Court Fees Act, the suit has to be valued under that special section and not under the general head of consequential relief which would make it fall under section 7 (iv) (c).

Koraga Gowda v. Somappa Gowda, (1932) 36 L.W. 793, and *Sobhanadri Rao, In re*, (1932) I.L.R. 56 Mad. 314, dissented from.

PETITION under sections 115 of Act V of 1908 and 107, Government of India Act, praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Coimbatore, dated 23rd August 1935 and made in Civil Miscellaneous Appeal No. 2 of 1935, preferred against the order of the Court of the District Munsif of Dharapuram, dated 29th September 1934 and made in Original Suit No. 336 of 1933.

R. Desikan for petitioner.

T. R. Ramachandran for respondent.

N. Srinivasa Ayyangar for Government Pleader (K. S. Krishnaswami Ayyangar) on behalf of Government.

JUDGMENT.

HORWILL J.—A suit was brought for a declaration that a certain property gifted to the plaintiff by her husband, who subsequently became an insolvent, was her property and for possession of the property which had been taken HORWILL J.

(1) [1912] 2 K.B. 365.

* Civil Revision Petition No. 1413 of 1935.

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KADIR BATCHA.
HORWILL J. possession of by the Official Receiver as part of the estate of her insolvent husband. The question that has been referred to us is whether the consequential relief of possession is to be valued according to section 7 (iv) (c) of the Court Fees Act or section 7 (v).

There is a long line of authority for the position that where the consequential relief is such as to fall directly under some other section of the Court Fees Act, the suit has to be valued under that special section and not under the general head of consequential relief, which would make it fall under section 7 (iv) (c). This principle was enunciated as long ago as in *Chinnammal v. Madarsa Rowther*(1) by BODDAM and BHASHYAM AYYANGAR JJ. and seems to have been accepted as axiomatic in the Full Bench case, *Arunachalam Chetty v. Rangasawmy Pillai*(2). At the very outset of the judgment of the Bench it is laid down :

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within clause 4, sub-clause (c), of section 7 of the Court Fees Act; but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly."

This decision of the Full Bench has been followed consistently in this Court. It is contended that this expression of opinion by the Full Bench was *obiter* but I have no doubt that it was a fully considered opinion in answer to the terms of the reference made to it; and even though it be *obiter*, I respectfully consider it to be a correct expression of the law which had been laid down in the earlier Madras cases and has been

(1) (1903) I.L.R. 27 Mad. 480. (2) (1914) I.L.R. 38 Mad. 922 (F.B.).

followed in a number of cases since. VENKATA-SUBBA RAO J. in *Ramakrishnayya v. Seshamma*(1) refers to this opinion and adopts it, and it came before the same Judge again in *Maroof v. Ayyakannu*(2) where it was argued that as it was a consequential relief it should fall under section 7 (iv) (c). That argument was repelled again by the weight of the authority just referred to. Since that decision the same principle has been upheld by VARADACHARIAR J. in *Sellammal v. Jothimani Nadar*(3) which was followed by BEASLEY C.J. in Civil Revision Petition No. 803 of 1935, where he says that because the plaintiff asked for possession, it must come under section 7 (v) and not under section 7 (iv) (c).

As against this current of authorities, four cases have been quoted. One is *Ramalinga Mudali v. Ramaswami Ayyar*(4) to which VENKATASUBBA RAO J. was a party. He refers to this case in *Ramakrishnayya v. Seshamma*(1) and says that in the earlier case it was held that where there was a prayer for possession, if it was a consequential relief, it would fall under section 7 (iv) (c), but that that suit was one relating to jurisdiction and the question whether it fell for the purpose of court-fee under section 7 (iv) (c) or under section 7 (v) was neither raised nor considered. Of the other cases, the earlier is *Koraga Gowda v. Somappa Gowda*(5) in which KRISHNAN PANDALAI J. expressed the opinion that if possession was a consequential relief it fell under section 7 (iv) (c); but the reason given by him for that

(1) (1934) 68 M.L.J. 369.

(3) (1935) 70 M.L.J. 308.

(2) (1934) I.L.R. 58 Mad. 1051.

(4) (1928) 29 L.W. 760.

(5) (1932) 36 L.W. 793.

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decision was one which, with all due respect for the learned Judge's opinion, I cannot accept. He says that the suit was primarily one for possession and the declaration sought was only ancillary to the prayer for possession. This in my opinion seems to be an excellent reason for holding that the case comes under section 7 (v) and not under section 7 (iv) (c); and the learned Advocate for the petitioner concedes the position that if the main prayer is one for possession and the prayer for declaration is only ancillary to it, section 7 (v) and not section 7 (iv) (c) applies. In *Venkatalal v. Kosaldasu Bavaji*(1), the third case relied on by the petitioner, the question whether section 7 (v) or section 7 (iv) (c) applied was not decided. The plaintiff in that case appealed and the applicability of section (7) (v) was not considered because it was clear that under section 7 (v) he would have to pay a higher court-fee than he had already paid; and the only question that arose before that Court was whether the plaintiff would be permitted to pay a lesser court-fee than that leviable under section 7 (iv) (c). The last case quoted on behalf of the petitioner is *Sobhanadri Rao, In re* (2) to which my learned brother was a party. That case was rather a peculiar one in which an inamdar sought to oust a tenant from possession, not so much because he wished to obtain possession but in order to assert his right to the kudivaram. In so far however as the learned Judges who decided that case applied a principle which seems in conflict with that applied by the Full Bench in *Arunachalam Chetty v. Rangaswamy Pillai*(3),

(1) (1930) 61 M.L.J. 39.

(2) (1932) I.L.R. 56 Mad. 314.

(3) (1914) I.L.R. 38 Mad. 922 (F.B.).

I am of opinion that the test applied in *Sobhana-*
dri Rao, In re(1) is not correct.

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In view of the fact that there is a very strong current of opinion in this Court and that the expressions of opinion to the contrary are not in my opinion of considerable importance, I have no doubt that the petitioner must pay court-fee under section 7 (v) upon the total value of the property involved.

It has been argued that the Madras Amendment to section 7 (iv) has altered the law as to the interpretation of the clauses of section 7 (iv); but it seems to me clear that it was never intended by the Legislature to alter the law as to the applicability of the sections of the Court Fees Act, but merely to settle a lower limit to the amount of court-fee payable under certain circumstances which came within the mischief of section 7 (iv) of the Act. This petition is therefore dismissed.

As regards costs, this petition is one between the plaintiff and the Government. The respondent is in no way interested in the result of the appeal. In fact, his interests, if any, are the same as the plaintiff's. I therefore dismiss the petition with the costs of the Government Pleader only. The respondent will bear his own costs.

MOCKETT J.—I agree. An argument has been addressed to us that a different view of this topic has been taken by the other High Courts in India. Cases have been cited showing that this is so. I think it is much too late in the day, in view of the trend of authorities in this presidency, to ask us to depart from the view taken in Madras.

MOCKETT J.

(1) (1932) I.L.R. 56 Mad. 314.

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MOCKETT J. The law governing the matter is clearly stated in the Full Bench decision in *Arunachalam Chetty v. Rangaswamy Pillai*(1). As I was a party to the decision in *Sobhanadri Rao, In re*(2), I think I should express something more than a bare agreement with what my learned brother has said. In that case, it will be observed that there was neither the argument which has been so fully put before us now, nor even the reference to the Full Bench decision. In the very special circumstances of that case, we took the view that, as the primary object of the suit was for a declaration, section 7 (iv) (c) was applicable. But, after hearing the present argument, it does appear to me that in view of the undoubted claim for possession which followed, the decision in that case, *Sobhanadri Rao, In re*(2), does not appear to be consistent with the view expressed in the Full Bench decision in *Arunachalam Chetty v. Rangaswamy Pillai*(1). The case law has been summarised by VENKATASUBBA RAO J. in *Maroof v. Ayyakannu*(3) and I agree with the views expressed therein.

I agree that this civil revision petition should be dismissed with costs of the Government Pleader.

A.S.V.

(1) (1914) I.L.R. 38 Mad. 922 (F.B.). (2) (1932) I.L.R. 56 Mad. 314.
(3) (1934) I.L.R. 58 Mad. 1051.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

A. SUBRAMANIA AYYAR (PETITIONER), PETITIONER,

v.

S. MEENAKSHISUNDARAM CHETTIAR AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

1937,
February 5.

Provincial Insolvency Act (V of 1920), sec. 34 (2)—“Debt provable under the Act” within meaning of—Debt not barred on date of insolvency petition but becoming barred before date of order of adjudication, if—Material date for purposes of sec. 34 (2).

For purposes of section 34 (2) of the Provincial Insolvency Act the material date is, in view of the provision in section 28 (7) of that Act as to “relation back”, the date of the presentation of the petition.

Held, accordingly, that a debt, which could have been enforced in a Court of law on the date of the presentation of the insolvency petition but the remedy by suit in respect of which had become barred by limitation before the date of the order of adjudication, was a debt provable under the Provincial Insolvency Act.

Nizam v. Babu Ram, (1933) I.L.R. 14 Lah. 730, and *Byramji Bomanji v. Official Assignee, Bombay*, A.I.R. 1936 Bom. 130, followed.

Venkata Hanumantha Rao v. Gangayya, (1928) I.L.R. 51 Mad. 594, *Sankaranarayana Aiyar v. Alagiri Aiyar*, (1918) 35 M.L.J. 296, *Rangiah v. Appaji Rao*, (1926) I.L.R. 50 Mad. 300, and *Atchuta Ramayyagaru v. Official Receiver, East Godavari*, (1935) I.L.R. 58 Mad. 1032, considered.

PETITION under section 75 (1) of Act V of 1920 praying the High Court to revise the order of the District Court of Tinnevely dated 14th February 1935 and made in Civil Miscellaneous Appeal No. 28 of 1933 preferred against the order of the

* Civil Revision Petition No. 1097 of 1935.

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v.
MEENAKSHI-
SUNDARAM.

Court of the Additional Subordinate Judge of Tinnevely dated 14th March 1933 and made in Interlocutory Application No. 209 of 1932 (in Insolvency Petition No. 14 of 1928, Sub-Court, Tinnevely).

T. Krishnaswami Ayyangar for petitioner.

A. Swaminatha Aiyar, S. Thyagaraja Aiyar and N. Rajagopala Ayyangar for respondents.

Cur. adv. vult.

VARADA-
CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This civil revision petition (under section 75 of the Provincial Insolvency Act) arises out of an application praying that the respondents' debts which were admitted by the Official Receiver may be expunged from the schedule. The matter has been dealt with in the Courts below on the assumption that the respondents' claim could have been enforced in a Court of law on the date of the *presentation* of the insolvency petition but that the remedy *by suit* had become barred by limitation before the date of the order of adjudication. The case has been argued before us on the same assumption.

Section 34 (2) of Act V of 1920 provides that all debts to which the insolvent is subject *when he is adjudged an insolvent (etc.)* shall be debts provable under the Act. The Courts below have upheld the respondents' contention that, in view of the provision in section 28 (7) as to "relation back", the "criterion date was the date of the filing of the petition"; in support of that conclusion, they have relied on *Venkata Hanumantha Rao v. Gangayya*(1), where it was held that a petition duly

(1) (1928) I.L.R. 51 Mad. 594.

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filed by a creditor might under section 16 be allowed to be *continued* by another creditor whose claim might (if a suit were necessary) have become barred between the date of the presentation of the insolvency petition and the date of the substitution. The trial Court further relied on the use of the expression "the commencement of the insolvency" in the course of the judgment in *Sivasubramania v. Theethiappa*(1). The latter case is clearly distinguishable; but, as regards the former case, it cannot be denied that the reasoning on which the decision has been based affords support to the respondents' contention, though it is perhaps possible to justify the decision on a different ground, viz., that the petition filed by a creditor must be regarded as a kind of *representative* proceeding and that the other creditors are in a sense parties thereto even from the outset.

There are two decisions directly in point, one of the Lahore High Court under the Provincial Insolvency Act [*Nizam v. Babu Ram*(2)] and the other of the Bombay High Court under the Presidency-towns Insolvency Act [*Byramji Bomanji v. Official Assignee, Bombay*(3)]; and they support the conclusion arrived at by the Courts below. In *Sankaranarayana Aiyar v. Alagiri Aiyar*(4) and *Rangiah v. Appaji Rao*(5) there are observations to the effect that on the ground of principle if not also as a matter of construction, the "relation back" doctrine must be held to govern the interpretation of the expression "order of adjudication" occurring in some of the later sections of

(1) (1923) I.L.R. 47 Mad. 120.

(3) A.I.R. 1936 Bom. 130.

(2) (1933) I.L.R. 14 Lah. 730.

(4) (1918) 35 M.L.J. 296.

(5) (1926) I.L.R. 50 Mad. 300.

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the Act. In *Atchuta Ramayyagaru v. Official Receiver, East Godavari*(1) both the learned Judges expressed the opinion that the restriction imposed by clause 2 of section 28 on the institution of suits by creditors must in view of section 28 (7) be held to relate back to the date of the presentation of the petition; and if this were the correct view, it would only be logical to hold that even for purposes of section 34 (2), the same is the material date; cf. *Harrison v. Kirk*(2).

Having heard the point fully argued we think it right to say that if the matter were *res integra*, we should have hesitated to come to the conclusion reached or suggested in the cases above referred to. The scheme of the English Bankruptcy Law since 1883 is to regard the date of the receiving order as the material date for questions like the present and to dissociate them from questions relating to the vesting of the title in the trustee (which only follows on adjudication) and from the doctrine as to "relation back" whose purpose and effect were explained by the Master of the Rolls in *In re Pollitt. Ex parte Minor*(3). The observations in some of the earlier English decisions (which have been quoted in the later cases) must, it seems to us, be understood with due regard to the state of the law when those cases were decided. The Provincial Insolvency Act however has not wholly followed the scheme of the English Act of 1883; not only has it not introduced the intermediate stage of a "receiving order" but it has departed from

(1) (1935) I.L.R. 58 Mad. 1032.

(2) [1904] A.C. 1.

(3) [1893] 1 Q.B. 455.

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modern English practice in fixing the date of the presentation of the insolvency petition as the material date for most purposes. In the notes appended to the Bill of 1905, it was stated that this was considered to be "in accordance with the law in force in the Presidency-towns" (11 and 12 Vic., c. 21). Further, the Act provides for the relation back, not of the trustee's title or of the commencement of the insolvency, but of the order of the Court. It is therefore not possible to say with confidence how far the Legislature in this country intended to dissociate or has in the result dissociated questions like the one now before us from the doctrine of "relation back" in the sense in which it has been introduced by the Act.

In a matter where certainty and uniformity of practice is more important than theoretical unassailability, we do not feel justified in dissenting from the view which has been expressed or assumed in the several cases above referred to in several provinces. Presumably creditors must for many years have acted on the view thus sanctioned and it seems reasonable to leave it to the Legislature to alter it, if necessary. On this ground we dismiss this revision petition, but without costs.

A.S.V.

APPELLATE CRIMINAL

Before Mr. Justice Mockett and Mr. Justice Horwill.

KING-EMPEROR, APPELLANT,

v.

BANDI PEDDA VENKATA NARI (FIRST ACCUSED),
RESPONDENT.*

Indian Penal Code (Act XLV of 1860), sec. 300—Intention and knowledge referred to in—Guides to the decision as to the existence of—Nature of material object and force used, if—Offence, if murder under sec. 302 or grievous hurt under sec. 326.

The accused was bathing in the street in front of his house causing "slush" in the road. P.W. 1 who was living in a house opposite protested and in the course of the quarrel the water-pot of the accused was broken. The accused then went into his house shouting abuse and brought out a rice pounder, which was a very heavy piece of wood, two yards long and between 2" and 3" in diameter. He struck P.W. 1 with it on the head causing a contused wound and he became unconscious. Then the aunt of P.W. 1 intervened. The first accused struck her also on the head with the rice pounder. She fell down unconscious and bleeding and died seven days later. Her skull was fractured. The Sessions Judge convicted the accused of an offence under section 326, Indian Penal Code, so far as the attack on the woman was concerned. On appeal by the Crown,

held that the case came within section 300, illustration (c), Indian Penal Code, and that the accused was guilty of murder under section 302.

The nature of the material object used and the force used are useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in section 300, Indian Penal Code, can be attributed to the accused.

Emperor v. Sardar Khan, (1916) I.L.R. 41 Bom. 27, and Referred Trial No. 72 of 1931 and Criminal Appeal No. 263 of 1931, discussed and doubted.

* Criminal Appeal No. 697 of 1936.

Referred Trial No. 132 of 1930 and Criminal Appeal No. 557 of 1930, followed.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (first accused) under section 302, Indian Penal Code, by the Sessions Judge of Cuddapah Division in Sessions Case No. 30 of 1936 on his file.

A. Narasimha Ayyar for Public Prosecutor (L. H. Bewes) for appellant.

C. R. Pattabhiraman for respondent.

The JUDGMENT of the Court was delivered by MOCKETT J.—This is an appeal by the Crown against the acquittal of the first accused of murder. He was in fact convicted of an offence under section 326, Indian Penal Code, and sentenced to rigorous imprisonment for three years. On another charge in relation to an offence committed against another person (P.W. 1) he was convicted under section 324, Indian Penal Code, and sentenced to rigorous imprisonment for one year, the sentences to run consecutively.

Now, with all respect to Mr. C. R. Pattabhiraman's arguments, we do not think there is any room for doubt with regard to the facts of this case which are simple enough. There is a wealth of evidence to establish them and we only propose to set out shortly what they amount to. The first accused lives opposite to P.W. 1 as will be seen in the plan. The first accused was bathing in the street opposite to his house, thereby causing "slush" in the road. P.W. 1 protested and asked him to go and bathe in his backyard. It seems to us a not unreasonable request. The accused said that he proposed to go on bathing where he

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was, whereupon P.W. 1 caught hold of his water-pot. So did the first accused and in the process the pot broke. Accused then went to his house shouting abuse and brought out M.O. 1, a rice pounder which is two yards long and between 2" and 3" in diameter. We have compared it with one of the maces carried by the chobdars of this Court. It is about 6" longer and slightly thinner than the top of one of those maces. It is a very heavy piece of wood and would appear to require the use of two hands by an ordinary man. With this rice pounder, the accused struck P.W. 1 on the head, and P.W. 1 is not able to tell us very much more because he stated that he did not recover consciousness until about an hour later. P.W. 1 was fortunate. He had "a contused transverse wound 1 inch by $\frac{1}{4}$ inch skin deep, on right parietal eminence $4\frac{1}{2}$ inches above right ear" described in Exhibit F as not of a serious nature. The next thing that happened was that the deceased woman, the aunt of P.W. 1, ran up crying out that her nephew was being killed, whereupon the first accused struck her on the head also with M.O. 1. She fell down unconscious and bleeding and died on 6th May 1936, this occurrence being on 29th April. In her case, her skull was fractured. The fracture is described as follows in Exhibit E:

"There is fissured stillat fracture of the frontal bone commencing from coronal section $1\frac{1}{2}$ inches to right of middle line, runs obliquely down to left orbital foramen passes through orbital plate ends at ethmoid bone. Measures $5\frac{1}{2}$ inches. From the middle of frontal part there was a fissured fracture goes transversely to the right $1\frac{1}{2}$ inches and then down to orbital ridge $1\frac{1}{2}$ inches and on right orbital roof $1\frac{1}{2}$ inches ends at ethmoid bone."

There was a clot under the fracture, the membranes were congested, and the doctor states that she died of meningitis due to the injuries received. There was a slight depression of the brain under the clot.

Now, the only question that can arise in this case—because, as we have already said, we are quite satisfied about the facts to which several witnesses have spoken—is what offence has the first accused committed? The learned Sessions Judge deals with that in paragraph 7 of his judgment. The following are some of the observations he makes in that paragraph; "From the lie of the case according to the showing of the prosecution itself, it is manifestly clear that there was no intention on the part of the first accused to cause Yerikamma's death." Why such an absence of intention should be so manifestly clear is not wholly apparent. But it is to be observed that the Judge states that the Public Prosecutor "very fairly admitted this". The Judge goes on to say that it is not clear from the evidence that there was any deliberate aim at the head. "It was not a premeditated act. It is a case of total absence of motive of any kind whatsoever. It was in a sudden fit of temper, infuriated by the sight of his broken pot, that the first accused in a momentary flash went into his house and came out with a rice pounder and dealt a blow with it." One may pick up a rice pounder "in a momentary flash", but it is difficult to understand how one can so describe going into a house, picking up an object and bringing it out. A point was made that the rice pounder was not fetched by the accused for the purpose of striking the deceased. That appears to be true. He fetched it for the

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purpose of striking P.W. 1 and, having struck P.W. 1, one might have expected that his temper would have abated. What did this woman do? All she did apparently was to object to her nephew being felled to the ground. For that, she received a blow on her head which killed her. But says the learned Judge: "The circumstances very clearly indicate to my mind both in respect of the intention and the knowledge on the part of the first accused nothing but an idea to chastise P.W. 1 and when Yerikamma *eo instanti* intervened, in the same fit of temper, he chastised her also in order apparently to drive her away." Such is the learned Judge's description of two blows from a weapon, because that is an accurate description of M.O. 1, which has only to be seen for one to appreciate that chastisement is a singularly inappropriate phrase to apply to any use of it. The Judge considers that "it is a fairly heavy weapon which, used as a weapon of offence, can surely cause death", and then surprisingly enough, after his observations about the chastisement, goes on to say, "it is undoubtedly a deadly weapon". The learned Judge ultimately finds that "it would not be a violent inference from the circumstances of the case that the first accused must have been aware that the act would result in grievous injury to Yerikamma". The result of his conclusions is that he feels convinced that the facts proved established an offence under section 326 so far as the attack upon Yerikamma was concerned. We are wholly unable to agree with either the reasons or the conclusions above set out. Under section 300, Indian Penal Code, it is, except in cases set out in that section, murder

(i) if the act by which the death is caused is done with the intention of causing death, or (ii) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or (iii) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (iv) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Now, it seems to us that when a man using great violence hits a woman, or indeed any one, with an object such as M.O. 1, it is not unreasonable for the Court to infer that he did so with the intention of causing death. But even if the Court is not prepared to draw that conclusion, can there be any doubt that the use of such a weapon must show an intention to cause such bodily injury as the offender knows to be likely to cause death? If neither of these inferences appealed to the trial Court, it must surely be that that act was done with the intention of causing bodily injury to any person. With what intention was the blow on the head struck with such a weapon as M.O. 1? Can it possibly be less than with the intention of causing such bodily injury as ensued? If that is so, it is in evidence by the doctor that the external injury was by itself sufficient in the ordinary course of nature to lead to death. He says: "As a matter of fact, it caused

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by itself death in this case, without any other supervening cause or factor." There was a hard clot already found under the fracture pressing against the brain causing "depression" in the words of the doctor. "This was what caused the inflammation of the membrane leading to meningitis. It should have formed immediately after the injury and should have caused unconsciousness." We have therefore no doubt whatever on the evidence that the lower Court could have found that the intention of the accused was to cause the death of this woman. Alternatively, it must be that one or the other of the intentions set out in section 300 is proved. In view of the nature of M.O. 1 which can properly and accurately be described as a "club", illustration (c) to section 300 exactly applied if the trial Judge found as he did that the accused had no intention to cause death. Illustration (c) reads as follows :

"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

It is sufficient for the purpose of our conclusion if we say that we find on the evidence that this case comes within section 300, illustration (c). If that is so, the accused is *prima facie* guilty of murder. Can the case be brought within any of the exceptions to that section? No attempt has been made to do so. It is not necessary to set out those exceptions. It is enough to say that none of the circumstances in this case bring the accused within the benefit of any of them. The only one that could possibly be urged is Exception 4, but

there was no sudden fight with the deceased nor was there a sudden quarrel with her. All that happened was that she endeavoured to intervene between the accused and P.W. 1 and was struck down with M.O. 1 the use of which on an unarmed woman obviously constitutes "taking undue advantage" and "acting in a cruel or unusual manner".

Now, the case law on this subject has been dealt with by the learned Counsel who have argued this case, and our attention has been drawn to certain decisions. The first to be noticed is the decision of the Bombay High Court reported as *Emperor v. Sardar Khan*(1). With regard to that decision, a careful perusal of the judgment shows that the learned Judges conceded that the Sessions Judge had followed what in a majority of cases had been held to be the right and logical course. He had inferred the intention from the extent of the injury and the nature of the weapon used which in that case was an iron-shod stick. The learned Judges then pointed out that juries are disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object if possible of reducing the offence. The learned Judges go on to say that they were disposed to take a more lenient view of the offence committed because death was caused by a single blow, and so it was more difficult to be absolutely certain what degree of bodily injury the offender intended. And they ultimately came to the conclusion that exceptional cases and circumstances warranted them, sitting as Judges, in taking what

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might be a jury's view rather than a Judge's point of view. In the result, the conviction for murder was altered to one for culpable homicide not amounting to murder. If the head-note of this decision correctly represents the finding of the learned Judges, it might well be said that this is a decision on the special facts of that case and lays down no general proposition of law. If it is intended, as it was cited before us, to establish the proposition that in the case of a single blow, whatever the weapon, the accused should not be convicted of murder, then we must record our respectful dissent. We still, however, consider that that was a special decision with regard to the special facts. So far as this High Court is concerned, our attention has been drawn to a decision in *Kesava v. Emperor*(1) in which the CHIEF JUSTICE and SUNDARAM CHETTI J. held that to strike a man on the skull using considerable force is an act so imminently dangerous that it must in all probability cause death and constituted the offence of murder under section 302. In the judgment occur the following words :

"We are satisfied that the appellant struck this very severe blow on the head of the deceased and caused his death. He must be taken to have known that to strike a man on his skull with a stick using considerable force was an act so imminently dangerous that it must in all probability cause death and that he did so without any possible excuse. This therefore is the offence of murder and nothing short of it."

We respectfully agree with that decision. There is however another decision, *Muthu Goundan v. Emperor*(2) in which JACKSON and CORNISH JJ. held that in a case where a son hit his father with

(1) A.I.R. 1931 Mad. 420.

(2) 1931 M.W.N 765.

a crowbar on the head on small provocation, he had committed an offence under section 324 and not the offence of murder. My learned brother HORWILL and myself have already expressed our view about that decision in Criminal Appeals Nos. 590 and 591 of 1936. We there stated :

"We only desire to say a word about that case, because it has been referred to us as an authority. The learned Judges held that an accused person who hit the deceased on the head with a crowbar which fractured his skull did not commit an offence graver than the one under section 324, Indian Penal Code. There might have been special circumstances in that case which induced the learned Judges to arrive at the decision which they did. We only desire to say that if, as is suggested to us, it is an authority for the proposition that a man who hits somebody else on the head with a crowbar causing death is guilty of nothing more than an offence under section 324, then we must record our respectful dissent."

It seems to us that the proper way in which to decide whether an offence has or has not been committed under section 300 read with section 302 is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. But it is obvious that the nature of the material object used and the force used must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in section 300, Indian Penal Code, can be attributed to the accused. With great respect to the learned Judges in the Bombay case to which we have referred, we think that it is a somewhat perilous course instead to call in aid the somewhat nebulous considerations which influence the conclusions of a jury.

The result of these conclusions is that this appeal will be allowed, and for the conviction

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under section 326 there will instead be a conviction under section 302. Many of the observations of the learned Sessions Judge are distinctly relevant on the question of sentence. This offence was committed without any long premeditation and certainly in a rage, and we do not consider that the capital sentence is called for. The accused will be sentenced to transportation for life. This sentence will run concurrently with the sentence of one year's rigorous imprisonment under section 324, Indian Penal Code, already imposed on him.

V.V.C.

APPELLATE CRIMINAL—FULL BENCH.

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

IN RE ATHAPPA GOUNDAN (PRISONER), FIRST ACCUSED.*

1937,
March 16.

Indian Evidence Act (I of 1872), ss. 27 and 30—Confessional statement by an accused to police leading to the discovery of material objects—How much of that statement admissible under sec. 27—Whether that statement could be taken into consideration against a co-accused under sec. 30.

Three persons were charged with the murder of one S. by strangling him. The prosecution evidence was, *inter alia*, to the effect that on the morning of 26th March 1936 the deceased was lying dead in or near a thatched house closely adjoining his tiled house; that on the night preceding at about "pattial time" the first and second accused were seen to go to the house of the deceased and were admitted by the third accused, the daughter of the deceased; that they were later seen by several persons whispering together in the deceased's compound where deceased was sleeping in a cot; and that later that evening the first and second accused were seen to leave the compound, the first accused carrying a bottle of toddy, and both intoxicated. On the 29th the first accused made a statement to a Sub-Inspector the purport of which was as follows:

"He said that at about 11 p.m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan, of Erangattur together killed Sennimalai Goundan *alias* Sottayyan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, . . . that that night . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Boyan of Kallipatti who got it from some other place, . . . that a small quantity was left over in one bottle only, that . . . (they) buried (1) the empty bottle (2) a rope and the cloth gag (and the cloth which was used for gagging the mouth) in a dung hill next to the cattle-shed in the same compound and the

* Referred Trial No. 4 of 1937 and Criminal Appeal No. 729 of 1936.

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other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us."

Subsequently, the Sub-Inspector took the first accused together with the village munsif to the dung hill and the accused took out a rope, a cloth and an empty bottle. The first accused then took the Sub-Inspector to the compound of the chatram and from near a log of wood dug up and produced another empty bottle.

The questions referred to the Full Bench were: (1) Whether the statement was admissible against the first accused and, if so, how much of it and (2) whether such statement or any part thereof could be "taken into account" against the second accused under section 30 of the Indian Evidence Act. The contention of the accused with regard to the first question was that the only portion of the statement admissible in evidence was the portion beginning with the words "they buried (1) the empty bottle" to the end.

Held by the Full Bench: With regard to question (1), the whole of the statement was admissible in evidence under section 27 of the Evidence Act, and with regard to question (2), the whole of that statement could be taken into consideration as against the second accused also.

If it is the accused's statement that connects the fact discovered with the offence and makes it relevant, then, even though the statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery of the fact.

Statements made by an accused person which are or may be provable under section 27 of the Evidence Act should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased.

Case law reviewed.

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the prisoner in Case No. 72 of the Calendar for 1936 on 25th

November 1936 and appeal by the said prisoner against the said sentence.

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The case first came on for hearing before MOCKETT and HORWILL JJ. who referred to a Full Bench the question of the admissibility of the confessional statement under sections 27 and 30 of the Evidence Act.

ORDER OF REFERENCE TO THE FULL BENCH:—

The three accused have been convicted of the murder of Sennimalai Goundan, the father of the third accused, by strangling him. The first accused has been sentenced to death and the second and third accused to transportation for life.

The third accused is the wife of P.W. 13. These two lived with the deceased till about a year prior to the latter's death when P.W. 13 left the house because, he says, the deceased and himself quarrelled. The third accused remained with her father the deceased. P.W. 13 was declared to be a hostile witness at the trial but there is other evidence that P.W. 13 left the house because of the third accused's intimacy with the first accused. It is also stated that the deceased and the third accused were quarrelling because of the frequency of the first accused's visits to the third accused. The second accused is an associate of the first accused. On the morning of 26th March 1936, it is in evidence for the prosecution that the third accused was heard to cry out that her father was dead. A number of prosecution witnesses thereupon went to the deceased's house. The preponderance of the evidence is that the deceased was lying dead in or near the thatched house closely adjoining the deceased's tiled house. The exact position of his body is not material for the purpose of this reference but a consideration of that aspect of the matter may be material for a decision on the facts. The medical evidence is quite definite that the deceased had been strangled. An inquest was held on 27th March from 6 to 9 p.m. and it was then that the witnesses for the prosecution were examined by the investigation officer. The prosecution witnesses with the exception of P.W. 13 who, as stated above, has been declared to be hostile agree that no explanation for the death of the deceased was suggested by the third accused. At the Sessions, but not before the Magistrate, the third accused stated that when

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she woke up she found her father hanging by a rope, that she raised an outcry, that the neighbours came and cut the rope, laid her father on the cot and carried the corpse to the thatched shed. There is no evidence for the prosecution supporting this belated statement. The medical evidence on the contrary is emphatic that the deceased died by strangulation and not by hanging. The evidence for the prosecution may be placed in the following categories: (i) The unfriendly relations between the deceased and the third accused over the latter's friendship with the first accused and there is further evidence that the third accused was anxious lest the deceased should transfer his property to a third person. (ii) On the night preceding the morning on which the body was discovered the first and second accused were seen to go to the house of the deceased and were admitted by the third accused. This was at about "pattial time". They were later seen by several witnesses whispering together in the deceased's compound where the deceased was sleeping on a cot. Later that evening the first and second accused were seen to leave the compound, the first accused carrying a bottle of toddy and both intoxicated. (iii) On the 29th at 6 a.m., it is in evidence that the first accused made a statement the purport of which is stated in Exhibit G: "He said that at about 11 p.m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur together killed Sennimalai Goundan *alias* Sottayyan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, . . . that that night . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Boyan of Kallipatti who got it from some other place . . . that a small quantity was left over in one bottle only that (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dung hill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us." Subsequently, the Sub-Inspector took the first accused together with the village munsif, P.W. 15, to the dung hill and the accused took M.O. I a rope, M.O. VI a cloth and M.O. VII an empty bottle. The first accused then took the Sub-Inspector to the compound of the chatram and from near a log of wood dug up and produced M.O. VII-a another empty bottle.

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From the above it will be seen that the admissibility in evidence of the statement in Exhibit G is of the utmost importance in this case. Mr. G. Chandrasekhara Sastri for the accused has argued that the only portion of this statement admissible in evidence is the portion beginning with the words "they buried (1) the empty bottle" to the end. The Public Prosecutor has contended that the whole of this statement is admissible under section 27 of the Indian Evidence Act. Many authorities have been cited before us from which it is evident that the position is far from clear in this Presidency. *Queen-Empress v. Commer Sahib*(1) is relied on as authority in support of his contention. We may, however, observe that the matter is very shortly discussed in that case. *Sogaimuthu Padayachi v. King-Emperor*(2), a judgment of SPENCER OFFG. C.J. given on a difference of opinion between DEVADOSS and WALLACE JJ., does not appear to be in accord with *Queen-Empress v. Commer Sahib*(1). The matter has been fully discussed in a decision of a Bench of this High Court (BEASLEY C.J. and SUNDARAM CHETTI J.) reported as *Periyakaruppan, In re*(3). In that case the learned Judges appear to be in complete accord with *Sogaimuthu Padayachi v. King-Emperor*(2), especially with regard to the following observations of SPENCER OFFG. C.J. at page 295: "But if the accused did use the words, then they are parts of the sentence in which he gave information which led to the discovery of the stolen property, and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible." The learned Judges lay down principles in this case which are in agreement with *Sogaimuthu Padayachi v. King-Emperor*(2) but in the result the Court decided that the confessional statement: "I have thrown into the Panayadi Oorani the aruvai with which I cut Seethai. I have buried in the hollow of a cut palmyra tree the ornaments which I took from her body" should be admitted eliminating the statement that it was the aruvai with which Seethai was cut and that the ornaments were those which he took from her body. It will thus be seen that in Madras there appears to be a definite variance in opinion—or at least considerable uncertainty—as to the admissibility of statements under section 27. In other Presidencies it will be seen from

(1) (1888) I.L.R. 12 Mad. 153. (2) (1925) I.L.R. 50 Mad. 274.
(3) (1930) 4 M. Cr. C. 250.

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the case law that opinion is by no means uniform. For instance, *Sukhan v. The Crown*(1) (a Bench of seven Judges) and *Amiruddin Ahmed v. Emperor*(2) are directly opposed to *Queen-Empress v. Babu Lal*(3) and *Lalji Dusadh v. King-Emperor*(4). The Bombay view appears to be in agreement with Lahore and Calcutta; see *Ganu Chandra v. Emperor*(5). *Mt. Jamunia Partap Lohar v. Emperor*(6) follows *Sogaimuthu Padayachi v. King-Emperor*(7).

The result of this position has become obvious for some time past in the handling of statements under section 27 of the Indian Evidence Act by the Sessions Courts of this Presidency. With certain exceptions there appear to be, broadly speaking, two schools of thought:

- (i) to exclude any statement at all but to record merely the fact that the accused showed the articles to the police, or
- (ii) to record that the accused stated that the article was in a certain place, e.g., "I have put the aruval in the well."

This procedure appears to be due to a commonly held view that the information in consequence of which the incriminating fact has been discovered must be limited to so much as would enable the police to find the incriminating object. FORD J. in his dissenting judgment in *Sukhan v. The Crown*(1) at page 303 comments on this position. In view of the importance of the question which has arisen we have not heard full arguments as to the admissibility of the above statement and have not decided it but instead refer it to a Full Bench:

A further point of law has arisen in this case on which an authoritative ruling is most desirable. It will be observed that in the statement made by the first accused he implicates the second accused. It has been argued that a confession under section 27 is not a confession such as is contemplated by section 30 of the Indian Evidence Act and cannot be taken into consideration against the second accused. We accordingly refer the following matters to a Full Bench:

- (i) Is the whole or any part of the following statement, "He said that at about 11 p.m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan, of Erangattur, together killed Sennimalai Goundan alias

(1) (1929) I.L.R. 10 Lah. 283 (F.B.). (2) (1917) I.L.R. 45 Cal. 557.
(3) (1884) I.L.R. 6 All. 509 (F.B.). (4) (1927) I.L.R. 6 Pat. 747.
(5) (1931) I.L.R. 56 Bom. 172. (6) A.I.R. 1936 Nag. 200.
(7) (1925) I.L.R. 50 Mad 274.

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Sottayyan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, . . . that that night, . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Boyan of Kallipatti who got it from some other place, . . . that a small quantity was left over in one bottle only, that . . . (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dung hill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us," alleged to have been made by the first accused admissible against the first accused under section 27 of the Indian Evidence Act and, if yes, how much of it, and

- (ii) If the answer to No. (i) is in the affirmative, can such statement or any part thereof be "taken into account" against the second accused under section 30 of the Indian Evidence Act?

We may add that it will be seen from Exhibit G that certain parts have been excised by the learned trial Judge on the ground of inadmissibility and it has not been argued before us that such statements are now admissible. We have however directed that in order that the Full Bench before whom this matter comes may have the opportunity of giving the fullest consideration to this matter the whole of Exhibit G shall be typed and added to the record to be placed before the Bench.

ON THE REFERENCE:—

- G. Chandrasekhara Sastri for first accused.
N. Somasundaram for second and third accused.
Public Prosecutor (L. H. Bewes) for the Crown.
Cur. adv. vult.

JUDGMENT.

BEASLEY O.J.—The following questions have been referred to the Full Bench, viz.,

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(i) Is the whole or any part of the following statement

"He said that at about 11 p.m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan *alias* Sottayyan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it . . . that that night, . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Boyan of Kallipatti who got it from some other place, . . . that a small quantity was left over in one bottle only, that . . . (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dung hill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us."

alleged to have been made by the first accused admissible against the first accused under section 27 of the Indian Evidence Act and, if yes, how much of it; and

(ii) If the answer to No. (i) is in the affirmative, can such statement or any part thereof be "taken into account" against the second accused under section 30 of the Indian Evidence Act?

In the Order of Reference my learned brothers MOCKETT and HORWILL JJ., the referring Judges, directed that in order that the Full Bench may give the fullest consideration to this matter, the whole of Exhibit G which sets out the statement made by the first accused should be typed and added to the record to be placed before the Bench. This direction has been carried out and the Court translation of Exhibit G where it relates to the cloth buried in the dung hill reads as follows: "the cloth which was used for gagging the

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mouth". The learned Counsel for the appellants agree that that is the correct translation.

The facts of this case are sufficiently stated in the Order of Reference and I will therefore proceed to discuss section 27 of the Indian Evidence Act which my learned brothers in their Order of Reference correctly say has given rise to opinions which from the case law are by no means uniform. That section reads as follows:

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Divergent opinions have been given by Judges upon how much of statements made by accused persons in the custody of the police in consequence of which facts are thereby discovered can be proved, of which the following may be given as examples, namely, that the accused has buried the weapon with which he cut or stabbed the deceased in a certain place or has stolen property which he has pledged or disposed of with certain persons, or has with the property stolen done something, or has murdered someone and thrown the body into a well, or has buried a weapon, adding with which he stabbed or cut the deceased. Some Judges have taken the view that only such part of the statement as relates to the burial or disposal of the articles can be proved and that the further part that the article had been used by the person for stabbing or cutting, or that the property disposed of or pledged, etc., was stolen property must be excluded; other Judges have taken the view that the latter statements

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can also be proved; and the cases directly bearing on this question need very careful examination.

The first of these is *Reg. v. Jora Hasji and others*(1) the head-note of which reads as follows:

"Under section 27 of the Indian Evidence Act not every statement made by a person accused of any offence while in the custody of a police officer, connected with the production or finding of property, is admissible. Those statements only which lead immediately to the discovery of property, and, in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly, connected with the fact discovered, are not admissible."

This head-note is taken bodily from the judgment of WEST J. on page 244. In that case, one Lallu disappeared from his village. On a search being made, a quantity of human bones and two cloths were found in a field within the limits of the village of Baithal and the three accused were sent for by a chief constable on suspicion. One accused produced a bill-hook and a knife from a field; another accused produced a stick; and the two showed the scene of murder together, which was also pointed out the next day by another of the accused. In the statement of the facts of the case the words used by the accused whilst in the custody of the police are not set out and therefore I do not know what they were. WEST J., however, gives an instance of a statement a part of which

(1) (1874) 11 Bom. H.C.R. 242.

he says would be inadmissible. He says at page 244:

"For instance a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find', the prisoner has said 'I placed a sword or knife in such a spot,' where it was found, that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery is not admissible."

Further on he says:

"The effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though, as a whole, the statement would constitute a confession which the preceding sections are intended to exclude."

Next is *Queen-Empress v. Babu Lal*(1) a decision of a Full Bench. There, the accused gave information to the police to the effect that they had stolen a cow and a calf and sold them to a particular person at a particular place. As a result of this information the cow and calf were discovered. It was held that only the statement that the accused had sold the cow and calf to a certain person could be proved under section 27 but not the statement that the accused had stolen them. But BRODHURST J. in the course of his judgment expresses his opinion upon the meaning

(1) (1884) I.I.R. 6 All. 509 (F.P.).

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of section 27 by stating a case where a person was missing and fears were entertained that he had been murdered. The Sub-Inspector on receiving a report about this went to Rampur and, on his arrival there and whilst he was standing close to a well, one Gobind Kahar came up to him and said, "I give myself up; I am guilty" and then made a voluntary and full confession stating the particulars of the crime and the reason for committing it and concluded by saying: "The knife with which I committed the murder is, together with the body, in this well." The well was thereupon searched and the knife and the body with a knife wound through the heart were found. BRODHURST J. says that the Sub-Inspector, when giving evidence in Court as to the discovery of the corpse and the knife, was under the provisions of section 27 of the Act competent to say that he had searched the well and found the body and a knife owing to Gobind Kahar having given the information: "The knife with which I committed the murder is, together with the body, in this well." The learned Judge was, it is apparent, taking as an instance an actual case. It seems difficult to reconcile BRODHURST J.'s opinion with the views of the other Judges forming that Full Bench. They excluded the statement of the accused that they had stolen the cow and the calf. But according to BRODHURST J. if they had said that the cow and the calf which they stole they sold to Abdul Rahman, the whole of that statement could have been proved; and I am unable to see that it can make any difference because they stated first that they had stolen the cow and the calf and then that

they had sold them. I will refer to this case again later on. However, taking his view, the statement in either shape would have to be admitted. In *Adu Shikdar v. Queen-Empress*(1) it was held that section 27 was not intended to let in a confession generally but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gave evidence. In that case, the prisoner's statement was that he had robbed Kristo Rishi of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40. Kristo Rishi was the murdered man. NORRIS J. said that no facts deposed to were discovered by that statement of the prisoner; but this case is cited by learned Counsel for the first appellant in support of his argument because NORRIS J., at page 641, emphatically endorses the observations of STRAIGHT OFFG. C.J. in *Queen-Empress v. Babu Lal*(2), to which case reference has already been made, where he says:

"No judicial officer dealing with such provisions should allow one word more to be deposed to by the police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Section 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence;"

STRAIGHT OFFG. C.J.'s observations when applied to the facts of this case are, in my opinion, of greater assistance to the learned Public Prosecutor's argument than the appellant's and I will refer to them again later. The next case is a decision

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(1) (1885) I.L.R. 11 Cal. 635. (2) (1884) I.L.R. 6 All. 509 (F.B.).

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of this High Court, which has been relied upon successfully for many years in support of arguments similar to the appellants', viz., *Queen-Empress v. Commer Sahib*(1), a decision of MUTHUSWAMI AYYAR and PARKER JJ. They state that the reasonable construction of section 27 is that in addition to the fact discovered so much of the information as was the immediate cause of its discovery is legal evidence. The information given by the prisoner in that case was that he had deposited the cloths produced with the witnesses who delivered them up on demand and this information they held was the proximate cause of the discovery of the cloths and was admissible in evidence. The Bench then said :

"If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, viz., that of leaving the cloths with the witnesses, and on that ground it would not be the immediate cause of, or the necessary preliminary to, the fact discovered."

This opinion was clearly *obiter* because the prisoner had not made any such further statement and it was not necessary to consider what would have been the position had he done so. In *Manjunathaya v. King-Emperor*(2) I think that SADASIVA AYYAR J. had that case in mind when he stated that he was bound by authority and that but for it he should himself have held that any statement which forms a simple connected narrative leading naturally to the discovery of the stolen property is admissible in evidence and that only statements which are patently irrelevant

(1) (1888) I.L.R. 12 Mad. 153, 154.

(2) (1914) 26 M.L.J. 352

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to the discovery should be excluded. The statement made by the first accused in that case was that he and the second accused stole the missing money and that the stolen money would be found in a heap of rubbish close to the house. In view of what he considered binding authority he held that the earlier part of the statement was inadmissible. Another case is *Queen-Empress v. Nana*(1), a Full Bench decision. There, the accused was charged with dishonestly receiving stolen property. In the course of the police investigation he was asked by the police where the property was. He replied that he had buried it in the fields. He then took the police to the spot where the property was concealed and with his own hands disinterred the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was held that his statement that he had buried the property in the fields was admissible in evidence under section 27 of the Evidence Act as it set the police in motion and led to the discovery of the property, and the view taken by this High Court in *Queen-Empress v. Commer Sahib*(2) was followed. The Court ruled out the statement that he had "kept" the property because it was not necessarily connected with the fact discovered. In *Amiruddin Ahmed v. Emperor*(3) the prisoners appear to have made long statements although what they said is nowhere stated in the judgment. As a result of the statements facts were discovered. The statements set out the whole history of the

(1) (1889) I.L.R. 14 Bom. 260 (F.B.). (2) (1888) I.L.R. 12 Mad. 153.
(3) (1917) I.L.R. 45 Cal. 557, 570.

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investigation and it was held as in the other cases that only the particular information which led to the discovery could be proved. SHAMSUL HUDA J. observes :

" If, therefore, an accused person were to state to a police officer that he killed A with a knife and concealed the dead body at a particular place, all that is admissible, is the information that he had concealed the dead body in that place but the further information that he himself had killed A is not admissible under section 27."

Sukhan v. The Crown(1) is a decision of a Full Bench of seven Judges. The question there was : " A is being tried under section 302, Indian Penal Code, for having committed the murder of B, who is proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the time of his disappearance B was wearing certain ornaments, but these ornaments were not found on his body at the time of its recovery from the well. During the investigation A is alleged to have made a statement to the police in these terms :—" I had removed the *karas*, had pushed the boy into the well and had pledged the *karas* with Allah Din," and in consequence of the information so received the *karas* were recovered from Allah Din, which were identified as those worn by B at the time of his disappearance. Is the whole, or any part, of the aforesaid statement admissible against A under section 27 of the Indian Evidence Act, and if the latter, how much ?" The Full Bench held (FFORDE and JAI LAL JJ. dissenting) that the statement by the accused that he had pledged with Allah Din the *karas* subsequently

(1) (1929) I.L.R. 10 Lah. 283 (F.B.).

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recovered from the latter was admissible under section 27 of the Evidence Act but that the rest of the incriminating statement could not be received in evidence. SHADI LAL C.J. says that the fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered, or any other material thing, or it may be a material thing in relation to the place or the locality where it is found and that, taking the case before them as an illustration, the fact discovered was not the *karas simpliciter* but the *karas* being found in the possession of Allah Din and that it was necessary to draw that distinction because the amount of the information admissible is limited by the precise fact discovered thereby, or, in other words, the information to be admitted must relate distinctly, not to the *karas*, but to the *karas* in relation to their possession by Allah Din. I must observe that the importance of the last named is that the *karas* in the possession of Allah Din were proved to be the *karas* which the boy was wearing when he was last seen alive. Therefore the information given by the accused that he had pledged them with Allah Din was by itself sufficient to make the subsequent discovery of them in the possession of Allah Din a highly relevant fact and indeed a very damaging one to him. Had the *karas* not been shown to have been those worn by the deceased, then in my view no relevant fact would have been discovered in consequence of the information given by the accused limited to that statement and there would be no connection at all between the *karas* and the offence charged ; and this to my mind is a very important point because it appears to me that in

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every case which has been cited, where only such part of the information as relates to the disposal of the articles has been admitted, the articles themselves were the stolen articles or cloths or jewels worn by the deceased or the dead body of the victim himself and were thus definitely connected with the offence charged and needed the inclusion of no further matter in the information in order to make them material objects because not only must the information relate distinctly to the fact discovered but the fact discovered must be a relevant fact. SHADI LAL C.J. agrees that the judgments of the High Courts in India which were cited did not disclose a complete unanimity as to the extent of the information admissible in evidence under section 27 but he takes the view that the consensus of judicial opinion however is in favour of the view that the section allows only so much of the information as leads directly and immediately to the discovery of a fact but that the portion of the information which merely explains the material thing discovered cannot be proved. In dealing with those opinions, he says on page 296 :

"Suppose a prisoner on being asked about the weapon of offence says 'I buried a hatchet in my field. I killed A with it.' Now, it is indisputable that the recovery of a hatchet from the field renders only the first part of the statement admissible, and that the second part cannot be given in evidence. But if the police officer converts the two sentences into one and represents the accused as saying 'the hatchet, with which I killed A, I buried in my field,' then, according to those judgments, the whole of the above statement would be admissible."

He, however, does not agree that it is. In the course of his judgment he refers to a Madras

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decision, namely, *Sogaimuthu Padayachi v. King-Emperor*(1) where this High Court admitted in evidence the statement of the accused that "the properties stolen from the mutt were buried by me and others in the Cauvery bank". He expresses the doubt whether the portion of the statement "stolen from the mutt" could be admitted on the strength of the decision in *Queen-Empress v. Commer Sahib*(2) already referred to. I will refer to *Sogaimuthu Padayachi v. King-Emperor*(1) later on. Both the dissenting Judges, FFORDE and JAI LAL JJ., definitely take the opposite view and the reasons stated by them for doing so, with all respect to the other members of the Full Bench, seem to me to be correct. FFORDE J. says that the fact, i.e., the "thing" must be connected with the crime in question in order to come within the rule of relevancy laid down in section 5 of the Act; and this is in my view obviously correct and no one has disputed that the fact must be a relevant fact. He observes quite rightly that in all the cases which have come before the Courts the "fact discovered" has been the body of the murdered person, the instrument of the crime, the spoils of the robbery or some other incriminating object connected with the crime under consideration and that it follows that before a confessional statement made by a person accused of an offence who is in the custody of a police officer may be proved against him two conditions must be observed, firstly, that some incriminating things must be proved to have been found as the direct result of the information supplied by the accused

(1) (1925) I.L.R. 50 Mad. 274.

(2) (1888) I.L.R. 12 Mad. 153.

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and, secondly, it must be confined to that portion which refers exclusively to the thing found and that the rule may be expressed in this way: when any incriminating object is proved to have been found as the result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. On page 304 FFORDE J. says:

“What is it which sets the police in motion and leads to the discovery of property? Usually it is the statement by the accused that he has hidden in some place some object connected with the crime. Take an actual case. The accused says: ‘The *Chhavi* with which I killed A is hidden under a heap of manure in my *haveli*.’ What part of this information must be deemed to have set the police in motion and led to the finding of the *chhavi*? Surely, not merely the words ‘the *chhavi* under a heap of manure in my *haveli*.’ By themselves those words would be meaningless. They would hardly be likely to set the police in motion. Is it not the connection of the *chhavi* with the murder under investigation which set the police in motion and led to the discovery? If the words ‘with which I killed A’ can in this sense be said to have led to the discovery of the *chhavi*, then the whole of that piece of information may be proved—though it amounts to a confession, as the words certainly relate distinctly to the fact discovered, i.e., to the *chhavi*.”

He refers to *Sogaimuthu Padayachi v. King-Emperor*(1) and agrees with the opinion of SPENCER OFFG. C.J. and DEVADOSS J. JAI LAL J. in his judgment on page 324 makes observations also with which I entirely agree, viz.:

“I will put the case in another form. The object of the prosecution in proving the information is to show, not that a

certain thing was found in a particular place, but that the accused had the knowledge—invariably guilty knowledge, and in some cases possession, of a thing which was connected with the crime. The location of the thing is not so very material. It may be with A, B, or C or may be in one place or the other. The important consideration is always the thing discovered and its connection with the crime. Divorced from the thing, therefore, the information becomes both useless and irrelevant. I will illustrate what I mean by giving an instance; supposing the prosecution merely proves that a certain thing was found in a particular place as a result of information supplied by the accused, but fails to prove the connection of the thing so discovered with the crime, is the evidence relevant in the case? I think not. The attempt of the prosecution, therefore, always is to establish the connection of the thing discovered with the crime, and therefore it is necessary for them to prove as a first step that the particular thing was discovered as a result of the information and then to prove its connection with the crime.

Another way of looking at the same topic is this. Supposing the witness in one case says ‘as a result of information given by accused I recovered some *karas* from Allah Din’ and, in another case, he says ‘as a result of information given by the accused I recovered *karas* which the deceased had on his person when he was last seen alive’, which of these two statements is relevant to the case? I have no hesitation in saying that it is the last statement which is relevant or has any bearing on the case. It is, therefore, not so much the reference to the place where certain property is found that is the important part of the information but it is the incriminating thing recovered on which stress is always laid. Without a description of the thing discovered or its connection with the crime, whether this is done by means of the statement of the accused or by other evidence, the information is of no value and in practice the police never bother to discover the thing unless the accused by his statement has connected it with the crime. What has therefore led to the discovery of the article is the information about its connection with the crime and its location.”

Before dealing with *Sogaimuthu Padayachi v. King-Emperor*(1), *Manjunathaya v.*

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King-Emperor(1) and *In re Periyakaruppan*(2), I must refer to another decision of the Bombay High Court, a decision of the Calcutta High Court and a decision of the Patna High Court which support the appellants' contention. The first case is *Ganu Chandra v. Emperor*(3). There, each of the accused gave information to the police that he would point out the place where his share of the property stolen in a dacoity case was buried and offered to produce the same. The Court held that the words "his share of the property" and "stolen in the Dahiwadi dacoity" must be excluded on the ground that they were not necessarily connected with and did not distinctly relate to the discovery of the property. Therefore the only part of the information admitted was that the accused would point out the places where the property was buried and that they offered to produce the same. *Supdt., etc., & Affairs, Bengal v. Bhajoo Majhi*(4) is to the same effect. In *Sonaram Mahton v. King-Emperor*(5) the person who was accused of murder made a statement to the effect that he and two others had hid the corpse of the victim in a mine into which they had descended by means of a wire rope hanging from a palas tree at the entrance to the incline and in consequence of the information so received the body and clothes of the deceased were discovered. It was held that the whole of the statement that the prisoner himself had put the body into the incline was receivable in evidence under section 27 of the Evidence Act. There was

(1) (1914) 26 M.L.J. 352.

(2) (1930) 4 M. Cr. C. 250.

(3) (1931) I.L.R. 56 Bom. 172.

(4) A.I.B. 1930 Cal. 291; (1929) 34 C.W.N. 106.

(5) (1930) I.L.R. 10 Pat. 153.

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no statement by the prisoner that the body was that of a man murdered by him or that he had murdered the man and hidden the corpse in the mine. Since it is generally accepted by all High Courts that the statement of the accused that he hid or buried material objects is admissible under section 27 where the material objects are discovered in consequence of his statement and it is not contested here by the appellants that such a statement is admissible, this case is not of much assistance, but *Sukhan v. The Crown*(1) is quoted with approval in the judgment and to that extent it does support the appellants' case, though SCROOPE J. on page 159 does say :

"On the other hand, we cannot garble the statement made to the police so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement."

I now come to the Madras cases. I have already referred to *Queen-Empress v. Commer Sahib*(2) and also to *Manjunathaya v. King-Emperor*(3) where SADASIVA AYYAR J. clearly expresses a view contrary to that in *Queen-Empress v. Commer Sahib*(2) and would admit a statement by the accused, "I committed this theft and I have concealed the stolen property in such and such a place", but in view of binding authority he is forced to hold otherwise. He did however admit "that portion signifying that the property stolen from the dabbi about which the police were then making an investigation will be found in the rubbish heap". Then there is the recent case of *Sogaimuthu Padayachi v. King-Emperor*(4) which

(1) (1929) I.L.R. 10 Lah. 283 (F.B.).
(3) (1914) 26 M.L.J. 352.

(2) (1888) I.L.R. 12 Mad. 153.
(4) (1925) I.L.R. 50 Mad. 274.

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was decided by SPENCER OFFG. C.J. on a difference of opinion between DEVADOSS and WALLACE JJ. He held agreeing with DEVADOSS J. that if an accused makes a statement under section 27 of the Indian Evidence Act the whole of the statement which leads to the discovery of the stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties. WALLACE J. took the contrary view and held that only the statement by the accused that he had hidden the properties should be admitted. The accused in that case were charged with murder under section 302, Indian Penal Code, and the information given by the accused was that "the properties stolen from the mutt were buried by me and others in the Cauvery bank". The case for the Crown was that this property was worn by or on the person of the victim who was the thambiran of the mutt. The part of the statement in controversy was "stolen from the mutt". DEVADOSS J. in his judgment cites a number of decisions bearing on the point and subjects them to a very careful examination and amongst others refers to the observations of BRODHURST J. in *Queen-Empress v. Babu Lal*(1) stating on page 281:

"As mentioned by BRODHURST J. in *Queen-Empress v. Babu Lal*(1), if the accused says 'the revolver with which I shot the deceased is in this well', can it be said that that statement is inadmissible? If the accused says 'I have hidden the stolen properties in this place' the whole statement must be taken together. If he does not make a statement that the properties are stolen there is no confession at all. Section 27 of the Evidence Act does contemplate a confession. . . ."

(1) (1884) I.L.R. 6 All. 509 (F.B.).

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The appellants' contention in that case was that the statement of the accused that the properties were in a particular place was admissible but that any statement which carried an explanation as to how the properties came to be there was inadmissible in evidence as well as the statement that they were stolen properties, in other words, only the statement that the property was buried in the Cauvery bank was admissible, and reliance was placed upon *Queen-Empress v. Commer Sahib*(1) and the Full Bench decision in *Queen-Empress v. Babu Lal*(2). Neither of these cases however supported the appellants' contention there that the statement that the accused had buried the articles was not receivable in evidence though certainly they supported the contention that the statement that the articles were stolen must be excluded. SPENCER OFFG. C.J. in his judgment adheres to the view expressed by him in *In re Nainamalai Konan*(3) that "the statement of an accused that he had in his possession certain stolen property is admissible in evidence even though he himself produced the property". Upon this point he agrees with DEVADOSS J. and he also agreed that if an accused makes a statement which is admissible under section 27, the whole of the statement which leads to the discovery of the stolen property is admissible and that the sentence should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. The opinion of DEVADOSS J. was quoted with approval by FFORDE J. in *Sukhan v.*

(1) (1888) I.L.R. 12 Mad. 153. (2) (1884) I.L.R. 6 All. 509 (F.B.).
(3) (1921) 14 L.W. 418.

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The Crown(1). Next there is the case cited by my learned brothers MOCKETT and HORWILL JJ. in their Order of Reference, namely, *In re Periyakaruppan*(2), a decision of myself and SUNDARAM CHETTI J. There, the prisoner made a statement to the police during investigation that he threw into a channel the aruval with which he cut the deceased and buried in the hollow of a tree the ornaments worn by the deceased. He also showed the places to the police wherefrom they were taken out. In this case again there was a strenuous argument on the appellant's behalf as in *Sogaimuthu Padayachi v. King-Emperor*(3) that the statement by the accused that he threw into the channel the aruval and buried the ornaments in the hollow of the tree should be excluded as being inadmissible; but we say:

"It is quite clear that that part of the statement of the appellant where he says that he had hidden the aruval and buried the other ornaments is admissible in evidence against him. Otherwise his evidence is incomplete and may even be unintelligible."

We did not admit the statement that it was the aruval with which the accused cut nor the statement that the ornaments were those which he took from her body. To that extent the judgment is inconsistent with *Sogaimuthu Padayachi v. King-Emperor*(3) and is opposed to the view of EFFORDE and JAI LAL JJ. in *Sukhan v. The Crown*(1) and the opinion of SADASIVA AYYAR J. in *Manjunathaya v. King-Emperor*(4), but the learned Public Prosecutor has reminded me that the question of the admissibility of that part of the accused's information was never argued at all

(1) (1929) I.L.R. 10 Lah. 288 (F.B.).

(3) (1925) I.L.R. 50 Mad. 274.

(2) (1930) 4 M. Cr. C. 250, 258.

(4) (1914) 26 M.L.J. 352.

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and that as a matter of fact he was not called upon to argue the case on behalf of the Crown, the case on the evidence before us having been very clearly proved without the assistance of that part of the confession. It seems to me, therefore, that we assumed that those words should be excluded without hearing any argument to the contrary, an assumption which I now think was incorrect. Then there is the decision of the Patna High Court in *Lalji Dusadh v. King-Emperor*(1). There, the accused in answer to the investigating police officer stated that he threw the weapon with which he assaulted the deceased at a certain place and the weapon was discovered as the result of that information and the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed was held admissible under section 27. This is directly in agreement with the view taken in *Sogaimuthu Padayachi v. King-Emperor*(2). On page 757 MULLICK A.C.J. says:

"It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon; but commonsense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provisions of section 27 of the Indian Evidence Act wholly nugatory. The whole confession of a prisoner in police custody cannot of course go in but where the confession includes a statement that a weapon was used for committing the offence charged that part of the confession can certainly go in if it leads to the discovery of the weapon."; and he cites *Sogaimuthu Padayachi v. King-Emperor*(2) in support of his opinion. Before

(1) (1927) I.L.R. 6 Pat. 747.

(2) (1925) I.L.R. 50 Mad. 274.

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leaving these cases I will again refer to *Queen-Empress v. Babu Lal*(1). There, the fact that the accused had sold the cow and calf to a particular person was a relevant fact because they were identified as being the property of the person from whom they were stolen. They were therefore connected with the offence charged against the accused, namely, assisting in concealment of stolen property (section 414, Indian Penal Code). The cow and the calf were shown to have been stolen and the statement of the accused that they had sold them to a person, one Abdul Rahman, in whose possession as a result of the information they were found to be by the police, also directly connected the accused with that offence without the further information that the accused had stolen them, and that is where the observations of STRAIGHT OFFG. C.J., which I have set out earlier in my judgment, apply, viz., that not one word more than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him can be deposed to by the police officer since the fact discovered must also be connected with the offence as well as with the accused. It follows from this that if the statement of the accused does connect it with the offence then that is admissible also.

The cases to which I have referred clearly show that there is a preponderance of opinion supporting the appellants. Nevertheless, I am more impressed with the reasons given in support of the minority view. The fact deposed to and the fact discovered obviously must be relevant and

(1) ('884) I.L.R. 6 All. 509 (F.B.).

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the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged ; and the confession in the section is a confession of the offence charged and not of anything else. Before the statement is given in evidence it must be shown that the fact discovered is a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of a murder just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered is relevant. It can be made relevant by evidence *aliunde*, and it can be made relevant by the statement of the accused itself. Suppose there is no evidence *aliunde*, what warrant is there for saying that the part of the statement of the accused that makes it relevant must be excluded because it amounts to a confession ? Is there any warrant for garbling the statement in order to make it innocuous to the accused and in the process causing it to be irrelevant and consequently inadmissible in evidence ? That is often the effect of removing from a statement the confessional portion, as what is left is by itself meaningless. Take the present case. If the appellants' contention is correct, only the following words can be admitted :

"They buried (1) the empty bottle, (2) a rope and the cloth gag used for gagging the mouth in a dung hill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them."

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As it stands, the statement is unimportant as, without more, the empty bottle, the rope and the cloth gag are not connected with the offence. There is nothing to show that the rope was the rope used on the neck of the deceased or that the cloth was used to gag him with ; and indeed there is no evidence at all otherwise to show that the victim had been gagged. I am clearly of the opinion that without the earlier portion of the statement no relevant fact was discovered by the police as a result of it. I will give an example which supports my view. A is murdered and the medical evidence shows that he died as the result of a wound which is consistent with its having been caused by a sharp cutting weapon. B an agriculturist is accused of the murder and whilst in custody states to the police : "I threw the *bichuva* with which I cut A into the back room of my hut." The police go to his hut and there find the *bichuva*. They have discovered a relevant fact. Strike out the words "with which I cut A" and all that remains is: "I threw the *bichuva* into the back room of my hut." What is there to connect the *bichuva* with the murder? Every agriculturist has one *bichuva* or more in his possession. What *bichuva* is this? There is no evidence otherwise that it was the *bichuva* with which the murder was committed. It is merely a *bichuva* and if the police discover it they have not discovered a relevant fact. The statement, the confessional part having been struck out, is irrelevant ; and none of it would go in under section 27 ; and indeed, were that the law, no attempt to put it in would ever be made. Further, it is undisputed that the information

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must set the police in motion, because it is in consequence of it that the discovery is made. Would the police be set in motion merely by the statement of the accused that he threw a *bichuva* into the back room of his hut if there is no evidence that it is the instrument of the crime? If there is no evidence *aliunde*, then the police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery of the fact. If this reasoning is applied to the present case, then the earlier part of it that the accused and Gurunatha Goundan killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing it connects the rope and the cloth gag directly with the offence and without it they are quite unconnected. Mr. Chandrasekhara Sastri, the learned Counsel for the first appellant, contended that in none of the cases cited was the confessional statement so lengthy as here. I agree. The statement objected to has usually consisted only of a few words such as "stolen from" "we stole from", etc., but in my opinion if those statements are admissible in evidence under section 27 for the reasons already stated, it makes no difference that the statement consists of ten words or twenty words so long as they are necessary to make the fact discovered a relevant one, care being taken of course not to allow more words to be deposed to than are absolutely

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necessary. With regard to the information relating to the two bottles of illicit arrack and the discovery of one of them with some arrack in it in a heap of mud in the corner of the compound of the choultry and the other empty in the dung heap, it is to be observed that this is not within that part of section 27 which, given the circumstances required therein, makes admissible in evidence a confessional statement. The statement that the bottle would be found in the dung heap, etc., is not a confession but it constitutes "information" leading up to the discovery of a fact, which fact is made material because there is evidence that at a time material to this case the accused was in the near vicinity of the scene of murder carrying a bottle and intoxicated which fact is wholly denied by the first accused in every respect.

Upon the second question referred, in my view, so much of the statement set out in question No. 1 as is admissible against the first accused can be taken into consideration as against the second accused. I see no reason for drawing any distinction between the confession in section 27 and the confession which cannot be proved at all under section 25, and under section 26 only when it is made in the immediate presence of a Magistrate or a confession made in Court or to a member of the public. There is nothing in the section which restricts the confession to one recorded before a Magistrate. On the other hand, illustration (a) to section 30 suggests that the section contemplates "the taking into consideration" of a confession to an ordinary witness. It follows therefore that all such confessions, when the

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accused are being tried jointly for the same offence when made by one of them affecting himself and another or others of the accused, may be taken into consideration as against the other or others under section 30 of the Evidence Act. In support of this view, there are *Sankappa Rai v. Emperor*(1), *Shivabhai v. Emperor*(2) and *In re Periyaswami Moopan*(3). I would therefore answer this question in the affirmative.

The question of whether the same considerations apply to the third accused does not arise as all references to her were deleted by the trial Court and I am only dealing with such part of the statement as was admitted.

My answer to question No. 1 is that the following statement is admissible in evidence under section 27 of the Act, viz.:

"He stated that at about 11 o'clock on the night of 26th March 1936 he and Gurunadha Goundan, son of Erungattur Kanda Goundan, together murdered the deceased Sottayyan alias Sennimalai Goundan by gagging his mouth with cloth by pressing him with rope . . . that that night . . . they got two bottles of illicit arrack . . . that a small quantity was left over in one bottle only . . . After, (1) the empty bottle (2) a rope and the cloth which was used for gagging the mouth have been buried in cow-dung pond adjoining the cattle shed in the compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go there, take them out and give."

And, as I have said in my answer to question No. 2, the whole of that statement can be taken into consideration as against the second accused also.

It is necessary to add for the information of the Sessions Judges and the police that, as pointed

(1) (1908) I.L.R. 31 Mad. 127. (2) (1926) I.L.R. 50 Bom. 683.
(3) (1930) I.L.R. 54 Mad. 75.

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out in *Public Prosecutor v. Venkoba Rao*(1) by a Bench of this High Court, statements made by an accused person which are or may be provable under section 27 of the Evidence Act should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence, his own words should be used and not a rendering into the third person of the purport of his statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section. I might add that no point has been taken by the accused's Advocate in this case that the statement before us was an inaccurate paraphrase. The making of any such statement was wholly denied.

I cannot leave this case without saying that in my opinion the case for the first appellant has been most ably argued by Mr. Chandrasekhara Sastri, his learned Counsel. Although his efforts have been unsuccessful they clearly deserve such a tribute.

MOCKETT J.

MOCKETT J.—I agree. I am not, as I intended, delivering a separate judgment in this case as I have had an opportunity of reading the judgment which has been delivered by my Lord the Chief Justice and there is nothing which I can usefully add to that judgment which entirely expresses my views on this most important topic. Moreover, I consider that it is most desirable that the Sessions Courts of this Presidency should be

(1) (1937) 2 M.L.J. 32.

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able to look for guidance to a single judgment expressing the views of the Full Bench. I would only say that in construing this section of the Indian Evidence Act I have endeavoured to follow the direction of the Judicial Committee relating to the construction of Indian statutes in *Ramanandi Kuer v. Kalawati Kuer*(1), namely,

“to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded”.

In this respect I find myself in respectful disagreement with the observations of LORT-WILLIAMS J. at the beginning of his judgment in *Supdt., etc., Affairs, Bengal v. Bhajoo Majhi*(2). The learned Judge's views as to the correct method of construing the same section 27 of the Evidence Act do not seem to me to be in accord with the above judgment of the Judicial Committee. If it were not for the very divergent views which have been held regarding this matter in this and other High Courts, I should almost have said that the words of this section are clear enough by themselves if they are read free from the considerations which the Judicial Committee have prohibited. I also agree with the comments on the various cases in the judgment which my learned brother HORWILL J. is about to deliver.

HORWILL J.—I would like to add to the judgment of my Lord the Chief Justice, with which I completely agree, that the weight of authority against the view we have here held is much less than the array of authorities adduced by the

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(1) (1927) L.R. 55 I.A. 18, 23.

(2) A.I.R. 1930 Cal. 291, 292; (1929) 34 C.W.N. 106.

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defence would at first sight lead one to believe. *Reg. v. Jora Hasji and others*(1) purports only to be a minute on section 27 for the instruction of the Courts of that Presidency, without reference to the particular facts of that case. The minute covers not only the point that has been raised before us but all the other aspects of section 27. The arguments put forward in that case must have been of the most general kind and no authorities seem to have been discussed or considered. Very much the same remarks can be made regarding *Queen-Empress v. Commer Sahib*(2) except that that case confined itself to the question which we have been considering. In *Queen-Empress v. Babu Lal*(3) the real point for consideration, which was discussed at great length in the principal judgments of that case, was whether section 27 of the Evidence Act governs section 26 only or section 25 as well as section 26. The majority of the Judges held that section 27 controls section 25 also, although BRODHURST J. and STRAIGHT OFFG. C.J. held very different views regarding the extent to which the statement actually made could be admitted in evidence. In *Adu Shikdar v. Queen-Empress*(4) NORRIS J., who delivered the judgment of the Court, thought that no relevant fact had been discovered in pursuance of the confessional statement and so, although he approved of the remarks of STRAIGHT OFFG. C.J. in *Queen-Empress v. Babu Lal*(3), the question as to how much of a statement such as we have been considering could be admitted did not there directly arise. That part of the sentence admitted in *Queen-Empress v.*

(1) (1874) 11 Bom. H.C.R. 242.

(2) (1888) I.L.R. 12 Mad. 153.

(3) (1884) I.L.R. 6 All. 509 (F.B.).

(4) (1885) I.L.R. 11 Cal. 635.

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Nana(1) probably did not differ materially from what would be admissible upon an application of the principles enunciated by my Lord the Chief Justice in his judgment above. The identity of the property was fixed by the question put by the police to the accused and the portion considered inadmissible by the Judges in that case still leaves a sentence which is complete in itself. The accused was asked what he had done with the property and he replied: "I have kept it and will show." The portion "have kept it and" was held to be inadmissible. That would leave the answer to the question of the police as "I will show", which makes perfectly good sense. *Amiruddin Ahmed v. Emperor*(2) was concerned with the admissibility of a confession made at the time of discovery; and it was rightly held that such a confession did not lead to the discovery of the property. Certain ornaments taken in a dacoity were dug up and when they were brought to light the accused said: "I got these ornaments as my share in the Rajoi dacoity." This confession was very obviously inadmissible. *Ganu Chandra v. Emperor*(3) was one of those difficult cases in which the actual words used by the police in questioning the accused and the words used by the accused in reply were not known. Only the general purport was given and BEAUMONT C.J., in the principal judgment in that case, said that it was the duty of the Judge to dissect the evidence regarding the confession and to divide the sentence into its component parts and only admit that part which led to the discovery of the particular fact, viz., the hidden property.

(1) (1889) I.L.R. 14 Bom. 260 (F.B.). (2) (1917) I.L.R. 45 Cal. 557.

(3) (1931) I.L.R. 56 Bom. 172.

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In such circumstances this procedure seems justifiable. In *Supdt., etc., Affairs, Bengal v. Bhajoo Majhi*(1) a contrary view to that held by us was undoubtedly arrived at; but some of the remarks made by LORT-WILLIAMS J. in the principal judgment in that case are instructive as showing why it is that such divergence of opinion exists with regard to the proper interpretation of section 27. He says :

"There is a school of legal thought in India which holds that in construing Acts of the Indian Legislature, the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Indian Evidence Act in general and section 27 in particular are examples which in my opinion indicate the falsity of this point of view."

He comes to the conclusion that

"some restricted or limited meaning, narrower than the natural meaning, must be given to those words".

This in our opinion is contrary to the canon of interpretation laid down by their Lordships of the Privy Council in many cases, of which *Ramanandi Kuer v. Kalawati Kuer*(2) may be quoted as an example. The judgment of LORT-WILLIAMS J., except with regard to the method to be adopted in interpreting section 27, supports the view which we have here taken. He says :

"If their natural meaning were given to the words of section 27 regardless of their parentage and history, I am satisfied that the result would be contrary to the intention of the Legislature. It would be so wide as to render section 26 practically useless . . . If, therefore, so much of the information as is clearly connected with, or has reference to, the fact thereby discovered, is admissible under section 27, it is difficult to see where the line can be drawn."

(1) A.I.R. 1930 Cal. 291 ; (1929) 34 C.W.N. 106.

(2) (1927) L.R. 55 I.A. 18.

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In other words, he was of the opinion that when a confession to the police which would be inadmissible under section 26 leads to the discovery of property, the whole confession may be admissible if the natural interpretation of section 27 were adopted. That is exactly our view. It is the attempt to interpret section 27 in the light of the existing English law that has led a great many Courts to give an interpretation to that section which is not warranted by the words used, and especially is this the case in *Sukhan v. The Crown*(1) which has been so fully discussed by my Lord.

[The case came on for final hearing before MOCKETT and HORWILL JJ. who delivered judgment on 17th March 1937 confirming the convictions and sentences of the first and second accused.]

V.V.C.

(1) (1929) I.L.R. 10 Lah. 283 (F.B.).

INCOME-TAX REFERENCE.

*Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Mockett and Mr. Justice Lakshmana Rao.*

S. A. S. S. CHELLAPPA CHETTIAR, PETITIONER,

v.

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

Indian Income-tax Act (XI of 1922), sec. 10 (2) (iii)—Money-lending business—Amount borrowed in course of, and lent to constituents—Purchase of agricultural lands of constituents by way of repayment of loans advanced, that being only way of obtaining repayment—Lands purchased retained by money-lender with a view to sale thereof on return of agricultural economic conditions—Profits of money-lending business—Assessment of—Deduction in respect of interest on amount borrowed and invested in purchase of lands, establishment and other charges for managing and cultivating said lands and amount spent for obtaining conveyances of said lands—Assessee's right to.

The assessee carried on business as a money-lender in India, Burma and the Federated Malay States. Owing to certain of his constituents in Burma being unable to meet their obligations, the assessee received, in repayment of loans made by him to them, agricultural lands in Burma. The money which had been lent to those constituents had originally been borrowed by the assessee for the purpose of his money-lending business. The assessee admittedly carried on only one business for the year of assessment. He received the said lands in repayment of the loans made by him not of his own volition but of necessity, there being no other method of getting payment, and therefore those lands came into his possession directly in the course of his money-lending business and represented the capital originally borrowed. The assessee did not retain and cultivate those lands of his own inclination, but, owing to the fall in the price of agricultural lands, he was involuntarily in

* Original Petition No. 252 of 1935.

possession and preserved his capital in the only way open to him pending a return of agricultural economic conditions which would make it possible for him to realise, if not all, at least some of the capital originally lent to the borrowers, the previous owners of the said lands.

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Held that, in computing the profits and gains of the banking business of the assessee, he was entitled, under section 10 (2) (iii) of the Indian Income-tax Act of 1922, to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as was represented by the agricultural lands.

In the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as section 10 (2) (iii) because the capital benefiting therefrom by means of permissible deductions happens to produce a non-taxable income.

Held further that the assessee was entitled to a deduction in respect of the establishment and other charges for managing and cultivating the said lands and the amount spent for obtaining conveyances of the said lands.

Case-law reviewed.

In the matter of the Indian Income-tax Act XI of 1922.

T. R. Venkatarama Sastri (K. S. Sankara Ayyar with him) for the assessee.—The point missed by the Commissioner is that the business in the present case is one business and that the purchase of property, the land in the present case, which is forced on the creditor, is part of the business. For the purpose of computing the profits of the business all the gains from the business must be put on one side and the losses or deductible items of the business on the other. The mere fact that one of the items of income is not chargeable with duty cannot disturb the mode of computation of profits under the Act. The property in the present case arises out of business transactions and is part of the assets of the business. The moment the property is sold the sale proceeds would be once again part of the assets of the business. The borrowing was for the purpose of the assessee's money-lending business and the purchase was a thing forced upon the assessee in the course of such business. The position would, no doubt, have been different if, while carrying on the money-lending business,

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the assessee had borrowed for the purchase of property and had purchased property with the borrowed money. [Reference was made to sections 4(1), 4(3) (viii), 6 and 10 (2) (iii) of the Income-tax Act of 1922.] The capital in question in the present case was borrowed and was also used for the money-lending business of the assessee. Decisions, including one of the Privy Council, have held that one of the items of the income of a business may be income which is exempted from tax by the provisions of the Act. That the whole of the business including the purchase of property forced on the assessee is one business would be apparent from the fact that if the assessee sold the property purchased by him for a profit, the excess would be chargeable with tax, while, if the borrowing was regarded as a separate business altogether, any profit made by a landowner by the sale of his land would not be taxable. The principle applicable to cases of one business is stated in *South Indian Industrials, Ltd., Madras v. Commissioner of Income-tax, Madras*(1) at page 438, though the case itself was one of several businesses. If there is but one business, all the permissible deductions thereof are to be left out of account in arriving at the assessable profits. *Ramasami Chettiar v. Commissioner of Income-tax, Madras*(2) recognizes that in the case of a money-lending business property may come in and that the mere fact that property has to be purchased by a money-lender does not make his business a different business in regard to the property purchased and income therefrom income from a different business. Income from such property is part of the income of the business of money-lending. The judgment of CORNISH J. in that case is not consistent with a number of authorities, e.g., the case of a money-lender becoming a usufructuary mortgagee in the course of his money-lending business decided by the Privy Council. Under the general law there can be no doubt that when a person carrying on a business is driven, in the course of his business, to purchase property, then the purchase is still part of the business. The assessee is a resident of British India and the lands purchased by him are in Burma where the money-lending business is still carried on by him. It could not be the assessee's intention to become a landowner in Burma. The money invested in the purchase is four-fifths of the assessee's capital. He is merely

(1) (1934) I.L.R. 58 Mad. 433. (2) (1933) I.L.R. 57 Mad. 22.

waiting for a favourable opportunity for selling the lands and pursuing his normal avocation as a money-lender. [*Commissioner of Income-tax, Bihar and Orissa v. Maharajahdiraj of Darbhanga*(1) was referred to and the approval therein of the observation of ASHWORTH J. was relied upon.] There is a distinction between property-owning unconnected with any business and property-owning connected with a business. The present is a case of the latter kind. The above decision of the Privy Council is authority for the position that part of the profits of a money-lending business may be income exempt from tax under the Act and is opposed to the view of CORNISH J. in *Ramasami Chettiar v. Commissioner of Income-tax, Madras*(2) that the moment a money-lending business goes to the region of a purchase of property, the business ceases to be a money-lending business. Even the Commissioner in the present case recognizes that the purchase was part of the money-lending business but the implied foundation of his judgment is that directly property is purchased in the course of the money-lending business, the transaction of purchase must be put out of the money-lending business and treated as a separate business. Land can be purchased as a part of a money-lending business and the land will be treated as part of the assets of that business. The nature of an investment, whether it is part of a business or not, cannot be made to depend upon the circumstance whether the income from such investment is under the Act taxable or not. [Reference was made to the judgment of ASHWORTH J. in *In the matter of Makund Sarup*(3) and to *Ibrahimsa Rowther v. Commissioner of Income-tax, Madras*(4), *Commr. of Income-tax v. K. A. R. K. Firm*(5), *Commr. of Income-tax v. P. L. S. M. Conam*(6), *S. L. S. Chettiappa Chettiar and others v. The Commissioner of Income-tax, Madras*(7), *Lakshmanan Chettiar v. Commissioner of Income-tax, Madras*(8) and *Arunachalam Chetty v. Commissioner of Income-tax*(9).

M. Patanjali Sastri for Commissioner of Income-tax.—The Commissioner does not question the proposition that the lands form the assets of the business. None of the cases cited by

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(1) (1935) I.L.R. 14 Pat. 623 (P.C.). (2) (1933) I.L.R. 57 Mad. 22.
(3) (1927) I.L.R. 50 All. 495, 503 (F.B.).
(4) (1928) I.L.R. 51 Mad. 455 (S.B.). (5) (1934) 2 I.T. Rep. 183.
(6) (1934) 2 I.T. Rep. 417. (7) (1929) 4 I.T.C. 188, 195.
(8) (1929) 4 I.T.C. 200. (9) (1928) I.L.R. 52 Mad. 296 (S.B.).

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the other side relate to the question of the admissibility of the deduction. "Capital borrowed for the purpose of the business" in section 10 (2) (iii) of the Act must be read subject to the provision in section 10 (2) (ix), namely, and solely employed for the purpose of earning profits which are being taxed in section 10 (2) (ix); see *Commissioner of Income-tax, Madras v. Somasundaram Chettiar*(1). The business in the present case is a combined business, consisting of operations in money-lending and of operations in land-owning. Section 10 of the Act deals only with taxable income and the whole object of the section is to reduce the amount which the assessee who has a taxable income has to pay by way of tax. If the assessee has no taxable income at all, section 10 has no application. The Commissioner relies upon the judgment of BEAUMONT C.J. in *Provident Investment Co. v. Commr. of Income-tax, Bombay*(2). The cases cited by the other side merely show that immovable property taken over must be considered as assets of the business. They dealt only with the question whether the profits from the immovable property taken over were assessable at all. None of them deals with the question of deduction under section 10. *South Indian Industrials, Ltd., Madras v. Commissioner of Income-tax, Madras*(3) only lays down the procedure applicable under section 10 to normal cases of an assessee carrying on distinct businesses. It does not deal with the case where a composite or combined business was carried on as in the present case. [*Sachindra Mohan Ghosh v. The Commissioner of Income-tax, Bihar and Orissa*(4), *Commissioners of Inland Revenue v. Maxse*(5), *Inland Revenue Commissioners v. William Ransom & Son*(6) and *Arunachalam Chetty v. Commissioner of Income-tax*(7) were referred to.]

K. S. Sankara Ayyar in reply.—*Arunachalam Chetty v. Commissioner of Income-tax*(7) is opposed to the contention of the other side that deductions under section 10 are only deductions allowed in cases where there are taxable profits.

[The important point to be remembered in connection with that case is that the businesses there were all treated as one business, though with branches. The principle applicable to cases of distinct businesses is that laid down in *South Indian*

(1) (1927) 54 M.L.J. 436 (S.B.).

(3) (1934) I.L.R. 58 Mad. 433.

(5) [1919] 1 K.B. 647.

(2) (1931) 6 I.T.C. 21.

(4) (1931) 5 I.T.C. 397.

(6) [1918] 2 K.B. 709.

(7) (1928) I.L.R. 52 Mad. 296 (S.B.).

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In the present case it is conceded that the business is one business. The business being a single business the capital borrowed cannot be appropriated between the money-lending business and the capital of that business locked up in land; see *Arunachalam Chetty v. Commissioner of Income-tax*(2) at page 299. In *Provident Investment Co. v. Commr. of Income-tax, Bombay*(3) the Court was able to trace the borrowing for the purposes of the foreign business the income of which was not taxable; see page 23. The borrowing went out of the picture altogether. In the present case, the borrowing was for the purpose of the business in British India and was invested in that business and that business is producing an income, though such income is not taxable. Section 4 of the Act states incomes which are liable to be taxed under the Act, viz., incomes accrued or received, etc., in British India. What was laid down in *Provident Investment Co. v. Commr. of Income-tax, Bombay*(3) was that deductions claimable under sections 4 and 10 are deductions in respect of income arising or accruing in British India and taxable under the Indian Income-tax Act. Income of a foreign business not received in British India is not taxable under the Act and therefore interest on capital borrowed for the purpose of such foreign business is not a permissible deduction under section 10. This is all the effect of *Provident Investment Co. v. Commr. of Income-tax, Bombay*(3). *Sachindra Mohan Ghosh v. The Commissioner of Income-tax, Bihar and Orissa*(4) turned upon the construction of section 12 (2). Agricultural income is not exempt from taxation because the landowner has already paid land tax to Government. *Commissioners of Inland Revenue v. Maxse*(5) only lays down that, in cases where a portion of the income is taxable and a portion is not, the income is apportionable. The right construction of section 10 is not to ascertain whether the assessee has earned taxable profits before he can be allowed to claim deductions allowed by that section but to ascertain the allowances permissible and after deducting them to ascertain the taxable income.

Cur. adv. vult.

(1) (1934) I.L.R. 58 Mad. 433.

(3) (1931) 6 I.T.C. 21.

(2) (1928) I.L.R. 52 Mad. 296 (S.B.).

(4) (1931) 5 I.T.C. 397.

(5) [1919] 1 K.B. 647.

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The JUDGMENT of the Court was delivered by MOCKETT J.—The assessee is the manager of a Hindu undivided family carrying on money-lending business in India, Burma and the Federated Malay States with borrowed capital. The findings of fact are not very clear but before us the argument has proceeded on the following basis: Owing to certain clients in Burma being unable to meet their obligations, the assessee was compelled to receive in repayment of loans made by him agricultural lands in Burma. The money which had been lent had originally been borrowed by the assessee for the purpose of his money-lending business, that is to say, he borrowed and in his turn lent the same money—no doubt at a higher rate of interest. It was conceded by Mr. Patanjali Sastri that the assessee was carrying on one business for the year of assessment 1934–1935. It has not been contended before us that the assessee was retaining and cultivating these lands of his own inclination, but owing to the fall in agricultural lands he was involuntarily in possession and was preserving his capital in the only way open to him pending a return of agricultural economic conditions which made it possible for him to realise, if not all, at least some of the capital originally lent to the borrowers, the previous owners of the lands. It was not disputed that the whole of the money borrowed, a great part of which is now in the form of land, was originally borrowed for the purpose of the money-lending business. In view of these admissions of fact, it is not necessary for us to send this matter back to the Commissioner for findings. For the assessment of the year 1934–1935 the assessee

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was assessed on a total income computed at Rs. 30,963. In computing the income, the Income-tax Officer disallowed Rs. 17,796 under interest payments in the Kyailat branch and Rs. 3,114 under establishment and other charges in the Kyailat and Thayetmyo branches. The interest charges disallowed were claimed by the assessee under section 10 (2) (iii) of the Income-tax Act as representing the capital borrowed by him for the purpose of his business which capital was now represented by agricultural lands. The Income-tax Officer held that four-fifths of the money borrowed was so represented but he disallowed the claim on the ground that as the money was invested in agricultural lands, the income from which is exempt from income-tax under section 4 (3) (viii) of the Act the assessee was not entitled to the allowance mentioned in section 10 (2) (iii). He accordingly disallowed the claim for interest as regards four-fifths of the money borrowed which he considered was the amount of the capital then represented by lands but he allowed the remaining one-fifth as being money borrowed for the purpose of the money-lending business and utilised therein. The assessee also claimed a sum of Rs. 3,114 made up as follows:

	RS.
Establishment charges	2,298
Loss in cattle purchase lands and bulls accounts	779
Conveyance charges relating to lands	37

The last item was allowed by the Commissioner. The other items were claimed as being

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charges under section 10 (2) (ix). The Commissioner disallowed the amount of these other items also on the ground that as it is expenditure for the purpose of earning agricultural income, it also was not deductible on the same grounds on which he had ruled that money borrowed and subsequently used in agricultural lands was not a permissible deduction. The assessee moved this Court and in compliance with the Court's directions the Commissioner has referred to us the following two questions :

"(i) Where a person who is carrying on business as a money-lender borrows money for his money-lending business, lends it out to constituents but is obliged in the course of the business to receive agricultural lands in repayment of his debts from such constituents, is he not entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as is represented by the agricultural lands got in under section 10 (2) (iii) in computing the profits and gains of the banking business for the year of account ?

(ii) Whether the petitioner is not entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands in the Kyailat and Thayetmyo on the ground that they are expenses incurred for agricultural purposes and the amount spent for obtaining conveyances on the ground that it is an expense of a capital nature ?"

Section 10 (1) and (2) is as follows :

"(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 :—

(iii) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid."

It is, as we have emphasised, conceded that this capital was borrowed for the purpose of the business and on the facts we hold that it has also been used for the purpose of the business, because it is an unquestioned fact that the assessee received these lands in repayment of the loans made by him not of his own volition but of necessity, there being no other method of getting payment, and that therefore these lands came into his possession directly in the course of his money-lending business and represented the capital originally borrowed. *Prima facie* therefore the assessee is entitled to the benefit of section 10 of the Act, but the Commissioner's learned Counsel argues that nothing which cannot help to earn taxable income is the subject of exemption and agricultural income is not taxable and by implication in section 10 (1) and (2) before the words "profits or gains" must be read the word "taxable". He contends that the object of section 10 is to reduce the amount of taxable income and that it cannot therefore possibly apply to any income which is not the subject of taxation. No case exactly in point has been cited. But the Commissioner has relied especially on two Indian decisions, one of this High Court and the other of the Bombay High Court. In *Commissioner of Income-Tax, Madras v. Somasundaram Chettiar*(1) the question arose

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whether interest on capital borrowed in India to be used abroad (in that case the Federated Malay States) was a permissible deduction under section 10 (2) (iii) of the Income-tax Act. It must be emphasised that no complication with regard to the use of the capital in a foreign country arises here, Burma and Madras being subject to the same Act. This High Court took the view that "business" in section 10 (2) (iii) means the business whose profits are being assessed in the year under consideration. In *Provident Investment Co. v. Commr. of Income-tax, Bombay*(1) the Bombay High Court held that where an Indian finance company borrowed money in British India and invested it abroad keeping both the income and capital abroad, the interest on the money so borrowed could not be deducted under section 10 (2) (iii) of the Income-tax Act by reason of the fact that the income was not the subject of taxation in British India. The decision of the Court there again rested on the fact that the whole of the interest derived from the borrowed capital was outside the jurisdiction and was not the subject of taxation in India. At page 25 BEAUMONT C.J. expressed himself as follows :

"Now looking at that section again in the light of the context, tax is to be payable by an assessee under the head of 'Business' in respect of the profits or gains of any business carried on by him. Clearly that must mean in respect of the taxable profits or gains of any business carried on by him and the business must be one which earns taxable profits or gains. Then when we come to sub-section (2) (iii), an allowance is to be made in respect of interest on capital borrowed for the purposes of the business. Now, I think that again must be

(1) (1931) 6 I.T.C. 21.

for the purposes of the business which earns or is capable of earning taxable profits. Whether in fact taxable profits are earned or not is not necessarily the criterion, because the borrowed money may earn no profit, but I think the 'business' referred to in that section is a business which is so carried on that taxable profits may be earned, and unless it is a business of that character a deduction for interest on capital money borrowed for the purposes of that business is not allowable under the Act."

It will be noticed that in both these cases the income derived from borrowed capital was not the subject of any taxation in British India. In this connection it should be observed that section 4 of the Income-tax Act makes the Act applicable to all income, profits or gains, accruing or arising or received in British India, or deemed to be received therein. But the Act does not apply to agricultural income in British India. Under section 4 (3) (viii) it is provided that "this Act shall not apply to . . . agricultural income". "Agricultural income" is defined in section 2 (1) as meaning

"(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such ;

(b) any income derived from such land by—

(i) agriculture."

The rest of the definition is not relevant. It should be observed that the agricultural income must be derived from "such land", i.e., land assessed to land-revenue in British India or subject to a local rate assessed and collected by the officers of Government as such. There is no foundation therefore for the argument which we have heard that agricultural income is exempt from all taxation and it is therefore *prima facie*

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inequitable that money borrowed and represented by an income which does not pay tax should be subjected to any of the benefits of the Act. On the contrary, under the Act such income is expressly excluded from the burden of income-tax because it has already paid tax to Government in another form. That such circumstances as we now have to consider were in the contemplation of the Legislature when passing this Act we take leave to doubt, but they have arisen and must be dealt with not on general principles but in accordance with the principles relating to the construction of a fiscal statute, viz., that it should be strictly construed.

It seems to us that the governing section in order to decide this matter must be section 10 (2) (iii). Was the capital borrowed for the purpose of the assessee's business? No difficulty arises about that for it is conceded that it was so borrowed. It was also unquestionably used for the purpose of the business because it is again conceded that it was lent to the borrowers. Does it continue to be so used? It is in that respect that it is important again to emphasise that this case has been argued before us on the basis that these lands came into and were retained in the possession of the assessee in payment of a money-lending debt and *ex necessitate*. In this Presidency there is a current of authority to the effect that immovable property received by a money-lender in repayment of loans is an asset of his money-lending business and that any profits derived from the sale of such lands and also any income from the land such as rents, etc., must be regarded as the profits of such business and taxable as

such. See *S. L. S. Chettiappa Chettiar and others v. The Commissioner of Income-tax, Madras*(1). In that case as here the assessee was a money-lender who had secured his advance on rubber estates which he had finally to take over in repayment of his debts and to hold until a favourable opportunity occurred for resale and it was held that any profits from such resale were profits of his money-lending business. [See also *Lakshmanan Chettiar v. Commissioner of Income-tax, Madras*(2).] In *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(3) the Judicial Committee had before them for consideration the question as to whether income received from an estate taken over by a lender as security for an amount advanced under an usufructuary mortgage was agricultural income. At page 631 Lord MACMILLAN, in delivering the advice of the Board, after setting out the facts and emphasising that *prima facie* the income of the land was agricultural income, states as follows :

"In answer to this *prima facie* conclusive ground for excluding the sum in question from the respondent's assessment the appellant concedes that if the respondent were not a money-lender and if the transaction in virtue of which he receives the rents had not been a transaction entered into in the course of his money-lending business, he would have been entitled to invoke the statutory exemption of agricultural income; but the appellant submits that the fact that the respondent carried on a money-lending business and receives the rents as the result of a transaction entered into in the course of that business makes all the difference."

It would appear therefore that the Board recognised the position that rents from agricultural

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(1) (1929) 4 I.T.C. 188.

(2) (1929) 4 I.T.C. 200.

(3) (1935) I.L.R. 14 Pat. 623 (P.C.).

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lands could be received in virtue of a money-lending transaction. Their Lordships then proceed to hold that agricultural income does not lose its character by reason of the nature of its receipt and state :

"The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, . . . "

In view of the above we consider that all the provisions of section 10 (2) (iii) are complied with in that the money concerned was borrowed and at all material times was used and continued to be used "for the purpose of the business".

Certain cases were referred to in which for the purpose of assessment the business of the assessee had been split into two categories, for instance, *Maxse's case, Commissioners of Inland Revenue v. Maxse*(1), in which the business of a journalist and the business of an editor were divided, and *Ransom's case, Inland Revenue Commissioners v. William Ransom & Son*(2), in which the business of a chemist and the business of husbandry were split. In the *Ipoh case, Commissioner of Income-tax, Madras v. Somasundaram Chettiar*(3) the Madras and Ipoh businesses were treated as distinct. That aspect does not arise before us because Mr. Patanjali Sastri argued the case on the basis, as is unquestionably the fact, that only one business was carried on by the assessee. In both the English cases cited above it must be observed that the separate enterprises were of design carried on by the assessee. For instance, in *Ransom's case* (2) no doubt the firm's directors

(1) [1919] 1 K.B. 647.

(2) [1918] 2 K.B. 709.

(3) (1927) 54 M.L.J. 436 (S.B.).

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could have bought their herbs in the market but they preferred to grow them themselves. Nor was there any obligation on Mr. Maxse to be a journalist as well as an editor. But in the case before us where is the money-lender's choice? Here is the only method by which he can be repaid if further losses in the money-lending business are to be avoided. And how can agricultural land be preserved except by cultivation? The cultivation was merely a necessary incident of his involuntary possession which came to him because as a money-lender he had lent money to a borrower who could not repay in money. It appears therefore that only by straining the Act against the assessee can he be excluded from the benefits of section 10 (2) (iii). Apart from the fact that that is not the method of construing a taxing statute it appears there is nothing unreasonable in the result at which we arrive. The Legislature has thought fit to exclude agricultural income from the incidence of income-tax because it has already paid the tax in another form. The position is peculiar to India and not to England and in this case we are told—and it appears to be the fact—that the assessee would be better off if he had not taken this land from the debtor and was therefore unable to realise anything in cash as he would then be able to get the benefit of section 10 (2) (iii). The argument of the Commissioner's learned Counsel appears to be entirely based on the fact that agricultural income is not the subject of income-tax in British India for he conceded that had the repayment of the loan to the money-lender been received in the form of a number of motor cars which could be let out on

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hire until a favourable opportunity to sell them arose (such profits would of course be taxable), the assessee would have been entitled to the benefits of section 10 (2) (iii). The Commissioner has relied on *Sachindra Mohan Ghosh v. The Commissioner of Income-tax, Bihar and Orissa*(1). In that case, a receiver was appointed by the Court for the management of an estate which derived taxable and non-taxable income and the question arose what proportion of the salary of the receiver was allowable expenditure. That decision is of no assistance in this matter because it deals with income from "other sources", and section 12 (2) which governs that decision permits a deduction of expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of making or earning such income, profits or gains. In the present case we are dealing with business and interest on capital borrowed for the business.

Since the arguments in this reference were concluded a report of a very recent decision of the Court of Appeal has been received in this country and has been brought to our notice, *Hughes v. Bank of New Zealand*(2). In that case, the bank had a branch in London and from its floating capital had purchased five per cent war loan which is tax free and three per cent India Government Stock and other securities on which the amount of the tax had been repaid on the ground that there was no residence by the assessee in the United Kingdom. It was sought by the Income-tax authorities to tax the interest on all the above securities. The authorities further denied

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the right of the bank to deduct the expenses incurred by the bank for the purpose of earning the income from the above securities. The Court of Appeal, after holding that the immunity from taxation of the above securities was absolute, dealt with the question whether the expenses of the bank incurred for the purpose of earning non-taxable income were properly deducted. £241,262 was found to be the expenses attributable to the earning of the profits derived from the above-mentioned securities and it would appear that very much the same argument was advanced by the Inspector of Taxes in that case as has been advanced here. It is summarised by Lord WRIGHT at page 997 as follows :

" It is contended on behalf of the Crown that, if the bank get the benefit of that exemption, it should be deprived of the advantage of deducting this sum of £41,262, being the expenses attributable to the earning of the income which has been held to be immune from taxation. In other words, it is said if the corpus—that is to say, the income—is to be excluded, the accessory—that is to say, the expense of earning it—ought also to be excluded. The exclusion on the one side ought to be balanced by the exclusion on the other, otherwise the tax-payer is getting a double advantage; he is getting his exemption in respect of the interest, and he is also having the additional benefit of deducting the expenses of earning that interest, just as if the interest had been included as taxable. I confess that there seems to be great force in that argument, and if I had been able to find a warrant for giving effect to that argument in the language of the Act I should certainly have done so, because it seems to me to be both a reasonable and a proper conclusion."

With regard to this last observation of Lord WRIGHT, as we have already pointed out, in India a special provision is made for taxing agricultural lands so that "the double advantage" referred to

(1) (1931) 5 I.T.C. 397. (2) [1936] 3 All E.R. 975.

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is not applicable here. But at page 998 his Lordship says :

"The expenses which are dealt with here by the commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted."

Lord WRIGHT rejected the contention that one part of the expenses could be eliminated and the trade as it were divided, observing that there was one individual trade. In the present reference, as already indicated, the agricultural activities of the assessee were inextricably mixed with and incidental to the money-lending business.

The above decision seems to support the view which we have expressed that, in the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as section 10 (2) (iii) because the capital benefiting therefrom by means of permissible deductions happens to produce a non-taxable income.

It follows from what has been stated above that the answer to the first question must be in the affirmative. The answer to the second question will admittedly follow from the decision on the first and the answer to it therefore is also in the affirmative. The assessee will have the costs of this petition fixed at Rs. 250. The Rs. 100 deposited by the assessee will be refunded.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

PULAVARTI LAKSHMANASWAMI (PLAINTIFF),
APPELLANT,

1936,
November 10.

v.

MAHAMMAD GALAH HUSSAIN SAHEB GARU AND
TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Madras District Police Act (XXIV of 1859), sec. 53—Protection to police officer under—Unavailability of—If and when—Damages—Suit for, against police officer—Malice—Onus of proof.

An act done by a police officer in the exercise of his Police-powers will not have the benefit of section 53 of the Madras District Police Act (XXIV of 1859) if it was done maliciously. The moment an act is shown to be malicious, it ceases to be protected by section 53. In an action for damages against a police officer for a malicious act done by him, the onus lies on the plaintiff to prove by strong and cogent evidence the existence on the part of the police officer of malice and the absence of any honest desire to execute his powers, and, if the plaintiff is unable to discharge this burden, then the suit will come within the said section.

APPEAL against the decree of the Court of the Subordinate Judge of Ellore in Original Suit No. 2 of 1929.

V. Viyyanna for appellant.

Government Pleader (K. S. Krishnaswami Ayyangar) for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.—This appeal raises an important question, namely, whether, in an action for a malicious act against a police officer, he is

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entitled to raise the defence of limitation, relying upon the protection given by section 53 of the Madras District Police Act (XXIV of 1859). The plaintiff alleges that the first defendant, a Police Sub-Inspector, accusing him falsely of having obstructed a public pathway by heaping bricks, commenced with a malicious motive a prosecution against him (Calendar Case No. 318 of 1927) on 18th March 1927 under sections 188 and 283 of the Indian Penal Code, and that two days later (on 20th March) he maliciously instituted another false complaint (Calendar Case No. 320 of 1927) under section 291 of the Indian Penal Code in connection with the same alleged heaping of bricks. The plaintiff further alleges that, although the earlier complaint was enquired into and dismissed, the second charge, instead of being withdrawn, was pressed and continued, which also was ultimately found to be false. The third defendant is a Circle Inspector, who, it is alleged, came on transfer to the village in question. It was his duty, the plaintiff states, to have withdrawn the second complaint, but from improper motives he failed to do so. The second defendant is the Secretary of State for India, against whom also damages have been claimed on the ground that he is liable for the tortious acts of his agents.

The suit has been dismissed by the Court below and the plaintiff has preferred the present appeal. So far as the Secretary of State is concerned, the appeal has not been pressed; it fails and is accordingly dismissed with costs.

The order of acquittal in respect of the first complaint was made on 26th July 1927; in respect of the second, on 21st November of the same

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year, and the suit was filed on 30th January 1929. Under the Limitation Act, in regard to actions for malicious prosecution, time runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated and the period prescribed is one year (Article 23). In this case the plaintiff gave a notice under section 80 of the Civil Procedure Code, and according to the lower Court, should the case be held to be governed by the Limitation Act, in computing limitation the period of the notice should be excluded, and the learned Government Pleader concedes that this conclusion is right. But, even upon this footing, the suit, having been brought more than fourteen months from the date of the first acquittal, is out of time, in so far as it relates to the earlier complaint. The appeal to that extent again has not been pressed.

Thus, the action is confined to the second prosecution and is pressed only as against defendants 1 and 3. Section 21 of the Madras District Police Act provides, *inter alia*, that it shall be the duty of every police officer to use his best endeavours and ability to prevent all crimes, offences and public nuisances; to preserve the peace, and to apprehend disorderly and suspicious characters; to detect and bring the offenders to justice. Then the next relevant provision, section 53, in so far as it applies to the facts of the case, runs as follows:—

“All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, under the provisions of this Act, or under the General Police-powers hereby given, shall be commenced within three months after the act complained of shall have been committed and not otherwise . . . ”.

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The question is, whether the protection given by this section extends to acts done by a police officer out of malice. The learned Government Pleader contends that there is nothing to suggest that such acts are excluded and that the words should receive their plain and natural meaning; it should be wrong, he maintains, to construe the section as if the words "*bona fide*" occurred before the words "done or intended to be done". But the question is, whether, upon a true construction of the section, a person who acts maliciously can be said to act under the provisions of the statute or the general powers conferred by it. There were numerous statutes in force in England, passed from time to time, with a view to afford protection to public authorities. The enactment under consideration is one of 1859 and, both before that date and since then, provisions similar to the one in question were and have been considered. In *Theobald v. Crichmore* (1) the question arose under the twelfth section of the Statute 53 Geo. III c. 127, by which it was enacted that

"if any action shall be brought for anything done in pursuance of this Act, every such action shall be commenced within three calendar months after the act committed and not afterwards".

Lord ELLENBOROUGH C.J. rejected the contention that the statute extended only to acts lawfully done; for, to say that, where the law is exceeded, the officer loses the benefit of the statute, would be to render the protection illusory, for it is then that he requires its protection. But illegal acts protected under the statute, the Chief Justice went on to observe, are

(1) (1818) 1 B. & Ald. 227; 106 E.R. 83.

those done through ignorance or inadvertence. BAYLEY J. concurred with this view and said:

"It appears to me that the officer acted illegally but in the supposed *bona fide* execution of his duty, and he is therefore entitled to the protection of this statute."

Parton v. Williams(1) arose under the eighth section of 24 Geo. II c. 44 which enacted that

"no action shall be brought against any Justice of the Peace for anything done in the execution of his office, or against any Constable, Headborough or other officer or person, acting as aforesaid unless within six calendar months after the act committed".

The constable there, under a warrant commanding him to take the goods of A, took the goods of B, believing them to belong to A. ABBOT C.J. held that the provision was intended for the benefit of persons who intend to act right but by mistake act wrong. In the judgments of BAYLEY J. and BEST J. there are observations to the same effect. In that case, it being held that the constable acted *bona fide*, the action brought beyond the period of six months was dismissed.

In *Smith v. Shaw*(2) the question arose with reference to the Commercial Dock Act (50 Geo. III c. 207). It was provided by section 94 of that Act that

"if any action shall be brought against any person for anything done in pursuance of this Act, such action shall be commenced within six calendar months next after the act committed or, in case there be a continuation of damage, within two months after the doing or committing of such damage shall have ceased".

BAYLEY J., delivering the judgment of the Court, observes that, according to the decisions which have construed similar words, so long as

(1) (1820) 3 B. & Ald. 330; 106 E.R. 684.
(2) (1829) 10 B.C. 277; 109 E.R. 453.

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the person concerned acts *bona fide*, although he acts erroneously, he is to be considered as acting in pursuance of the Act and he is to be entitled to its protection.

The learned Government Pleader relies upon *Kirby v. Simpson*(1), which arose under 11 and 12 Vict. c. 44, also a statute passed before the Police Act, with which we are concerned. There, the question arose whether a Magistrate, acting *malafide* in the execution of his office, was entitled to notice of action under the ninth section of that statute and the answer was in the affirmative. That case, however, turned upon the express words of that section which, so far as it is relevant to the present case, may be read thus :

“Whereas it is expedient to protect Justices of the Peace in the execution of their duty : Be it therefore enacted . . . that every action thereafter to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice . . . shall be an action on the case as for a tort ; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause.”

Then section 8 provides that no action shall be brought beyond six months after the act complained of and section 9 enacts that at least one calendar month's notice shall be given of such intended action. It will be seen that actions for malicious acts are among those contemplated by the statute itself, and, as has been pointed out by PARKE B:

“The first section of 11 and 12 Vict. c. 44 assumes that a person may act maliciously and without reasonable and probable cause and nevertheless be acting in the execution of his duty as a Justice of the Peace.”

(1) (1854) 10 Ex. 358; 156 E.R. 482.

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PARKE B. guardedly adds (and that is important) that his observations apply only to the statute then under consideration and not to those cases which may arise under various Acts of Parliament affording protection to persons acting *bona fide*.

These various statutes to which I have referred were special statutes passed prior to the Police Act now under consideration. But in 1893 a general Act was passed in England known as the Public Authorities Protection Act, section 1 of which, so far as it is material, runs as follows :—

“Where after the commencement of this Act, any action is commenced against any person for anything done in pursuance of any public duty, the following provision shall have effect”,

and then it is provided that an action shall not lie, if not commenced within six months. Dealing with that section Lord FINLAY in *Newell v. Starkie*(1) declares that the Act will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously :

“In that case he has not been acting within the terms of the statutory or other legal authority ; he has not been *bona fide* endeavouring to carry it out.”

To the same effect is the observation of Lord ATKINSON who also draws a distinction between an act done maliciously and one done mistakenly but honestly ; in the former case the officer is not protected, whereas in the latter he is. This very authoritative statement of the law has been adopted by the Court of Appeal in *G. Scammele & Nephew, Ltd. v. Hurley*(2). SCRUTTON L.J. points out that illegal acts are protected by statute, but the protection disappears if they are done with

(1) [1919] 2 I.R. 325.

(2) [1929] 1 K.B. 419.

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an improper motive, such as spite ; in that case the acts complained of were not done in intended execution of a statute, but only in pretended execution thereof. The learned Lord Justice quotes with approval BLACKBURN J. who observes in *Selmes v. Judge* (1) :

“ The Judge thought that the defendants were not acting under 5 and 6 William IV c. 50 and that consequently they were not entitled to the notice of action allowed thereby. 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.”

The observations of BLACKBURN J. are quoted with approval also by GREER L.J. and SANKEY L.J.

It is difficult to say upon what particular English statute, section 53 of the Police Act has been modelled, but in substance there is no difference between that section and the provisions which have been judicially considered in the decisions already referred to. Both section 53 and those statutes have the same object in view, that of affording protection to public officers in the discharge of public duties ; and if section 53 is compared with the English Act of 1893, it will be seen that in regard to the nature of the protection afforded, similar safeguards have been prescribed. The first under the section in question relates to time, three months limitation ; the English Act provides a period of six months. The second, under both section 53 and the English Act, relates to the right given to the defendant to make a tender ; and, thirdly, both the enactments contain special rules as to costs. We shall not be justified

(1) (1871) L.R. 6 Q.B. 724.

therefore in departing from the construction uniformly adopted in English decisions.

There is one further argument that remains to be noticed. The learned Government Pleader relies on section 44 of the Police Act which, while prescribing penalties for certain illegal acts and omissions, refers to police officers maliciously preferring false complaints, but I fail to see how it is of any avail to him ; for, the Police Act says nowhere that the protection given by section 53 refers to all sorts of acts or omissions alluded to in the Act. If an act is done maliciously, upon the construction uniformly adopted, it ceases to be an act

“ done or intended to be done under the provisions of the Act ” ;

and that construction is not in the least affected by there being a reference, in some section of the enactment, to malicious acts. The moment an act is shown to be malicious, it ceases to be protected by section 53 and unless a contrary intention can be gathered, as from the language of 11 and 12 Vic. c. 44, section 1, considered in *Kirby v. Simpson*(1) already referred to, there can be no justification for holding that the Legislature intended to extend the protection to acts actuated by malice.

Then, as to *Koti Reddi v. Subbiah*(2), it dealt with the construction of section 80 of the Civil Procedure Code and the decision turned upon the words “purporting to be done” occurring there. That case has therefore no bearing on the point raised.

(1) (1854) 10 Ex. 358 ; 156 E.R. 482. (2) (1917) I.L.R. 41 Mad. 792 (F.B.).

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In an action for malicious prosecution, malice being requisite, section 53 can have no application. In regard to the English Act of 1893, it has been held that actions for deceit or malicious prosecution may be commenced after the expiration of the six months limit, as there can be no *bona fides* in the commission of a fraudulent or malicious act; see Halsbury's Laws of England, Vol. XXIII, section 696.

In the result, so far as defendants 1 and 3 are concerned, the lower Court's decree is set aside, the appeal is allowed, and the case is remanded for being disposed of on the merits; as regards the costs of the appeal, the plaintiff will get them if he succeeds in the suit, and the lower Court will in that event provide in its decree for payment of these costs to the plaintiff.

CORNISH J.

CORNISH J.—I am of the same opinion. I am unable to agree with the proposition that anything done by a police officer in his capacity of a policeman is something done under the Police Act, or under his General Police-powers given by the Act, notwithstanding that it was done maliciously. Section 21 of the Act says that a police officer shall for all purposes contained in the Act be considered to be always on duty. But I think it would be going too far to hold that this would cover any act done by a policeman under colour of his office. The duty which is cast upon the officer by the section is to "use his best endeavours and ability" to prevent all crimes, offences and public nuisances, to preserve the peace, and to detect and bring offenders to justice, and so forth. He may, of course, make a mistake. He might arrest or charge an innocent person. But in

making an honest mistake the officer might still have been using his best endeavours to carry out his duties. In such a case he will not have an immunity from legal proceedings for what he has done; though any legal proceedings against the officer by the aggrieved party must be taken within the three months' time limit fixed by section 53. But it can be no part of an officer's duty to wilfully bring a false charge against a man. On this ground alone I think that an officer who so abuses his powers could not claim to have done what he did under the Police Act or under his General Police-powers. The question is put beyond doubt by the decision of the House of Lords in *Newell v. Starkie*(1) that a public officer acting in the exercise of a statutory or other authority will not have the protection of the Public Authorities Protection Act, 1893, if he has acted maliciously. There is no substantial difference between the purposes of the English and the Madras Acts. The English Act provides that an action or prosecution shall not lie against any person for any act done in pursuance of an Act of Parliament or of any public duty or authority unless it is commenced within six months after the act complained of. Section 53 of the Madras Police Act says that all actions and prosecutions against any person for anything done under the provisions of the Act, or under the General Police-powers given by the Act, shall be commenced within three months after the act complained of. The English Act applies to all public officers, inclusive of police officers, exercising statutory authority; whereas the Madras Act is limited to

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(1) [1919] 2 I.R. 325.

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police officers exercising police authority under the Act. There is, therefore, no reason in point of policy or construction for excluding from the Madras Act the principle which is applicable to the English Act. I think, then, upon this principle, that an act done by a police officer in the exercise of his Police-powers will not have the benefit of section 53 of the Act if it was done maliciously. But the onus is on the plaintiff in the suit to prove by strong and cogent evidence the existence of malice and the absence of any honest desire to execute his powers on the part of the police officer; *G. Scammell & Nephew, Ltd. v. Hurley*(1). If the plaintiff, the present appellant, is unable to discharge this burden, his suit will come within section 53 and will be hopelessly time-barred.

G.R.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice.

1936,
November 17.

PERUMAL MUDALIAR (PLAINTIFF), PETITIONER,

v.

THE SOUTH INDIAN RAILWAY CO. LTD., BY ITS AGENT
AT TRICHINOPOLY (DEFENDANT), RESPONDENT.*

Expert—Report embodying opinion of—Evidentiary value of, without oral examination of expert—Exceptions—R. 15 of the South Indian Railway Co., Ltd., Goods Tariff, Part I—Powers under, to re-classify goods even after acceptance of declaration by consignor about quality and description of same—Powers under r. 20 to levy excess charge.

Subject to certain exceptions, as, for example, the certificate of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, the opinion of an expert

(1) [1929] 1 K.B. 419.

* Civil Revision Petition No. 603 of 1935.

must be given orally and a mere report or certificate by him is not evidence.

Rule 15 of the rules of the South Indian Railway Co., Ltd., Goods Tariff, Part I, gives power to the Railway Company to re-classify a consignment, even after the acceptance of the declaration as to the nature, quality and description of the goods at the forwarding station, if it finds that there has been an incorrect description of the same; and rule 20 gives power to the Railway Company to call upon the consignee to pay the excess charge on the basis of such corrected description.

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 Coimbatore dated 8th December 1934 in Small Cause Suit No. 625 of 1934.

R. Rangachari and V. Seshadri for appellant.

S. S. Ramachandra Ayyar for respondent.

JUDGMENT.

This is really a comparatively simple case although a great deal has been made of it here and certainly one part of the case, although it does not affect the matter, gave rise to a considerable amount of discussion. With that I will deal later.

The suit was filed by the petitioner against the South Indian Railway Company claiming a refund of an excess charge levied by the company at Podanur on a consignment of 200 bags of coconut oil-cakes and also a charge made for demurrage as well. There was also a claim for interest. The bags were consigned at Rajahmundry on 20th September 1932, the destination of the consignment being Podanur. The bags arrived at Podanur and on 27th September 1932

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a sum of Rs. 159-14-0 was tendered as freight for the bags by the petitioner to the Railway Company. The company refused to deliver the consignment to the petitioner unless an excess charge of Rs. 90-8-0 was paid and also a smaller sum, Rs. 7-15-0, for demurrage. On 29th September 1932 the amount of excess charge and demurrage was paid by the petitioner under protest and delivery of the bags taken. The goods when they were put on the railway for carriage at Rajahmundry were certified by the consignor in the risk note as being "intended for manurial purposes and for inland use only, not intended for shipment". A declaration (Exhibit III) was also given by the consignor to the following effect :

"This is to certify that the consignment of 200 bags oil-cake booked under invoice No. 3 of 20th September 1932, Rajahmundry to Podanur, and loaded in E.I.R.C.G. No. 27300 is for manurial purposes and for inland use only and not intended for shipment."

As before stated, the consignment arrived at Podanur and the Railway Company, having reason to suppose that these oil-cakes were not going to be used for the purpose set out in the certificate but as cattle-fodder, under rules 15 and 20 of the South Indian Railway Company Ltd., Goods Tariff, Part I, re-classified the consignment and called upon the consignee to pay the excess charge which the Railway Company are entitled under rule 20 to levy. The question in the lower Court was whether in fact there had been an incorrect description of the consignment given by the consignor at Rajahmundry. The question of description is one of considerable importance, because if the oil-cakes were intended for the purposes of manure as was stated,

the consignment would have applied to it a lower rate namely, the C-FF rates, whereas, if the oil-cakes were for other purposes, a higher rate, namely, that ultimately levied by the Railway Company, would have to be applied. The learned District Munsif after hearing the evidence of the petitioner's witnesses which he describes as not being very convincing held that the petitioner had not established his case, namely, that these goods were correctly described in the certificate and the declaration to which I have already referred. He accordingly dismissed the suit. Then a further point was taken, namely, that the Railway Company was not entitled, after the acceptance of the declaration at the forwarding station, to re-classify the goods consigned. Upon this point he was in favour of the Railway Company and obviously quite rightly, having regard to rules 15 and 20 to which I have already referred and I imagine every common-sense principle. Here it has been contended that there was no evidence before the District Munsif upon which he could hold that there had been a misdescription of these goods at Rajahmundry, in other words, the learned District Munsif was bound to accept the plaintiff's oral evidence and that of his own witnesses upon this point, there being no evidence at all to the contrary called on behalf of the Railway Company. It is here that the matter to which I first referred at the beginning of my judgment arises. At the trial, the following documents were put in and marked as exhibits on behalf of the Railway Company, namely, a report made by a Claims Inspector of the South Indian Railway to the company touching this matter setting out the

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result of his enquiries and the opinions of others and his own with regard to the use of coconut oil-cakes in Coimbatore and elsewhere. This report was marked as Exhibit VI. Two letters were put in, Exhibits VII and VIII-a, the former being from the Chief Commercial Superintendent of the Railway Company to the Director of Agriculture, Madras, and the latter being the reply from the Director of Agriculture giving his opinion upon the question put to him touching the matter of these oil-cakes. I am amazed to see that those documents were allowed to be exhibited without the writers of them being called to give evidence if they were tendered, as apparently it is contended they were, as forming the opinion of experts. But Exhibit VI, the report of the Claims Inspector, cannot be regarded as expert evidence on the question as to the use of oil-cakes, since the report is based purely upon hearsay evidence, though the opinion of the Director of Agriculture is certainly the opinion of an expert, but this evidence, being only documentary, is clearly inadmissible. The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—it is quite obvious that the opinion of an expert must be given orally and that a report merely or certificate by him cannot possibly be evidence. Unless he goes into the witness box and gives oral evidence, there can be no cross-examination of the expert at all. Most amazingly these documents were allowed to be marked as exhibits

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without any sort of objection by the pleader for the petitioner and had he raised the objection which it was his duty and right to do, then the Railway Company would have been given time, I have no doubt, to call the experts in question. No such objection was ever taken; and, quite apart from that, even without an objection, it seems to me that the learned District Munsif was quite wrong in allowing those documents to be marked at all as exhibits in the case. This matter, no objection having been taken to the evidence, I thought at one time would justify me in remanding the case for a further finding of fact after the respondent company had been given an opportunity of putting forward the evidence in the regular way by means of witnesses. But, having gone through the evidence adduced on behalf of the petitioner, I entirely agree with the learned District Munsif that the petitioner did not show that the certificate given, Exhibit III, was a correct one and that the description that the goods were intended for use as manure was a correct description. He could have shown this by producing evidence to show that the oil-cakes had in fact been put to that use, but, although the evidence was given two years after the consignment was taken delivery of at Podanur, no such evidence was forthcoming. The plaintiff was bound to prove that this particular consignment was used for the purpose of manure. It would not have availed him—and in fact his evidence did not go to anything like that length—to show that some other consignment of coconut oil-cakes had been used for that purpose. As I read the evidence, account books were kept but no account books were produced in order to show

that this consignment was used for the purpose of manure or was sold to somebody for use for that purpose. No evidence whatever worthy of the name has been called to show how that consignment was dealt with by the petitioner after he had taken delivery of it. On the facts, therefore, the petitioner failed to prove his case.

On the question of law, I am clearly of the opinion that the learned District Munsif was right in holding that the Railway Company was entitled to re-classify the goods in the manner it did. I had presented to me an argument which completely ignored rules 15 and 20 of the South Indian Railway Company Limited, Goods Tariff, Part I, and proceeded to the length of stating that, when once a Railway Company has accepted goods and the certificate and the declaration made as to the nature, quality and description of the goods, then thereafter, even if the Railway Company discovers that the certificate is false and the description is wrong and that the goods ought to have had applied to them a higher rate, it is not entitled to charge the higher rate. Quite apart from the fact that this amazing proposition is not supported by any authority in point, were that to be the law, then fraud would be made easy. For example, a person could consign goods enclosed in a securely packed chest and give to them a certain description and without opening the case the Railway Company would be unable to say at the time the consignment is made whether the goods answer to the description or not. If the Railway Company accept the goods as being of that description, it does so on the assumption that the description is correct. If it finds that the description is

otherwise, it is entitled to its remedy. Apart from this obvious right, there are rules 15 and 20. Rule 15 lays down that the Railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of any other errors at the place of destination and of collecting any amount that may have been omitted or under-charged and that no admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct. How the argument addressed to me could possibly be presented with any hope of success in view of the latter words of this rule I cannot understand. Rule 20 provides that, if on arrival at destination it is found that goods have been improperly described and that a lower rate than that correctly applicable has been thereby obtained, charges at double the highest rate in force, viz., 9th clause, will be levied, calculated on the entire distance over which the consignment has been carried. I may here mention that no double rate was in fact levied by the company but all that the company did was to levy the rate which is properly applicable to that particular consignment, it being a consignment which could not be carried under O-FF rates. This disposes of the case entirely. Both on the facts and upon the law the petitioner's suit rightly failed and this civil revision petition must be dismissed with costs.

Solicitors for respondent : *King & Partridge.*

G.R.

APPELLATE CIVIL—FULL BENCH.

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

1936,
December 17.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL REPRESENTED BY THE COLLECTOR,
WEST GODAVARI, (APPELLANT), APPELLANT,

v.

BAYISETTI VEERANNA AND FOUR OTHERS (RESPONDENTS),
RESPONDENTS.*

*Madras Irrigation Cess Act (VII of 1865) as amended in 1900,
sec. 1, Proviso 2—"Irrigated by using without due
authority"—Meaning of—Ryotwari holder—Wet lands of
—Water flowing into, without his knowledge—Liability for
water cess in respect of.*

The expression "irrigated by using without due authority" in the second proviso to section 1 of the Madras Irrigation Cess Act of 1865 as amended in 1900 can reasonably be held only to contemplate a voluntary user, that is, with a preconceived purpose or at least an intention so to use the water.

Where it was found that the wet lands of a ryotwari holder received water for about twenty-four hours through a breach in a channel while the source of irrigation assigned to those lands was a sluice in the channel but that he had nothing to do with the breach and was not even aware of it,

held that he was not liable to be charged to water cess.

Interpretation of the second proviso in *Kanniappa Mudaliar v. Secretary of State for India*, (1936) I.L.R. 59 Mad. 107, as regards the immunity of ryotwari holders of land classified as wet, approved.

APPEAL under Clause 15 of the Letters Patent against the judgment of PANDRANG ROW J. dated 23rd October 1935 and passed in Second Appeal No. 1433 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge

* Letters Patent Appeal No. 10 of 1936.

of Ellore in Appeal Suit No. 213 of 1930 preferred against the decree of the Court of the District Munsif of Kovvur in Original Suit No. 562 of 1927.

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Government Pleader (K. S. Krishnaswami Ayyangar) for appellant.

O. T. G. Nambiar as *amicus curiae* for respondents.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This Letters Patent Appeal arises out of a suit for recovery of water cess which the plaintiff alleges was illegally levied from him. The facts found are that the wet lands of the plaintiff who is a ryotwari holder received water for about twenty-four hours in August 1926 through a breach in the channel while the source of irrigation assigned to these lands was a sluice in the channel and that the plaintiff had nothing to do with the breach and was not even aware of it. On these findings of fact, our learned brother PANDRANG ROW J., before whom this second appeal came in the first instance, followed the judgment of a Divisional Bench since reported as *Kanniappa Mudaliar v. Secretary of State for India*(1) and held that the plaintiff was not liable to be charged to water cess. This Letters Patent Appeal was posted before a Bench of three Judges as it was represented on behalf of the Government that the decision in *Kanniappa Mudaliar v. Secretary of State for India*(1) required further consideration.

VARADA-
CHARIAR J.

The matter has now been argued before us fully by the learned Government Pleader; and we are indebted to Mr. Nambiar who had kindly

(1) (1936) I.L.R. 59 Mad. 107.

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agreed to represent the other side as *amicus curiae*. It is not disputed that the case is directly governed by the decision in *Kanniappa Mudaliar v. Secretary of State for India*(1) so far as the effect of the second proviso to section 1 of the Madras Irrigation Cess Act is concerned. There are certain observations in that judgment, bearing upon the relative scope of clauses (a) and (b) of section 1 of the Act and their relation to each other, to which the learned Government Pleader took exception. It is not necessary for the purposes of this case for us to express any opinion upon the correctness or otherwise of those observations. Assuming for the moment that the present case falls under clause (b), it is sufficient to say that we agree with the opinion of the learned Judges so far as their interpretation of the second proviso to the section is concerned, namely, the one relating to the immunity of ryotwari holders of land classified as wet.

The expression "irrigated by using without due authority" can reasonably be held only to contemplate a voluntary user, that is, with a pre-conceived purpose or at least an intention so to use the water. In substance, the provision in respect of unauthorised or improper user is one in the nature of a penalty and the mere fact that sub-clause (b) of the enacting portion of the section was intended to apply even to cases of involuntary irrigation will not justify putting upon the language of the proviso a construction which is wholly at variance with the implication of the word "use" or the reference to "due authority".

(1) (1936) I.L.R. 59 Mad. 107.

As pointed out by the learned Judges who decided *Kanniappa Mudaliar v. Secretary of State for India*(1), a course of decisions in this Court had uniformly held that the word "used" appearing in different portions of the Act clearly contemplated voluntary user. When in 1900 the Legislature proposed to enable the Government to levy cess even in respect of involuntary irrigation, the Legislature did not indicate its intention to depart from the proper or declared significance of the word "used" but adopted different phraseology in clause (b) to cover cases of involuntary irrigation. We are, therefore, of opinion that even the policy of the legislation of 1900 would not justify us in putting upon the expression "using without due authority" a different interpretation from that adopted in the earlier cases. The Letters Patent appeal fails and is dismissed.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice King.

NANU NAIR (COUNTER-PETITIONER), PETITIONER,

v.

PUTHAN VEETIL KARTHYAYINI AMMA,
(PETITIONER), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 488—Adoptive father—Liability of, to pay maintenance to adopted child.

An adoptive father is not liable to pay maintenance to his adopted child under section 488, Criminal Procedure Code.

(1) (1936) I.L.R. 59 Mad. 107.

* Criminal Revision Case No. 654 of 1936 (Criminal Revision Petition No. 609 of 1936).

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—
VARADA-
CHARIAR J.

1937,
February 26.

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v.
KARTHYAYINI.

Abdul Rahim v. Mst. Amir Begum, (1926) I.L.R. 7 Lah. 365, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Palghat dated 4th June 1936 and passed in Miscellaneous Case No. 77 of 1936.

O. K. Nambiar for petitioner.

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

ORDER.

The question here is whether an adoptive father is liable under section 488 of the Code of Criminal Procedure to pay maintenance to his adopted child. There appears to be no direct authority on the point. In *Abdul Rahim v. Mst. Amir Begum*(1), however, it was held that a stepfather is not bound to pay maintenance to his stepson—even though apparently before he deserted his wife he had in fact been maintaining the stepson. While sympathising with the point of view taken by the learned Joint Magistrate I must, I think, look to the strict words of the section—and from them it seems clear that an adopted child does not fall within the phrase “his legitimate or illegitimate child”.

The order is accordingly set aside so far as it awards maintenance for the child.

V.V.C.

(1) (1926) I.L.R. 7 Lah. 365.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Venkataramana Rao and Mr. Justice Lakshmana Rao.

PARVATANENI LAKSHMAYYA (PETITIONER), PETITIONER,

1937,
March 16.

v.

THE OFFICIAL RECEIVER OF KISTNA AT MASULIPATAM (RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 60 (1) (c)—“Agriculturist”—Test to be applied to find out who is.

An “agriculturist” within the meaning of section 60 (1) (c) of the Code of Civil Procedure must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise.

Case-law discussed.

PETITION under section 75 of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Kistna at Masulipatam in Civil Miscellaneous Appeal No. 41 of 1933 preferred against the order of the Court of the Subordinate Judge of Bezvada (Additional) in Interlocutory Application No. 1263 of 1931 in Insolvency Petition No. 23 of 1929.

This petition originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH :—

The only question in this case is whether the insolvent is an “agriculturist” within the meaning of section 60 (1) (c) of the Code of Civil Procedure. In *Muthuvenkatarama Reddier v. Official Receiver, South Arcot*(1) a Bench took the view that in order to constitute a person an “agriculturist” within the meaning of that section agriculture must be the sole source of living. In *Gopalam Garu v. Gopalakrishnayya Garu*(2) another Bench,

* Civil Revision Petition No. 1121 of 1934.

(1) (1925) I.L.R. 49 Mad. 227. (2) A.I.R. 1927 Mad. 342.

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a member of which was also a party to the other decision, took the view that in order to constitute a person an "agriculturist" it was enough if his chief source of income was agriculture. In view of this difference of opinion I think it desirable to have this matter decided by a Bench and I accordingly refer it to a Bench.

On the reference the case was posted before the Full Bench constituted as above.

P. Satyanarayana for petitioner.

V. Govindarajachari for respondent.

BEASLEY C.J. The JUDGMENT of the Court was delivered by BEASLEY C.J.—The only question raised in this civil revision petition is whether the insolvent is an "agriculturist" within the meaning of section 60 (1) (c) of the Code of Civil Procedure; and this petition has been posted before a Bench of three Judges because in *Muthuvenkatarama Reddiar v. Official Receiver, South Arcot*(1) DEVADOSS and WALLER JJ. took the view that in order to constitute a person an "agriculturist" within the meaning of that section agriculture must be the sole source of living, whereas, in *Gopalam Garu v. Gopalakrishnayya Garu*(2), DEVADOSS and WALLACE JJ. held that in order to constitute a person an "agriculturist" it is enough if his chief source of income is agriculture. These decisions are obviously in conflict.

In the present case the facts are that the petitioner's income was derived from agriculture (as a mahazadar enjoying kists paid by his ryots), from a motor business and a tobacco trade. He became insolvent and it was claimed that his house was not liable to sale because of section 60 (1) (c) of the Code of Civil Procedure. The

(1) (1925) I.L.R. 49 Mad. 227.

(2) A.I.R. 1927 Mad. 342.

Subordinate Judge held that the petitioner was not an "agriculturist" within the meaning of that section and the District Judge affirmed that decision on appeal.

By reason of section 60 (1) (c) of the Code of Civil Procedure

"houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an 'agriculturist' and occupied by him"

shall not be liable to attachment or sale; and by reason of section 28 (5) of the Provincial Insolvency Act the property of the insolvent which vests in the Official Receiver is not to include property which is exempted by the Code of Civil Procedure from liability to attachment and sale in execution of a decree.

We will, first of all, take the cases cited which support the view that in order to constitute a person an "agriculturist" within the meaning of section 60 (1) (c) of the Code of Civil Procedure it is enough if his chief source of income is agriculture. *Ma E Se v. Ma Bok Son*(1) was the first case cited on the petitioner's behalf; but it does not really assist his argument because, there, both a house in the village and also a hut in a field belonging to an "agriculturist" and occupied by him were held to be exempt from attachment. It was assumed that the occupier was an "agriculturist" and it was held that the house, although situated in a village and not in the field, was with the hut equally exempt from attachment under the provisions of section 60 (1) (c). That case therefore does not decide the point here. *The Bank of*

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(1) (1929) I.L.R. 7 Ran. 766.

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Chettinad v. Ko San Ok(1), next cited, was upon the point of whether houses belonging to and occupied by an "agriculturist" otherwise than in connection with his calling are exempt from attachment under that section and does not decide the point before us. In that case, *Muthuvenkatarama Reddiar v. Official Receiver, South Arcot*(2) was cited, but only upon the point under discussion by the Full Bench and not on the present one. Next, reference was made to some decisions of the Allahabad High Court and all of them are upon this point. In *Jamna Prasad Raut v. Raghunath Prasad*(3) the appellant was both a zamindar and a cultivator of land and the question was whether he was an "agriculturist" and on page 308 the test applied was

"what is his main source of income and whether or not he is an 'agriculturist' within the strict sense of the term and occupies the house as such".

And it was stated that he had to show that his main source of income was cultivation and not zamindari and that he was in the strict sense of the term an "agriculturist". This it was held that he had failed to do. In *Shafian v. Hamid Ul-lah Khan*(4) the test applied was whether the person's chief occupation and chief means of livelihood were agriculture. It appears that the judgment-debtor there was both an "agriculturist" and a zamindar, his zamindari being infinitesimal in amount and he was held to be an "agriculturist". In *Sabha Ram v. Kishan Singh*(5) a Division Bench applied the test of whether the main source of income was agriculture. The same test

(1) (1933) I.L.R. 11 Ran. 372 (F.B.). (2) (1925) I.L.R. 49 Mad. 227.
(3) (1913) I.L.R. 35 All. 907. (4) (1916) 33 I.C. 727.
(5) (1930) I.L.R. 52 All. 1027.

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was employed in *Bachan Singh v. Bhika Singh*(1), i.e., main source of income. As in the other Allahabad cases the party alleging himself to be an "agriculturist" was also a zamindar, and a proposition of law was propounded by the lower appellate Court that a pure and simple zamindar is to be taken as an "agriculturist" in the absence of any legal definition to the contrary. On second appeal, IQBAL AHMAD J. however expressed the opinion that the presumption is the other way and that a zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation. In *Dharam Singh v. Shah Mal Singh*(2), also a case of a zamindar obtaining his livelihood from cultivation as well as from the zamindari, the 'main source of income test' appears to have been accepted by NIAMAT-ULLAH J., though he says that the fact that he cultivates his own land and thereby maintains himself and his family will not necessarily make him any the less an "agriculturist" and that, on the other hand, if land which he cultivates and has let to tenants is considered to be sufficient for his maintenance, he will not be considered to be an "agriculturist" only because he cultivates the whole of what he owns. He then discusses the facts of the case and states :

"The fact, that the appellants own 27 pakka bighas of land, is, in my opinion, an indication of the extent to which they are maintained by sources other than agriculture pure and simple. This amount of land, if let to tenants, will fetch sufficient, though somewhat reduced, income for the maintenance of the appellants. On the whole I think that they cannot be considered to be 'agriculturists' within the meaning of section 60 (1) (c)."

(1) A.I.R. 1927 All. 601.

(2) A.I.R. 1931 All. 20.

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Next, two decisions of the Lahore High Court were cited, namely, *Abdullah v. Anjuman Dehi*(1) and *Gurbakhsh v. Lal Chand-Darshan Lal*(2). In the former case, it was held that by "agriculturist" is meant one who earns his livelihood wholly or principally by agriculture or ordinarily engages personally in agricultural labour. In the latter case, it was held that an "agriculturist" means a professed cultivator and a farmer or husbandman. In that case, the judgment-debtor did not himself till the land and earn his living thereby, wholly or partly, and he was held not to be an "agriculturist". But on page 739 COLDSTREAM J. makes some observations which with respect we cannot agree with. He there expresses the opinion that there is no justification in the wording of the section for holding that for the purpose of that section the term excludes a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood. In our opinion, such a person would not be an "agriculturist" in the strictest sense in which the section should be applied. We are supported in this view by *Jivan Bhaga v. Hira Bhaiji*(3). There, WEST J. says:

"It was for 'agriculturists' in the strictest sense and for an 'agriculturist' in that sole character that the protection of section 266 (c) of the Civil Procedure Code [the equivalent of the present section 60 (1) (c)] was intended."

On the other side, there is the decision of the Calcutta High Court in *Surangini Deby v. Kedarnath Chandra*(4) where the same view as that taken in *Muthuvenkatarama Reddiar v.*

(1) A.I.R. 1928 Lah. 132.

(3) (1887) I.L.R. 12 Bom. 363.

(2) A.I.R. 1936 Lah. 737.

(4) (1921) 63 I.C. 681.

Official Receiver, South Arcot(1) was expressed. There, it was held that where a judgment-debtor's only source of living is not by cultivation of land he is not an "agriculturist" within the meaning of section 60 (1) (c).

After a consideration of the authorities referred to, we have come to the conclusion that the test is not "main source of income", neither is it "sole source of income". We think that, having regard to the scheme of the section exempting from attachment, as it does, tools of artisans, and, where the judgment-debtor is an "agriculturist", his implements of husbandry and such cattle and seed-grain as may in the opinion of the Court be necessary to enable him to earn his livelihood, and his houses and other buildings occupied by him, protection is intended to be given to those who are real tillers of the land, and that an "agriculturist" in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief, or principal sources of income are not, in our view, the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an "agriculturist" within the meaning of the section. At the same time we see no reason for depriving an "agriculturist" of the exemption under the section because he may have invested money in a

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(1) (1925) I.L.R. 49 Mad. 227.

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business or businesses as alleged in the present case and may derive some income therefrom or do coolie work and add to his earnings in bad times. The test of sole source of income if applied would deprive him of the benefit of the section and we prefer the tests which we have already laid down, viz., that he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise.

The case is accordingly sent back to the lower Court for disposal in the light of our observations ; the costs of this petition will abide the result there.

G.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Venkataramana Rao and Mr. Justice Lakshmana Rao.

1937,
March. 15.

SWAMINATHAN alias MUTHUVELU UDAYAR (SECOND RESPONDENT), PETITIONER,

v.

THE OFFICIAL RECEIVER OF RAMNAD AT MADURA AND TWENTY-THREE OTHERS (PETITIONER AND RESPONDENTS 1 AND 4 TO 25), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXIII, r. 1, Explanation—Whether Official Receiver can institute a suit in forma pauperis to recover the estate of an insolvent vested in him under sec. 28, cl. (2), Provincial Insolvency Act (V of 1920).

An Official Receiver, in whom the estate of an insolvent is vested under section 28, clause (2), of the Provincial Insolvency Act (V of 1920) by virtue of an order of adjudication made by

* Civil Revision Petition No. 113 of 1935.

the Court, can institute a suit as a pauper for the recovery of the said estate provided he fulfils the conditions laid down in the Explanation to Order XXXIII, rule 1, Civil Procedure Code.

The word "person" occurring in the Explanation would include both natural and legal persons, and an Official Receiver is a person within the meaning of the above Explanation.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai dated 6th December 1934 and made in Original Petition No. 5 of 1934 (Original Suit No. 231 of 1934 on the file of the Sub-Court, Devakottai).

The petition originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH:—

This case was admitted by BURN J. on the ground that the question involved in the case is of some general importance. On the exact matter in question, there seems to be some difference of opinion. A Bench of the Rangoon High Court in *Mitra v. Corpn. of Royal Exchange Assce.*(1) has taken the view that an Official Receiver cannot be allowed to sue as a pauper where he himself is possessed of sufficient funds to carry on the suit. A different view has been taken by the Allahabad High Court in *Mohammed Zaki v. The Municipal Board, Mainpuri*(2). The nearest analogy in my opinion seems to be the case of an executor, in regard to whom the preponderance of opinion in this Court has been that he can be permitted to sue as a pauper if the estate which he represents does not possess sufficient funds to carry on the suit ; vide *Sivagami Ammal v. Gopalaswami Odayar*(3) and *Ammakannammal v. Damodara Mudaliar*(4). A different view has been taken by JACKSON J. in *In re A. S. Radhakrishna Aiyar*(5) where I find that one side

(1) A.I.R. 1930 Ran. 259.
(3) (1924) 48 M.L.J. 390.

(2) (1918) 16 A.L.J. 440.
(4) A.I.R. 1928 Mad. 66.
(5) (1924) 88 I.C. 91.

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SWAMINATHAN v. OFFICIAL RECEIVER, RAMNAD. was not represented. I therefore think it desirable that this matter should be decided by a Bench. I accordingly refer this civil revision petition to a Bench for disposal.

ON THE REFERENCE :—

K. S. Venkatarama Ayyar for petitioner.

K. V. Krishnaswami Ayyar and *C. A. Seshagiri Sastri* for first respondent.

R. Kesava Ayyangar for respondents 7, 8 and 9.

T. D. Srinivasachariar for twenty-fourth respondent.

Other respondents were unrepresented.

Cur. adv. vult.

VENKATARAMANA RAO J.—The JUDGMENT of the Court was delivered by this civil revision petition is whether an Official Receiver, in whom the estate of an insolvent is vested under section 28, clause 2, of the Provincial Insolvency Act by virtue of an order of adjudication made by the Court, can institute a suit as a pauper for the recovery of the said estate. The decision turns upon the construction of Order XXXIII, rule I, Civil Procedure Code, which runs thus :

“ Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a ‘ pauper ’ when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.”

The point now in controversy is whether an Official Receiver is a “ person ” within the meaning of the above explanation. There is no definition of “ person ” in the Civil Procedure Code. *Prima*

facie, the interpretation of the said term in the General Clauses Act would apply, according to which a “ person ” shall include any company or association or body of individuals, whether incorporated or not. This connotes that “ person ” would include both natural and legal persons. This is in strict accordance with the conception of a person in law. In his book on “ Jurisprudence ” (8th Edition), at page 329, Salmond observes thus:—

“ So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.

. . . Persons as so defined are of two kinds, distinguishable as natural and legal.”

He further points out that a natural person is capable of a double personality. At page 335, he explains it thus :

“ It often happens that a single human being possesses a double personality. He is one man, but two persons. *Unus homo*, it is said, *plures personas sustinet*. In one capacity, or in one right as English lawyers say, he may have legal relations with himself in his other capacity or right . . . This double personality exists chiefly in the case of trusteeship. A trustee is a person in whom the property of another is nominally (i.e., technically) vested to the intent that he may represent that other in the management and protection of it. A trustee, therefore, is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another.”

An Official Receiver satisfies this conception of a person. The estate of the insolvent is vested in him to the intent that he may represent the insolvent and realise the estate and administer it in

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accordance with the provisions of the Act. He is thus clothed with the representative character of a trustee. As Lord SELBORNE pointed out in *Pharmaceutical Society v. London and Provincial Supply Association*(1) :

"There can be no question that the word 'person' may, and . . . *prima facie* does, in a public statute, include a person in law : that is, a corporation, as well as a natural person. But although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far."

The same view was taken by Lord BLACKBURN at pages 868 and 869. Unless therefore the context and the object of the enactment requires otherwise, "person" in Order XXXIII, rule 1, Civil Procedure Code, should have the extended meaning given to it in law. Under Order XXXIII, rule 1, any suit may be instituted by a pauper, that is, the intended plaintiff in a suit can be a pauper. Suits under the Civil Procedure Code can be instituted not only by natural human beings but also by artificial persons such as a corporation or an idol and also by persons like executors, administrators, trustees and official receivers who represent the estate of another. *Prima facie*, therefore, having regard to the scheme of the Code, the context and object of the enactment would not exclude an Official Receiver from the category of persons within the meaning of the said rule. But it is contended that by reference to the necessary wearing-apparel in the explanation and the necessity of the presentation of the application by the applicant in person, it can only

(1) (1880) 5 App. Cas. 857, 861.

contemplate a natural person. We think this contention is sufficiently met by the observations of KUMARASWAMI SASTRI J. in *Perumal Goundan v. Thirumalarayapuram Jananukoola Dhana-sekhara Sangha Nidhi*(1). Dealing with the argument with reference to the wearing-apparel, he observes thus :

"The explanation simply allows deduction of the value of wearing-apparel and can only mean that if the applicant has necessary wearing-apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing-apparel, can sue as paupers . . ."

In regard to the physical presence of the applicant and his examination contemplated in the Code, the learned Judge observes thus :

"Rule 2 of Order XXXIII of the Civil Procedure Code, in our opinion, only prohibits a pauper who is competent in law to appear in person from taking advantage of Order III of the Civil Procedure Code, and appearing by a pleader or recognised agent instead of being present personally. It does not cover cases where from the nature of the case physical presence is impossible or where the law, owing to any disability, directs that all acts required by the Code should be performed by a next friend."

In a very early decision of the Madras High Court the word "person" was understood as including persons in a fiduciary character. In *In re Bill*(2), in accordance with this interpretation, an administrator was held entitled to sue in *forma pauperis*. This interpretation was never departed from, except in one case decided by JACKSON J., *In re A. S. Radhakrishna Aiyar*(3), where the learned Judge seems to follow the decision in *Manaji Rajuji (Rao Saheb) v. Khandoo Baloo*(4) which has taken a contrary view. In *Sivagami*

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(1) (1917) I.L.R. 41 Mad. 624.
(3) (1924) 88 I.C. 91.

(2) (1884) I.L.R. 7 Mad. 390.
(4) (1911) I.L.R. 36 Bom. 279.

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Ammal v. Gopalaswami Odayar(1) it was pointed out, following *In re Bill*(2), that the word "person" in Order XXXIII, rule 1, indicates a juridical person and that an executor can sue in *forma pauperis*. This is also the view taken by KUMARASWAMI SASTRI J. in *Ammakannammal v. Damodara Mudaliar*(3) (a case of an executor) and in *Perumal Goundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi*(4) (a case of an Official Liquidator). In a recent decision, dealing with the case of a mutwalli, reported as *Mabia Khaton v. Satkari*(5), GHOSE and CAMMIADÉ JJ. observed that the capacity of a person suing in a representative character must be kept distinct from his personal capacity and that a mutwalli, trustee or a shebait can be allowed to sue in *forma pauperis*.

The argument that was strongly pressed upon us and based on *Mitra v. Corp'n. of Royal Exchange Assce.*(6) is that as the property vests in the Official Receiver and he is the legal owner of the insolvent's estate, he cannot be allowed to sue in *forma pauperis*. The test is not whether a person is the legal owner, but whether as legal owner he is a pauper or not. If the principle of law is that a natural person in his own right is a different person when he is representing the estate of another, the test is whether in that representative character and as owner of that estate he is a pauper within the meaning of the Explanation of Order XXXIII, rule 1. The said decision again does not draw a distinction

(1) (1924) 48 M.L.J. 390.
(3) A.I.R. 1928 Mad. 66.
(5) (1926) 100 I.C. 264.

(2) (1884) I.L.R. 7 Mad. 390.
(4) (1917) I.L.R. 41 Mad. 624.
(6) A.I.R. 1930 Ran. 259.

between legal ownership vesting in a person by virtue of his fulfilling a representative character and so long as he fulfils the representative character and the legal ownership vesting in a person by virtue of succession or inheritance. The case of *Mohammed Zaki v. The Municipal Board, Mainpuri*(1) also is in favour of the view that an Official Receiver can sue as a pauper. The case of *Manaji Rajuji (Rao Saheb) v. Khandoo Baloo*(2) relied on is the one where DAVAR J. held that an executor was not entitled to sue in *forma pauperis* on the ground that he in his individual capacity was not a pauper. The ground assigned was that "the privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation". This decision proceeds on the assumption that the "person" referred to in the Explanation to Order XXXIII, rule 1, can only refer to a person suing in his own right and not to a person suing in a representative character or to an artificial person. The learned Judge notices in the same case that it was conceded before him that an executor could not institute a suit in *forma pauperis*. This is the English rule but that rule is not applicable in India as pointed out in *In re Bill*(3) which we prefer to follow.

We are therefore of the opinion that the Official Receiver in this case can be allowed to sue as a pauper provided he fulfils the conditions laid down in the Explanation to Order XXXIII, rule 1, Civil Procedure Code. The case is therefore

(1) (1918) 16 A.L.J. 440.

(2) (1911) I.L.R. 36 Bom. 279.

(3) (1884) I.L.R. 7 Mad. 390.

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remanded to the lower Court for the determination of the question whether the petitioner satisfies the condition laid down in the Explanation to Order XXXIII, rule 1, Civil Procedure Code and for disposal accordingly. Costs will abide the result.

V.V.C.

INCOME-TAX REFERENCE.

*Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Mockett and Mr. Justice Lakshmana Rao.*

1936,
December 4.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

MESSRS. P. T. CHENGALVAROYA CHETTIAR AND
P. L. M. M. V. S. AND COMPANY, MADRAS,
RESPONDENTS. *

*Indian Income-tax Act (XI of 1922), sec. 10 (2) (ix)—
Capital or revenue expenditure—Shells lying under
Government property—Exclusive right to excavate—Pay-
ment for—Nature of—"Annual lease amount"—Amount
payable stated in deed conferring right to be—Section 44 of
the Act—Discontinued firm—Partners of—Assessment on,
in respect of profits of firm before its dissolution—Mode of
—No assessment on firm before its dissolution.*

By a deed dated 2nd July 1930 the assessee got the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,450, payable by certain instalments and described in the instrument as regards Rs. 10,150 (being one-third of the amount stated) as "the annual lease amount".

Held that the sum of Rs. 30,450 paid by the assessee to the Government under the deed of 2nd July 1930 was a capital

* Original Petition No. 187 of 1936.

expenditure and not a revenue expenditure and the assessee could not claim a deduction in respect of the said sum.

The transaction in question is exactly the same as that in the case of *Commissioner of Income-tax v. Chengalroya Mudaliar*, (1934) I.L.R. 58 Mad. 1, and the use of the words "annual lease amount" does not alter its nature.

Held further that the partners of a discontinued firm could be assessed jointly and severally in respect of the profits earned by the firm before it was discontinued even though no assessment had been made upon the firm before its discontinuance.

The words "tax payable" in section 44 of the Indian Income-tax Act of 1922 mean "tax that is due to be paid"; "tax which the firm or partnership would be liable to pay if it had not been discontinued"; "tax either found to be due already or that will be found to be due in the future".

In the matter of the Indian Income-tax Act (XI of 1922) and in the matter of the assessment of Messrs. P. T. Chengalvaroya Chettiar and P.L. M.M.V.S. and Company, Madras.

M. Subbaraya Ayyar for assessees.

M. Patanjali Sastri for Commissioner of Income-tax.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—Two questions have been referred to us by the Commissioner of Income-tax, viz.,

"(i) Whether the sum of Rs. 30,450 paid by the assessee to the Government under the instrument of lease, dated 2nd July 1930, is inadmissible as a revenue expenditure; and

(ii) Whether, after dissolution of the partnership, the Income-tax Officer had jurisdiction to assess the firm as a unit and whether section 44 of the Act gives jurisdiction to the officer both to make a joint and single assessment or whether the individual partners alone are liable to be assessed in respect of their proportionate shares."

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With regard to question No. 1, the facts are quite sufficiently stated by the Commissioner of Income-tax in his letter of reference, but quite briefly they are that the assessee by a deed, dated 2nd July 1930, got the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,450 payable by certain instalments and described in the instrument as regards Rs. 10,150 (being one-third of the amount stated) as "the annual lease amount". This sum of Rs. 30,450 was originally allowed to be deducted by the Income-tax Officer as being a payment out of revenue and not a capital expenditure. Subsequently, having regard to this High Court's decision in *Commissioner of Income-tax v. Chengalroya Mudaliar*(1), that allowance was cancelled and the sum was treated as a capital expenditure in the hands of the assessee. Hence this reference. In our view, the facts of this case are not distinguishable from the facts in *Chengalroya Mudaliar's case*(1). There, it was held that, having regard to the instrument, the expenditure was an initial expenditure without which the assessee could not even have begun winning the shells and it was, therefore, a capital expenditure. We have had addressed to us a strenuous argument by Mr. Subbaraya Ayyar that there is a very material distinction between the words in the instrument in this case and those in *Chengalroya Mudaliar's case*(1). He contends that, as the words "annual lease amount" appear in the instrument in question here and do not appear in the instrument in *Chengalroya*

(1) (1934) I.L.R. 58 Mad. 1.

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Mudaliar's case(1), it renders the agreement in question a rental agreement and that full significance must be given to the words "annual lease amount" and they must be taken as showing that the payment to be made under the instrument was a payment by way of rent and therefore a revenue expenditure and not a capital expenditure as in *Chengalroya Mudaliar's case*(1). We are unable to see that those words make any material difference. The transaction in question is exactly the same as that in *Chengalroya Mudaliar's case*(1) and the use of the words "annual lease amount" does not, in our opinion, alter its nature. The answer to the first question must be in the affirmative.

With regard to the second question, the assessment here was made by the Income-tax authorities under section 44 of the Act which reads as follows :

"Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm."

The object of that section is perfectly clear. It is to enable the tax on the profits of a firm which has been discontinued to be got by the Income-tax authorities and to prevent the avoidance of taxation by the discontinuance of the firm. The words are, in our opinion, perfectly clear but Mr. Subbaraya Ayyar contends that unless an assessment upon the firm has already been made before its discontinuance, which is not the case here, the partners of it cannot be assessed jointly

(1) (1934) I.L.R. 58 Mad. 1.

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after its discontinuance because according to him the words "tax payable" in the section mean "payable as the result of an assessment already made upon the firm". If this contention is correct, it leads to a strange result. The object of the section being perfectly clear, viz., to get at the tax on the profits of the firm made before its discontinuance, and bearing in mind that that is its object, the result of the contention, if correct, would be that the tax recoverable would be less than that recoverable if the business had not been discontinued. In such a case, the tax would have been upon the profits of the business but if a separate assessment is made upon the partners separately and not jointly after the discontinuance of the business it is conceded that the tax recoverable would be less. We are unable to see why the fact that an assessment has not been made upon the firm previous to its discontinuance should bring about such a result. It seems to us that "tax payable" means "tax that is due to be paid"; "tax which the firm or partnership would be liable to pay if it had not been discontinued"; "tax either found to be due already or that will be found to be due in the future". That being so, we are clearly of the opinion that the Income-tax authorities were correct in assessing the partners of the discontinued firm jointly and severally in respect of the profits earned by the firm before it was discontinued. Question No. 2 is answered accordingly.

The Income-tax Commissioner will get Rs. 250 costs.

A.S.V.

INCOME-TAX REFERENCE.

*Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Mockett and Mr. Justice Lakshmana Rao.*

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1936.
December 18.

v.

THE HONOURABLE SRI RAVU SWETACHALAPATI
RAMAKRISHNA RANGA RAO BAHADUR,
RAJA OF BOBBILI,
RESPONDENT. *

Indian Income-tax Act (XI of 1922), sec. 14 (1)—Impartible estate—Income of, received by holder of estate—Assessment of holder in respect of, as an individual—Permissibility—Holder manager of joint Hindu family.

The assessee was the holder of an impartible estate and was, besides, the managing member of a Hindu undivided family. The question was whether in respect of income derived from the impartible estate the assessee could be assessed as an individual. The contention of the assessee was that the income was the income of the joint family and therefore the joint family should be assessed as such in respect of it.

Held that the assessee could be assessed in respect of the said income as an individual.

Income from an impartible estate when received by the holder of the estate is his absolute property. It is in no respect different from the income derived by the holder from his personal exertions or his other self-acquisitions. The income is received by him as the holder of the impartible estate and not "as a member of a Hindu undivided family" within the meaning of section 14 (1) of the Indian Income-tax Act of 1922. The income is his and the junior members have no right therein.

Case-law reviewed.

* Original Petition No. 224 of 1936.

COMMISSIONER OF INCOME-TAX v. RAJA OF BOBBILI. In the matter of the Indian Income-tax Act, XI of 1922.

V. Govindarajachari for assessee.—The question is whether the income of a joint ancestral impartible estate is the income of the joint family of which the holder of the estate is the manager and whether in respect of such income the holder should be assessed as the representative of a Hindu undivided family or whether he can be assessed as an individual. The contention of the assessee is that the assessment should be as in the case of a joint Hindu family represented by its manager, the holder of the estate for the time being. Income from a joint ancestral impartible estate is not the absolute property of the holder because the income is subject to claims of rights for maintenance by persons entitled to such rights. The estate itself being joint family property, income from it is income of the joint family. [*Krishan Kishore v. The Commissioner of Income-Tax*(1), *Commissioner of Income-Tax, Bihar and Orissa v. Maharajahadhiraja Kumar Visheswar Singh*(2), *Commissioner of Income-Tax v. Zamindar of Chemudu*(3), *Vijayananda Gajpatiraj Kumar of Vizianagram v. Commissioner of Income-Tax*(4) and *Collector of Gorakhpur v. Ram Sundar Mal*(5) were relied upon.] In *Subbayya Thevar v. Sivagnana Marudappa Pandian*(6) it is stated that the opinion of Mulla (in pages 610 and 611 of his Hindu Law) relied upon by the Commissioner is wrong. [*Sri Sri Raja Shiva Prasad Singh v. The Crown*(7) and *Rani Jagadamba Kumari v. Wazir Narain Singh*(8) were referred to.] The view at page 1413 of *Shibaprasad Singh v. Prayagkumari Debee*(9) as regards maintenance is somewhat inconsistent with that held in *Collector of Gorakhpur v. Ram Sundar Mal*(5). *Shibaprasad Singh v. Prayagkumari Debee*(9) at page 1413 seems to re-state the old view, i.e., that held in *Rama Rao v. Raja of Pittapur*(10). *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu*(11) is the case which is re-affirmed in *Collector of*

(1) (1932) I.L.R. 14 Lah. 255, 262.

(2) (1935) I.L.R. 14 Pat. 785, 786, 791, 794 (S.B.).

(3) (1934) I.L.R. 57 Mad. 1023. (4) (1934) I.L.R. 56 All. 1009, 1015.

(5) (1934) I.L.R. 56 All. 468, 485 (P.C.).

(6) (1936) 71 M.L.J. 568, 571. (7) (1924) I.L.R. 4 Pat. 73, 87.

(8) (1922) I.L.R. 2 Pat. 319, 322, 325 (P.C.).

(9) (1932) I.L.R. 59 Cal. 1399 (P.C.).

(10) (1918) I.L.R. 41 Mad. 778 (P.C.).

(11) (1900) I.L.R. 24 Mad. 147, 153 (P.C.).

Gorakhpur v. Ram Sundar Mal(1). *Bajinath Prasad Singh v. Tej Bali Singh*(2) refers to all the earlier decisions of the Privy Council and explains them.

M. Patanjali Sastri for Commissioner of Income-tax.—The only point for determination in the present case is as to the character of the income from an impartible estate assuming that the estate is a joint ancestral estate. We are not concerned with the question whether and to what extent an impartible estate can be regarded as joint family property or with cases under section 14 (1) of the Income-tax Act, viz., as to the nature of the amount received by a junior member of the family of the holder of a joint ancestral impartible estate from out of the income of that estate. In *Commissioner of Income-Tax v. Zamindar of Chemudu*(3) the Court refused to be drawn to a consideration of the question as to the nature of the income received by the holder from out of the estate, whether it was his absolute property or joint family property. The question as to the character of the income from the estate in the hands of the holder is concluded by the decisions of the Privy Council in *Rani Jagadamba Kumari v. Wazir Narain Singh*(4) and *Shibaprasad Singh v. Prayagkumari Debee*(5). *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(6) shows that even if the family is not assessed, a junior member cannot be assessed in respect of amount received by him as a junior member. *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(7) is the only other decision of the Privy Council in which the nature of the income in the hands of the holder of the estate was considered; see page 453. Even if the corpus of the estate is joint family property, the income of such estate in the hands of the holder will be his separate or self-acquired property and will devolve upon the separate heirs of the holder. The cases referred to by the other side related only to the corpus of the estate—whether it is joint family property or the separate property of the holder. The result of those cases is that for purposes of succession and maintenance an impartible estate is regarded as joint family property but for all other purposes it is the separate or self-acquired property of the holder. Those cases had not, however, to consider the

(1) (1934) I.L.R. 56 All. 468, 485 (P.C.).

(2) (1921) I.L.R. 43 All. 228 (P.C.). (3) (1934) I.L.R. 57 Mad. 1023.

(4) (1922) I.L.R. 2 Pat. 319 (P.C.). (5) (1932) I.L.R. 59 Cal. 1399 (P.C.).

(6) (1929) 3 I.T.C. 441.

(7) (1902) I.L.R. 29 Cal. 433 (P.C.).

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nature of the income from an impartible estate, which is the question for determination in the present case, and that question was considered in the three cases relied upon by me. There is nothing in the Income-tax Act against the view that the income is the separate property of the holder. In fact the question has to be decided solely with reference to the principles of Hindu law and not with reference to any provisions in the Act. Section 3 of the Act no doubt refers to a Hindu undivided family. But the question whether any particular income is or is not income of a Hindu undivided family has to be decided only with reference to the principles of the Hindu law. [Reference was made to section 14 (1) of the Act]. Even though the recipient of an income may be a member of a joint Hindu family, it does not follow that every item of income received by him is as a member of an undivided family and is therefore joint family income. The holder of an impartible estate may be a member of an undivided family but it does not follow that income from the estate received by him is received by him as a member of an undivided family. That income is really of the same nature as a salary received by him. The assessee in the present case can therefore get no assistance from section 14 (1) of the Act or from *Commissioner of Income-Tax v. Zamindar of Chemudu*(1) in which the Court refused to consider the question of the nature of the income in the hands of the holder. *Subbayya Thevar v. Sivagnana Marudappa Pandian*(2) does not affect the statement of the law on page 609 of Mulla's book ; see page 572.

V. Govindarajachari in reply.—The object of section 14 (1) of the Act is to prevent double taxation. Section 14 assumes that the income out of which a junior member receives maintenance was assessed in the hands of the person paying. The holder of an impartible estate is bound to maintain a junior member out of the income of the estate. The obligation of the holder is proprietary and not a mere personal obligation. The income at the time it is received by the holder is joint family income ; otherwise a junior member cannot claim maintenance out of it. The holder receiving the income receives it as manager of a joint family. The balance left after payment of maintenance to junior members is no doubt the absolute or self-acquired property of the holder. This is the

(1) (1934) I.L.R. 57 Mad. 1023.

(2) (1936) 71 M.L.J. 568.

true mode of reconciling the different sets of Privy Council decisions.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C. J.—The question before us is :

“Whether in respect of the following three sums, viz., Rs. 8,436 being income assessable under the head ‘property’, Rs. 998 under ‘business’ and Rs. 3,755 under other sources (quarries and fisheries) the petitioner was rightly taxed as an individual or whether he should have been taxed as the representative of a Hindu undivided family.”

The assessee, the Raja of Bobbili, is the present holder of the impartible estate of Bobbili. During the previous year (1st April 1934 to 31st March 1935) he was also the Chief Minister to the Government of Madras. He is, besides, the managing member of a Hindu undivided family of which he and his brother are the senior coparceners. For the assessment year 1935–1936 his total income from all sources liable to income-tax was ascertained to be Rs. 64,083 made up of the following items :—

	RS.
1. Salaries	49,399
2. Interest on securities	420
3. Property	8,446
4. Business : Money-lending (Rs. 998) and Kerosine oil agency (Rs. 525).	1,523
5. Other sources : Dividends (Rs. 540) and quarries and fisheries (Rs. 3,755)	4,295
	<u>64,083</u>

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He was assessed both to income-tax and super-tax, super-tax being levied as on an individual. With the exception of certain amounts it was admitted that the Raja was rightly assessed as an individual. The sums about which there is a dispute are Rs. 8,446 from property, Rs. 998 from money-lending business and Rs. 3,755 from other sources (fisheries and quarries). These sums are income derived from the impartible estate. The assessee's contention is that they are income of the joint family and therefore the joint family should have been assessed as such in respect of them and not the Raja as an individual.

The point for consideration is whether for purposes of income-tax the income from the impartible estate is income of the joint family of which the Raja is the manager ; and in this connection certain principles with regard to impartible estates must be stated ; and they are that from the very nature of the estate there can be no right of partition and that except in Madras no coparcener can restrain alienations by the head of the family though the right to maintenance and of survivorship may exist. The distinction between an impartible estate and a joint family estate has now been made clear in a number of decisions. What has now to be considered is the income from such an estate, the Income-tax Commissioner's claim being that this income must be regarded for the purposes of income-tax as the income of an individual and in support of his claim a number of cases have been cited. Amongst those cases which in our opinion lend considerable support to the Income-tax Commissioner's contention is *Shibaprasad Singh v. Prayagkumari*

Debee(1), a decision of the Privy Council. The litigation in that case related to the succession to the estate of one Raja Durgaprasad who died childless survived by three widows who were the plaintiffs in the suit and the respondents in the first appeal. The defendant, Shibaprasad Singh, was a collateral relative of the deceased Raja. The parties were governed by the Mitakshara law. The chief item of property was the impartible estate but the Raja died possessed of considerable other immovable property, also of cash, deposits in banks, jewellery and other movable property. Upon the Raja's death the defendant took possession of the impartible estate and also other property of the Raja claiming that it passed to him by survivorship. The plaintiffs alleged that the family had ceased to be joint, and claimed the estate under Hindu law, claiming the other immovable and movable property as self-acquisitions. Amongst the questions of law dealt with was whether the holder of an impartible estate can incorporate with it property, either movable or immovable, so as to make that property descend according to the rule of primogeniture governing the estate. It was held that the blending of income from self-acquired property with income from an impartible estate raises no presumption of an intention to incorporate but that intention can be indicated in other modes and that movable property cannot form an accretion to an ancestral impartible estate and even the income of an estate of that nature is not an accretion to it. In the course of the judgment of

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their Lordships' Board a large number of cases touching the question are referred to and examined; and in drawing a distinction between an impartible estate and the ordinary joint family estate, on page 1413, it is stated:

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case(1), and the *first Pittapur* case(2), and so also the third as held in the *second Pittapur* case(3). To this extent the general law of the *Mitakshara* has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in *Bajinath's* case(4). To this extent the estate still retains its character of joint family property, and its devolution is governed by the general *Mitakshara* law applicable to such property."

The important words affecting the question here are those which state that "the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property". After dealing with the question of whether the family had ceased to be joint, their Lordships consider on page 1414 the second question, namely, whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him, and a number of decisions are referred to, the first of them being *Parbati Kumari Debi v. Jagadis*

(1) (1888) I.L.R. 10 All. 272 (P.C.). (2) (1898) I.L.R. 22 Mad. 383 (P.C.).
(3) (1918) I.L.R. 41 Mad. 778 (P.C.). (4) (1921) I.L.R. 43 All. 228 (P.C.).

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Chunder Dhabal(1) which was a case relating to the succession to an ancestral impartible estate when some property had been purchased on behalf of the last holder out of the savings of the estate. It was contended that this property had been incorporated with the estate and therefore passed with it. The evidence was that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate and it was held that these facts were not adequate for holding that the Raja intended to incorporate the property with the ancestral estate for the purposes of his succession and that the property must therefore follow the rule of the *Mitakshara* as to self-acquired property. Next *Janki Prasad Singh v. Dwarka Prasad Singh*(2) is cited. That also relates to immovable property and, referring to the previously-cited case, it was held that the question whether properties acquired by an owner become part of the ancestral estate for the purpose of his succession depends on his intention to incorporate the acquisitions with the original estate. Another case referred to is *Rani Jagadamba Kumari v. Wazir Narain Singh*(3) which was a case relied upon by Mr. Patanjali Sastri in support of his argument and to which a further reference will be made in this judgment. The actual point of the decision in that case was that where the estate is impartible no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate.

(1) (1902) I.L.R. 29 Cal. 433 (P.C.).
(2) (1918) I.L.R. 35 All. 391 (P.C.). (3) (1922) I.L.R. 2 Pat. 319 (P.C.).

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The case does not decide that, if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property. Several other cases are also referred to. On page 1418 the distinction between the blending of income in the case of a member of a joint family and a member of it who is the holder of an ancestral impartible estate is stated as follows :

"If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property, *Rajani Kanta Pal v. Jaga Mohan Pal*(1). But no such presumption can arise if a member of a joint family, who is the holder of an ancestral impartible estate, mixes the income of his self-acquired property with the income of the estate."

Having dealt with the question of the incorporation of immovable property purchased out of the income of an impartible estate and having held that it can form an accretion to the joint family estate provided the intention on the part of the holder of the impartible estate is clearly proved, their Lordships proceed to deal on page 1422 with movable property as distinguished from immovable property and there say :

"None of these considerations, however, apply to movable property. Such property, their Lordships think, cannot form an accretion to an ancestral impartible estate";

and here follow the very important words :

"The income even of such an estate is not an accretion to the estate. As was said by the Board in *Rani Jagadamba Kumari v. Wazir Narain Singh*(2) 'the income when received is the absolute property of the owner of the impartible estate'. It does not attach to the estate as does the income of an ordinary

ancestral estate attach to that estate. The conclusion to which their Lordships have come on this part of the case is that, while immovable property can be incorporated with an impartible estate, movable property cannot."

It will be convenient now to examine the case reported as *Rani Jagadamba Kumari v. Wazir Narain Singh*(1), another decision of the Privy Council. There, it was held that the income of an impartible joint estate is not so affected by its source that it should be assumed to form an accretion to the estate and further, as the holder is entitled to the whole of the income, the principle applicable to an ordinary joint family that self-acquired moneys are to be regarded as joint property if mixed with the moneys of the joint family, does not necessarily apply to property acquired by the holder of an impartible estate out of the income. In that case, the deceased holder of an impartible estate had applied savings out of the income to purchasing immovable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the income of the estate, and it was held that the property so acquired had not become part of the impartible estate but remained the separate property of the deceased holder. One question raised, namely, whether movable property can ever be treated as an accretion to immovable property about which their Lordships expressed considerable doubt has since been set at rest by the decision of their Lordships in *Shibaprasad Singh v. Prayagkumari Debee*(2) already referred to. Lord BUCKMASTER, in delivering the judgment of their Lordships' Board, on

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(1) (1923) I.L.R. 50 Cal. 439 (P.C.). (2) (1922) I.L.R. 2 Pat. 319 (P.C.).

(1) (1922) I.L.R. 2 Pat. 319 (P.C.). (2) (1932) I.L.R. 59 Cal. 1399 (P.C.).

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page 325 [of the case reported as *Rani Jagadamba Kumari v. Wazir Narain Singh*(1)], states as follows :

"Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja, other than the impartible raj, was derived from the income of the raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lakhs and other movable and immovable properties. With the exception of the Government promissory notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the Bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property."

These two cases and *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(2) are the only three Privy

(1) (1922) I.L.R. 2 Pat. 319 (P.C.). (2) (1902) I.L.R. 29 Cal. 433 (P.C.).

Council decisions where this question of income from an impartible estate has been considered. It appears clearly from these decisions that such income is in no respect different from the income derived from the personal exertions of the holder of the impartible estate or his other self-acquisitions and this income comes to him because he is the holder of the impartible estate. Why should this income be treated for the purposes of income-tax differently to his income arising from his salary as a Minister in respect of which he is assessed under section 3 as an individual? In addition to these three Privy Council decisions, there is a decision of the Patna High Court which is directly in point, viz., *Sri Sri Raja Shiva Prasad Singh v. The Crown*(1). There, it was held that the Finance Act of 1922, which, for the purpose of assessing super-tax, allows a larger deduction from income in the case of a Hindu joint family than in the case of an individual, contemplates that that larger deduction shall be made only in a case of the income of an undivided family in which all the coparceners are interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being. On page 88 DAWSON MILLER C.J. says :

"The income of the estate is that of the incumbent for the time being, nor does the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. It is essentially his income and I so hold. The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of the undivided family in which they are all jointly interested and

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(1) (1924) I.L.R. 4 Pat. 73.

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BEASLEY C.J. not in the case of an impartible estate where the income is the sole property of the holder for the time being."

The latest decision of the Privy Council in *Collector of Gorakhpur v. Ram Sundar Mal*(1) does not touch this question and what was decided there was that the right of the junior members of the family to maintenance out of an ancestral impartible estate is based upon their joint ownership and not custom. It does not say that the income of an ancestral impartible estate is not the income of the holder for the time being or that the latter is bound in law to apply the income or any portion thereof towards the maintenance of the junior members. The contention of the assessee that this income falls to be assessed as that of a Hindu undivided family is founded upon the words of section 14 of the Income-tax Act which reads as follows :

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The object of this exemption is to save double taxation and therefore where the Hindu undivided family has been assessed under section 3 in respect of its income a member of it is not to be assessed again individually. It is argued that the assessee here who is admittedly a member of a Hindu undivided family has received the income in question as such member, that he is therefore exempt from an individual assessment and that the words of the section themselves therefore negative the Income-tax authorities' contention ; and further assistance is sought by reference to decisions both of this High Court

(1) (1934) I.L.R. 56 All. 468 (P.C.).

and other High Courts. Taking this High Court first, there is *Commissioner of Income-Tax v. Zamindar of Chemudu*(1) where it was held that a sum received as maintenance by an assessee as the brother of the last holder of an ancestral impartible estate entitled under the law to receive maintenance out of such estate is a sum received by him as a member of a Hindu undivided family within the meaning of clause 1 of section 14 of the Indian Income-tax Act and that the right to maintenance which the son of a zamindar still possesses is not the creature of custom but it is an incident of the ordinary joint family property which has been left untouched by custom despite its encroachment on the other incidents, i.e., he receives the maintenance by reason of his status. As RAMESAM J., who delivered the judgment of the Full Bench, on page 1027 says :

"The question is whether the assessee received his payment as a member of a Hindu undivided family. Undoubtedly he does receive this payment of Rs. 6,000 because he is a member of the undivided Hindu family."

It is different in the case of the assessee here. It is true that he is a member of a Hindu undivided family but he receives nothing from the family. The income is received by him as the holder of the impartible estate and it cannot be said that he receives it as a member of a Hindu undivided family. The income is his and the junior members have no right therein. *Krishan Kishore v. The Commissioner of Income-Tax*(2) was also cited for the assessee. What was decided in that case was that there is no legal sanction for the proposition that an estate which is governed

(1) (1934) I.L.R. 57 Mad. 1023.

(2) (1932) I.L.R. 14 Lah. 255.

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by the rule of primogeniture cannot belong to an undivided Hindu family but must be the sole property of the person who has succeeded to it by the rule of primogeniture. This decision, however, does not touch the question in point here. It is not disputed that the corpus belongs to the undivided family. The question is as regards the income; and if in this case it is assumed that the income from an impartible estate means the joint family income, then that is clearly contrary to what was decided in *Rani Jagadamba Kumari v. Wazir Narain Singh*(1), *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(2) and *Shibaprasad Singh v. Prayagkumari Debee*(3) and to none of these cases is any reference made; and we must respectfully dissent from that view. In *Commissioner of Income-Tax, Bihar and Orissa v. Maharajadhiraja Kumar Visheswar Singh*(4) it was held that section 14 (1) of the Income-tax Act applies only to sums received by a member of a Hindu undivided family out of income to a share in which he has a vested right, that is to say, sums which he receives from the joint income of the family, and that a sum received by an assessee because he is a member of an undivided family does not stand on the same footing as a sum received by him as a member of the family within the meaning of section 14(1) of the Act. It is contended that this case assists the assessee because it shows that the income is still the joint income of the family. But the assertion of the assessee that the allowance was paid out of joint family property was not controverted in that case and, as stated in

(1) (1922) I.L.R. 2 Pat. 319 (P.C.).

(2) (1902) I.L.R. 29 Cal. 433 (P.C.).

(3) (1932) I.L.R. 59 Cal. 1399 (P.C.).

(4) (1935) I.L.R. 14 Pat. 785 (S.B.).

the leading judgment, the Court had not to consider the nature of the income from the impartible estate in the hands of the holder. In our view, the junior member receives maintenance because he is entitled to a share in the corpus and the holder of the impartible estate is bound to maintain the junior members of the family and no useful purpose will be served by a reference to other cases as none of the cases cited on behalf of the assessee, in our opinion, destroy the force of those relied upon by the Commissioner of Income-tax. We hold, therefore, that the assessee was rightly assessed in respect of his income as an individual. The question propounded is answered accordingly. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

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INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Mockett and Mr. Justice Lakshmana Rao.

M. KANNIAPPA NAICKER AND COMPANY,
PETITIONER,

v.

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

Indian Income-tax Act (XI of 1922), sec. 26 (2)—Applicability of—Conditions—Business carried on by transferee not the same but merely of the same nature—Effect—Sec. 26-A (1) of the Act—Registration of instrument of partnership—Refusal of—Legality of—Individual shares of partners not specified in instrument—Shares known to Income-tax authorities and set out in application for registration.

The requisites of sub-section 2 of section 26 of the Indian Income-tax Act of 1922 are that there must be a business in existence prior to the date of an assessment being made and that on the date of the making of the assessment it must be carried on by a different person to the person who carried it on prior to the date of the assessment, that is to say, the business must be the same but the person carrying it on must be different. What the sub-section requires is that it should be the same business and not merely business of the same nature.

Bell v. National Provincial Bank of England, Limited, (1903) 5 T.C. 1, and *Commissioner of Income-tax, Madras v. Best & Co., Madras*, (1932) I.L.R. 55 Mad. 882 (S.B.), distinguished.

The words of sub-section 1 of section 26-A requiring the specification in the instrument of partnership of the individual shares of the partners do not permit of any elasticity of construction. Where the individual shares of the partners are not specified in the instrument of partnership, the Income-tax Officer can refuse registration of the instrument on that ground, even though the Income-tax authorities are aware of

what the shares of the partners are and the application for registration itself sets out the individual shares of the partners.

In the matter of the Indian Income-tax Act XI of 1922 and in the matter of M. Kanniappa Naicker and Company.

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G. Ramakrishna Ayyar (T. Muniswami Reddi with him) for assessee.—Section 26 of the Indian Income-tax Act is applicable to cases in which there is some sort of transfer of the ownership of the prior business to the successor. The marginal note to the section is significant. Sub-section 1 of that section applies to a case where there has been a firm already in existence and the firm is reconstituted in the year of assessment. In such a case under that sub-section the reconstituted firm is assessed as if it had been carrying on the business throughout the assessment year. The person called the "successor" in section 26 (2) must succeed to the ownership of the business taken over. The sub-section can have no application to a case in which two persons carrying on independently businesses of the same kind agree to join together and to carry on those businesses as partners. In such a case there is no taking over by the succeeding business of the businesses carried on before by each of the partners independently. The case is really one of the closing down of the two earlier businesses and the starting of a new business. There cannot be said to be even an amalgamation of the old businesses. The transaction is really the formation of a new venture by both the persons as partners though of the same kind. *Kesava Rao v. The Commissioner of Income-tax*(1) shows that for the applicability of section 26(2) there must be a transfer of ownership. The succeeding business must have taken over the old business, its assets and liabilities. In the present case the old businesses collected each its own outstandings. Neither of the old businesses had any interest in the assets of the other and the new business had not any interest in the outstandings of either of the old businesses. The mere combining of two businesses is not enough to bring the case under section 26(2). Mere continuity of a business is not the test of succession within section 26(2) but the existence of a legal relationship between the old business and the new one. A transfer by operation of law or by act

* Original Petition No. 17 of 1936.

(1) (1935) 70 M.L.J. 13 (F.B.).

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of parties underlies the idea of succession in section 26 (2). [*Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(1), *In re The Commissioner of Income-tax, Burma v. N.N. Firm*(2) and *Mills from Emelie, Limited v. The Commissioners of Inland Revenue*(3) were referred to and *George Humphries & Co. (A Firm) v. Cook (H. M. Inspector of Taxes)*(4) was relied upon as the case nearest in point to the present case.] *Commissioner of Income-tax, Madras v. Best & Co., Madras*(5) is distinguishable. In that case, Best & Co. carried on several businesses and there was a transfer of one of those businesses and the question was whether there could be a transfer of part of a business. In the present case there was no transfer of either of the former businesses to the successor. Then as to section 26-A: Even if the instrument of partnership does not specify the shares of the partners, under the law the shares will be equal. The "and sons" company is regarded as a unit and its share is given. *In re Ramlal Murlidhar*(6) shows that it is not necessary that the instrument should be complete by itself and that the supplementing of the instrument by other evidence is permissible. [*Ananda Chandra v. Jhulon Singh*(7) was referred to.]

M. Patanjali Sastri for Commissioner of Income-tax.—Section 26-A requires that the shares of the various partners shall be specified in the deed of partnership. The object of the section is to avoid the Income-tax Officer being called upon to launch upon an enquiry as to the shares of the various partners.

[Suppose there is no difficulty in finding out the shares.—The CHIEF JUSTICE.]

The Commissioner relies upon the wording of the section. Otherwise the Income-tax Officer may be called upon to make an enquiry. Under section 28 (2) the fixation of shares is final so far as the Income-tax authorities are concerned. Section 28 (2) cannot apply to a case where the shares are not specified in the instrument. The partners may alter their shares by a subsequent arrangement during the course of the assessment year. A penalty is under section 28 (2) leviable in case of

(1) (1932) I.L.R. 12 Pat. 5, 9.

(2) (1933) I.L.R. 11 Ran. 501, 504.

(3) (1919) 12 T.C. 73.

(4) (1934) 19 T.C. 121.

(5) (1932) I.L.R. 55 Mad. 832 (S.B.).

(6) (1930) I.L.R. 58. Cal. 1005.

(7) A.I.R. 1929 Cal. 409.

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distribution of profits contrary to the shares specified in the instrument of partnership. That penalty cannot be levied if the instrument of partnership does not specify the shares. [*In re Commissioner of Income-tax, Burma v. N. N. Firm*(1) was referred to.] The question is not whether or not it is easy to find out the shares. The principle contended for is that the instrument must specify the shares. Then as to whether there was a succession within section 26 (2): The Commissioner has found that the partners continued to carry on the same business, namely, the supply of labour to the Port Trust and on the facts his finding is correct. [*Commissioner of Income-tax, Madras v. Best & Co., Madras*(2), *Bell v. National Provincial Bank of England, Limited*(3) and *Alexander Ferguson & Co., Ltd. v. Alkin*(4) were referred to.]

G. Ramakrishna Ayyar in reply.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—The questions propounded are : BEASLEY C.J.

"(a) Whether on the facts of this case the assessee firm did succeed to the business of the individual partners within the meaning of section 26 (2) of the Indian Income-tax Act? and

(b) whether a firm constituted under a registered deed of partnership of which one member is a firm is not entitled to be registered as a firm for the purpose of income-tax merely because while specifying the individual share of the profits and losses the instrument does not specify the shares *inter se* of the partner firm?"

Prior to 31st August 1933, a firm called M. K. Naicker & Sons was supplying labour to the Madras Port Trust under a contract which expired on 31st August 1933 and M. Raju Naicker and R. Govindarajulu Naicker in partnership had a

(1) (1933) I.L.R. 11 Ran. 501.

(2) (1932) I.L.R. 55 Mad. 832 (S.B.).

(3) (1903) 5 T.C. 1.

(4) (1898) 4 T.C. 36, 39, 40.

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similar contract with the Madras Port Trust which also expired on the same date. The labour under the contract was supplied by the former partnership, M. K. Naicker & Sons, to two godowns belonging to the Madras Port Trust and by the latter partners to two other godowns also belonging to the Madras Port Trust. Until 1933-34 the family represented by M. K. Naicker & Sons which was an undivided family and the firm consisting of M. Raju Naicker and R. Govindarajulu Naicker were separately assessed. The managing member of the former firm had for many years been supplying labour to the Madras Port Trust under similar contracts. When the before-mentioned contracts were about to expire, the Port Trust, contrary to their previous practice, decided to call for tenders for the supply of labour for a period of five years from September 1933, the previous practice having been to grant contracts without calling for tenders. M. K. Naicker & Sons and the other partnership decided to tender jointly for this contract in pursuance of an informal agreement entered into between them on 3rd July 1933 in which it was agreed that if the tender should be accepted by the Port Trust, fifty per cent of the profits and losses would be allotted to M. K. Naicker & Sons, twenty-five per cent to Raju Naicker and twenty-five per cent to Govindarajulu Naicker and that on acceptance of the tender a detailed partnership agreement would be executed and registered. These persons succeeded in getting the contract and accordingly jointly supplied the labour to the four godowns of the Madras Port Trust which they had previously done individually and on 21st

December 1934 executed a deed of partnership in respect of a firm styled M. K. Naicker & Co., the present petitioners M. K. Naicker & Sons, consisting of four partners, being called the partners of the first part and Raju Naicker and Govindarajulu Naicker partners of the second and third part respectively, and their shares in the profits and losses were specified as follows : M. K. Naicker & Sons seven annas in the rupee ; Raju Naicker five annas in the rupee and Govindarajulu Naicker four annas in the rupee. Under that document the partners who are described as three in number agreed to carry on the labour supply to the Madras Port Trust in pursuance of an agreement made by M. K. Naicker & Co. with the latter dated 5th September 1933. Subsequently M. K. Naicker & Co. applied to the Income-tax Officer for the registration of the firm under section 26-A of the Act filing the instrument of partnership already referred to dated 21st December 1934. This application was refused on the ground that the instrument of partnership did not specify the shares of the partners in the partnership. This point will be dealt with when we come to consider question (b) and as regards question (a) some further facts must be stated and they are that for the assessment of the year 1934-35 M. K. Naicker & Sons filed a return showing the income of the labour supply business carried on by them during the period 1st January 1933 to 31st August 1933, the date on which their independent contract with the Port Trust expired, contending that the labour supply business carried on by them had been discontinued on 31st August 1933 and therefore claiming the relief

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provided by section 25 (3) of the Act. Raju Naicker and Govindarajulu Naicker made a similar return and claim. The Income-tax Officer held that there was no discontinuance of the business within the meaning of section 25 (3) of the Act but that there was a "succession" within the meaning of section 26 (2) of the Act and held that the firm of M. K. Naicker & Co. (the assessee here) was liable to be taxed in respect of the profits earned by M. K. Naicker & Sons and the partnership of Raju Naicker and Govindarajulu Naicker. He accordingly required M. K. Naicker & Co. to make a return of its income for the tax year 1934-35. The firm filed a return declaring a loss amounting to Rs. 6,475-13-7. Since the assessee firm's contract with the Port Trust commenced only in September 1933, they required "September to August" to be treated as their "previous" year for the purposes of the assessment. This claim was allowed but the Income-tax Officer held that for the tax year 1934-35 M. K. Naicker & Co. was liable to be assessed on the profits of M. K. Naicker & Sons and the partnership of Raju Naicker and Govindarajulu Naicker for the period January 1933 to 31st August 1933 and he determined the profits of this period to be Rs. 23,064.

The facts have been found by the Income-tax Commissioner as follows : (a) the individual partners were separately carrying on the business of supplying labour to the Madras Port Trust until 31st August 1933 ; (b) when the Port Trust invited tenders for the supply of labour from 1st September 1933, the partners of the firm tendered jointly and secured the contract ; (c) from 1st September

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1933 the partners continued to carry on the same business (supply of labour to the Port Trust) jointly in accordance with the agreement dated 5th September 1933 ; (d) most of the employees of the old business and the goodwill of the individual partners as suppliers of labour are now used for the joint business of the three partners in the same line. From 1st September 1933 the individual partners have not been carrying on the business of supplying labour separately either to the Port Trust or to any other person. The Commissioner is of the opinion that the facts before stated by him establish that the business carried on by M. K. Naicker & Co. is identical with the business carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker individually, that it is in continuation of the individual business of the partners, that the effect of the joint contract of the partners with the Port Trust is that their separate businesses became amalgamated into one business, that prior to 1st September 1933 the business of supplying labour to the Port Trust consisted of two units, one owned by M. K. Naicker & Sons and the other by Raju Naicker and Govindarajulu Naicker, that after 1st September both these units are owned by M. K. Naicker & Co. no one having any exclusive ownership of any one unit, that there is thus a transfer of ownership of the separate business from the partners concerned to the firm and that this amounts to "succession" within the meaning of section 26 (2) of the Act ; and in support of this opinion he relies upon *Commissioner of Income-tax, Madras v. Best & Co., Madras*(1).

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Taking question (a) first, the relevant section is section 26 (2) of the Act which reads as follows :

"Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

The requisites of that sub-section, therefore, are that there must be a business in existence prior to the date of an assessment being made and that on the date of the making of the assessment, it must be carried on by a different person to the person who carried it on prior to the date of the assessment, that is to say, the business must be the same but the person carrying it on must be different. For the Commissioner of Income-tax *Bell v. National Provincial Bank of England, Limited*(1) was relied upon. The question there was whether the respondent Bank which acquired by purchase the business of the County of Stafford Bank succeeded to the business of the latter Bank within the meaning of Rule 4 of the 1st and 2nd Cases of Schedule D, section 100, of the Income-tax Act of 1842 the material part of which is similar to the sub-section in question here. On page 10 the MASTER OF THE ROLLS says :

"It seems to me that the words of Rule 4 are plain, and that if the National Provincial Bank had not existed, but some new company had been formed to take over for the first time the business of the Stafford Bank, there would have been a case directly falling in terms within the words of the 4th Rule: 'If any person shall have succeeded to any trade, manufacture, adventure or concern'. In the case I put of a new company formed for the first time and acquiring the Stafford Bank, that

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would clearly be a case of a person succeeding to a concern. What difference does it make that that person who succeeds to the concern should himself already have an existing business? Does he the less succeed to the new business because he had the old one? It seems to me certainly not. He had the old one before. He has the old one still and the new one in addition and to that new one, it seems to me, he has succeeded."

It was accordingly held that there had been a succession within the meaning of the 4th Rule. There, there was a definite existing business, namely, the respondent Bank. There was also a definite and distinct business, the Stafford Bank. The former bank became the owners by purchase of the latter. Therefore, the business of the latter was at the date of the assessment being carried on by a different body, namely, the respondent Bank and, as the MASTER OF THE ROLLS put it, it had clearly succeeded to that business. The present case, in our opinion, is distinguishable from *Bell v. National Provincial Bank of England, Limited*(1) for the following reason, namely, that at the time of the purchase of the Stafford Bank it was an existing business which could and probably would have been continued under the same ownership for years. Here, the facts are entirely different and for this purpose the nature of the businesses which were going on prior to the date of the assessment in question here must be examined. Those businesses were to supply cooly labour to certain godowns belonging to the Madras Port Trust and were being conducted under contracts of specified durations. There is nothing to show that on the termination of any contract the next contract was bound to go to

(1) (1903) 5 T.C. 1.

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either of the firms carrying on these businesses, which it is important to note existed solely for the purposes of those contracts, because it is not suggested that either of the partnerships carried on any other businesses in connection with the supply of labour except that M. K. Naicker & Sons had a small contract business. In our view these businesses must be held to have terminated on the dates of the expiry of each contract, that is to say, the business of M. K. Naicker & Sons terminated on 31st August 1933 and that of Raju Naicker and Govindarajulu Naicker on the same date. Reference was made by the Commissioner of Income-tax to the goodwill of these firms but we were unable to get from Mr. Patanjali Sastri any helpful reply in answer to questions put by us as to what could possibly be the goodwill attaching to such businesses. Unlike the case of the Stafford Bank, there was nothing which either of these partnerships could sell to any one for example in August 1933 or, to take an earlier date, July, when these two entities informally agreed to make a joint tender for the contract in question. They had no contract lasting beyond 31st August 1933 to sell, even supposing the Madras Port Trust would permit them to do so. It is conceded also that M. K. Naicker & Co. did not take over any of the assets or liabilities of the businesses carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker whereas in *Bell v. National Provincial Bank of England, Limited*(1) the latter took over the Stafford Bank's existing business and its clients and also its premises. The Income-tax Officer's main reason for the

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assessment is that these persons had for several years possessed the monopoly of supplying labour to the Port Trust and, finding that their monopoly was about to come to an end owing to the adoption by the Port Trust of the policy of inviting tenders and in order to secure continuity for their business, they entered into a partnership and put in their tender for the contract and as they were successful they found themselves in a position to continue the business without a break. It is quite correct that they continued to supply labour to the godowns of the Madras Port Trust as before and that what they did after 31st August 1933 was business of the same nature as before. But in our view what the section requires is that it should be the same business and not business of the same nature and we think that this is the mistake which has been made by the Commissioner of Income-tax when he finds that "the partners continued to carry on the same business (supply of labour to the Port Trust)". This is not a case like *Commissioner of Income-tax, Madras v. Best & Co., Madras*(1). There, Best & Co. were carrying on a number of businesses in their own name and as proprietors of concerns under different names. Amongst the latter was the Eagle Rolling Mills. This business they sold to a new company floated for acquiring it as a going concern and it was held that the new company had succeeded Best & Co. within the meaning of section 26 (2) of the Act. That was a plain case of an existing company being purchased by another as in *Bell v. National Provincial*

(1) (1932) I.L.R. 55 Mad. 832 (S.B.)

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Bank of England, Limited(1). In our view, the two businesses of M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker came to an end on 31st August 1933 and thereafter a new partnership (M. K. Naicker & Co.) was started to carry on a business of a similar nature. There was therefore no "succession" to a business as is required by section 26 (2) of the Act.

There remains question (b) to be considered. The procedure relating to registration of firms is laid down in section 26-A of the Act which is as follows :

"(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed ; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

It is the former sub-section that is in question here. The application was refused on the ground that the individual shares of the partners were not specified in the instrument of partnership. The instrument of partnership, as has already been stated, treats the partnership of M. K. Naicker & Sons which was made up of four partners as one of the three partners in the firm of M. K. Naicker & Co., and to this partnership a seven annas share in the rupee in the profits and losses is given. The contention of the Income-tax authorities is that as M. K. Naicker & Sons

(1) (1903) 5 T.C. 1.

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consists of four partners, the shares of each of them should have been set out in the partnership deed (Exhibit C). The shares of the partners in M. K. Naicker & Sons were each Re. 0-1-9 total-ling seven annas and, as that partnership had previously been registered, a reference to the instrument relating to it, a copy of which was filed with the Income-tax authorities, would show this. Not only would the Income-tax authorities be aware of what the shares of the partners were—and it is conceded that they did know—but the application for registration itself set out the individual shares of the partners of M. K. Naicker & Sons. Notwithstanding this knowledge the Income-tax Officer—and his action has been upheld by the Commissioner—presumably took the view that he was rigidly bound by the words of the section and that, as in the instrument of partnership these individual shares were not given, registration must be refused. The object in requiring this information is in order that the Income-tax authorities may determine what the profit received by each of the partners from the partnership profits is and in order to prevent the profits from being distributed to the partners otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under the Act and to prevent any partner returning his income below its real amount. We think that this is a hard case in view of the fact that the Income-tax authorities were really aware of the shares of the partners ; but the words of the sub-section do not seem to us to permit of any elasticity of construction. Section 28 (2) also points to the same conclusion.

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The individual shares of the partners must be specified in the instrument of partnership. They were not. That being so, the Income-tax Officer could refuse registration on that ground. The answer to this question, therefore, must be in the negative.

As regards costs, as the main contention has been upon question (a) and the assesseees have succeeded, in our opinion they are entitled to the costs which we fix at Rs. 250. The sum of Rs. 100 deposited by the assesseees is ordered to be refunded to them.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

1936,
November 12.

MARUDAMUTHU KADURAR (PETITIONER), PETITIONER,

v.

ARUMUGASAMI KADURAR (MINOR) AND ANOTHER,
REPRESENTED BY THEIR MOTHER AND NEXT FRIEND SWAYAMBA
AMMAL, (RESPONDENTS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 89—
Execution sale—Application by judgment-debtor to set
aside—Amount to be deposited by him as condition of—
Purchaser of portion of property at sale—Amount deposited
into Court by—Judgment-debtor's right to use—Consent of
purchaser to use.*

In execution of a decree three items of property of the judgment-debtor were sold, the first lot being purchased by A, the

* Civil Revision Petition No. 1039 of 1935.

second by B and the third by the decree-holders themselves. Pending confirmation of the sale, the judgment-debtor privately sold the first lot to A and the second to B. A and B deposited in Court amounts which, together with an amount deposited by the judgment-debtor himself, were sufficient to cover the amount mentioned in the sale proclamation *plus* 5 per cent on the sale of the third lot *plus* the poundage in respect of that lot. A, B and the judgment-debtor applied under Order XXI, rule 89, Civil Procedure Code, for the setting aside of the sale. A and B being themselves purchasers of two items of the property were incompetent to apply under Order XXI, rule 89. The question was whether the judgment-debtor had deposited in Court the amount necessary for making the payments under clauses (a) and (b) of Order XXI, rule 89. The amount deposited by him was not by itself sufficient for the purpose but A and B had expressed their willingness that the amounts deposited by them might be used by the judgment-debtor. It was urged that taking those amounts also into consideration, the judgment-debtor must be held to have deposited in Court an amount sufficient to satisfy the requirements of Order XXI, rule 89.

Held that the amounts deposited by A and B could not be taken into consideration and that the judgment-debtor had not therefore deposited the necessary amount.

After the deposit by A and B, the money deposited by them was in the custody of the Court till final orders were passed by it with respect to the sale and they could not, while the money was kept in the custody of the Court, operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of Order XXI, rule 89.

Civil Miscellaneous Appeal No. 82 of 1911 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 District Court of Trichinopoly dated 13th August 1935 and made in Civil Miscellaneous Appeal No. 40 of 1935 (Execution Application No. 882 of 1934 in Original Suit No. 109 of 1927, Sub-Court, Trichinopoly).

MARUDAMUTHU v. ARUMUGASAMI. *K. Rajah Ayyar* and *L. A. Gopalakrishna Ayyar* for petitioner.

S. Parthasarathi and *V. K. Thiruvengkatachari* for respondents.

Cur. adv. vult.

JUDGMENT.

This civil revision petition arises out of an application made under Order XXI, rule 89, Civil Procedure Code, to set aside a Court sale. The application was made by three petitioners, of whom the petitioner here was the third petitioner before the Subordinate Judge. The other two petitioners were the purchasers of two lots of the property sold, namely, lots 1 and 3.

The facts are briefly these: In execution of the decree in Original Suit No. 109 of 1927 in which the petitioner here was the only defendant, four items of property were ordered to be sold. The first petitioner in the lower Court purchased the first lot for Rs. 1,000 which was deposited by him. Lot 2 was not sold. The second petitioner purchased the third lot for Rs. 800. He also deposited the money into Court. Lot 4 was purchased for Rs. 1,005 by the decree-holders who were minors represented by their next friend. Pending confirmation of the sale the third petitioner (that is, the judgment-debtor petitioner) privately sold lot 1, to the first petitioner for a sum of Rs. 1,200. He wanted that a sum of Rs. 957-13-0 out of this amount may be appropriated towards the decree amount, the balance being the poundage of Rs. 42-3-0. Lot 3 properties were sold by the judgment-debtor privately to the second petitioner for Rs. 1,000. He prayed that out of that sum

Rs. 764-1-0 may be appropriated towards the MARUDAMUTHU satisfaction of the decree, the balance of ARUMUGASAMI. Rs. 35-15-0 representing poundage. The third petitioner, the petitioner here, had deposited in Court Rs. 369-8-0. Thus the total amount available is Rs. 957-13-0 *plus* 764-1-0 *plus* 369-8-6, in all Rs. 2,091-6-6. This amount will cover the amount mentioned in the sale proclamation, that is, Rs. 1,998-14-6 *plus* 5 per cent, on the sale price of lot 4 purchased by the decree-holders *plus* the poundage in respect of the sale of lot 4. In these circumstances the three petitioners ask the Court to set aside the sale stating that they have complied with the provisions of Order XXI, rule 89, Civil Procedure Code, the relevant portions of which are as follows:—

“(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding any interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—(a) for payment to the purchaser, a sum equal to five per cent of the purchase money, and (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.”

It will be observed that of the three petitioners, petitioners 1 and 2 are themselves purchasers of two items of the property and are hence incompetent to maintain an application under Order XXI, rule 89. But the judgment-debtor being one of the petitioners entitled to apply under Order XXI, rule 89, the question whether the sale can be set aside in the above circumstances has to be considered; and, as already stated, he is the only petitioner before this Court.

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ARUMUGASAMI. The learned Subordinate Judge set aside the Court sale, but his order was set aside by the learned District Judge.

The question of law presented by this case is a novel one and has not been the subject-matter of decision in any Court. It is argued by the petitioner that, inasmuch as the two purchasers have expressed their willingness that the money deposited by them in Court may be used by him as the properties have been privately sold to them, he has complied with the provisions of Order XXI, rule 89, Civil Procedure Code, by depositing in Court the necessary funds and the sale should therefore be set aside. He is supported in his application by the other two purchasers. It appears to me that the contention of the petitioner cannot be accepted. If the money deposited by the purchasers of lots 1 and 3 can be used by the petitioner, then no doubt the sale should be set aside. The question is, can it be said in the circumstances of the present case that the petitioner has deposited in Court the necessary sum? It is argued that since the purchasers of lots 1 and 3 have expressed their willingness that the money deposited by them may be used by the petitioner, that money has become his for depositing in Court and that he has therefore deposited into Court the necessary amount. In support of this contention an unreported decision of this Court in Civil Miscellaneous Appeal No. 82 of 1911 has been brought to my notice, but that case is distinguishable from the present one inasmuch as the amount in Court standing to the credit of the co-parceners which they allowed the fifth defendant, the petitioner, to use for setting aside the sale

was their own money, that is money lying to their credit, and therefore it may well be said that it became the money of the petitioner for him to deposit in Court within the meaning of Order XXI, rule 89, Civil Procedure Code, when they expressed their consent to that course. If in the present case the amount deposited by the first and second petitioners can, after the deposit, be said to be money which they can deal with as they liked, then the argument that taking that amount also into consideration the petitioner here has deposited in Court sufficient amount to make the payments may be accepted. It seems to me that after making the deposit the money deposited by the purchasers is in the custody of the Court till final orders are passed by it with respect to the sale. If the sale is confirmed the purchasers get the property and the money can no longer be claimed by them. If, on the other hand, it is set aside they will be refunded the money and it becomes theirs. But they cannot, while the money is kept in the custody of the Court, operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of Order XXI, rule 89. In the circumstances of the present case I am not satisfied that the petitioner has deposited in Court the amount necessary for making the payments under clauses (a) and (b) of Order XXI, rule 89, Civil Procedure Code. In my opinion the order of the lower Court is right and the civil revision petition is dismissed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

1937,
January 25.

SETHURAJAN, MINOR, BY GUARDIAN NATARAJA
SETHURAYAN (RESPONDENT—THIRD DEFENDANT), APPELLANT,

v.

GURUSWAMI PATHAR (PETITIONER—PLAINTIFF),
RESPONDENT.*

*Executing Court—Jurisdiction—Decree under execution—
Validity of—Jurisdiction to go into question of—Minor—
Decree passed against, on footing of his being a major—
Validity of decree attacked on ground of.*

An executing Court is not entitled to go into the question whether a person against whom the decree under execution was obtained on the footing that he was a major was in fact a minor and the decree was therefore void as against him.

Section 47 of the Code of Civil Procedure is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree.

Case-law reviewed.

APPEAL against the order of the District Court of East Tanjore at Negapatam dated 18th February 1933 and made in Appeal Suit No. 79 of 1932 preferred against the order of the Court of the District Munsif of Shiyali dated 22nd June 1932 and made in Miscellaneous Application No. 25 of 1932 in Original Suit No. 29 of 1929.

S. R. Muthuswami Ayyar for appellant.

M. S. Venkatarama Ayyar for respondent.

Cur. adv. vult.

* Appeal Against Appellate Order No. 146 of 1933.

JUDGMENT.

MOCKETT J.—This is a second appeal against the order of the District Judge of East Tanjore allowing the appeal against the order of the District Munsif of Shiyali. The decree-holder-respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution the third defendant obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. The lower Court having so found dismissed the petition. The lower appellate Court allowed the appeal on the grounds that this matter could not be raised by the appellant in execution and that his proper remedy was by way of suit. The point for decision is which of these two views is correct.

The appellant has argued that under Order XXI, rule 99, Civil Procedure Code, the petition was correctly dismissed because he, being a minor, was in the same position as a person "other than the judgment-debtor", and, according to the ruling of the Privy Council in *Rashid-un-nisa v. Muhammad Ismail Khan*(1), the appellant, not having been properly represented, was not a party at all. That argument, however, seems to beg the question in this case, which is, at what stage should the question of minority be gone into? And it is to be observed that in the above-mentioned case, the question was raised in connection with section 244 of the Code of 1882

(1) (1909) I.L.R. 31 All. 572, 582 (P.C.).

SETHURAJAN (corresponding to section 47 of the present Code)
 v.
 GURUSWAMI. and it was held that a suit to set aside execution
 MOCKETT J. proceedings by a minor on the ground of non-
 representation was not barred by the above
 section. There are conflicting authorities on the
 subject. In *Sami Chettiar v. Sesha Iyer & Co.* (1)
 DEVADOSS J. took the view that the question of a
 defendant being a minor could be taken at any
 time, even in execution. And in *Venkatasomes-
 wara Rao v. Lakshmanaswami* (2) KUMARASWAMI
 SASTRI J., one of the referring Judges, stated that,
 at least, on the balance of convenience, it was
 better that the question whether a decree was
 void by reason of the defendant being a minor
 should be gone into in execution and not by
 means of a suit. DEVADOSS J. at page 284 says :

"The second question is, can the executing Court enter-
 tain an objection to the execution of the decree against a
 minor on the ground that the guardian *ad litem* had an interest
 adverse to that of the minor in the suit? If the decree is not
 illegal on the face of it, is it open to the executing Court to go
 behind it?"

He then goes on to say that it is open to the
 minors to have these matters investigated in a
 suit. KUMARASWAMI SASTRI J. seems to draw a
 distinction between a void and voidable decree.
 In the former, he considers that the matter can
 be investigated in execution and so does
 DEVADOSS J. The Full Bench set at rest none of
 these questions. It is necessary to say a few
 words with regard to KUMARASWAMI SASTRI J.'s
 suggestion that the balance of convenience is in
 favour of investigating the question of minority
 in execution. That may be so, and that comment

(1) A.I.R. 1928 Mad. 1057.

(2) (1928) I.L.R. 52 Mad. 275 (F.B.).

might frequently be made with regard to the
 preferability of investigations in execution to
 those in a suit. But, with great respect, it does
 not seem to me to satisfy the test laid down by
 section 47. The point that is raised in such cases
 seems to be not one "relating to the execution,
 discharge or satisfaction of the decree", but
 amounts to a plea that the decree is void and that
 it was wrongly passed by the trial Court. An
 examination of the cases mentioned shows that
 they are not direct decisions on this point, the
 observations in favour of the appellant in these
 cases being *obiter*. But the matter has been
 directly dealt with in two recent decisions of this
 High Court. In *Govindan Nadar v. Natesa
 Pillai* (1) JACKSON J. had to deal with this very
 question. In that case, it was raised in execution
 that the defendant was a lunatic, unrepresented.
 JACKSON J., following the decisions of the
 Calcutta High Court in *Kalipada Sarkar v. Hari
 Mohan Dalal* (2) and *Gora Chand Haldar v.
 Prafulla Kumar Roy* (3), took the view that it was
 not open to the executing Court to go into that
 matter. The rule to be derived from *Gora Chand
 Haldar v. Prafulla Kumar Roy* (3) seems to be
 that the voidness of the decree must be apparent
 on the face of it. JACKSON J. observes that the
 rule laid down by the Calcutta High Court con-
 forms with the universally recognised principle,
 and he accepted those decisions. In *Lakshmanan
 Chettiar v. Chidambaram Chettiar* (4) a Bench of
 this High Court (CURGENVEN and CORNISH JJ.)
 has expressed approval of the above decision of

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(1) (1931) 61 M.L.J. 520.

(2) (1916) I.L.R. 44 Cal. 627.

(3) (1925) I.L.R. 53 Cal. 166, 173 (F.B.).

(4) (1934) I.L.R. 58 Mad. 752.

SETHURAJAN JACKSON J. and prefers his view to that of
v.
GURUSWAMI. OLDFIELD J. in *Subramania Aiyar v. Vaithi-*
MOCKETT J. *natha Aiyar*(1) and MADHAVAN NAIR J. in
Arunachalam Chetty v. Abdul Subhan Sahib(2).
It may be mentioned that the High Court of
Rangoon in *S. A. Nathan v. S. R. Samson*(3) has
dissented from the Full Bench decision of the
Calcutta High Court in *Gora Chand Haldar v.*
Prafulla Kumar Roy(4). I prefer the Calcutta
view expressed in *Kalipada Sarkar v. Hari*
Mohan Dalal(5) and *Gora Chand Haldar v.*
Prafulla Kumar Roy(4). I do not consider that
section 47, Civil Procedure Code, is intended to be
used for the purpose of investigating matters
relating to the validity of the decree itself when
on the face of it there is nothing illegal about
the decree. Cases in which pleas of minority
might be deliberately withheld for the purpose
of obstructing future execution proceedings can
be easily imagined and I am not impressed by
the argument as to hardship. As to the question
of hardship, in suitable cases, the Court in which
the suit is filed to set aside the decree can always,
by interlocutory orders, make provision against
the minor's property being unjustly sold.

As to the point raised that the order of the
District Munsif was not appealable it is quite
clear that he purported to make it under sec-
tion 47 and there is no substance in this
contention. As a result of these conclusions, I
would dismiss this appeal with costs.

HORWILL J. HORWILL J.—I agree. There is no definite
current of decisions in any High Court to the

(1) (1913) I.L.R. 38 Mad. 682.

(2) (1925) 50 M.L.J. 232.

(3) (1931) I.L.R. 9 Ran. 480 (F.B.). (4) (1925) I.L.R. 53 Cal. 166, 173 (F.B.).

(5) (1916) I.L.R. 44 Cal. 627.

effect that an executing Court, whose business it
is to execute, should institute an enquiry at the
instance of any person to ascertain whether a
decree, to all appearances a perfectly valid one,
may not for some reason or other be invalid. It
is against the well-established principles govern-
ing the duties of an executing Court that it
should sit in judgment over a Court that has
passed a decree, which may even be a superior
Court. Cases do however arise where the
executing Court is forced to notice that a decree
is not executable and in such cases it should not
execute. The unexecutability of the decree may
be obvious from a perusal of the judgment and
the pleadings or it may appear, when a decree-
holder is seeking to make a legal representative of
a judgment-debtor liable, that the legal represen-
tative is not liable because no decree was passed
against the judgment-debtor while he was yet
alive. Executing Courts must recognise these
facts. I do however feel that it would be against
the trend of decisions, above all, the decisions
since the closely-reasoned judgments in *Kalipada*
Sarkar v. Hari Mohan Dalal(1), to countenance
an enquiry in execution whether a judgment-
debtor was a minor. Although the principal case
relied on by the appellants, *S. A. Nathan v.*
S. R. Samson(2), disagrees with *Gora Chand*
Haldar v. Prafulla Kumar Roy(3) regarding the
distinction between a decree that is void on the
face of it and one that is found to be void after
enquiry, yet the effect of the judgment in
S. A. Nathan v. S. R. Samson(2) is to make an

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(1) (1916) I.L.R. 44 Cal. 627.

(2) (1931) I.L.R. 9 Ran. 480 (F.B.).

(3) (1925) I.L.R. 53 Cal. 166 (F.B.).

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exception only with regard to a judgment-debtor who died before decree, a special case since distinguished even by the Calcutta High Court. In most of the decisions placed before us on behalf of the appellant, the effect of the Privy Council case, *Rashid-un-nisa v. Muhammad Ismail Khan*(1), has not been considered; but in the Rangoon case it is recognised that this decision of the Committee does stand in the way of an enquiry regarding the minority of a judgment-debtor. When a judgment-debtor appears in execution and asserts that he is a minor he is in fact saying that he was not a party to the decree, which admission precludes the executing Court from making an enquiry under section 47, Civil Procedure Code.

It is argued that if the District Munsif had no authority under section 47 to go into this matter, his order was not one under section 47 and so is not appealable. The fallacy of this argument is that although the District Munsif ought not to have made this enquiry, he assumed jurisdiction and purported to pass an order under section 47, Civil Procedure Code. His order, wrongly given though it was, was therefore under section 47, Civil Procedure Code, and appealable.

The respondent has put forward an alternative answer to the appellant. It is that as two brothers of the appellant, with identical rights and liabilities, were parties to the decree, they sufficiently represented the minor appellant. This is a reasonable contention but it is weakened, if not vitiated, by the fact that the plaintiff did

(1) (1909) I.L.R. 31 All. 572 (P.C.).

not treat them as representatives of the appellant's interest, because he impleaded him, as well as his brothers. In view of the fact that the appeal fails otherwise, we have not thought it necessary to decide this rather nice point.

A.S.V.

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APPELLATE CIVIL.

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

DAVOOD MOHIDEEN ROWTHER, PETITIONER,

v.

SAHABDEEN SAHIB, RESPONDENT.*

1937,
February 11.

Provincial Insolvency Act (V of 1920), ss. 28 and 29—Suit by creditor against debtor after adjudication of latter as an insolvent in respect of a debt provable in insolvency—Maintainability of—Condition precedent to—Leave of Insolvency Court, if—Suit instituted without such leave—Power of Court in which suit instituted to grant leave to continue it.

After a debtor is adjudged an insolvent, a suit filed by his creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is not maintainable and the Court in which the suit is instituted cannot give leave to continue it.

When section 29 of the Provincial Insolvency Act speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made. Under section 28 of the Act leave of the Court is a condition precedent to the right of action, the want of it is a defect fatal to the suit and subsequent leave cannot validate it.

Case-law reviewed.

* Civil Revision Petitions Nos. 1295 of 1935 and 1167 of 1936.

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PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in Small Cause Suit No. 219 of 1934 and the order of the Court of the Subordinate Judge of Tanjore dated 13th July 1936 and made in Execution Application No. 217 of 1936 in Small Cause Suit No. 219 of 1934.

The above petitions originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH:—

This case (Civil Revision Petition No. 1295 of 1935) raises a question of some importance relating to the construction of section 29 of the Provincial Insolvency Act. A few facts may be necessary for the appreciation of the exact point involved in the case. On 11th March 1924 the defendant in this case executed an usufructuary mortgage in favour of one Haidersa Rowther. On the said date the property was subject to a simple mortgage. The simple mortgagees sued to enforce the security, obtained a decree, and, in execution thereof, purchased the property and dispossessed Haidersa on 25th July 1928. In the meantime the mortgagor applied to the Insolvency Court for adjudicating him an insolvent and the order of adjudication was passed on 8th August 1928. The insolvency has not terminated as the insolvent has not obtained his final discharge. It appears that Haidersa was adjudicated an insolvent and the Official Receiver sold all the outstandings due to the estate of Haidersa, and at the auction sale the plaintiff in this suit purchased the claim of Haidersa against the defendant in pursuance of the usufructuary mortgage executed in his favour. That claim was to recover money due under the mortgage under section 68 of the Transfer of Property Act by reason of the dispossession on 25th July 1928. The plaintiff instituted this suit on 18th April 1934 to recover the money due under the mortgage by reason of his purchase. He did not obtain leave of the Insolvency Court as required by section 28 (2) of the Act. The defendant did not plead the

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bar of section 28 (2) in his original written statement but later filed an additional written statement raising this plea. In answer to this the plaintiff filed an application under section 29 for leave to continue the proceedings, and leave was granted. The question, therefore, is whether it is open to the Court to grant such leave under section 29. Under section 28 (2), on the making of an order of adjudication, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. The section in my opinion imposes a condition precedent to the right of action. It has been construed to be so by a Bench of this Court in *Ghouse Khan v. Bala Subba Rowther*(1) and it has also been held that it is not open to the Insolvency Court to grant leave subsequently and cure the initial defect. WALLACE J. observes in *Ponnusami v. Kalaperumal*(2) that the absence of leave is not only a bar to the original institution of the suit, but that a suit commenced without leave cannot be continued by obtaining leave at any subsequent stage thereto. But in *Ghouse Khan v. Bala Subba Rowther*(1) ODGERS J. made an observation to the following effect, that even where a suit has been instituted without the leave of the Insolvency Court it would be open to the plaintiff to apply to the Court before which the suit was instituted for leave and that such leave could be granted. It was on the strength of that observation that the learned Judge in this case allowed the plaintiff to continue the suit. Taking sections 28 and 29 together it seems to me that section 29 contemplates proceedings pending on the date of the adjudication and not suits instituted subsequent to the order of adjudication. Else it seems to me that the condition precedent imposed by section 28 (2) will become nugatory. But a different view seems to have been taken in Bombay on the corresponding section, 18 (3), of the Presidency-towns Insolvency Act where the language is similar. In *Mahomed Haji Essack v. Abdul Rahiman*(3) the learned Judges say that even though leave has not been obtained under section 17 of the Presidency-towns Insolvency Act it is open to the Court before which a suit is instituted to grant leave, and pending the suit

(1) (1927) I.L.R. 51 Mad. 833.

(2) A.I.R. 1929 Mad. 480.

(3) (1916) I.L.R. 41 Bom. 312.

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the proceedings under section 18 (3) of the Presidency-towns Insolvency Act may be stayed. In doing so SCOTT C.J. purported to follow the decision of the English Court reported as *Brownscombe v. Fair*(1). That case was decided on the construction of sections 9 and 10 of the English Bankruptcy Act, 46 and 47 Vic. c. 52. In section 9 we find a clause corresponding to section 28 (2) of the Provincial Insolvency Act whereby a creditor cannot commence an action without the leave of the Insolvency Court. The language of section 10 of the said English Bankruptcy Act is similar to section 29 of the Indian Act. It says that any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against the debtor either stay the proceedings or allow them to continue on such terms as it may think just. In that case, the Master and the learned Judge before whom the original case came up allowed the suit to be continued. On appeal, WILLS J. stayed the action. In doing so he made the following observation :

"The intention of the Legislature in the Bankruptcy Act was, that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances, such as where a case was at the time of the bankruptcy ripe for trial in which the amount of the proof against the bankrupt's estate would not be seriously affected. But there must be such circumstance; in the present case there is nothing exceptional. Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated; but I do not think so, for the words are perfectly general."

These observations seem to indicate that even though leave has not been obtained in the first instance it is open to the Court before which the suit is pending to stay the action or continue it. As the provisions of the Indian law are more or less based upon the English Bankruptcy Act, the decision of WILLS J. is of some importance in the construction of the Indian Act. But I must say that the Lahore High Court has taken a different view, namely, the view which I have already indicated that taking sections 28 and 29 together what is contemplated is proceedings pending on the date of the adjudication and not proceedings instituted after the order of

adjudication. It is therefore desirable that this matter should be considered by a Bench as the question is one of frequent occurrence. I therefore refer this matter to a Bench.

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ON THE REFERENCE :

T. R. Srinivasan for petitioner.

S. K. Ahmed Meeran for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—The facts sufficient for the disposal of this revision petition are fully stated in the order of reference and it is unnecessary to repeat them. On those facts the question arises whether, after a person is adjudged an insolvent, a suit filed by a creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is maintainable and can the Court in which the suit is instituted give leave to continue it? The sections of the Provincial Insolvency Act relevant to this question are sections 28 and 29. Section 28, clause 2, runs thus :

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"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose."

Section 29 runs thus :

"Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose."

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Unhampered by authority, reading both sections together and giving the words their plain and natural meaning, the following propositions are clearly deducible :

(i) Section 28 (2) is mandatory and, after an order of adjudication is made, no suit or other proceeding can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action ; and

(ii) where any suit or other proceeding is pending on the date of the adjudication in any Civil Court, such Court on being apprised of the order of adjudication can in its discretion either stay the suit or proceeding or give leave to continue the same.

It will be seen that section 27, which deals with the power of Insolvency Courts to make an order of adjudication, is the first of the sections enacted under the heading "Order of adjudication". The succeeding sections deal with the legal consequences which follow from the order of adjudication. Thus the point of time in relation to which both sections 28 and 29 speak is the date of the order of adjudication. Section 28 deals with proceedings not pending on the date of the order of adjudication and section 29 deals with proceedings then pending. The term "pending" literally means "begun but not yet carried out or finished". Therefore when section 29 speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made; see *Subramanyam v. Narasimham*(1).

(1) (1928) 56 M.L.J. 489, 492 and 493.

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In the view that under section 28 leave of the Court is a condition precedent to the right of action, no other interpretation of section 29 is possible. If leave is a condition precedent, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. If it be held that leave can be given under section 29 to continue a suit commenced without the leave of the Insolvency Court, it would be rendering section 28 nugatory. To illustrate, suppose a District Court before which proceedings in insolvency are pending refuses to grant leave to a creditor to institute a suit against an insolvent ; after such refusal the creditor files a suit in the District Munsif's Court and it can grant leave to continue the suit ; this means the District Munsif will be sitting as it were in judgment against the order of the District Judge, a state of affairs which could never have been in the contemplation of the Legislature in enacting the Provincial Insolvency Act, whatever may be the English Law or the law of insolvency which governs the presidency-towns with which we shall presently deal.

An argument based on hardship to the creditor resulting from this interpretation was addressed to us relying on certain decisions. [Vide *Subramanyam v. Narasimham*(1) and *Bhimaji v. Chunilal Jhaverchand* (2)]. It is this : a creditor for no fault of his in ignorance of the adjudication files a suit ; it would be unjust to dismiss the suit for want of leave and it may be at the time of dismissal his claim may be barred and he will be practically remediless. When the words

(1) (1928) 56 M.L.J. 489.

(2) (1931) I.L.R. 57 Bom. 623.

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of the statute are plain, a Court of law cannot refuse to give them their natural meaning because of a possibility of hardship or injustice; moreover, as pointed out by WALLACE J. in *Ponnusami v. Kalaperumal*(1), there is really no such hardship. As observed by him at page 481 :

"The gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand, unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court."

There is preponderance of Indian authority in support of the view we are taking. In *Ghouse Khan v. Bala Subba Rowther*(2) ODGERS and CURGENVEN JJ. held that leave of the Insolvency Court is a condition precedent to the institution of a suit and failure to obtain such leave is a defect which cannot be cured and leave subsequent to the institution of the suit cannot be given. They followed the decision in *In re Dwarkadas Tejbhandas*(3) given on an analogous provision in the Presidency-towns Insolvency Act (section 17). In *Ponnusami v. Kalaperumal*(1) WALLACE J. held that even subsequent annulment of insolvency would not cure the initial defect. It must be noticed that WALLACE J. was inclined to take a different view in cases of the creditor's ignorance of the insolvency. [See *Subramanyam v. Narasimham*(4)]. In *Maya Ookeda v. Kuverji*(5) BLACKWELL J., following *In re Dwarkadas Tejbhandas*(3), dismissed a suit instituted without such leave. [See also *Panna Lal-Tassaduq*

(1) A.I.R. 1929 Mad. 480. (2) (1927) I.L.R. 51 Mad. 833.
(3) (1915) I.L.R. 40 Bom. 235 (4) (1928) 56 M.L.J. 489.
(5) (1931) 34 Bom. L.R. 649.

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Hussain v. Hira Nand-Jiwan Ram(1) and *Rowe & Co. v. Tan Thean Taik*(2)]. We may point out that in *Ghouse Khan v. Bala Subba Rowther*(3), *In re Dwarkadas Tejbhandas*(4) and *Panna Lal-Tassaduq Hussain v. Hira Nand-Jiwan Ram*(1) the creditor filed the suit in ignorance of the order of adjudication and yet this circumstance did not affect the decision in those cases.

We shall now deal with the argument in support of the contrary view based mainly on an English decision in *Brownscombe v. Fair*(5) and on *Mahomed Haji Essack v. Abdul Rahiman*(6) which followed it. It is contended that the words in section 29 are general and wide enough to cover suits instituted before and after the date of the order of adjudication and that such a construction was adopted in construing section 10 (2) of the English Bankruptcy Act of 1883 where the language was similar. Sections 9 and 10 of the English Bankruptcy Act of 1883, so far as they are relevant for the present discussion, are in these terms:

Section 9 (1):—"On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

Section 10 (2):—"The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the

(1) (1927) I.L.R. 8 Lah. 593. (2) (1924) I.L.R. 2 Ran. 643.
(3) (1927) I.L.R. 51 Mad. 833. (4) (1915) I.L.R. 40 Bom. 235.
(5) (1887) 58 L.T. 85. (6) (1916) I.L.R. 41 Bom. 312.

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debtor, and any Court in which proceedings are pending against a debtor, may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings, or allow them to continue on such terms as it may think just."

It does not appear from the report of *Brownscombe v. Fair*(1) whether the order was passed under the first portion of section 10 (2) or under the latter portion thereof. But from the arguments of Mr. Read and Mr. Rose Innes it may be taken that the order was made under the latter portion of section 10 (2) which is similar in language to section 29 of the Provincial Insolvency Act and section 18 (3) of the Presidency-towns Insolvency Act. The following observations of WILLS J. in that case do lend countenance to the argument at the Bar:

"Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated but I do not think so, for the words are perfectly general."

With due respect, we may point out that the plain language of the section does not warrant this interpretation. Section 9 deals with proceedings not pending on the date of the receiving order and section 10 with proceedings so pending. That this is the correct view seems to be borne out by the observations of STIRLING J. in *In re Berry. Duffield v. Williams*(2):

"Section 9 prohibits the 'commencing' of actions or proceedings, except with the leave of the Court; and I agree with the opinion expressed by NORTH J. in *In re Wray (A Solicitor)*(3) that it has no reference to proceedings actually pending against the debtor at the date of the receiving order. Such receiving proceedings are dealt with by section 10, sub-section 1

(1) (1887) 58 L.T. 85.

(2) [1896] I. Ch. 939, 946.

(3) (1887) 36 Ch. D. 138, 143.

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of which applies to the interval between the presentation of a bankruptcy petition and the making of a receiving order; while sub-section 2 applies to any time after the presentation of a bankruptcy petition. The scheme appears to be that actions and other proceedings are to go on against the debtors unless either the Court of Bankruptcy or the Court in which the proceedings are pending sees fit to interfere in the exercise of the discretion vested in it."

It may be noted that in Halsbury's Laws of England, Vol. II, at page 63, *Brownscombe v. Fair*(1) is cited as an authority for the proposition that actions which are commenced after the receiving order without the leave of the Court may be stayed but in the footnote it is added: "They are stayed under the Bankruptcy Act, 1883, section 9." (See also Vol. II, Hailsham's Edition, page 90.) Similarly in William's Bankruptcy Practice (14th Edition, 1932) at page 70 the same case is given as an authority for the said proposition under section 7 of the English Bankruptcy Act, 1914, corresponding to section 9 of the Act of 1883 which is the same as section 28 of the Provincial Insolvency Act and section 17 of the Presidency-towns Insolvency Act. Thus it will be seen that *Brownscombe v. Fair*(1) is not treated as an authority for the exercise of such a power under section 10 (2). It is therefore not safe to construe section 29 in the light of the decision in *Brownscombe v. Fair*(1). The decision in *Mahomed Haji Essack v. Abdul Rahiman*(2) is a decision under section 18, clause 3, of the Presidency-towns Insolvency Act and sections 17 and 18 are a reproduction of sections 9 and 10 of the English Bankruptcy Act, 1883. SCOTT C.J.

(1) (1887) 58 L.T. 85.

(2) (1916) I.L.R. 41 Bom. 312.

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follows *Brownscombe v. Fair*(1) without any discussion and the decision cannot be relied on as an authority on section 29 of the Provincial Insolvency Act. Two other cases of the Bombay High Court were cited, namely, the decision of FAWCETT J. in *Bheraji Samrathji v. Vasant-rao*(2) and the decision of TYABJI J. in *Bhimaji v. Chunilal Jhaverchand*(3). Both the learned Judges followed *Mahomed Haji Essack v. Abdul Rahiman*(4), but FAWCETT J. observed that, if the matter were *res integra*, a different view might be open and he referred to *Panna Lal-Tassaduq Hussain v. Hira Nand-Jiwan Ram*(5) in support of that view. The decision in *Subramanyam v. Narasimham*(6) is distinguishable. There, the question was whether a decree passed in a suit instituted without leave in the absence of any objection being taken on that score is a nullity. It is unnecessary to deal with the correctness of that decision, but we must express our dissent from the observations contained in the judgment in regard to the interpretation of sections 28 and 29 of the Provincial Insolvency Act in so far as they purport to be based on the theory of ignorance of the creditor of the proceedings in insolvency. TIRUVENKATACHARI J. in that case observes that the word "commenced" must be construed as "knowingly commenced". WALLACE J. seems inclined to this view though he says that having regard to the preponderance of authority he would not dissent from the view he took in *Ponnusami v. Kalaperumal*(7). It

(1) (1887) 58 L.T. 85.

(3) (1931) I.L.R. 57 Bom. 623.

(5) (1927) I.L.R. 8 Lah. 593.

(2) (1928) 31 Bom. L.R. 981.

(4) (1916) I.L.R. 41 Bom. 312.

(6) (1928) 56 M.L.J. 489

(7) A.I.R. 1929 Mad. 480.

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seems to us that there is no warrant for importing into the section words which are not there. In *Ghouse Khan v. Bala Subba Rowther*(1) there is no doubt an observation of ODGERS J. at page 839 to the effect that leave may be obtained under section 29 though the suit might have been instituted without the leave of the Insolvency Court but it is an *obiter dictum* which was not necessary for the case. Further the observation is irreconcilable with the view taken by him in regard to section 28 of the Act that want of leave is fatal to the suit.

We are therefore of opinion on a proper construction of sections 28 and 29 of the Provincial Insolvency Act that leave of the Insolvency Court not having been obtained prior to its institution, the present suit is not maintainable and the learned Subordinate Judge had no power to grant leave to continue the suit. We therefore reverse the decision of the lower Court and dismiss the suit but in the circumstances we direct each party to bear his own costs.

[The judgment in Civil Revision Petition No. 1167 of 1936 is omitted as not being necessary for the purpose of this report.]

A.S.V.

(1) (1927) I.L.R. 51 Mad. 833.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

THAMMANA RATTAYYA AND TWO OTHERS
(ACCUSED NOS. 3, 4 AND 5), RESPONDENTS.**Child Marriage Restraint Act (XIX of 1929), sec. 6—Applicability of—Liability of parents—Mother merely participating in marriage promoted by father—Not liable—Absence of reasonable enquiry by priest as to the age of parties—Liability under sec. 5 of the Act.*

Under the Child Marriage Restraint Act (XIX of 1929), the section under which the parents are liable is section 6 and not section 5.

When the father of the bridegroom promotes a marriage, the mother has no authority by law to prevent the marriage and her mere participation in the marriage cannot be regarded as constituting an offence punishable under section 6 of the Act which is confined only to the person who has actual charge of the minor either as parent or as guardian at the time.

Section 5 of the Act contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and the bridegroom and forms his own opinion.

Held, accordingly, on the facts of the case, that the father alone was liable under section 6 of the Act and not the mother; and, as there was no proof of enquiry on the part of the priest as to the age of the bridegroom, he was liable under section 5.

Ganpatrao v. Emperor, A.I.R. 1932 Nag. 174, approved.

Munshi Ram v. Emperor, A.I.R. 1936 All. 11, dissented from.

* Criminal Appeal No. 616 of 1936.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents by the Court of Session of Kistna Division in Criminal Appeal No. 16 of 1936 on its file (Calendar Case No. 29 of 1935 on the file of the District Magistrate, Kistna).

Parakat Govinda Menon for Public Prosecutor
(*L. H. Bewes*) for appellant.

T. L. Venkatarama Ayyar for respondents.

JUDGMENT.

This is an appeal from the acquittal of three of the accused in Calendar Case No. 29 of 1935 on the file of the District Magistrate of Kistna. The acquittal of these accused was ordered by the Sessions Judge of Kistna in Criminal Appeal No. 16 of 1936. The offences charged were under sections 5 and 6 of the Child Marriage Restraint Act (XIX of 1929). These three accused were accused 3, 4 and 5 in the trial Court. The third and fourth accused were the parents of the bridegroom and the fifth accused was the priest who solemnized the marriage, which is alleged by the prosecution to be a child marriage. The case for the prosecution was that the bridegroom was under eighteen years of age and the bride under fourteen years of age when the marriage was solemnized on 7th February 1935. The first and second accused were the parents of the bride and their convictions were upheld in appeal. The sixth accused was another priest who was said to have solemnized the marriage. He was acquitted on appeal, but there has been no appeal so far as his acquittal is concerned. The learned District Magistrate in his judgment refers to the conflict of authority as to the

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question whether the parents are liable under section 5 or under section 6 or under both these sections of the Child Marriage Restraint Act, the decisions he refers to being those reported as *Ganpatrao v. Emperor* (1) and *Munshi Ram v. Emperor* (2). The District Magistrate followed the decision in the Nagpur case to the effect that section 6 alone applies to the case of parents. This view in my opinion is right and the criticism of the learned Sessions Judge does not appear to be sound. Apart from the marginal notes which are relied upon in the Nagpur case there is the proviso to section 6 that no woman shall be punishable with imprisonment under that section which indicates that it is this section, namely, section 6, that is applicable to parents; the absence of such a proviso to section 5 indicates that it was not meant to apply to parents. Further, the concluding words of section 5 which throw upon the accused person the burden of proving that he had reason to believe that the marriage was not a child marriage seem to show that this burden would not have been thrown by the Legislature on the parents who must know the age of their own child. The view therefore that section 5 applies only to solemnization of marriage by others than parents appears to be correct, and it follows therefore that section 6 alone applies to parents who promote a child marriage or permit it or negligently fail to prevent it. It is not disputed that the third and fourth accused who are the parents of the bridegroom cannot be convicted under section 6 merely because the bride was

(1) A.I.R. 1932 Nag. 174.

(2) A.I.R. 1936 All. 11.

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under fourteen years, and that they can be convicted, if at all, under section 6, only if the bridegroom, that is their own son, who was in their charge was under eighteen years at the time of the marriage. The only question therefore that arises is whether the bridegroom was under eighteen years of age, or in other words, a child as defined in the Act at the time of the marriage. The District Magistrate appears to have relied mainly on the alleged admission of the third accused in his statement during the trial, in which his wife the fourth accused joined, to the effect that the bridegroom had not completed his eighteenth year at the time of the marriage. The learned Sessions Judge points out that the District Magistrate was misled by a wrong translation of the statement of the third accused in Telugu. The learned Sessions Judge does not say what the correct translation is, and on the other hand, makes a misstatement of fact when he says that there is absolutely no evidence that the bridegroom was under the age of eighteen years. As a matter of fact there is the evidence of P.W. 1 to the effect that the bridegroom was seventeen years old at the time of the marriage and this evidence was not attacked in cross-examination. The learned Sessions Judge must have completely lost sight of this evidence of the age of the bridegroom, for otherwise it is impossible to believe that he would have said that there is absolutely no evidence on the point. I have looked into the statement made by the third accused in Telugu, and I cannot say that the learned District Magistrate was clearly wrong in interpreting the last sentence in the statement to mean that the son had not completed eighteen years. The last sentence

really means that the son was just eighteen years old. It may be that this was with reference to his age at the time the statement was made. Apparently the District Magistrate took it to mean that the third accused's son had just attained eighteen years when the third accused made the statement. If so, he was right in coming to the conclusion that there was an admission to the effect that the bridegroom had not completed eighteen years at the time of the marriage, because this statement was made very nearly a year after the marriage. It is of course equally possible that the statement made by the third accused meant that the bridegroom was just eighteen years of age at the time of the marriage, in which case there would be no admission that the bridegroom was under eighteen years at the time of the marriage. In this state of doubt as to what the third accused really meant by his statement, he and his wife are entitled to the benefit of the doubt, and his so-called admission cannot be relied upon in support of the prosecution. There is however, as I have pointed out, the uncontradicted evidence of P.W. 1 on the point. If that evidence that the bridegroom was only seventeen years at the time of the marriage had been not true, the witness would have been cross-examined, and in all probability evidence to rebut this evidence of P.W. 1 would have been put forward on the side of the defence. That was not done, and I have no doubt that P.W. 1 was not cross-examined because the evidence he gave was true and could not be successfully contradicted. There is no reason why that evidence should not be accepted, and it must therefore be found that the prosecution has established the fact that the bridegroom

was under eighteen years of age at the time of the marriage. It follows therefore that the acquittal of the third accused was wrong and that it must be set aside. It is accordingly set aside and he is convicted of an offence punishable under section 6 of the Child Marriage Restraint Act (XIX of 1929) and sentenced to the sentence imposed by the District Magistrate upon him, namely a fine of Rs. 150 and in default of payment simple imprisonment for one week.

As regards the fourth accused, that is the mother of the bridegroom, it has been argued that the mother cannot be convicted at the same time as the father of the bridegroom when it is obvious that the minor bridegroom was in the charge of the father and not of the mother. The case for the prosecution was that the father himself promoted the marriage and got it performed. In these circumstances it is impossible to contend that the mother could have done anything to prevent it. She had no authority by law to prevent the marriage and her mere participation in the marriage cannot be regarded as constituting an offence punishable under section 6 of the Act which is confined only to the person who has actual charge of the minor either as parent or as guardian at the time. It cannot, in the circumstances, be said that the mother of the bridegroom had charge of the bridegroom at the time of the marriage. Her acquittal though it was based on other grounds cannot therefore be interfered with in appeal.

As regards the fifth accused who is the purohit who solemnized the marriage in question, he was charged and convicted under section 5 of the Act.

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The conviction was set aside and he was acquitted in appeal on the ground that he had reason to believe that the marriage was not a child marriage. The learned Sessions Judge has not given any reasons for coming to the conclusion that the priest had reason to believe this ; beyond his bare statement that he did believe that the bridegroom was over eighteen years and the bride was fourteen years there is no scrap of evidence to show that he had any reason to believe that it was so. It is clear that both the bridegroom and the bride were children as defined by the Act and he has done nothing to discharge the burden which lay upon him to show that he had reason to believe that neither of them was a child. The argument which found favour with the learned Sessions Judge was that it is well known to students of medical jurisprudence that it is impossible to estimate by appearance the age of a girl between the ages of twelve and sixteen. This is the only reason given in support of the finding that the fifth accused had reason to believe that the marriage was not a child marriage. If this were to be accepted as a sufficient reason, the burden imposed by section 5 of the Act on the person charged will cease to exist, for in every case this argument would be available, viz., the statement in books on medical jurisprudence that it is impossible to estimate accurately by appearance the age of a girl between the ages of twelve and sixteen. Section 5 contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at

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the bride and the bridegroom and forms his own opinion. He must know that it is difficult to judge by appearance and the law casts upon him the duty of making a reasonable enquiry before he can claim to have had reason to believe that neither the bride nor the bridegroom was a child. It is not alleged or suggested that any enquiry was made and certainly there is no proof of any such enquiry being made. I have no doubt that the statement that the fifth accused believed that neither the bride nor the bridegroom was a child is not true. His acquittal therefore must be set aside and it is accordingly set aside. He is convicted of an offence punishable under section 5 of the Act, and sentenced to the same sentence as that imposed by the District Magistrate, viz., to pay a fine of Rs. 75 and in default of payment to undergo simple imprisonment for one week.

V.V.C.

PRIVY COUNCIL.

J.C.*
1937,
April 23.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA,
APPELLANT,

v.

RAJA SOBHANADRI APPA RAO, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Enfranchisement of village-service inams—Madras Permanent Settlement Regulation (XXV of 1802), sec. 4—"Lands paying only favourable quit-rent", whether reserved—Madras Proprietary Estates' Village-service Act (II of 1894), sec. 17—Enfranchisement of lands paying only favourable quit-rent—Zamindar's right of resumption.

A grant of a village-service inam subject only to favourable quit-rent is a grant carrying a partial exemption from land revenue. The exemption is a part of the payment for services and is not a burden.

"Lands paying only favourable quit-rent" in section 4 of Regulation XXV of 1802 are lands subject to a quit-rent substantially short of full assessment. Such lands fall within the reservation provided for in the Regulation and are excluded from the Permanent Settlement. They may be enfranchised under Act II of 1894 and, on enfranchisement, the zamindar is not entitled to resume them. The right of a proprietor of an estate to resume under the proviso to section 17 of the Act is restricted to grants made by him or his representatives after the Permanent Settlement.

Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State, (1913) I.L.R. 38 Mad. 620, referred to.

CONSOLIDATED APPEAL (No. 59 of 1935) from decrees of the High Court (January 26, 1932) reversing decrees of the Subordinate Judge of Masulipatam (December 21, 1925) confirming decrees of the Principal District Munsif of Gudivada (September 22 and December 31, 1924) and

* Present: LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and SIR JOHN WALLIS.

decrees of the High Court (February 5, 1932) reversing 23 decrees and confirming 57 decrees of the Subordinate Judge of Bezwada (March 16, 1926) confirming 23 decrees and modifying 57 decrees of the District Munsif of Nuzvid (December 27, 1923).

These appeals arise from 98 suits of which 80 were instituted in the Court of the District Munsif of Nuzvid and 4 in the Court of the District Munsif of Gudivada by the Zamindar of Telaprole and 14 in the Court of the District Munsif of Gudivada by the Zamindar of Ventrapragada.

The estates of Telaprole and Ventrapragada were carved out of the Nuzvid Zamindari, an estate permanently settled in 1879.

In 1912 the Government enfranchised the villages in question and in 1922 the suits under appeal were instituted in the appropriate jurisdictions.

The District Munsif of Nuzvid found in the suits before him that all the grants were pre-settlement grants made by the predecessor of the zamindar for private and personal services, that in all the cases the assets, with the exception of those from two villages, were included in the revenue payable by the zamindar and that the zamindar was entitled to resume the villages, excepting the two villages referred to, and decreed the suits with those exceptions. Appeals from these decrees were dismissed by the Subordinate Judge of Bezwada. The District Munsif of Gudivada, in the suits before him, found that the grants were made before 1802 as remuneration for public services, that the assets of the land were not included in the revenue payable by the zamindars, the lands being either

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lakhiraj or paying only favourable quit-rent with-
in section 4 of Regulation XXV of 1802 and that the
grants were made or continued by the State within
section 17 of Act II of 1894 and were resumable
by the Government, and dismissed the suits.

On appeal, the Subordinate Judge of Masulipatam found that under the proviso to section 17 of Act II of 1894 the zamindar was entitled to resume the lands if the grant was made by him or his predecessor whether before or after the Permanent Settlement and whether the income of the lands was or was not taken into account at the Permanent Settlement, that the income of the suit lands was included in the peishcush because it was not excluded by section 4 of Regulation XXV of 1802 as the lands were not lakhiraj and they were not paying "only favourable quit-rent" as they were burdened with services. He, however, dismissed the suits as barred by limitation. Appeals from all the decrees were taken to the High Court. The High Court found that the inams were subject to kattubadi (favourable quit-rent), that, being burdened with service, they were not lands paying "only favourable quit-rent" within the Regulation but were subject to two burdens, and held, following the judgment of SANKARAN NAIR J. in *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State*(1), that the lands could not be regarded as excluded from the zamindaris.

De Gruyther K.C. for appellant.—When Regulation XXV of 1802 was passed it was intended to cover all inams. Those paying no quit-rent and those paying a favourable quit-rent were placed on the same footing. The expression "only favourable quit-rent" in section 4 in its application to lands distinguishes lands paying favourable quit-rent from lands

(1) (1913) I.L.R. 38 Mad. 620, 625.

paying ordinary or full quit-rent. The expression has been wrongly construed in *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State*(1).

Secretary of State v. Sri Rajah Vasireddi(2) has been followed in the present case. There was an appeal from it—*Chandra Mouleswara Prasada v. Secretary of State for India*(3). That decision does not touch the exact point raised here. It is not disputed that lands granted by a zamindar to a servant for personal service may be resumed by him on failure of the service. But the case is different as regards lands granted for public services. These lands are lakhiraj. They are not included in the grant to the zamindar. When lands are granted for public services subject to a quit-rent payable to the zamindar they are neither lakhiraj nor lands granted on a favourable quit-rent. Regulation XXIX of 1802 (Karnams Regulation) and the sanad should be considered before going to section 4 of Regulation XXV of 1802. Act II of 1894 was intended to apply to karnams who paid no quit-rent. Payment of quit-rent to the zamindar does not affect the right of Government to resume in the case of public service. The zamindar's right to quit-rent is not affected. The Act applies only to persons on the Collector's Register at the time of the enactment. This is apparent from the definition of proprietor in the Act. The Act applies to post-settlement grants. The proviso to section 17 would apply to future grants also. But the grants here are pre-settlement grants. The sanad has not been exhibited, but there is a common form: Standing Orders of the Board of Revenue, *Narasimha v. Parthasarathy*(4) and *Prabhatchandra Barua v. King-Emperor*(5).

Pringle following.—The sanad, though not exhibited, appears from the petition for leave to appeal to have been produced. It also appears from the *Nuzvid* case, *Raja Venkata Rao v. Court of Wards*(6), to have been in common form. Where tenure of land is affected by a duty to render public services, the zamindar cannot touch it; *Joykishen Mookerjee v. The Collector of East Burdwan*(7) and *Forbes v. Meer Mahomed*

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(1) (1913) I.L.R. 38 Mad. 620, 625. (2) (1929) 30 L.W. 129.
(3) (1935) L.R. 62 I.A. 166; I.L.R. 58 Mad. 711.
(4) (1913) L.R. 41 I.A. 51; I.L.R. 37 Mad. 199.
(5) (1930) L.R. 57 I.A. 226; I.L.R. 58 Cal. 430.
(6) (1879) L.R. 7 I.A. 38; I.L.R. 2 Mad. 128.
(7) (1864) 10 M.I.A. 16.

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Tuquee(1). Here the zamindar claims under the proviso to section 17 of the Act. The karnam grants here were made in 1708 and after. Collectors were established in 1794. Collectors' Registers were enjoined in 1802. [The Fifth Report was referred to and reference was made to *Lakshmi Venkayamma v. Secy. of State*(2).]

Subba Row and *Parikh* for respondents.—The Subordinate Judge of Bezwada found in respect of the 80 cases that came before him on appeal that the inams in 23 cases were pre-settlement and in 57 post-settlement grants. The High Court found all were pre-settlement. The High Court in second appeal was bound to accept the findings of fact of the Subordinate Judge and it was not open to the High Court to disturb the finding in the 57 cases. The zamindar has to maintain karnams. The Regulations are based on the Fifth Report. Lakhiraj lands and other lands paying only favourable quit-rent do not include lands granted for village-services. Here the lands are not lands paying only favourable quit-rent as they are subject to services; *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State* (supra). In *Secretary of State v. Raja of Venkatagiri*(3) it was held that section 4 of the Regulation did not apply as the sanad was in a special form. When lands are granted in return for village-services they are resumable by the zamindar. If the grant was made pre-settlement by the zamindar, the zamindar can resume, *Chandra Mouleswara Prasada v. Secretary of State* (supra). A karnam in a zamindari village is a zamindari officer and the zamindar has to maintain him. This goes to show that the karnams' inams would be included in the zamindar's assets. [*Baij Nath Singh v. Sukhu Mahton*(4) was referred to.] When it is not clear whether the rent is included in the assets, the grant should be construed in favour of the zamindar; Collectors' Instructions, paragraph 15, *Prasad Row v. The Secretary of State for India*(5) and the Fifth Report (Higginbothams' edition), Vol II, page 772.

De Gruyther K.C. in reply.—The High Court was justified in finding that all the grants were pre-settlement. The point was

(1) (1870) 13 M.I.A. 438. (2) A.I.R. 1929 Mad. 399.

(3) (1921) L.R. 48 I.A. 415; I.L.R. 44 Mad. 864.

(4) (1891) I.L.R. 18 Cal. 534.

(5) (1917) L.R. 44 I.A. 166; I.L.R. 40 Mad. 886.

not taken by the respondents in their case that the High Court had no jurisdiction to interfere with the finding of fact. *Vasireddi's* case(1), page 170, if read in the broadest sense, gives the proprietor an absolute right to resume. But the questions now raised were never considered by the Board in that case. The case was decided on the burden of proof. The question was whether there was a pre-settlement or a post-settlement grant.

The JUDGMENT of the Judicial Committee was delivered by Sir JOHN WALLIS.—The main question in all these consolidated appeals from judgments of the Madras High Court is whether the plaintiffs, who are zamindars of permanently-settled estates, are entitled to resume the suit lands which had been held by village karnams or accountants as part of their remuneration and had been enfranchised by the Government under section 17 of the Madras Proprietary Estates' Village-service Act II of 1894. From the earliest times, as stated at page 84 of the Fifth Report, village officers and servants have received, together with other emoluments, grants of land wholly or partially exempted by Government from the payment of land revenue in lieu of wages for their services. In 1894 the Madras Government, having decided to substitute a system of payment by salaries, provided by legislation for the imposition of cesses to meet these salaries; and at the same time took power under section 17 to enfranchise these inams in permanently-settled estates, as hereinafter explained.

In 1922 the proprietors of the Telaprole and Ventrapragada estates, which are parts of the former permanently-settled Nuzvid Zamindari

(1) (1935) L.R. 62 I.A. 166, 170; I.L.R. 58 Mad. 711.

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which was partitioned in 1879, instituted a large number of suits in the Courts of the District Munsifs of Nuzvid and Gudivada, the appropriate jurisdictions, disputing the right of the Government to enfranchise the suit lands under section 17 of Madras Act II of 1894, already mentioned, and claiming to recover possession of them under the proviso to that section on the ground that they had been granted either after or before the Permanent Settlement in 1802 by the plaintiffs' predecessors for village-service, and that after the enfranchisement the village servants had refused to perform their services. Appeals were preferred from the decrees of the District Munsif of Nuzvid to the Subordinate Court of Bezwada which affirmed the decrees of the Court below decreeing the suits, and from the decrees of the District Munsif of Gudivada dismissing the suits to the Subordinate Court of Masulipatam which dismissed the appeals. From these decrees second appeals were taken to the High Court. In these appeals the learned Judges upheld the contention of the Government that the Government were entitled to enfranchise lands granted to village karnams free of quit-rent prior to the Permanent Settlement because they were within the reservation in respect of lakhiraj lands in section 4 of the Permanent Settlement Regulation XXV of 1802, allowed the appeals and dismissed the plaintiffs' suits; but in ninety-eight cases, where lands had been so granted subject to the payment of a kattubadi or quit-rent, they held that the Government had no right to enfranchise them under section 17 already mentioned, as they were not included in the reservation, and that the plaintiffs were entitled to resume them.

From these ninety-eight decrees of the High Court in second appeal the Secretary of State for India in Council has preferred these consolidated appeals to His Majesty in Council after obtaining a certificate from the High Court that they were appealable under section 109 (c) of the Code of Civil Procedure as involving an important question of law.

In order to see how this question arises their Lordships will refer in the first place to the terms of section 17, and at the same time will deal with the other important question as to its construction raised by the learned Counsel for the appellant. This is the first section in Chapter III of the Act, which is headed "Enfranchisement of Village-service Inams". The enfranchisement of inams by the Inam Commissioner under the Inam Rules has been going on ever since the sixties of last century, and consists in releasing the lands from service and renouncing the reversionary rights of the State and confirming the inam to the grantee, his heirs and assigns to dispose of as they might think proper subject to the payment of a quit-rent and also, in some cases, of a pecuniary payment. The Inam Statement on which the enfranchisement was based, and the Inam Register which records and evidences it, have often come under the consideration of the Board.

As may be gathered from the section, some village-service inams in Government villages, which are by far the most numerous in the Madras Presidency, had prior to the passing of the Act been enfranchised in this way, either under the Inam Rules or other rules made in that behalf, and the section directs that enfranchisements

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under the Act are to be made in the same way and to be subject to the payment of quit-rent.

Before introducing the new system of remuneration into permanently-settled estates, it was considered desirable to take statutory authority for enfranchising these inams with a view to avoiding possible litigation, but that object has been imperfectly attained owing to the way in which the section has been construed in the Courts below.

In construing this section and also the provisions of section 4 of the Madras Permanent Settlement Regulation XXV of 1802, on which so much is found to turn, it is necessary to bear in mind that every inam in the original sense of that term is an alienation or assignment by the State of the land revenue of the specified land and the right to realise it. And in consequence all such lands from the revenue point of view are regarded as "alienated lands" and are so described in the preamble to the Permanent Settlement Regulation XXV of 1802, whether or not the inam is made subject to the payment of an annual fixed payment under the name of *jodi*, *kattubadi* or quit-rent. Where no quit-rent is reserved the lands are lakhiraj in the sense of being totally exempt from land revenue. Where a quit-rent is reserved these are only partially exempt because the inamdar has to pay the Government part of the land revenue in the shape of a quit-rent. There is in their Lordships' opinion no apparent reason why the power of enfranchisement should have been conferred in the one case and withheld in the other, but that is the effect of the judgments now under appeal.

Section 17 is as follows :—

"If the remuneration of a village-office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village-office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent under the rules for the time being in force in respect of the enfranchisement of village-service inams in villages not permanently settled or under such rules as the Government may lay down in this behalf; such enfranchisement shall take effect from such date as the Government may notify :

Provided that the said enfranchisement shall be applicable to all lands or assignments as aforesaid even though, at the time this Act comes into force, they may not be devoted to the purpose for which they were originally granted ;

and provided, further, that any lands or emoluments derived from lands which may have been granted by the proprietor for the remuneration of village-service and which are still so held or enjoyed may be resumed by the grantor or his representative."

Under the terms of the section, enfranchisement is authorised where the remuneration of the village-service consists of lands "granted or continued in respect of or annexed to such village-office by the State", or when it consists of assignments of revenue payable in respect of lands so "granted or continued". As in all these cases the village servants, as part of their remuneration, had been assigned the revenues payable in respect of the lands forming part of their remuneration, as well as the lands themselves, and, as such assignments can only have been made by the State, it might appear that all such assignments of revenue must have been made and continued by the State within the meaning of the section, and that it empowered the Government to enfranchise.

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It is, however, unnecessary to decide this question as no such case was set up. The Government's case was that the lands "had been continued by the State" within the meaning of the section, as they were not in a position to set up that the lands had been granted by the State, because, as observed by the Board in *Chandra Mouleswara Prasada v. Secretary of State for India*(1),

"in the case of an ancient grant made before 1802 it is wellnigh impossible, in the absence of the document granting the property, to discover with any reasonable certainty the date and other particulars of its origin".

To prove the "continuance" of the lands, which is the case set up here, the Government contend that all these village-service lands, whether or not subject to a payment of kattubadi or quit-rent, are excluded from the Permanent Settlement by section 4 of Regulation XXV of 1802, which reserves to Government full power of "*continuing or abolishing* them", the lands not subject to quit-rent being lakhiraj lands, and the lands subject to the payment of quit-rent falling within the description of "all other lands paying only favourable quit-rents" within the meaning of the section.

The expression "continuing or abolishing" is better suited to the other "articles of revenue" included in section 4 of the Permanent Settlement Regulation than to the two last articles, "lakhiraj lands" and "lands paying only favourable quit-rents", but as applied to lands must in their Lordships' opinion be read as meaning continuing the tenure on which the lands were

held or abolishing it by resuming the lands. Their Lordships are also of opinion that the word "continued" must have the same meaning in section 17 of the present Act. The framers of the section must have contemplated that continuance would be proved, as it has been in these cases, by reference to the provisions of section 4 of the Permanent Settlement Regulation, and indeed most probably took the word "continued" from that section, so that, assuming lands paying only favourable quit-rents to be included in the reservation in section 4 of the Regulation, their Lordships are of opinion that continuance by the State has been proved in these cases. Whether they are so excluded from the Permanent Settlement is the important question in respect of which the certificate has been granted, and their Lordships will give their reasons later for holding that they are excluded.

The learned Judges no doubt took the same view of the meaning of the word "continued" in affirming the right to enfranchise in cases where no kattubadi had been reserved, but those judgments are not included in the record, as they are not the subject of these appeals; and RAMESAM J. had already ruled to the same effect in the extract from his judgment set out at page 167 of the report in *Vasireddi's* case(1).

Assuming that section 17 of the Act confers authority to enfranchise on the ground that the lands were continued by the State, the next question is what is the effect of the second proviso which has been often construed as entitling the

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proprietors of estates to resume lands granted for village-service by their predecessors prior to the Permanent Settlement, although the body of the section apparently authorises their enfranchisement. That was the construction on which the Board proceeded in the case just mentioned, and it had not been challenged in the argument before the Board on behalf of the Secretary of State who was the respondent in that appeal. It has, however, been explained by Mr. Pringle, who was Counsel for the defendant in that case and this, that the objection was to have been taken if the Board had not intimated that the appellant zamindar had failed to prove that the suit lands had been granted by one of his predecessors, and it is quite clear that the Board did not adjudicate upon it. The learned Counsel for the appellant have now raised the contention that reading the proviso, as it must be read, in the light of the definitions of "proprietor" and "estate" in section 4 of the Act, the right of resumption by a proprietor is limited in the case of permanently-settled estates to grants made by a proprietor of the estate after the Permanent Settlement, that is in this case after December, 1802 :—

" ' Proprietor ' means any person in whose name any *estate* is for the time being registered in the office of the Collector of the district wherein the *estate* is situated. . . . "

The definition of "estate", so far as it is applicable to this case, is as follows :—

" ' Estate ' means—

" (a) any permanently-settled estate, whether a *zamin-dari*, *jaghir*, *mitta* or *palaiyam*."

Their Lordships have no doubt that this construction of the proviso gives effect to the intention of the Legislature. The elaborate provisions in

the body of the section, on a careful examination, prove to have been specially framed to obviate the necessity of raising the question by whom these ancient grants were made, as already explained. On the other hand, grants made subsequently to the Permanent Settlement by proprietors, who under that settlement are also assignees of the land revenue, are not made by the State, and it is to such grants only that the proviso applies. It is unfortunate that these grants by the zamindar are often spoken of as post-settlement inams, when they are not inams at all as they are not assignments by the State of its land revenue, but are made by persons to whom the State has already assigned the land revenue.

It only remains to deal with the ruling which has been certified by the High Court as involving an important question of law. That question is stated with great precision by RAMESAM J. in one of the judgments under appeal which is printed at page 140 of the record :—

" In the case of both these inams the Subordinate Judge found that the inams are subject to the payment of *kattubadi*. This raises a new question of law. If at the time of the Permanent Settlement they were subject to *kattubadi* payable to the zamindar, the zamindar then representing the Government, the lands cannot be said to be *lakhiraj*. The only question therefore is whether they would come under the second heading in section 4 of the Regulation. Can they be regarded as lands paying only a small quit-rent? What is the effect of the word 'only'? The contention for the zamindar is that the lands must be subject to one burden only, namely, the payment of light quit-rent. If they are subject to an additional burden, namely, rendering of services, they are subject to two burdens, namely, payment of quit-rent and rendering of services; and such inams do not fall under section 4 of the

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Regulation and cannot be regarded as excluded from the assets of the zamindari. The meaning of the word 'only' was considered by SANKARAN NAIR J. in *Sri Raja Parthasarathy Appa Rao Bahadur v. Secretary of State*(1). His view is that if the land is subject to two burdens, whatever the nature of the services might be, the land cannot be regarded as excluded from the assets. TYABJI J. expresses a slightly different view at page 623. He thought that if the lands were burdened with services due to the Government, they must be regarded as excluded. We prefer to follow SANKARAN NAIR J.'s view and hold that the suit inams cannot be regarded as excluded from the zamindari."

On reference to the report all that SANKARAN NAIR J. is found to have said on the subject is that the provision in section 4 of Regulation XXV of 1802 as to all other lands paying only favourable quit-rents "obviously does not include lands which are held on condition of paying quit-rent, and also on condition of rendering certain services in addition to that rent". Such lands, as RAMESAM J. puts it, are thus subject to two burdens, and therefore all service inams which are subject to the payment are not lands "subject only to the payment of favourable quit-rents", and do not come within the reservation in section 4 of Regulation XXV of 1802. Now, in the first place, in their Lordships' opinion, it is a fallacy to speak of the imposition of quit-rent in this case as a burden. The karnam in lieu of wages is granted the land, together with an assignment by the State of the land revenue of the land subject to the payment of a quit-rent, that is to say, he is not granted a total but only a partial exemption from the land revenue on the land. Far from being a

[1913] I.L.R. 38 Mad. 620, 625.

burden this assignment so limited is part of his remuneration. Secondly, it appears to be inadmissible, when the Legislature has in the preamble expressed its intention to exclude all alienated land from the Permanent Settlement, to hold that it has sufficiently manifested its intention by the use in a badly drafted section of the words "paying only favourable quit-rents", to exclude from the reservation for no apparent reason the very large class of service inams which are subject to the payment of quit-rent, especially as due effect may otherwise be given to the use of the word "only". The drafting of this section has not escaped criticism, and is so very inferior to the drafting of the rest of the Regulation as to suggest that this section, which combines the provisions of sections 35 and 36 of the Bengal Permanent Settlement Regulation VIII of 1793, was substituted at a later stage for the original draft. The Madras Government had been directed to follow with the necessary modification the terms of the Bengal Permanent Settlement Regulation, and as will be seen there were good reasons for thinking that section 36 of that Regulation required some modification in Madras.

Section 4 is in the following terms, the articles of revenue not now in question being omitted:

"The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads . . . of lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit-rents—the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

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The corresponding section 36 of the Bengal Regulation is as follows :—

“ The assessment is to be filed independent and exclusive of all *lakhiraj* lands, whether exempted or not from the *khiraj* (or public revenue) with or without due authority.”

In Madras all alienations of land revenue take the form of inams with or without reservation of quit-rent. In these circumstances the framers of the Madras section decided, perhaps not very happily, to retain the use of the word *lakhiraj* for lands without any reservation of quit-rent and so totally exempt from land revenue, and to provide under another “ article ” for “ all other lands paying only favourable quit-rents ”, and so only partially exempt from land revenue.

If the Bengal Regulation had been reproduced, it might have been contended that lands paying quit-rents were not *lakhiraj*, not being totally but only partially exempt from land revenue ; and it would appear to have been thought desirable to provide expressly that the reservation extended to lands which, though not wholly exempt from land revenue, paid only favourable quit-rents instead of paying the full revenue. As regards the expression “ favourable quit-rents ”, the word *inam* means favour, and any quit-rent falling substantially short of the full assessment is a favourable quit-rent. This, in their Lordships’ opinion, is a sufficient explanation of the use of the word “ only ”, which, for reasons already given, could not receive the construction put upon it for the first time in construing the Act of 1894 now under consideration in the absence of any other possible explanation. Their Lordships are also unable to accept the further contention of the learned Counsel for the respondents that the

special provisions of the Bengal Regulation as to *chakran* lands, or lands granted in lieu of wages, can be read into section 4 of the Madras Regulation, and have not been shown any sufficient reason for differing from the findings of the High Court that in all these appeals the inams were pre-settlement grants and so governed by this ruling.

Their Lordships will therefore humbly advise His Majesty that the appeals of the Secretary of State in all these cases be allowed and the decrees of the High Court and of the lower Courts in favour of the respondents be set aside, and the suits dismissed. The respondents will pay the appellant’s costs throughout.

Solicitor for appellant : *The Solicitor, India Office.*

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

C.S.S.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Venkatasubba Rao, Mr. Justice Cornish and
Mr. Justice Venkataramana Rao.

1937,
March 3.

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(PETITIONER—SECOND DECREE-HOLDER), APPELLANT,

v.

GOTTUMUKKULA VENKATA SOMARAJU
(SECOND RESPONDENT), RESPONDENT.*

Hindu Law—Joint family—Manager—Right of, to represent joint family in respect of joint family properties, movable and immovable—Presumption—Description in pleadings as manager, if necessary—Debt binding on the joint family—Liability of each item of joint family property to discharge such a debt—Meaning of the word debt—Code of Civil Procedure (Act V 1908), ss. 50 and 53—Pre-partition debt—Debt binding on the family—Subsequent partition and allotment of property—Son, if a legal representative of his deceased father in respect of the share taken by the son on partition.

A and his sons B and C were members of an undivided Hindu family. A, for and on behalf of the joint family, purchased certain property which was then subject to a mortgage. Subsequent to the said purchase, the mortgagee brought a suit to enforce the mortgage and impleaded A as the purchaser of the equity of redemption. A represented the joint family in that suit. There was a decree for sale and, in execution of the decree, the mortgagee purchased the property, and on foot of that purchase filed a suit against A, B and C to recover possession of the property and mesne profits. On the plea raised by B and C that they ceased to have any interest in the property by virtue of a partition effected in the joint family in and by which the property fell to the share of A, they were exonerated from the suit. At the said partition A obtained the said property for himself and on behalf of another son, D (a minor), with whom he continued to remain joint.

* Appeal Against Order No. 433 of 1936.

The trial Court dismissed the suit, but the High Court, on appeal, pronounced judgment on 3rd May 1933 decreeing possession to the plaintiff and directing the ascertainment of mesne profits. A decree for mesne profits was ultimately passed on 3rd April 1935. Two months later A died, and in February 1936 an application was filed to recover the amount by sale of the other properties in D's hands. D resisted the same on the ground that, during the pendency of the above-mentioned appeal in the High Court, there was a partition between him and his father A, in and by which the suit property fell to the share of his father, and by reason of the said partition the properties which fell to his share could not be rendered liable in execution on the basis of a decree obtained against his father alone. The lower Court gave effect to this contention.

Held by the Full Bench: The properties of the joint family in D's hands could be proceeded against in execution.

Per VENKATASUBBA RAO and VENKATARAMANA RAO JJ.—(1) A Hindu father, by virtue of his position as manager of the undivided Hindu family, has got the power to represent the entire family in all transactions relating to the family and this right of representation applies not merely to suits in connection with immovable properties but also to other transactions as well.

(2) When the suit relates to joint family property and the person sued is either the father or the eldest member, the accredited head of the family, it must be presumed that he was sued as representing his family, and he need not be described as such in the pleadings, nor need the decree be specifically passed against him as such.

(3) Once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability; the question of division or non-division hardly arises. *Daulat Ram v. Mehr Chand*, (1887) L.R. 14 I.A. 187; I.L.R. 15 Cal. 70, *Lingangowda v. Basangowda*, (1927) L.R. 54 I.A. 122; I.L.R. 51 Bom. 450, and *Sheo Shankar Ram v. Jaddo Kunwar*, (1914) L.R. 41 I.A. 216; I.L.R. 36 All. 383, followed.

(4) *Quaere*: Whether a decree passed against the father alone, though prior to the partition and necessarily therefore in respect of a pre-partition debt, cannot be executed subsequent to the partition against the coparcenary property in the hands of the son.

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Per CORNISH J.—(1) The word in the Hindu law texts which is translated as “debt” has a wider significance than a present obligation to pay a liquidated sum of money, which is the ordinary meaning of the word.

(2) Section 53 of the Code of Civil Procedure covers a case where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son on partition, and, for the purpose of section 50 of the Code, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son.

APPEAL against the order of the Court of the Subordinate Judge of Narasapur dated 2nd July 1936 and made in Execution Application No. 124 of 1936 in Execution Petition No. 24 of 1936 in Original Suit No. 7 of 1922.

N. Sivaramakrishna Ayyar for appellant.—The alleged partition of 1931 relied on by the respondent between himself and his father was after the decree for possession and mesne profits in 1925 against the latter in the lower Court and when the appeal therefrom was pending in the High Court. At all material times the father represented in those proceedings the joint family composed of himself and the respondent. It is not necessary that it should be so stated in those proceedings; see *Suraj Bansi Koer v. Sheo Persad Singh*(1), *Sheo Shanker Ram v. Jaddo Kunwar*(2), *Daulat Ram v. Mehr Chand*(3), *Lingangowda v. Basangowda*(4), *Kishan Prasad v. Har Narain Singh*(5), *K. P. Kunna Pisharody v. V. M. Narayanan Somayajipad*(6) and *Kuttayan v. Mammanna Ravuthan*(7). It is enough if the proceedings are to that effect. The respondent attained majority in 1929 and he did nothing to effectively put an end to that representation.

The earlier decisions to the contrary are no longer good law. Even after the alleged partition of 1931, since the father

(1) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148.
(2) (1914) L.R. 41 I.A. 216; I.L.R. 36 All. 383.
(3) (1887) L.R. 14 I.A. 187; I.L.R. 15 Cal. 70.
(4) (1927) L.R. 54 I.A. 122; I.L.R. 51 Bom. 450.
(5) (1911) L.R. 38 I.A. 45; I.L.R. 33 All. 272.
(6) (1881) I.L.R. 3 Mad. 234. (7) (1911) I.L.R. 35 Mad. 681.

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continued to represent the respondent also, it would, at the worst, be a case of defective representation and not one of no representation. In *Muniswami v. Kutti*(1), which dealt with a case before the amendment of section 21 of the Indian Limitation Act, it was held that an acknowledgment of liability by the father even after partition was good, though on that date the father could not be held to represent the joint family. Further, if the debt was not contracted for an illegal or immoral purpose, the property continues to be liable and the creditor can reach the property in spite of the alleged partition, and this right of the creditor is not based on the existence of the power of the father to represent the family; see *Subramania Ayyar v. Sabapathy Aiyar*(2), *Sat Narain v. Rai Bahadur Sri Kishen Das*(3), *Peda Venkanna v. Sreenivasa Deekshatulu*(4) and *Jagannatha Rao v. Viswesam*(5).

Section 53 of the Code of Civil Procedure was introduced in the Code of 1908 to set at rest the conflict between the view held by the Madras High Court and that held by the Bombay and Calcutta High Courts. The section was intended to provide that the death of a Hindu father does not affect any remedy or right of a creditor. Section 60 of the Code gives a list of properties which could be attached. There is no difference between this section and the corresponding section of the Code of 1882. In view of the pious obligation theory the share of the sons is also property which could be attached under section 60. In section 53 of the Code the word “liability” means liability to be seized in execution. The pious obligation theory proceeds on the footing that it is the father’s debt which the sons are bound to discharge. The liability under this theory has no connection with the liability based on the theory of representation which proceeds on the footing that the debt is a family debt and the father represents the family in connection with the same. The scope of section 53 has been considered in *Narayan Ganesh v. Sagunabai*(6) and *Chhotey Lal v. Ganpat Rai*(7). See Mulla on Civil Procedure Code, section 53, under the heading “Liability of ancestral property in execution proceedings”.

(1) (1933) I.L.R. 56 Mad. 833. (2) (1927) I.L.R. 51 Mad. 361 (F.B.).
(3) (1936) 71 M.L.J. 812, 821 (P.C.). (4) (1917) I.L.R. 41 Mad. 136.
(5) (1924) I.L.R. 47 Mad. 621. (6) (1924) I.L.R. 49 Bom. 113, 117.
(7) (1934) I.L.R. 57 All. 176, 179 (F.B.).

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P. Satyanarayana Rao and S. Venugopala Rao for respondent.—The rights of the appellant cannot be worked out in execution. After the *bona fide* partition of 1931 the father of the respondent could not represent the latter and as a fact he did not represent him. The father was not sued in his representative capacity and the respondent could not be made liable. The Madras view has been to that effect; see *Alagappa Chetti v. Vellian Chetti*(1), *Viraragavamma v. Samudrala*(2) and *Guruvappa v. Thimma*(3). This decree which was passed against the father in respect of a pre-partition debt, though prior to the partition, cannot be executed subsequent to the partition against the coparcenary property in the hands of the son (respondent). As a necessary corollary, section 53 of the Code is inapplicable to a case where before the father's death the son had become divided; see the dictum of AGARWALLA J. in *Atul Krishna Roy v. Lala Nandanji*(4). See also *Krishnasami Konan v. Ramasami Ayyar*(5).

N. Sivaramakrishna Ayyar replied.

Cur. adv. vult.

JUDGMENT.

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VENKATASUBBA RAO J.—This appeal has been brought against an order made by the lower Court refusing execution against the respondent. The decree that was sought to be executed was one passed in Original Suit No. 7 of 1922, *inter alia*, against the respondent's father who was the fifth defendant in the suit. Into the chequered history of that suit, it is unnecessary to enter; it is sufficient to state for the present purpose that the suit itself was commenced in 1919 (it was originally numbered as Original Suit No. 96 of 1919), that a decree for possession was passed against the fifth defendant in May 1933, that in execution of that decree the plaintiff obtained

(1) (1894) I.L.R. 18 Mad. 33.

(2) (1885) I.L.R. 8 Mad. 208.

(3) (1887) I.L.R. 10 Mad. 316.

(4) (1935) I.L.R. 14 Pat. 732 (F.B.).

(5) (1899) I.L.R. 22 Mad. 519.

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possession of the lands in October of the same year and that by a further judgment delivered on 3rd April 1935 mesne profits were awarded against the fifth defendant who subsequently died in the following June. (To avoid confusion, it may be stated that the formal decree drawn up in respect of mesne profits bears a later date, namely, 22nd July 1935, but that is a circumstance which is immaterial). The plaintiff-appellant applied for execution in February 1936, praying first, that the respondent (i.e., the fifth defendant's undivided son) might be brought on the record as his legal representative and secondly, that the decree for mesne profits might be executed against the coparcenary property in his hands. The respondent contested the plaintiff's right, relying upon a partition said to have been entered into on 1st February 1931 between his father and himself. The facts alleged by him are these. Under the partition the lands in dispute along with certain other items of coparcenary property were allotted to the father, who two days later settled those properties upon his wife (the respondent's mother) by a deed of gift dated 3rd February 1931. He contended that in those circumstances the decree passed against his father could not be executed against the joint family property which fell to his share. This contention the lower Court upheld, finding as a fact that the partition set up was a genuine transaction. The plaintiff, who has filed this appeal, impeaches the correctness of the learned Subordinate Judge's order.

It may be convenient to set out here a few more facts connected with Original Suit No. 7 of 1922. Along with the fifth defendant, his two

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adult sons were impleaded as defendants 6 and 7, but the respondent himself was not joined, he being then an infant. Those two sons put forward an oral partition alleged to have been entered into between themselves and their father in 1912. They asserted that they were not in possession of any of the items claimed, as the entire lands in dispute had been allotted to their father. Their contention was accepted and they were exonerated. So far as the plaintiff's claim to mesne profits was concerned, as the decree awarded profits only from 1916 onwards, defendants 6 and 7 were held not liable, apparently on the ground that the mesne profits decreed were in respect of a period subsequent to the partition. (See the order embodying the finding at page 172 and the judgment of RAMESAM J. at page 153 of the Privy Council pleadings book). Pausing here for a moment, the fact that emerges from this brief narrative is, that the fifth defendant was sued as representing the family in respect of his joint family property. In fact the addition of the sixth and seventh defendants makes no difference, as the claim against the fifth defendant was in essence one made against him as representing his branch of the family. The view that prevailed in the suit was, that the sixth and the seventh defendants possessed no interest in the joint family property and should therefore be regarded as having been unnecessarily impleaded. The following passage bearing on this point from the order embodying the finding may in this connection be quoted :

"Coming now to the fifth to seventh defendants, they form one group. The fifth defendant is the father and the sixth

and the seventh defendants are his sons by his first wife. The fifth defendant has another son by his second wife and they two are living together as members of a joint family. The contention of the defendants is that the lands in suit, so far as they are admitted to have been in the possession of the fifth defendant, are in his sole possession and that the sixth and the seventh defendants were not in possession of them in any of the years under enquiry. Division between the father and the sons in the year 1912 has been set up. Though the partition deed has not been produced, evidence of subsequent acts of the parties dealing separately with their respective shares has been adduced. . . . The oral evidence on the defendants' side supports the contention of these defendants."

Although several questions have been argued, I conceive that the real point to decide is, did the fifth defendant represent in the action his son, the respondent, who was then a minor, although he was not described as a party on the record? For deciding this question a reference to the pleadings becomes necessary. The fifth defendant, in the written statement filed by him, describes the lands in question as those in the possession of his *family* and refers to the position of defendants 6 and 7 in the following terms :

"All these items of property fell to the share of the fifth defendant in the partition of the property of the family of defendants 5, 6 and 7. Defendants 6 and 7 have no concern in this suit" (paragraph 7).

The present suit (Original Suit No. 7 of 1922) is itself the sequel of an earlier suit (Original Suit No. 65 of 1908) the facts of which also show that the fifth defendant was sued as representing his family. That was a mortgage suit filed by the plaintiff and certain others who had a subsisting mortgage right, *inter alia*, over the lands in question in the possession of the fifth defendant. The family of the fifth defendant had acquired these properties under a purchase effected by his

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father, which shows that they were ancestral properties in the hands of defendants 5, 6 and 7. The purchase by the fifth defendant's father, it may be mentioned, was subject to the mortgage sued on in the earlier action. In due course, a mortgage decree was passed against the mortgagor and various other persons, including defendants 5 to 7, and the properties were, in execution of the decree, brought to sale and purchased by the mortgagees themselves. It was to recover possession of the lands so purchased that the present suit (Original Suit No. 7 of 1922) was filed. Among the persons who contested the suit was the fifth defendant who pleaded that it was barred by section 47, Civil Procedure Code, but eventually, as already observed, a decree was passed in favour of the plaintiff. I have narrated these facts at some length with a view to show that the fifth defendant was sued as representing his family and that it was in that capacity that he defended the action. The respondent describes himself as being twenty-six years old in an affidavit filed by him on 2nd January 1937, that is to say, during the greater part of the time the suit (Original Suit No. 7 of 1922) was going on, he was a minor. He became a major about 1929 but still continued to be represented by his father in the suit. Granting that in the absence of the partition of 1931 he would be bound by the decree passed against his father and that it could be executed against the coparcenary property in his possession (a point which I shall presently consider), the question arises, does the fact of the partition make any difference? I think the theory of representation must imply that the respondent,

though not *eo nomine* on the record, should be treated as though he himself were a party to the suit. If this be so, it follows in my opinion that, unless he has done something which has had the effect of removing him from the record, he must be treated as continuing to be a party till the date of the decree. At any rate, on the facts of this case it is impossible to come to a different conclusion. The lower Court's decree was passed in 1925 and it was while an appeal from that decree was pending in this Court that the partition of 1931 now put forward was entered into. Is it to be imagined that the respondent could at his will abruptly put an end to the representation which had gone on for about twelve years, producing by his act the strange legal result of his not being bound by the decree to be passed shortly thereafter? I think the answer to this question must be in the negative.

The decision of this case must in my opinion really turn on the question, first, whether a managing member can effectively represent the entire joint family in a suit by or against him and secondly, on the still more important question, whether the decree should show on its face that the claim was made by or against the manager in his representative character. On neither point it seems to me much doubt can be entertained in view of certain Privy Council decisions. In *Daulat Ram v. Mehr Chand*(1) the facts were these. The plaintiff, being a mortgagee and purchaser at an execution sale of the mortgaged property, sued the defendants for a declaration that his purchase included their share of the mortgaged

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(1) (1887) L.R. 14 I.A. 187, 192, 197; I.L.R. 15 Cal. 70.

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property and was not limited to the shares of the mortgagors who, as the managing members of the joint family to which the defendants belonged, had purported to mortgage the interest of the entire family. This case established two principles: first, that the managing member could effectively represent the entire family and that a decree passed against him would be binding upon all the members, and secondly, that it is not necessary that it should be stated in the pleadings in express terms that he is suing or is being sued as such manager: the suit will be deemed to have been brought by or against him in his representative character if the circumstances of the case show that he is the manager of the family and the property involved is the family property. In the plaint in that suit, the mortgagee claimed not only to recover against the mortgagors the amount of the mortgage debt and interest, but asked that he might have execution and be satisfied out of the mortgaged property. Similarly, in his application for execution, he asked, not that he might be allowed merely to seize the right, title and interest of the mortgagors, but that he might be permitted to seize and sell the entire property that had been mortgaged. That the decree (which by the way was not produced before their Lordships) did not contain the words that the mortgagors were sued in their representative character, is perfectly obvious. From the provisions of the mortgage deed their Lordships came to the conclusion that what was intended to be mortgaged was the whole of the mortgaged property and not the mortgagors' share alone. Relying upon the facts

adverted to above, they held that the circumstances of the case showed that the suit was brought against the managers in their representative character. There is yet another principle, though not material to the present purpose, which this case establishes. The suit, as already stated, was brought by the mortgagee-purchaser and their Lordships observed that the defendants had the opportunity of having the questions tried *in that suit*: firstly, whether in fact there was a debt due, and secondly, whether the mortgage was a valid mortgage which bound the ancestral property (pages 192 and 197). Without raising those questions, the defendants rested their defence on the ground that they had not been made parties to the suit and consequently their share in the property had not been sold and could not be sold under the execution (page 195). The result was that the decree was held to be binding upon them, although they had not been made parties to the action. This theory of representation was pushed further in *Sheo Shankar Ram v. Jaddo Kunwar*(1). There was a mortgage suit in which a foreclosure decree was passed against the managing members of a joint Hindu family. They did not avail themselves of their right to redeem, so that an order absolute was pronounced against them. The other members of the family then brought a suit claiming that they were entitled to redeem the mortgaged properties. Their claim was negatived. The importance of this decision lies in the fact that the mortgagee never had notice of the fact that the properties had been acquired by the mortgagors on behalf of their joint family (page 219).

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(1) (1914) L.R. 41 I.A. 216, 219, 220; I.L.R. 36 All. 383.

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That shows that neither were the mortgagors described in the plaint as the managers of the family nor was the decree passed against them in their representative character. But from the circumstances of the case it appeared that the joint family was effectively represented. It may be worth noting what those circumstances are:

"They (the mortgagors) were at the time of acquiring the properties and also at all material times in the foreclosure suits the managers of the joint family and they acted as such both in acquiring the properties and in abstaining from redeeming them."

In coming to the conclusion that the mortgagors effectively represented the entire family their Lordships refer to the findings of the Courts in India (page 220). In the passage quoted above I regard the statement, that the mortgagors acted as managers even in abstaining from redeeming the properties, as most significant. This case shows beyond a shadow of doubt that a decree which does not on its face show that it was passed against the coparcenary would yet be binding upon the whole family. *Lingangowda v. Basangowda*(1) gives effect to the same principle. That case referred to certain lands and it was there held that a previous decree which negatived the right of the managing member would, on the ground of *res judicata*, be binding upon the junior members of the coparcenary. Their Lordships observe that in such cases the Court looks to Explanation VI of section 11 of the Code of Civil Procedure, 1908, to see

"whether or not the leading member of the family has been acting either on behalf of the minors in their interests or, if they are majors, with the assent of the majors".

(1) (1927) L.R. 54 I.A. 122; I.L.R. 51 Bom. 450.

Then, on the facts, they came to the conclusion that the plaintiff in the previous suit was acting on behalf of himself and his minor children. It may be mentioned that there was the finding of the Subordinate Judge in the case that the managing member had conducted the previous suit with due care, which amounts to saying, in the words of Explanation VI referred to above, that the parties litigated, in respect of the right claimed, *bona fide* in the former action. The three decisions of the Privy Council, to which I have referred, relate to immovable property, but the principle of representation applies alike to other transactions as well. In *Kishan Prasad v. Har Narain Singh*(1) the suit was brought in respect of a loan and the question that was raised was one of limitation. The action was originally brought by the managing members of the family and it was held that the joinder of the other members as co-plaintiffs after the expiry of the statutory period did not prevent the suit as originally constituted from being in time. It became necessary to determine whether the members newly added were necessary parties and their Lordships held they were not. In the course of their judgment they refer to two decisions of the Madras High Court. The first case, *K. P. Kanna Pisharody v. V. M. Narayanan Somayajipad*(2), turned on co-ownership of land. TURNER C.J. held that all the owners in such a case must be joined and they could not invest the managers with the right to sue in a representative capacity. Their Lordships say that this

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(1) (1911) L.R. 38 I.A. 45; I.L.R. 33 All. 272.
(2) (1881) I.L.R. 3 Mad. 234.

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proposition, thus broadly stated as to co-ownership, cannot be applied to the managing members of an undivided Hindu family. Then, referring to *Alagappa Chetti v. Vellian Chetti*(1), their Lordships observe that the proposition there laid down to the effect that a manager cannot sue without joining all those interested with him, if literally construed, goes too far. The decision of the Judicial Committee cited above renders obsolete *Viraragavamma v. Samudrala*(2) and *Guruvappa v. Thimma*(3). I have refrained from quoting in support of my view the Indian decisions on the point, but to one decision I may refer, where the question has been exhaustively considered by TEK CHAND J., *Jai Kishen v. Ram Chand*(4).

Lastly, the question remains, does the fact that subsequent to the suit there was a partition make any difference? The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or became divided. As Mayne observes:

"All the members of the family, and therefore all their property, *divided or undivided*, will be liable for debts which have been contracted on behalf of the family by one who was authorised to contract them." Mayne's Hindu Law, 9th Edn., sec. 333.

(1) (1894) I.L.R. 18 Mad. 33.

(3) (1887) I.L.R. 10 Mad. 316.

(2) (1885) I.L.R. 8 Mad. 208.

(4) A.I.R. 1935 Lah. 1.

In this case the partition was, as already stated, entered into prior to the decree (though long after the commencement of the suit) but that circumstance, as I have held above, makes no difference.

I have dealt with the case on the footing that the fifth defendant was sued as representing the joint family of which he was the manager; but, in addition to being the managing member, he happens to be the father of the respondent. Both the Counsel therefore argued the case mainly on the assumption that the decree passed against the father was in respect of his personal debt, which the respondent, as his son, was under a pious obligation to discharge. There is a legal duty cast upon the son, as upon any other junior coparcener, to discharge a liability incurred by the father in his capacity of manager for family purposes, and it is therefore unnecessary on the facts here to invoke the doctrine of pious obligation. However, as stated above, it was argued that a decree passed against the father alone, though prior to the partition and necessarily therefore in respect of a pre-partition debt, cannot be executed subsequent to the partition, against the coparcenary property in the hands of the son. As to the soundness of this position, although it is supported by some authority, I entertain considerable doubt and wish to reserve my opinion upon it for the present. It is then contended—that is the next step in the argument—that this position necessarily leads to the result that section 53, Civil Procedure Code, is inapplicable where before the father's death the son had become divided. With this view again I am not

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prepared to agree at present, but on this point also I wish to make no final pronouncement.

In the result, the appeal is allowed with costs both here and in the Court below.

CORNISH J.

CORNISH J.—If the debt be regarded as a joint family debt I agree with my learned brother's judgment. But I think that the same conclusion can be supported upon the view that the decree debt was personal to the fifth defendant.

The appellant, who had an unsatisfied decree against the fifth defendant, has sought to execute that decree after the judgment-debtor's death against the present respondent as his legal representative. He was, therefore, bound to have recourse to section 50 of the Code for that purpose. That is the effect of the Full Bench ruling in *Kanchamalai Pathar v. Shahaji Rajah Sahib*(1). The liability of the legal representative in respect of such unsatisfied decree is by section 50 limited to the extent of the property of the deceased judgment-debtor which has come into his hands and has not been duly disposed of by him. That is the sole measure of a legal representative's liability for the debts of the deceased. The share of ancestral property which a son takes in a partition with his father ceases to be property in which the father has any right or proprietorship. Such share becomes the separate property of the son as against his father. But it has been decided by the Full Bench in *Subramania Ayyar v. Sabapathy Aiyar*(2) that the liability of a son under Hindu law for a debt incurred by his father continues notwithstanding a later partition between them.

(1) (1935) I.L.R. 59 Mad. 461 (F.B.).

(2) (1927) I.L.R. 51 Mad. 361 (F.B.).

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The creditor can enforce that liability against the son. The share, however, which a son has taken in a partition with the father is certainly not property of the father which after his death forms part of the father's estate in the hands of the son.

But then comes the special provision of section 53, which says that, for the purpose of section 50, property in the hands of a son which is liable under Hindu law for the payment of a debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son as his legal representative. A fiction is introduced. As CAVE J. observed in *The Queen v. Norfolk County Council*(1):

"When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."

Apart from section 53, a Hindu son could not be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of the section seems to me sufficiently wide to include a liability incurred by the father which is enforceable against property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability.

In *Atul Krishna Roy v. Lala Nandanji*(2) the view taken by one of the learned Judges,

(1) (1891) 60 L.J. Q.B. 379.

(2) (1935) I.L.R. 14 Pat. 732 (F.B.).

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AGARWALLA J., is that section 53 is intended only to deal with the case of a joint Hindu family and to have no application to a separated Hindu family. As a matter of history it is known that the section was introduced to set at rest a question upon which there had been a divergence of opinion in the Courts concerning the right of a decree-holder to execute the decree after his judgment-debtor's death against ancestral property which had passed by survivorship to the judgment-debtor's son. The state of the law previous to an amendment may be considered in the interpretation of the amending enactment, and it is permissible to use this knowledge for the purpose of ascertaining the remedy or alteration which the Legislature intended. But it is not a rule of construction that the language of an amending or new provision is to be limited to the particular matter intended to be altered if, in the ordinary and natural sense of the words employed, the enactment is capable of a wider application.

I think that section 53 covers a case, such as the present, where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. In such circumstances, for the purpose of section 50, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son. This is no hardship to the son. It is merely a matter of procedure how the creditor shall enforce his right of making him liable for the father's debt. It has been held that in the execution proceedings, though the fact of the debt is not open to dispute, the character of the debt and

its bearing upon the son's obligation to pay are matters which can be challenged as questions arising in the execution. Further, under section 47 (3), the son can raise the question whether he is a legal representative for the purpose of section 50. And if the debt is shown to be of such a character that the son is relieved of his obligation, the condition required by section 53 to his being fixed with the liability of a legal representative will be wanting.

On the question whether the debt in the present case was a debt incurred by the father prior to the partition, I am content to accept what my brother VENKATASUBBA RAO J. has stated in *Muthammal v. Sivakami Ammal*(1) that the word in the texts which is translated "debt" has a wider significance than a present obligation to pay a liquidated sum of money, which is the ordinary meaning of the word. It would include a liability for mesne profits incurred by the father before partition, although the actual liability was not determined in a suit until after the partition. It will be a pre-partition debt in the sense in which the word "debt" is used in the texts.

For these reasons I think the civil miscellaneous appeal should succeed.

VENKATARAMANA RAO J.—I agree that this appeal should be allowed. The facts are fully stated in the judgment of my learned brother VENKATASUBBA RAO J., and it is unnecessary to restate them. I shall content myself with stating a few facts which are necessary for the disposal of the point on which I seek to rest my decision.

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(1) (1925) 21 L.W. 606.

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At all material times in this litigation the fifth defendant and his son, the respondent in this appeal, were members of an undivided Hindu family. The property to which the present claim relates was purchased by the fifth defendant for and on behalf of the joint family which at that time consisted of the fifth defendant and defendants 6 and 7, his then undivided sons by the first wife. It was on the date of the acquisition subject to a mortgage. Subsequent to the purchase the mortgagee brought a suit to enforce the mortgage impleading the fifth defendant as a purchaser of the equity of redemption. The fifth defendant represented his family in that litigation. There was a decree for sale and in execution of the decree the mortgagee purchased the property and the present suit has been instituted, based on that purchase, to recover possession of the property and for mesne profits in respect thereof. The plaintiff impleaded not only the fifth defendant but also his sons, the sixth and the seventh defendants. On the plea raised by defendants 6 and 7 that they ceased to have any interest in the suit properties by virtue of a partition effected in the family in and by which the suit properties fell to the share of the fifth defendant, they were exonerated from the suit. At the said partition the fifth defendant obtained the said properties for himself and his son, the present respondent, who continued to be members of an undivided Hindu family. On 21st December 1925 the suit was dismissed and there was an appeal against the said decree to the High Court. The High Court pronounced judgment on 3rd May 1933 decreeing possession to the plaintiff and

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directing the ascertainment of mesne profits, and a decree for mesne profits was ultimately passed on 3rd April 1935. Two months later the fifth defendant died and in February 1936 the present application was filed to recover the amount by sale of the properties in the hands of the present respondent. It was resisted by him on the ground that during the pendency of the appeal there was a partition between him and his father in and by which the suit properties fell to the share of the father and by reason of the said partition the properties in his hands could not be rendered liable in execution on the basis of a decree obtained against his father alone. The lower Court gave effect to his contention.

It is contended in appeal that by virtue of section 53 of the Code of Civil Procedure the present respondent can be rendered liable in execution of a decree against the father in spite of the partition. It seems to me unnecessary to go into this question on the facts of this particular case. A father in a joint Hindu family, apart from certain rights which he gets by virtue of his position as a father in Hindu law, is also the head and manager of the joint family. As pointed out by their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*(1):

“The father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate.”

By virtue of such position as manager, the father has got the power to represent the family in all transactions relating to the family. He can

(1) (1879) L.R. 6 I.A. 88; I.L.R. 5 Cal. 148, 165.

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sue and be used as a representative of his family. That a manager can represent the family in litigation has never been doubted and has been laid down, as pointed out in *Kuttayan v. Mammanna Ravuthan*(1), from the earliest times by the Privy Council. Where the suit relates to a joint family property and the person sued is either the father or the eldest member, the accredited head of the family, it must be presumed that he was sued as representing his family, and he need not be described as such in the pleadings, nor need the decree be specifically passed against him as such. In *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*(2) one Mosaheb was sued as the heir of his grandfather, Nath Dass, for recovery of about Rs. 39,000 on account of the rents of a certain Mouzah, Ramnugger, and it was stated that Nath Dass had taken a lease of that from 1847 to 1854 and a decree was passed for the amount to be recovered from the property left by the deceased Nath Dass. In execution of the said decree, Mouzah Muddunpore which belonged to the joint family was sold. In the suit, Chooman, an undivided brother of Mosaheb, was not joined. The question arose as to the validity of the execution sale and how far it was binding on both the brothers or either of them. Their Lordships of the Judicial Committee held the sale to be valid and binding against both, and observed thus:

"Acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosaheb Das is sued as a representative of the family, and that it must further be assumed that Nath Dass in taking the lease of the mouzah here referred to—Ramnugger, in respect of which the rent was due—must be assumed to have taken it

(1) (1911) I.L.R. 35 Mad. 681.

(2) (1879) L.R. 6 I.A. 233.

on behalf of the family, and that the debt must be deemed to be a debt from the family . . . Looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property."

This decision clearly lays down that, where a decree has been obtained against the manager as a representative of the joint family in respect of a joint family liability, it will be binding on his undivided brother and the entire joint family property can be taken in execution, though the undivided brother was not made a party to the suit. This principle would *a fortiori* apply to the case of a father and son. I think it is unnecessary to refer to the other Privy Council decisions as they have been already dealt with at length by my learned brother VENKATASUBBA RAO J. in his judgment. Therefore, where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially parties to the suit through such manager. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit. It was on this principle held that, where a manager dies during the pendency of the suit or after decree, the person who succeeds him as manager can be brought on the record and the other members of the family need not be made parties. A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not a party *eo nomine* to the litigation

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represented by its manager ; vide *Lingangowda v. Basangowda*(1). Once the liability is declared a family liability, every item of the joint family property is bound to satisfy that liability ; the question of division or non-division hardly arises. The principle of Hindu law is that members, who are united at the time a joint family liability is incurred, are not absolved from their liability by the fact that they become subsequently divided ; vide *Chalamayya v. Varadayya*(2). So far as a creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division. In this case, at the time of the acquisition, at the time of the first partition, at the date of the institution of the suit, and at the date of the institution of the appeal, the fifth defendant was sued as a representative of his family and he effectively represented the family, and thus the present respondent. The question is, did that representation cease by virtue of the partition before the date of the decree in the High Court? The suit having been properly constituted, any severance of status among the several members of the family would not divest the representative character of the manager therein till the other members choose to disaffirm it ; he was entitled to carry on the litigation for and

(1) (1927) L.R. 54 I.A. 122 ; I.L.R. 51 Bom. 450.

(2) (1898) I.L.R. 22 Mad. 166, 170, 171.

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on behalf of the respondent and can be held accountable in respect thereof. The estate of a person dying during the pendency of a suit was held to be fully represented by one of his several heirs brought on the record in his place, but only for that purpose ; much more so, in respect of a transaction concerning the joint family, the manager who is empowered by law to represent the other members who are interested therein must be deemed to continue to represent them till the transaction is completed, as until then the joint interest in the transaction cannot be said to have ceased. But in this case it seems to me it would not lie in the mouth of the present respondent to deny the representative character of his father. At the date of the partition he must be deemed to have been quite aware of the pending litigation, and when the suit property was assigned to the share of the father he must be deemed to have also been clothed with the necessary power to defend the appeal in regard thereto. If the present respondent thought that his father should not be allowed to represent him, it was his duty to have come on the record. Having failed to do so, he is precluded from now asserting that the fifth defendant no longer represented him. Therefore the property in the hands of the present respondent is liable to be taken in execution of the decree for mesne profits passed in this case. In this view, it seems to me, the argument based on section 53, Civil Procedure Code, does not arise. I may add that I also share the doubts entertained by my learned brother VENKATASUBBA RAO J. in regard to the correctness of the decisions which take the view that, in respect of a decree obtained

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prior to partition against a father alone, execution cannot be levied subsequent thereto against the coparcenary property in the hands of the son.

I agree in the order proposed by my learned brother VENKATASUBBA RAO J.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936,
November 12.

SELLAPPA CHETTIAR AND TWO OTHERS (DEFENDANTS
3 TO 5), APPELLANTS,

v.

SUPPAN CHETTIAR AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS 1 AND 2), RESPONDENTS.*

Hindu law—Joint family—Manager—Alienation by—“Benefit of the estate”—Meaning and test of—Impartible estate being joint family property—Junior member’s interest in—Nature of—Madras Impartible Estates Act (II of 1904), sec. 4—Holder of impartible estate governed by—Mortgage by, not for justifiable purpose—Son of holder joining in—Effect of.

The power of the manager of a joint Hindu family to alienate property of the joint family can be exercised not only in a case of need but “for the benefit of the estate”. For a transaction to be “for the benefit of the estate” it need not necessarily be of a defensive character, in the sense that it is calculated to protect the estate from some threatened danger or destruction. To hold the “defensive character” to be the test would be to ignore the distinction between necessity and benefit.

Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree, (1856) 6 M.I.A. 393, and *Palaniappa Chetty v.*

* Appeal No. 418 of 1931.

Sreemath Devasikamony Pandara Sannadhi, (1917) L.R. 44 I.A. 147; I.L.R. 40 Mad. 709, referred to.

Jagat Narain v. Mathura Das, (1928) I.L.R. 50 All. 969 (F.B.), approved.

In the case of an impartible joint family estate, the coparceners other than the zamindar in possession have a right of ownership. *Ramasami Naik v. Ramasami Chetti*, (1907) I.L.R. 30 Mad. 255, which held the interest of the coparceners to be a mere *spes successionis*, cannot, in view of the decisions of the Judicial Committee in *Shibaprasad Singh v. Prayagkumari Debee*, (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399, and *Collector of Gorakhpur v. Ram Sundar Mal*, (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468, be regarded as having laid down the correct law.

When the holder of an impartible joint family estate to which the Madras Impartible Estates Act (II of 1904) applies mortgages property appertaining to the estate for a purpose not binding upon the estate and his son joins in the mortgage, the mortgage affects the life interest of the son by reason of his having joined in the transaction.

APPEAL against the decree of the District Court of West Tanjore at Tanjore in Original Suit No. 16 of 1928.

T. L. Venkatarama Ayyar for appellants.

B. Sitarama Rao for first respondent.

Other respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This suit has been brought to enforce a simple mortgage granted to the plaintiff on 8th January 1916 (Exhibit A) by the first defendant and his father, the late Zamindar of Neduvasal, to secure the repayment of Rs. 8,300. It may be mentioned that the plaintiff was a usufructuary mortgagee under two earlier deeds executed in his favour on 16th December 1910 for about Rs. 86,000. The suit mortgage

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comprises six villages, of which four have been subsequently sold by the first defendant and his father to the second defendant by Exhibit F, dated 14th August 1919. The latter by Exhibit H, dated 1st June 1925, conveyed his interest to defendants 3 to 5, reciting in the deed that the original purchase was intended to be on their behalf.

The only persons contesting the suit are defendants 3 to 5. The first defendant, it may however be stated, originally filed a defence, but subsequently not only withdrew it but admitted the plaintiff's claim.

The villages in question are part of an impartible estate, of which the first defendant's father was the proprietor at the time the suit mortgage was granted. Defendants 3 to 5 contend that the alienation was made without legal necessity and is consequently not binding on the estate under section 4 of the Impartible Estates Act (Madras Act II of 1904). The effect of that section is that the power of the proprietor, in regard to alienating his estate or binding it by his debts, is co-extensive with that of the manager of a joint Hindu family, not being a father or grandfather; in other words, the Act does not recognise the doctrine either of antecedent debt or of pious obligation [see *Venkatalingama v. Arunachellam Chettiar*(1)]. The short question, therefore, is, was the alienation made for a purpose which would have been held justifiable had it been made by a manager of coparcenary property? Before dealing with the question, we may observe (and it is conceded) that it is unnecessary to enquire

(1) (1923) 19 L.W. 132.

in this suit what interest, if any, defendants 3 to 5 have acquired in the suit property by reason of the alienations mentioned above (Exhibits F and H).

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The mortgage amount of Rs. 8,300 consists of two parts :

(i) Rs. 4,892 borrowed for the purpose of redeeming from mortgage a property at Tanjore known as "Kamala Vilas" ;

(ii) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late zamindar's daughter, i.e., the first defendant's sister.

In regard to the former amount, the facts are these. The late zamindar purchased a house known as "Kamala Vilas" on 26th June 1915 for Rs. 6,500. The house had been previously mortgaged and the zamindar undertook to discharge the mortgage debt. This amounted to Rs. 4,892, which sum was paid from the amount borrowed from the plaintiff. If the original purchase of the house can be justified, it follows that this part of the debt must be held to be binding. This raises the question, what is the extent of a manager's power in regard to buying property? It is not doubted that the power of the manager can be exercised not only in a case of need but "for the benefit of the estate". This has been held in numerous cases which have followed *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(1); but, as regards what is meant by the expression "the benefit of the estate", there has been a conflict of judicial opinion. One view seems to be, that unless the transaction is of a defensive character, in the sense that it is

(1) (1856) 6 M I.A. 393.

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calculated to protect the estate from some threatened danger or destruction, it cannot be said to be for the benefit of the estate. We are unable to place this narrow interpretation upon the words in question. If the true doctrine is that the "defensive character" is to be the test, the distinction between necessity and benefit disappears. For, suppose an alienation is made for raising funds to preserve some part of the estate from extinction. It is difficult to say in this instance whether the purpose is one of need or one of benefit, but there can be no doubt that the primary purpose is one of need. Suppose again, money is raised for defending the estate from hostile litigation. Here again, the question whether the purpose is one of necessity or benefit presents similar difficulty. The fact is that benefit and need are so interwoven in such cases as to make the demarcation difficult. To hold therefore that the rule of benefit should be confined only to cases where both need and benefit co-exist, would be to disregard "benefit" as affording a distinct ground of justification. In *Hunoomanpersaud's case*(1) the rule is stated with sufficient emphasis upon benefit as furnishing a further ground. Their Lordships say :

"It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance, the charge is one which a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate."

In this passage the reference to "prudent owner" when considering the question of benefit, is not without significance. That seems to show that

their Lordships are thinking of "benefit" as something distinct from "need". Their Lordships then go on to say :

"The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

This seems to have given rise to the view that the "pressure" and the "danger" referred to here are examples of the "benefit" mentioned. In *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi*(1) their Lordships of the Judicial Committee point out the difficulty of stating precisely what is meant by "benefit" used in this connection. The whole passage is worth quoting :

"No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

Their Lordships recognise the difficulty (we may add, possibly also the danger) of attempting a precise statement of what are included in the term "benefit". To infer from the three instances given in this passage that the transaction should be of a defensive nature does not seem warranted by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the contrary, that cases of less obvious benefit are not

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(1) (1856) 6 M.I.A. 393.

(1) (1917) L.R. 44 I.A. 147; I.L.R. 40 Mad. 709.

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to be excluded. Indeed, it could be easily conceived what strange anomalies would arise were the restricted view to prevail. To take a familiar example, where unproductive immovable property is sold with a view to the investment of the proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other similar cases may be supposed, in which it would be in the interests of the coparcenary to sell ancestral property with a view to make a fresh purchase. Is it to be held that a manager cannot sell the family dwelling house situated in a slum, in order to buy a fresh property intended for the future residence of the family? Again, is a manager to be debarred from selling the dwelling house in a remote village when the family for educating its children shifts its residence to a town? Or again, is it proper to hold that a manager can repair a dilapidated family house, but cannot incur a debt for the purpose of reasonably improving and enlarging it? The Full Bench of the Allahabad High Court, in a forcible and lucid judgment, repelled the theory that the transaction must necessarily be of a "defensive nature", *Jagat Narain v. Mathura Das*(1), and we agree with the opinion expressed there that the pronouncements of the Judicial Committee would not justify the narrower view being taken of the expression "for the benefit of the estate".

The question then remains, whether the evidence adduced here is sufficient to prove that the

(1) (1928) I.L.R. 50 All. 969 (F.B.).

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purchase of the house could be said to have conferred a benefit upon the estate in the sense in which we have interpreted it. There was no attempt made to show in what circumstances or for what purpose the house was purchased. Mr. Sitarama Rao for the plaintiff relies upon the recital in Exhibit F to the effect that on its date, namely, in 1919, the zamindar and his family were actually residing in that house. Granting the recital to be evidence, it merely shows that the house was used for residential purposes; but that is hardly sufficient. Moreover, it ought to be shown that the house formed an accretion to the impartible estate, for, if there was no intention to incorporate it, the purpose could hardly be described as justifiable. In Exhibit F it is stated that for the repair of this house, a part of the amount raised under that document was utilised. The mere fact that the money represents a portion of the proceeds of the sale of a fraction of the impartible estate raises no presumption of an intention to incorporate; beyond that, no evidence whatsoever has been adduced. We must therefore hold that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would, however, affect the zamindar's life interest; but as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

This leads us to the question whether the zamindar's son, i.e., the present first defendant, by joining in the mortgage conveyed any interest to the plaintiff. Mr. T. L. Venkatarama Ayyar strongly contends, relying upon some cases of

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which *Ramasami Naik v. Ramasami Chetti*(1) is the most important, that in the case of an impartible joint family estate, the coparceners other than the zamindar in possession have no right of ownership. This question has been fully considered in two recent decisions of the Judicial Committee and their Lordships have with great emphasis repelled the contention that there was no co-ownership. In *Shibaprasad Singh v. Prayagkumari Debee*(2) their Lordships, in the judgment delivered by Sir DINSHAW MULLA, review the case-law on the point and show that the decisions proceed upon two apparently inconsistent views; one set of decisions [*Sartaj Kuari's case*(3), the *first Pittapur case*(4) and the *second Pittapur case*(5)] proceed on the view that there is no co-ownership, while the other line represented by *Baijnath's case*(6) rests upon the principle that there is a right of survivorship, which in turn is founded upon co-ownership. Their Lordships point out that the inconsistency is apparent and not real. It is the general law of the Mitakshara that regulates partible and impartible property alike belonging to a coparcenary, but in the case of impartible property, custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by custom, that right still remains and that is what was held in *Baijnath's case*(6). To this extent the estate

(1) (1907) I.L.R. 30 Mad. 255.
(2) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399
(3) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
(4) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.
(5) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.
(6) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

retains its character of joint family property and the right of co-ownership is preserved. Their Lordships cite a passage from the judgment of Sir JAMES COLVILLE in *Chintamun Singh v. Nowlukho Konwari*(1) where the right of the junior members is referred to as a contingent right of property, which they can part with or transfer. After full discussion, the position is thus summed up by their Lordships:

"Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, expressed or implied, on the part of the junior members of the family to renounce their right of succession to the estate." ; *Shibaprasad Singh v. Prayagkumari Debee*(2).

What this decision lays down is the very opposite of what has been held in *Ramasami Naik v. Ramasami Chetti*(3). The contention was put forward that the interest possessed by the junior members, if any, was only a *spes successionis* and that contention was definitely rejected. It is noticeable that in the passage quoted above, the right of the senior member to take by survivorship is referred to as his *birth-right*, capable of being renounced or surrendered.

In *Collector of Gorakhpur v. Ram Sundar Mal*(4) their Lordships, in the judgment delivered

(1) (1875) L.R. 2 I.A. 263; I.L.R. 1 Cal. 153.
(2) (1932) L.R. 59 I.A. 331, 345, 346; I.L.R. 59 Cal. 1399.
(3) (1907) I.L.R. 30 Mad. 255.
(4) (1934) L.R. 61 I.A. 286; I.L.R. 16 All. 468.

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by Lord BLANESBURGH, re-affirm this doctrine. They first point out that *Sartaj Kuari's* case(1) and the first *Pittapur* case(2) appeared to be destructive of the rule that an impartible zamindari could be in any sense joint family property, but they go on to say that this view, apparently implied in these cases, was definitely negatived by Lord DUNEDIN when delivering the judgment in *Bajinath's* case(3). Then they make the following significant observation:

"One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance the *Chellapalli* case, *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu*(4), which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, . . ."

After further discussion, their Lordships observe that, while the power of the holder of an impartible raj to dispose of it by deed or by will remains definitely established, the right of the junior branch to succeed by survivorship on the extinction of the senior branch has also been definitely and emphatically re-affirmed; "nor must this right be whittled away; it cannot be regarded as merely visionary."

In view of these pronouncements of the Judicial Committee, we can no longer regard *Ramasami Naik v. Ramasami Chetti* (5), which held the interest of the coparceners to be a mere

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.

(2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.

(3) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

(4) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.

(5) (1907) I.L.R. 30 Mad. 255.

spes successionis, as having laid down the correct law.

It is unnecessary to consider whether a member other than the zamindar in possession can, by transferring his interest, bring in a stranger, nor is it necessary to enquire whether one member can, by making a transfer, affect the interest possessed by members other than himself; see *Ramasami Chetti v. Periasami*(1) dealing with the Padamattur estate in Sivaganga zamindari. For, under the Madras Impartible Estates Act, no member could make an alienation which would enure beyond his own lifetime. We have therefore here no difficulty in holding that the mortgage in question to the extent of the first item of the consideration affects the life interest of the first defendant by reason of his having joined in the transaction.

Then passing on to the next item of the consideration, namely, Rs. 3,408, we must hold that the debt to that extent was borrowed for a legal necessity. The plaintiff has deposed that the amount was utilised in meeting the expenses of the marriage of the late zamindar's daughter. That evidence stands uncontradicted.

[After discussing the evidence, his Lordship continued as follows:—]

We must therefore hold that to this extent what has passed to the plaintiff under the mortgage is the entire estate in the properties in question and not merely the life interests of the two executants, namely the late zamindar and the first defendant.

(1) (1878) L.R. 5 I.A. 61; I.L.R. 1 Mad. 312.

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The only contention that remains is as regards interest. We agree with the learned Judge that the stipulation in respect of it does not amount to a penalty and that the amount claimed is therefore due.

Lastly, the direction in paragraph 5 of the decree as to the passing of a personal decree, it is conceded, cannot stand and it is accordingly deleted.

In the result, for recovering Rs. 3,408 and the interest thereupon the mortgaged items can be sold, but for recovering the remaining sum, namely Rs. 4,891 with interest upon it, what can be sold is the first defendant's life interest alone in those properties, and we accordingly give judgment to that effect. The lower Court's order as to the costs of the suit will stand, three-eighths of those costs being assigned to the former amount and five-eighths to the latter.

As regards the costs of the appeal, our order is that the appellants (defendants 3 to 5) shall pay two-thirds of the plaintiff-respondent's costs. These costs also will be apportioned in the manner stated above.

In the memorandum of objections we make no order as to costs.

Time for redemption will be six months from now.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

THE MADRAS AND SOUTHERN MAHRATTA
RAILWAY COMPANY, LIMITED
(DEFENDANTS), APPELLANTS,

1936,
November 27.

v.

THE MAHARAJA OF PITHAPURAM AND
TWO OTHERS (PLAINTIFF AND NIL), RESPONDENTS.*

Riparian owner—Rights of—Distinction between taking measures to prevent mischief coming on to one's land and active transference of mischief after it has come thereon.

A riparian owner may make defences against floods anywhere on his own land provided he does not interfere with the *alveus* or with a recognised flood channel, but if flood water comes on to his land he must not take active steps to turn it on to his neighbour's property, since such an act would amount to active transference of the mischief and not to a protective measure in anticipation of apprehended danger.

APPEALS against the decrees of the District Court of East Godavari in Appeal Suits Nos. 105 and 106 of 1930 respectively preferred against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 48 and 58 of 1927 respectively.

K. S. Krishnaswami Ayyangar and C. Krishnaswami Ayyar for appellants.

S. Srinivasa Ayyangar for N. A. Krishna Ayyar and C. Rama Rao for second and third respondents.

Cur. adv. vult.

* Second Appeals Nos. 1566 and 1572 of 1931.

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JUDGMENT.

PANDRANG ROW J.—There is no dispute about the facts of this case. In fact, we have the admission of the defendant railway company itself that the act complained of was one performed by one of their officers. Paragraph 2 of the written statement of the company, which has been extracted in full by my learned brother, is clear on the point. In substance, the company admits that water in the stream swelled into a flood on account of heavy rains on 27th July 1925 and rose so as to submerge the bridge and threatened to wash away the bridge and the railway lines, endangering the property and also the plaintiff's lands and that, thereupon, the company's Permanent Way Inspector made an opening in the northern bank of the stream at a point within its own limits solely for the purpose of averting imminent danger to its property. In other words, the company's attitude was: "We have done what is complained of, but we were justified in doing it and we did no wrong in doing it." That was the main defence, namely, a justification of what they had done. There was a further defence put forward which was based on what might be called the right to abate the nuisance which had been committed by the plaintiff by raising the bank of the stream in question in 1923. This defence needs no further consideration, because it has not been pressed before us during the hearing of these appeals. A further defence which was not raised in the written statement appears to have been raised in the lower appellate Court, namely, that the flooding of the plaintiff's lands was inevitable and therefore

the plaintiff was not entitled to get damages, reliance being placed on *Thomas & another v. Birmingham Canal Navigation's Proprietors Co.*(1). But this contention was not pressed by the learned Counsel who appeared for the appellant-company and it is enough to point out that the finding of the lower appellate Court is to the effect that the inevitability of the flooding of the plaintiff's lands was not established.

The main defence, therefore, that is left is the defence of justification and on this point a very elaborate argument was addressed to us supported by copious references to English law beginning with *Menzies v. Breadalbane*(2). The general principle regulating the liability of landholders with regard to the escape and overflow of water has been stated, in my opinion, correctly in Coulson and Forbes on the Law of Waters, Fifth Edn. at page 143. In substance, for the purpose of this case, it is enough to say that that principle is that, where the owner of land, for his own convenience, diverts or interferes with the course of a stream, he will be liable for all direct and proximate damage, unless he can show that the escape of the water was caused by *vis major* or the act of God or the like. The cases referred to in the argument have all been discussed in Coulson and Forbes and the result is summed up, so far as the present point is concerned, at page 172 as follows:

"The result of the cases appears to be that a riparian owner may make defences against floods anywhere on his own

(1) (1879) 43 L.T. 435.

(2) (1828) H.L. 3 Bligh (N.S.) 414; 32 R.R. 103.

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land, provided he does not interfere with the *alveus* or with a recognised flood channel, but if flood water comes on to his land he must not take active steps to turn it on to his neighbour's property."

This in my opinion is the correct view of the law on the subject and there is nothing in any of the cases relied upon by the Advocate for the appellant which militates against this view. The difference between taking protective measures against a future danger and getting rid of or diverting the danger after it has come, that is to say, a present danger, is referred to even in the earliest case, *Menzies v. Breadalbane*(1), which is the *locus classicus* on the subject. Reference is made there to certain passages in the Digest 39. 1.1.1. to the effect that the action *aquae pluviae arcendae* will lie as often as water is about to do harm in the field of a neighbour by reason of the hand of man, that is, if by something that was done by the hand of man water flows differently than it would flow by nature. This is the general principle. Reference is, no doubt, also made to the existence of some other passages in the Digest which appear to have a contrary tendency. One of these is apparently Digest 39. 3.2.9. which is to the effect that, if a person diverts a torrent so that the water might not reach him and if by this a neighbour is injured, the latter cannot have the action *aq. pl. ar.*; for to ward off water means only not letting it flow in (to injure). (*Si vicinus flumen torrentem averterit, ne aqua ad eum pervenit, et hoc modo sit effectum, ut vicino noceatur, agi cum eo aquae pluviae arcendae non posse; aquam enim arcere, hoc esse,*

(1) (1828) H.L. 3 Bligh (N.S.) 414; 32 R.R. 103.

curare ne influat). In fact the principle that no one can by his own act cause water to overflow into his neighbour's fields so as to damage them is one of the most ancient principles known to law. That principle is found even in the most ancient code of laws that has come down to us, namely, the Code of Hammurabi which is about five thousand years old and which provides that, if a breach occurs in a man's irrigating dam by reason of his negligence and laziness and his neighbour's fields are flooded by the overflow of water therefrom, the man in whose dam the breach has occurred shall reimburse the loss. The same principle is repeated in another provision of that Code which says if any one opens his canal in a negligent manner and thereby floods the fields of his neighbours, he shall be held liable to account to those neighbours and to pay them grain corresponding with their losses. The principle therefore is of very great antiquity, and it was well established in the Roman law and has been accepted and enforced by the Courts in England and in this country including Burma. Reference may be made in this connection to the decision of the Privy Council in *Maung Bya v. Maung Kyi Nyo and others*(1) where it is stated that the law applicable in Burma to the flow of and flooding by fresh water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is the same as that in England. In that case, their Lordships of the Judicial Committee relied on *Menzies v. Breadalbane*(2), see pages 501 and 502, though

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(1) (1925) I.L.R. 3 Ran. 494 (P.C.).
(2) (1828) H.L. 3 Bligh (N.S.) 414; 32 R.R. 103.

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by a curious slip the judgment in that case is attributed to Lord ELDON instead of to Lord LYNTHURST who was the Lord Chancellor in 1828 when the decision was pronounced, Lord ELDON having resigned his office after his long tenure of it in the previous year on the accession of Canning to power. In no subsequent case was any doubt thrown on the difference between protective measures taken against a future or anticipated flood and the actual diversion of a flood after it had come. That difference, so far as Madras is concerned, has been stressed in *Gopal Reddi v. Chenna Reddi*(1). The difference is stressed in *Whalley v. Lancashire and Yorkshire Railway Co.*(2) which is referred to and followed in *Gopala Krishna Yachendrupa Varu v. Secretary of State*(3), in which reference is also made to *Attorney-General v. Earl of Lonsdale*(4). The important point to remember is that in the present case we are not dealing with a protecting dam or a barricade put up against a flood, but we have before us a case in which the protecting wall or bank of a natural watercourse was itself cut and the water of the stream diverted when the flood was actually on. The lower appellate Court's quotation from Clerk and Lindsell on Torts in paragraph 14 of its judgment is quite apposite and it is enough to refer only to a portion thereof to the following effect :

"Even where the flood is extraordinary if the water has already invaded the land and collected on it, the owner may not, in order to protect himself against the consequences of the water remaining there, dig a cut for the purpose of getting rid of the water, if by so doing, he will cause damage to the parties

(1) (1894) I.L.R. 18 Mad. 158.
(3) (1914) 26 I.C. 800.

(2) (1884) 13 Q.B.D. 131.
(4) (1868) L.R. 7 Eq. 377.

on whose land he discharges it, for there is a difference between protecting yourself from an injury which is not yet suffered by you and getting rid of the consequences of an injury which has occurred to you."

The same view is taken in *Sami-ullah v. Makund Lal*(1). Reference may also be made to the recent case, *Lankapara Tea Company, Limited v. Gopalpur Tea Company, Limited*(2), where at page 1021 the statement in Coulson and Forbes at page 172, already quoted above, has been approved.

The cut was made in the present case in what was undoubtedly the bank of the river or stream with the knowledge, and, indeed it may be said, with the object of diverting the flood water from its natural course along the stream into the plaintiff's lands. A river is said to consist of the bed, the bank and the water but in fact the bank is really the outermost part of the bed in which the river naturally flows. It is the natural wall which contains the water in the stream and holds it to its course. Any interference with the water-course in this manner must necessarily be wrongful, and I do not think that any doubt has ever existed on this point. What is wrongful cannot be justified by reason of the fact that the wrongful act was committed for the purpose of getting rid of danger or damage to oneself. Such selfishness cannot be regarded as reasonable selfishness. The judicial *imprimatur* to reasonable selfishness was given by BRAMWELL B. in *Nield v. London and North Western Railway Co.*(3), but that was a case which related to an artificial canal and not to a natural stream, and it was expressly stated there

(1) (1921) I.L.R. 43 All. 688.

(2) (1936) I.L.R. 63 Cal. 1008.
(3) (1874) L.R. 10 Ex. 4.

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that there was no duty on the owners of a canal analogous to that on the owners of a natural water-course not to impede the flow of water down it, and I may add, nor to divert such flow. In another case, *Maxey Drainage Board v. Great Northern Railway Co.*(1), which was also relied upon on behalf of the appellant-company, what was done by the defendants was a protective work against an anticipated common danger, and in that case LUSH J. at page 431 observes that, if it could have been shown that the defendants, when water or filth was on their land, had by artificial means discharged it on to their neighbour's land, they would be liable. Even if it be that there is no duty cast by law on frontagers of non-tidal rivers to maintain the natural protecting walls or banks at their usual height on the ground that, as held by Lord ESHER M.R. in *West-Norfolk Farmers' Manure Co. v. Archdale*(2), the doctrine established in *Attorney-General v. Tomline*(3) was meant to apply only to natural protecting banks against the sea and the waters of tidal rivers, it does not follow that the cutting of such natural protecting walls or banks of non-tidal rivers is permitted by law or that it does not constitute a wrong. In *Nitro Phosphate and Odam's Chemical Manure Company v. London and St. Katharine Docks Company*(4) there is a reference to the ordinary liability of a riverain proprietor who intermeddles with an existing river wall which it is his duty to maintain, and it is added that there can be no such maintenance if there is any opening in it, as an inclosure or defence not continuous is

(1) (1912) 106 L.T. 429.
(3) (1880) 14 Ch.D. 58.

(2) (1886) 16 Q.B.D. 754.
(4) (1878) 9 Ch.D. 503.

no inclosure or defence at all. The present case is a much stronger one, for it is not a case of mere neglect of duty to maintain the river wall but an active cutting down of that wall deliberately and wilfully and with knowledge of the consequences. It may be that this was done for the purpose of protecting the railway bridge and for other praiseworthy motives, but it does not cease to be a wrongful act merely because the motive was a good one. The law does not permit a man even for a good motive to do what is wrongful. The end does not justify the means. The statement of the law contained in Halsbury's Laws of England, Vol. 28, pages 453, 454 and 456, is also clear on the point that, while a person can protect his own property by some defensive measure for the purpose of warding off a danger and prevent the danger from coming into his land, he would be liable, if he diverts or interferes with the course of a stream on his own land, for all direct and proximate damage resulting from such overflow. It would suffice to refer to two more cases, *Fletcher v. Smith*(1) and *Greenock Corporation v. Caledonian Railway*(2), the latter being a case of interference with the natural course of a natural stream, though not by cutting the bank of the stream, but by substituting an artificial watercourse for the natural watercourse. It was held in that case that, even though the flood was an extraordinary one wholly unprecedented, the company which made the diversion was liable. Lord WRENBURY said that the case was not analogous to that of a man who has brought a wild beast upon his land

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(1) (1877) 2 App. Cas. 781.

(2) [1917] A.C. 556.

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and has effectually chained it and the chain has been broken by the act of God as was the case in *Nichols v. Marsland*(1), but that it was a case in which the act of God (if there was one) brought the wild beast, and (but for the act of man) there was a safe exit for the wild beast and it would have gone away and there would have been no injury. The act of man consisted in closing the exit, which, had it remained, would have rendered the advent of the wild beast harmless. In the present case, however, there was no closing of the exit but the making of a different exit, different from the natural exit, for the flood water, with full knowledge that the consequences of such diversion would be to damage the plaintiff's property.

One more reference and that to the statement of the law in Salmond on the Law of Torts may perhaps be made. At page 576 the rule of law is laid down as follows :

"Although a person is not responsible for allowing the escape of things which are naturally on his land, he is responsible for causing their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus he is responsible for the escape of water from his land, if the escape is due to some embankment, channel or other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land."

It is unnecessary to multiply authority on this point which to my mind is very clear. This is certainly a case in which there has been considerable damage, and the only point urged was that there was no *injuria*. But from what I have said above it is clear that in this case there is both *injuria* as well as *damnum*. It therefore follows

(1) (1876) L.B. 2 Ex. 1.

that the decrees appealed from are right and that the second appeals should be dismissed with costs.

There is a memorandum of cross-objections filed in one of these appeals, Second Appeal No. 1566 of 1931, on which nothing has been said, though attention was directed to its existence. It is therefore unnecessary to say anything about it except that it is dismissed but without costs.

VENKATARAMANA RAO J.—These second appeals raise a question as to the right of a landowner to divert the flood water of a natural stream passing through his land on to adjoining lands to save his property from injury. The facts are not in dispute. There is a natural stream known as Gorrikandi which passes through Gollaprolu village which belongs to the plaintiff and irrigates the lands in the said village and other villages. It runs from west to east. There are bunds on either side of the stream which are mostly of sand and earth and they form the banks of the stream and conserve and confine the ordinary course of the stream within them. The railway line of the defendant, The Madras and Southern Mahratta Railway Company, Ltd., from Madras to Waltair, passes through the village of Gollaprolu and runs from south to north. There is a railway bridge belonging to the railway company across the stream in the village of Gollaprolu. It is also a fact that Gorrikandi is a rapid stream at or about the suit locality. On or about 27th July 1925 there were heavy rains, the result of which was to cause high floods in the stream. On 28th July 1925 it was found at about 10 a.m. that the water had considerably risen in the stream. The Permanent Way Inspector who was on the spot thought that owing to the impact of water the bridge was in danger. He

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waited for two hours and then resolved to cut open the northern side of the bund to the east of the bridge to prevent danger to the bridge and to the travelling public. He accordingly did so. The result was the flooding of the lands of the plaintiff and the consequent damage to them. It was found that the Inspector did not act negligently but acted *bona fide* with the intention aforesaid. It was also found that the site of the bund at the suit locality was the property of the railway company and the place where the breach was effected was within its limits. The suit out of which Second Appeal No. 1566 of 1931 has arisen was filed by the Maharaja of Pithapuram, as the then proprietor of the Gallaprolu estate, for damages and other reliefs. A similar claim was made by the tenants of the estate in regard to the lands in their occupation in the suit out of which Second Appeal No. 1572 arises. The allegations in the plaints in both the suits are more or less similar. The plaintiff in the suit out of which Second Appeal No. 1566 of 1931 arises, after alleging wrongful opening of the bund and diversion of water, puts the basis of the claim thus in paragraph 10 of the plaint :

"The bund has been in existence from time immemorial at that height till the defendant interfered with it and has served to protect the plaintiff's lands on the north from floods and also to ensure a steady supply of water to the plaintiff's lands at the tail end of the stream. The plaintiff is entitled to enjoy the protection afforded, as aforesaid, by the bund in the accustomed manner and without interference by the defendant."

The main defence of the railway company is thus formulated in paragraphs 2 and 3 of the written statement :

"2. The defendant company states that on or about 27th July 1925 there were heavy rains in and about Golla-

prolu and the water in the Gorrikandi stream swelled into a flood and rose so as to submerge the girders of the defendant company's bridge No. 449 over the said stream and threatened to wash away the bridge and the railway line thus endangering the property of the defendant company and the safety of the public and also the plaintiff's lands. Thereupon, the defendant company's Permanent Way Inspector made an opening in the northern bank of the stream at a point lying within its own limits solely for the purpose of averting imminent danger to its property which was occasioned by forces beyond the defendant company's control."

"3. The defendant company charges that in the circumstances it was legally justified in the steps it took to defend its property and is not liable to the plaintiff in damages or otherwise for any injury caused by the flood water flowing on to the plaintiff's lands as a consequence of measures taken in defence of its property."

Both the Courts gave a decree in favour of the plaintiffs for damages. These second appeals are against the decrees in the said suits. The question, therefore, is, is the railway company liable in the circumstances and on the facts admitted and found as above ?

It is well settled that an owner of land by or near a river is not entitled to make any change in the *alveus* and disturb the ordinary course of the river. The effect of such interference might be to direct the flow of the river with a great degree of violence upon the opposite bank or upon some other portion of the same bank and would be productive of considerable damage to property at or near the said bank. As a necessary corollary to this, it has been laid down that the course which the flood water takes should not be changed to the prejudice of the proprietors lower down, vide *Menzies v. Breadalbane*(1), and the

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natural barriers should not be cut so as to permit water to flow where otherwise it would not; cf. *Attorney-General v. Tomline*(1). This obligation is imposed by law irrespective of the ownership of the bed. Of course a landlord may take such precautions on his lands to defend his property against flood, but always subject to the limitation that he cannot interfere with the *alveus* of the river; *per* Viscount CAVE in *Gerrard v. Crowe*(2).

It is admitted in the written statement that the bunds in this case form the banks of the stream. The bank is only the outermost part of the bed on which the river naturally flows. The bunds therefore form the natural barriers confining the flow of water in a particular course. As observed by the learned Judges in *Sami-ullah v. Makund Lal*(3):

“Where there is a natural outlet for a natural stream, no one has power, for the safety of his own property, to divert or interfere with its flow, and if he does so, he is ordinarily liable to pay to anyone who is injured by his act, no matter how the water, before the mischief, came into the water-course.”

Therefore the cutting open of the bund is an interference with the natural outlet of the water in the stream in question. Mr. Krishnaswami Ayyangar relied on a passage in Salmond on the Law of Torts to the effect that a landowner may lawfully remove from his land an embankment or other artificial structure which serves as a protection to the adjoining land of his neighbour against the natural flow of water. There is no evidence

given in this case that the natural flow of flood water was through the lands of the plaintiff and that the bund is an artificial protection against the said natural flow. On the other hand, it is conceded in the written statement, as pointed out above, that it is a natural barrier, being the bank of a stream. Therefore the observations of the learned writer have no application to the facts of the present case.

It is again contended that the rule above-stated in regard to the obligation not to divert the flow of a natural stream would not apply to a case of extraordinary flood and certain observations of the LORD CHANCELLOR in *Menzies v. Breadalbane*(1) have been relied on, viz.:

“These passages to which I am now alluding, have reference to the accidental and extraordinary casualties from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self-preservation, guard themselves against the consequence.”

But here comes the distinction made in law between steps taken to prevent an extraordinary flood coming on and steps taken to divert it when the flood is on, or, in other words, between strictly protective measures and measures actively transferring the flood water on to the land of another.

One of the recognised exceptions to the maxim “*sic utere tuo ut alienum non laedas*” is that a landowner can erect works on his land or take steps to prevent a risk from a common enemy such as rain, floods or incursions from the sea. The law allows “a reasonable selfishness” in doing so even though damage might be caused to a neighbour

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(1) (1880) 14 Ch. D. 58.
(2) [1921] 1 A.C. 395, 397. (3) (1921) I.L.R. 43 All. 688, 690.

(1) (1828) H.L. 3 Bligh (N.S.) 414; 32 R.E. 103, 108.

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thereafter. As Lord BRAMWELL observes in *Nield v. London and North Western Railway Co.*(1) :

"He who puts up a barricade against a flood is entitled to say to his neighbour who complains of it: 'Why did not you do the same?'"

This is to prevent a threatened flooding. LINDLEY L.J. likewise says in *Whalley v. Lancashire and Yorkshire Railway Co.*(2) :

"If an extraordinary flood is seen to be coming upon land, the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it."

But he then adds :

"Of course there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you."

The rule of law is thus stated in Theobald's Law of Land at page 6 :

"A landowner may protect his land against an unusual flood, though he may thereby cause an injury to a neighbour; but if an excess of water has come on to a man's land, for instance, by an unusually heavy rainfall, he must not, in order to get rid of it, do any act which would have the effect of casting it on his neighbour's land in such a way as to cause damage, which would not have been caused if the act had not been done; *Nield v. London and North Western Railway Co.*(1) and *Whalley v. Lancashire and Yorkshire Railway Co.*(2). See *Thomas & another v. Birmingham Canal Navigation's Proprietors Co.*(3)."

In *Sami-ullah v. Makund Lal*(4) the learned Judges of the Allahabad High Court similarly observe :

"The right of a person to protect his land from extraordinary flood extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief

(1) (1874) L.R. 10 Ex. 4, 7.
(3) (1879) 43 L.T. 435.

(2) (1884) 13 Q.B.D. 131, 140.
(4) (1921) I.L.R. 43 All. 688, 691.

from his land to the land of another person which would otherwise have been protected."

In this case what was done was to cut open the bund and let down the water in concentrated violence on to the plaintiff's lands. That is active transference of the mischief and not a protective measure in anticipation of apprehended danger. The defendants therefore cannot escape liability for their action. Nor can they plead successfully that the occasion was such that there was no exercise of volition behind the action, as in the case of the lighted squib, *Scott v. Shepherd*(1); for, according to the evidence, the Permanent Way Inspector waited for two hours before he deliberately did the act now complained of. The railway company is therefore liable for the damage to the lands of the plaintiff and the decree of the lower Courts is correct. The second appeals fail and are dismissed with costs. The memorandum of objections in Second Appeal No. 1566 of 1931 is dismissed without costs.

Solicitors for appellant : *King & Partridge.*

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(1) (1773) 2 Black. W. 892; 96 E.R. 525.

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APPELLATE CIVIL.

*Before Mr. Justice Venkataramana Rao.*1936,
November 17.K. M. VENKATACHALA CHETTY (DEFENDANT),
APPELLANT,

v.

V. D. NATESA CHETTY (PLAINTIFF),
RESPONDENT.*

Court-fee—High Court Fees Rules (Original Side) (Madras) 1933, rr. 35 and 36—"Final judgment"—Test to be adopted for finding out what is—Suit on the Original Side of the High Court for a declaration that a partnership subsisted between the parties and for dissolution—Judgment referring the suit to the Official Referee for taking the necessary accounts—If a "final judgment".

A judgment delivered on the Original Side of the High Court declaring that a partnership subsisted between the plaintiff and the defendant in an action for dissolution of partnership and referring it to the Official Referee for the taking of the necessary accounts is a "final judgment" within the meaning of Rule 35 of the High Court Fees Rules, 1933.

The test to be adopted for finding out whether a judgment is a "final judgment" pointed out and case law discussed.

On the reference of the Master as to the court-fee leviable on the memorandum of Original Side Appeal entered in the Stamp Register as No. 14872 of 1936.

G. Ramakrishna Ayyar for appellant.

ORDER.

The question involved in this reference relates to the amount of court-fee payable upon a memorandum of appeal presented against a judgment

* Stamp Register No. 14872 of 1936.

delivered on the Original Side of the High Court declaring that a partnership subsisted between the plaintiff and the defendant in an action for dissolution of partnership and referring it to the Official Referee for the taking of the necessary accounts. The provisions which regulate the payment of the court-fee are Rules 35 and 36 of the High Court Fees Rules, 1933. They run thus :

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" 35. Memorandum of appeal from a final judgment when the value of the subject-matter of the appeal does not exceed Rs. 2,500 ... 225 0 0

36. Memorandum of appeal from any other judgment or order ... 100 0 0".

The fee of Rs. 100 was paid by the appellant under Rule 36 and he contends that it is sufficient. The argument of his learned Counsel is, as the matter has been referred to the Official Referee for accounts, the suit cannot be said to be finally disposed of, and there is no "final judgment" within the meaning of Rule 35, and he is not bound to pay a higher court-fee than what he has done. An appeal lies from the judgment of a single Judge in a suit instituted on the Original Side under Clause 15 of the Letters Patent. The word "final" is not to be found in Clause 15, but it occurs in Clause 39 of the Letters Patent where an appeal is provided to His Majesty in Council against the "final judgment", decree or order of the High Court of Judicature at Madras. It may be noticed that Clause 40 of the Letters Patent provides a similar appeal against any preliminary or interlocutory judgment, decree or order of the High Court under certain conditions specified in the said clause. So far as our High Court is

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concerned, there has been a judicial interpretation of what a "judgment" is within the meaning of Clause 15 of the Letters Patent in the Full Bench decision in *Tuljaram Row v. Alagappa Chettiar*(1), and ever since the date of the said decision, so far as I know, it has been treated as an authority on the said matter, and subsequent decisions have in this Court uniformly adopted the interpretation given therein. According to the said decision, the word "judgment" in Clause 15 would cover not only a "final judgment" but an "interlocutory or preliminary judgment". But, neither WHITE C.J. nor KRISHNASWAMI AYYAR J. defined what a "final judgment" is. KRISHNASWAMI AYYAR J. adopts the definition given by Black in his book on Judgments for explaining what an "interlocutory judgment" is. He seems to treat the terms "interlocutory" and "preliminary" as synonymous. It is unnecessary for me to consider whether this view is sound. I think it is enough to determine for the purpose of this reference what a "final judgment" means. If it is determined what a "final judgment" means, every judgment which is not final will be either "interlocutory or preliminary".

The cases in England on the question what is a "final judgment" are not easy to reconcile, but the Judicial Committee for the purpose of the Letters Patent seems to have adopted the definition of "final judgment" as given by COTTON L.J. in *Ex parte Chinery*(2) and by Lord ESHER M.R. in *Onslow v. Commissioners of Inland Revenue*(3); vide *Tata Iron and Steel Company, Limited v.*

(1) (1910) I.L.R. 35 Mad. 1 (F.B.).
(2) (1884) 12 Q.B.D. 342. (3) (1890) 25 Q.B.D. 465.

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Chief Revenue-authority of Bombay(1). In *Ex parte Chinery*(2) COTTON L.J. observes :

"I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established."

In *In re Riddell. Ex parte Earl of Strathmore*(3) Lord ESHER M.R., after citing with approval the opinion of COTTON L.J., explains what a "final judgment" means thus :

"A 'final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one. . . .

In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action was finally determined, then, whether it was tried 'on the merits' or not, the order . . . is a 'final judgment'."

If this test is adopted there can be no question that the judgment in a suit for dissolution of partnership, or in a suit for account, which determines the liability of the parties finally, in the sense that so long as that judgment stands it cannot be raised again, will be a "final judgment" within the meaning of Rule 35 of the Fees Rules.

This view is also borne out by the opinion expressed by the Judicial Committee in more cases than one on the language of section 595 of the Code of Civil Procedure, 1882. Under clause (c)

(1) (1923) I.L.R. 47 Bom. 724, 733 (P.C.).
(2) (1884) 12 Q.B.D. 342. (3) (1888) 20 Q.B.D. 512, 516.

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of that section, which corresponds to section 109 (c) of the present Code, an appeal was held to lie to His Majesty in Council from any final decree passed on an appeal by a High Court or any other Court of final appellate jurisdiction. In *Rahimbhoy Habibbhoy v. C. A. Turner*(1) a question arose thus: the decree directed the taking of accounts which the defendants contended ought not to be taken at all; this was passed by the Judge sitting on the Original Side of the High Court and it was confirmed in appeal by a Bench of two Judges; against the decision in appeal, leave to appeal to His Majesty in Council was sought. The High Court declined leave on the ground that it was not a final decree within the meaning of section 595, clause (c), Civil Procedure Code. The Privy Council expressed the opinion that this view was wrong. Lord HOBHOUSE observed thus:

"The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of section 595 of the Code."

It will be seen that this view is in accord with the view expressed by Lord ESHER referred to above in *In re Riddell. Ex parte Earl of Strathmore*(2). The interpretation put on the word "final" was again re-affirmed by the Privy Council in *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*(3). What is meant by "final" is further

(1) (1890) I.L.R. 15 Bom. 155, 159 (P.C.).
(2) (1888) 20 Q.B.D. 512. (3) (1894) I.L.R. 17 All. 112 (P.C.).

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made clear by the following observations of their Lordships in the above judgment:

"The question is whether the decree of the High Court is final. It appears to their Lordships that it is final. The case is analogous to that of *Rahimbhoy Habibbhoy v. C. A. Turner*(1). There the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. Of course the account might turn out in the defendant's favour. But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit."

As observed by the learned Judges in *Chundi Dutt Jha v. Pudmanund Singh Bahadur*(2), the decision of the Privy Council in *Rahimbhoy Habibbhoy v. C. A. Turner*(1) clearly indicates that in their opinion final decree in section 595 does not mean the last decree but the decree determining the rights finally. Even under the new Code, where the wording differs materially from that of the old Code, their Lordships of the Privy Council expressed the opinion that the decision in *Rahimbhoy Habibbhoy v. C. A. Turner*(1) will also govern cases arising under the new Code. Referring to these two cases, *Rahimbhoy Habibbhoy v. C. A. Turner*(1) and *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*(3), the Privy Council observed thus in *Abdul Rahman v. D. K. Cassim & Sons*(4):

"Two other cases before this Board were relied on by the learned Judges, viz., *Rahimbhoy Habibbhoy v. C. A. Turner*(1) and *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*(3). But both of these cases were decided with reference to the Civil Procedure Code of 1882, in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these cases on the ground that the suit had been fully tried in the lower Court and the 'cardinal point' decided, leaving, in the one case, only a reference for

(1) (1890) I.L.R. 15 Bom. 155 (P.C.). (2) (1895) I.L.R. 22 Cal. 928.
(3) (1894) I.L.R. 17 All. 112 (P.C.). (4) (1932) I.L.R. 11 Ran. 58, 63 (P.C.).

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accounts, and, in the other, only subordinate points for decision which should have been dealt with by the appellate Court. In the first case, *Rahimbhoy Habibbhoy v. C. A. Turner*(1), it is clear that an appeal to His Majesty in Council would have lain as of right under the provisions of the present Code."

This case clearly indicates that the principle enunciated in *Rahimbhoy Habibbhoy v. C. A. Turner*(1) is that, where the cardinal point in the case is decided and the matter is referred for the taking of accounts, the judgment would be a "final judgment". Therefore it seems to me that a judgment which decides finally the liability to account so far as the Court deciding it is concerned would be a "final judgment" within the meaning of Rule 35 of the Fees Rules, though there is a reference for the taking of accounts to the Official Referee. The appellant is therefore liable to pay court-fee under Rule 35 of the Original Side Fees Rules.

Mr. Ramakrishna Aiyar submitted that, if he were to appeal against the decree passed after the consideration of the report of the Official Referee, he would have to pay another *ad valorem* fee within the meaning of Rule 35 and it would work hardship. But that is a matter for amendment of the rules. In cases arising under the Court Fees Act it may be noticed that such hardship does not occur ordinarily because, as pointed out in *Supputhayammal, In re*(2), in an appeal against the final decree in a suit credit is given to the court-fee paid on the memorandum of appeal presented against the preliminary decree. The appellant is given ten days' time from to-day to pay the additional court-fee.

G.R.

(1) (1890) I.L.R. 15 Bom. 155, 159 (P.C.). (2) (1932) I.L.R. 55 Mad. 664.

APPELLATE CIVIL.

Before Mr. Justice King.

MARUTHAPPAN SERVAI AND ANOTHER (DEFENDANTS
2 AND 3), APPELLANTS,

1936,
November 26.

v.

NIRAIKULATHAN SERVAI AND TWO OTHERS (PLAINTIFFS
2 AND 3 AND FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Joint family—Debt incurred to assist prosecution for the murder of a member of the joint family—If binding on all members.

The first defendant, a grandfather, mortgaged the joint family property belonging to himself and his grandsons, defendants 2 and 3, for the purpose of borrowing money to pay an Advocate who was engaged to assist the police in prosecuting a man accused of having murdered the first defendant's son, who was also the father of defendants 2 and 3. In a suit brought upon the mortgage the question was whether money spent in assisting the prosecution which could bring no definite benefit to the family at all but was undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family.

Held, that the debt incurred was not binding upon the family as being either for necessity or for family benefit.

In such a case, the decree should be passed against the grandfather's share of the family property and not against the shares of the grandsons.

Held further, that since the debt incurred was clearly neither illegal nor immoral, the grandsons were bound by the doctrine of pious obligation to discharge it; and the mortgagee was entitled to a decree against the assets, if any, of the family in their hands.

Anokh Singh v. Sapuran Singh, (1923) 79 I.C. 980, considered.

Krishna Ayyar v. Muthulakshmi Ammal, (1933) 66 M.L.J. 342, distinguished.

* Second Appeal No. 106 of 1933.

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SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 24 of 1931 preferred against the decree of the Court of the District Munsif of Kovilpatti in Original Suit No. 340 of 1929.

S. Narasinga Rao for *K. Rajah Ayyar* for first appellant.

S. Ramaswami Ayyar for first and second respondents.

JUDGMENT.

This is a suit brought upon a mortgage deed of 1920 by the mortgagee to enforce his mortgage. The mortgagor is the first defendant. The other defendants are his two grandsons, defendants 2 and 3. In the mortgage deed the property is described as belonging to the mortgagor himself but it has been found by the Court of first instance that the property mortgaged was really the joint family property of the mortgagor and his grandsons. The purpose for which the money was borrowed was recited to be to pay an Advocate who was engaged to assist the police in prosecuting a man accused of having murdered the first defendant's son, who was also the father of defendants 2 and 3. Both the Courts have held that this was a purpose binding upon the joint family and have given a mortgage decree over the whole of the property, that is to say, including the shares of defendants 2 and 3 as well as the share of the first defendant.

It is contended in this second appeal that this finding is wrong and that the mortgage as a mortgage can be valid only as against the share of the first defendant. The learned Advocate for the

respondent, however, argues that the question whether any particular sum of money had been borrowed for family necessity or a purpose binding upon the family is a question of fact and that, as both the lower Courts have given findings on this question, I am precluded from interfering with those findings in second appeal. I agree that in the main the question whether money had been borrowed for a family purpose is a question of fact. I agree also that there is a finding in the present case that money was necessary if a pleader were to be engaged to assist the police, that is to say, that the money was not otherwise available. But it does not seem to me that either of the Courts below has definitely given any positive finding of fact on this point. They are clearly obsessed by the difficulty of the situation. In the ordinary sense of the word it is not necessary and never can be necessary to spend money in order to assist in the prosecution of a person accused of the murder of a member of one's family. To have that person convicted and even hanged can do the family no good; it cannot restore the murdered man to life; it cannot be said to affect the finances of the family or even its prestige. In any case the Courts below have not seriously faced this problem. The District Munsif in giving his finding merely says: "In the absence of decided rulings either way I am inclined to hold that this is an item of expenditure which should bind the family. To hold otherwise would sometimes work grave hardship." And the learned Subordinate Judge says as follows: "In the present instance the debt in question was incurred for the purpose of finding out and bringing to book the

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real offender, that is to say, for the vindication of justice. Such an object seems to me proper and lawful and the vindication of justice is as much a necessity as the defence of an accused member of a family." It seems to me that that finding was given merely as a bare expression of opinion on the part of the learned Subordinate Judge. There is no attempt at showing by any kind of detailed discussion of the circumstances of the family how this benefit is derived or how this necessity arises. I do not, as I have said, consider that these findings thus hesitatingly expressed actually amount to findings of fact which preclude me from interfering in second appeal.

In support of the lower Court's decision I have been referred to two cases. The first is the one reported as *Anokh Singh v. Sapuran Singh*(1). There money was borrowed in order to prosecute a case under section 498, Indian Penal Code. The decision, however, that it was necessary to incur debts in order to prosecute for an offence under that section is not discussed at any length but is contained in a single sentence :

"Debts incurred for a litigation of this nature may in my opinion be reasonably regarded as necessary."

The other case is the one reported as *Krishna Ayyar v. Muthulakshmi Ammal*(2). That is clearly distinguishable from the facts of the present case, for there money had been borrowed partly in order to recover title-deeds and partly to defend a widow against an unfounded charge of having forged a bond. It has never been doubted that money spent in defending a member

(1) (1928) 79 L.C. 990.

my

(2) (1933) 66 M.L.J. 342.

of a family on a criminal charge is a legal necessity. The question here obviously is whether money spent in assisting a particular prosecution which can bring no definite benefit to the family at all but is undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family. I do not think I can derive very much assistance from either of these two cases. It seems that the matter is one on which authority is practically wanting and one of first impression, and taking the words "necessity" and "family benefit" in their ordinary sense, it seems impossible to hold that the debts incurred in this instance can be binding upon the family. I would therefore set aside the findings of the lower Courts upon this point.

The result, however, is not to dismiss the plaintiff's suit altogether. He can still have a mortgage decree against the first defendant's share of the family property ; and as against defendants 2 and 3, since the debt incurred is clearly neither illegal nor immoral and they are bound by the doctrine of pious obligation to discharge it, he can have a decree against such of the assets of the family as have come or may come into their hands. I make no order as to costs in this appeal.

V.V.C.

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APPELLATE CIVIL—FULL BENCH.

Before Sir M. Venkatasubba Rao, Kt., Officiating Chief
Justice, Mr. Justice Cornish and Mr. Justice
Venkataramana Rao.

1936,
October 13
and
1937,
January 29.

LAKSHMI AMMAL AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

ANANTHARAMA AYYANGAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Hindu Law of Inheritance (Amendment) Act (II of 1929)—
Applicability—Last male owner dying before Act leaving
female heir who dies after Act—Succession to—Applicability
of provisions of Act to—Hindu law—Remote reversioner—
Suit by, when nearer reversioners in existence and not pre-
cluded from suing—Dismissal of—Not always necessary.*

Held by the Full Bench.—When the last male owner, a Hindu, dies before the passing of the Hindu Law of Inheritance (Amendment) Act (II of 1929), leaving a female heir (a limited owner under the law) who is alive after that Act has come into force, the succession to the last male owner is governed by the provisions of that Act.

The true principle is that, under the Hindu law, it is the death of the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes, therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner.

Gavarammal v. Manikammal, (1933) I.L.R. 57 Mad. 718, overruled.

* Appeal No. 443 of 1930.

Held by the Division Bench.—Though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence.

Case-law on the point reviewed.

The plaintiffs, claiming to be the nearest presumptive reversioners of one V, sued the first defendant, his mother who had succeeded him on his death, and the second defendant, V's sister, for the appointment of a receiver for the management of V's estate and for a declaration that a transaction styled a "partition release" effected by the defendants was not valid beyond the first defendant's lifetime. During the pendency of the suit and after the passing of the Hindu Law of Inheritance (Amendment) Act (II of 1929), the second defendant filed an additional written statement urging that by virtue of that Act she and her minor son, not made a party to the suit, were nearer reversioners of V than the plaintiffs and that the plaintiffs were not therefore entitled to maintain the suit. The suit was decreed by the trial Court and the defendants preferred an appeal to the High Court. In the appeal it was found, as the result of the opinion of the Full Bench to which the question whether the succession to V was governed by the Hindu Law of Inheritance (Amendment) Act (II of 1929) was referred, that the second defendant and her son were nearer reversioners of V than the plaintiffs. The defendants-appellants thereupon urged that the plaintiffs not being the nearest reversioners were not entitled to maintain the suit and that it must therefore be dismissed.

Held that, as (i) the entire evidence with respect to the relief asked for had been given by the plaintiffs, (ii) the transaction styled a "partition release" had been declared by the lower Court to be valid only during the lifetime of the first defendant and (iii) the acts of the first and second defendants had been shown to be prejudicial to the interest of the plaintiffs and might be prejudicial to the interest of the minor son of the second defendant also, the proper action to be taken in the case was not to dismiss the suit but to ask the plaintiffs-respondents to make the minor son of the second defendant a party-defendant to the suit, so that the case on behalf of the reversioners might once for all be tried and disposed of.

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ANANTHARAMA; APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 66 of 1927.

The appeal originally came on for hearing before MADHAVAN NAIR and STONE JJ. who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The genealogical table given at page 10 of the pleadings will help to understand the relationship of the parties.

The plaintiffs claim to be the nearest presumptive reversioners of one Venkatakrishna Ayyangar, the deceased son of the first defendant, Lakshmi Ammal, and the brother of the second defendant, Sundarathammal. Rangaswami Ayyangar, the husband of Lakshmi Ammal and the father of Venkatakrishna Ayyangar, died on 17th September 1924. Venkatakrishna Ayyangar was born after his father's death on 18th May 1925, and he died a minor on 11th July 1927. On his death his mother Lakshmi Ammal succeeded him. The plaintiffs' case is that she has been mismanaging the estate and has been dealing with it unlawfully. Hence they instituted the suit out of which this appeal arises for the appointment of a receiver for the management of the estate of Venkatakrishna Ayyangar and also for a declaration that the transaction styled a "partition release" effected by the defendants on 15th September 1927 is not valid beyond the first defendant's lifetime.

Various questions of law and fact were raised in the suit; but for the purpose of this reference it is necessary to refer only to one question, a question of law, raised by the second defendant. By an additional written statement she urged that by virtue of Act II of 1929, the Hindu Law of Inheritance (Amendment) Act, she and her son are nearer reversioners of Venkatakrishna Ayyangar than the plaintiffs and that the plaintiffs are not therefore entitled to maintain the suit. It is conceded that but for the alteration in succession introduced by Act II of 1929, if the Act is applicable, the plaintiffs would be entitled to institute the suit. The main question for determination is whether Act II of 1929 would apply to this case and whether the second defendant and her son are nearer reversioners of Venkatakrishna Ayyangar than the plaintiffs.

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ANANTHARAMA. Act II of 1929 altered the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. The preamble of the Act states: "Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate, it is hereby enacted as follows: "; and section 2 lays down that a sister and sister's son are entitled to rank after certain other relations and next after the father's father and before a father's brother; provided a sister's son shall not include a son adopted after the sister's death. The section runs as follows: "A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother; provided that a sister's son shall not include a son adopted after the sister's death." It is conceded that if the Act applies to this case, the second defendant and her son would be nearer reversioners of Venkatakrishna Ayyangar than the plaintiffs.

It is argued on behalf of the plaintiffs that the Act is intended to apply only to cases of Hindu intestate males who die after the passing of the Act, and reliance in support of the argument is placed on the language of the preamble. If this argument is accepted, it will follow that since the last male holder in the present case died in 1927 before the passing of the Act, the second defendant and her son cannot rely on the Act and claim to be the nearer reversioners. According to this view the critical date to be considered is the death of the last male owner. On the other hand the appellants argue that the critical date for consideration is not the death of the last male owner but is the death of the limited owner when the succession opens and since in the present case the first defendant is still living the Act will apply and the second defendant and her son will be the nearer reversioners. According to this view the question for decision is not whether the Act is retrospective.

In *Gavarammal v. Manikammal*(1) it was held, differing from the decisions in *Shib Das v. Nand Lal*(2) and *Bandhan Singh v. Mt. Daulata Kuar*(3), as follows: The Hindu Law of Inheritance (Amendment) Act II of 1929 does not apply to

(1) (1933) I.L.R. 57 Mad. 718.

(2) (1931) I.L.R. 13 Lah. 178.

(3) A.I.R. 1933 All. 152.

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cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such persons the Hindu law as it stood before the Act should be applied. The mere circumstance of the succession opening after the passing of the Act by the death of the limited owner is not enough to attract the provisions of this Act. It must also be shown that the opening of the succession is in respect of the estate of a Hindu male dying intestate after the passing of the Act. (See the headnote.) The decision of our Court did not find favour in the Patna High Court. In *Chulhan v. Mt. Akli*(1) COURTNEY TERRELL C.J. held: "Where a widow is in possession of her husband's estate as a limited owner the question whether certain persons are heirs under Act II of 1929 depends on the date of the death of the widow and not on the date of the death of the last male holder. In such cases the question is not whether Act II of 1929 is retrospective." The learned Judge followed the decision of the Lahore High Court in *Shib Das v. Nand Lal*(2), and *Bandhan Singh v. Mt. Daulata Kuar*(3). In Appeal No. 256 of 1925 CURGENVEN and BHASHYAM AYYANGAR JJ. applied section 2 of the Act to a case where the last male owner died before the passing of the Act. In that case, the plaintiffs sued for a declaration that they are the reversioners of one Seshayya of whom the first defendant was the widow. Of the remaining defendants the second defendant was the adopted son of Seshayya's sister Subbamma and defendants 3 to 7 were his children. One issue in the case, which was found in the affirmative by the Subordinate Judge, was whether the plaintiffs were the nearest reversioners to Seshayya. On this point the learned Judges stated: "Since the disposal of the suit, however, there has been enacted Act II of 1929—Hindu Law of Inheritance (Amendment) Act—and by that Act the sons of certain female relatives, including a sister, have been declared entitled to rank in order of succession next after a father's father and before a father's brother: and it is not disputed that by virtue of this Act the defendants become nearer reversioners than the plaintiffs can claim to be, subject to one possible qualification"; and then they dealt with the proviso to section 2 which says that a sister's son shall not include a son adopted after the sister's death. The question of

(1) A.I.R. 1934 Pat. 324.

(2) (1931) I.L.R. 13 Lah. 178.

(3) A.I.R. 1938 All. 152.

an adopted son does not arise in this case. After saying that in that case they had no materials to decide conclusively whether the second defendant came within the proviso, the learned Judges stated: "However, Mr. Raghava Rao for the plaintiffs recognises that the situation so far as his clients are concerned has undergone a great change and very wisely he sees the uselessness of contending for the maintenance of the decree in the circumstances now arisen" This decision is an authority in support of the position contended for by the appellants and it is in conflict with the decision in *Gavarammal v. Manikammal*(1) relied on by the respondents. In their judgment in *Kalimuthu Pillai v. Ammamuthu Pillai*(2), RAMESAM and CURGENVEN JJ. stated as follows: "The only question for decision is who, according to Hindu law, is the preferential heir, the plaintiff—the daughter's daughter's son—or the first defendant—the sister's son. As the succession opened in 1928 this case is not governed by the Hindu Law of Inheritance (Amendment) Act II of 1929." It may be mentioned that the last male owner in that case, Kalimuthu, died in 1888. He had four wives of whom two survived him and the last of them died in January 1923. The statement of the learned Judges would suggest that if the succession had opened after the passing of the Act, they would hold that, though the last male owner died before the passing of the Act, the Act would apply.

The decisions in *Gavarammal v. Manikammal*(1) and Appeal No. 256 of 1925 show that on the point under consideration there is a conflict of opinion in our High Court. The view of RAMESAM and CURGENVEN JJ. inferentially supports the decision in Appeal No. 256 of 1925. The question is admittedly one of considerable importance. In the circumstances we would refer to a Full Bench the question "whether in a case like the present where the last male owner dies before the passing of Act II of 1929 and the succession opens after the passing of the Act, the said Act (II of 1929)—the Hindu Law of Inheritance (Amendment) Act—would apply." We may say that in our opinion the Act would apply. For the reasons mentioned in *Chulhan v. Mt. Akli*(3) and as the Act is intended to alter the order of succession, the critical date for its

(1) (1933) I.L.R. 57 Mad. 718.

(2) (1934) 67 M.L.J. 503.

(3) A.I.R. 1934 Pat. 324.

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All the other questions arising in the appeal will be heard, if necessary, after the receipt of the opinion of the Full Bench on the above question.

The appeal came on for hearing pursuant to the above Order of Reference before the Full Bench constituted as above.

ON THE REFERENCE :

B. Sitarama Rao for S. Srinivasa Ayyangar (with him, *P. N. Appuswami Ayyar*) for appellants.—It is a fiction of the Hindu law that in cases where the last male owner dies sonless but leaving a life tenant, such as a widow or a daughter, the last male owner is deemed to continue to live till the death of the life tenant and succession to him is deemed to open at the death of the life tenant and the heirs of the last male owner are to be determined as at that date. Section 2 of the Hindu Law of Inheritance (Amendment) Act II of 1929 is worded as it is because of this fiction of the Hindu law. It is a sort of declaration that is made. It cannot be said that the question as to who is the heir of the last male owner will arise only once. It is likely to arise again and again. The date of the death of the last male owner is not really material.

[There is another way of putting the point. Take the table of heirs and in that table insert the heirs under the Act in their proper places. That will show the correct scope of the legislation, i.e., the new Act.—The OFFG. CHIEF JUSTICE.]

[The table on page 41 of Mulla's Hindu Law was referred to.] *Moniram Kolita v. Keri Kolitani*(2) states that the heirs of the husband would be persons who would have been his heirs if he had lived up to and died at the moment of the widow's death; see pages 789-90 of I.L.R. 5 Cal. *Venkatanarayana Pillai v. Subbammal*(3) is authority for the position that the inheritance opens only on the death of the female

(1) (1933) I.L.R. 57 Mad. 718.
(2) (1880) L.R. 7 I.A. 115; I.L.R. 5 Cal. 776.
(3) (1915) L.R. 42 I.A. 125; I.L.R. 88 Mad. 406.

owner; see page 410 of I.L.R. 88 Mad. [*Janaki Ammal v. Narayanasami Aiyer*(1) was referred to.] Ghose's Hindu Law, page 282, is authority for the position that a wife is half of her husband when she gives birth to a son. As to the applicability and effect of the Act in Bombay as regards a sister, see *Shidramappa Nilappa v. Neelawabai*(2). In that case also the last male owner died before the Act but the question as to the applicability of the Act was not considered and decided. There was, however, no contention raised that the Act was inapplicable to such a case. [Ghose's Hindu Law, page 284, was referred to.] The only conditions necessary for the applicability of the Act are (i) the death intestate of a Hindu male and (ii) his property not being one held in coparcenary or disposed of by a will. The Act became law on the date when it received the assent of the Governor-General in Council and its applicability depends upon the question of heirship arising after the date of the Act of a Hindu male who has died intestate. The important point is not whether the male died before or after the Act but whether the question of heirship arises after the Act. *Srimati Shakuntla Devi v. Kaushalya Devi*(3), *Rajpali Kunwar v. Sarju Rai*(4) and *Chulhan v. Mt. Akli*(5) are cases subsequent to *Gavarammal v. Manikammal*(6) and they discuss the question on principle. *Srimati Shakuntla Devi v. Kaushalya Devi*(3) reverses *Mt. Janki v. Mt. Sattan*(7) upon which reliance is placed in *Gavarammal v. Manikammal*(6). Mulla's Hindu Law, page 48, states that the view in *Gavarammal v. Manikammal*(6) is wrong.

K. S. Sankara Ayyar for T. R. Venkatarama Sastri for R. Krishnaswami for respondents.—The Hindu Law of Inheritance (Amendment) Act II of 1929 is applicable only to cases of persons who die after the Act comes into force. The Act is admitted to be not retrospective, i.e., rights which came into existence before 1929 are not affected by the Act. The only question is whether it applies to persons who died before it came into force. The Act being intended to alter the order of succession, it cannot apply to cases where the order was settled before the coming into force of the Act. With regard

(1) (1916) L.R. 43 I.A. 207; I.L.R. 39 Mad. 634, 637.
(2) (1932) I.L.R. 57 Bom. 377. (3) (1935) I.L.R. 17 Lah. 356.
(4) (1936) I.L.R. 58 All. 1041 (F.B.). (5) A.I.R. 1934 Pat. 324.
(6) (1933) I.L.R. 57 Mad. 718. (7) A.I.R. 1933 Lah. 777.

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to the observations of the Privy Council in *Moniram Kolita v. Keri Kolitani*(1), the answer is that it is not that there is no succession till after the death of the widow or other life tenant or life tenants. There is a succession in the case of the widow and, in cases in which there is a daughter, there is a succession of the daughter after the death of the widow. It is not as if during their lives the succession is in abeyance. What the Privy Council in *Moniram Kolita v. Keri Kolitani*(1) means is that the person who is to be held an heir of the last male owner after the life of the widow or the daughter is the person who would be such heir if the last male owner died on that date. In the case of a person who dies before the date of the Act the order of succession to him becomes settled before the date of the Act and the Act cannot apply so as to alter that order.

[There can be no vested right to an order of succession.—
VENKATARAMANA RAO J.]

The words "male dying intestate" in the preamble to the Act can apply only to persons who die after the Act; otherwise the expression should have been "male dying or who has died before the Act".

[The Legislature could well have said "male intestate". The word "dying" is absolutely unnecessary. There is no particular meaning to be attached to that word.—OFFG. CHIEF JUSTICE.]

[The word "intestate" is never used in connection with a living person. The word "dying" is absolutely unnecessary.—CORNISH J.]

[The real point which you have to combat is that under the scheme of the Hindu law the succession of a widow is not regarded as the succession of an heir. Succession is said to open only on the death of the widow or other life tenant and it is only the person who then succeeds that is regarded as the heir. The widow and daughter are no doubt heirs and take by right of succession as heirs. But they are not regarded as heirs for the purpose of ascertaining the heirs of the last male owner after their death.—OFFG. CHIEF JUSTICE.]

The expression "who would have been subject to the law of the Mitakshara" in section 1 (2) of the Act is entirely inapplicable to cases of males dying before the Act.

(1) (1880) L.R. 7 I.A. 115; I.L.R. 5 Cal. 776

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T. R. Venkatarama Sastri continuing on behalf of respondents.—Where a widow inherits, she inherits on behalf of the whole body of heirs and therefore the line of heirs becomes settled on the date when the widow succeeds. The respondents rely upon the words "dying intestate" in the preamble and upon the words "who but for the passing of this Act would have been subject" in section 1 (2) of the Act. Succession does not open on the death of the widow though the heir is determined then. *Moniram Kolita v. Keri Kolitani*(1) merely refers to a rule of selection of heirs after the death of the widow and does not exclude the idea that the widow is herself an heir. [*Venkatanarayana Pillai v. Subbammal*(2) was referred to in regard to the question as to when the succession opens.]

Only in the sense that at the time of the death of the limited owner it is necessary to determine who the heirs are, it is supposed that the propositus had died then but otherwise the fiction cannot be carried further. It cannot be said that a person who died before the passing of the Act could by this fiction be deemed to have died only after the passing of the Act. [Reference was made to Mayne's Hindu Law, paragraphs 521, 522 and 609.]

Cur. adv. vult.

The OPINION of the Full Bench was delivered by VENKATASUBBA RAO OFFG. C.J.—The question referred to the Full Bench is, whether the succession to a Hindu male dying before the passing of Act II of 1929, leaving a female heir (a limited owner under the law) who is alive after the Act has come into force, is governed by the provisions of that Act. The last male holder was one Venkatakrishna, who died a minor on 11th July 1927. He was succeeded by his mother, Lakshmi Ammal (the first defendant), against whom the action has been brought by the plaintiffs claiming to be the presumptive reversioners, with

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(1) (1880) L.R. 7 I.A. 115; I.L.R. 5 Cal. 776.
(2) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.

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a view to obtain certain reliefs in regard to her deceased son's estate. The plaintiffs' right is challenged by the sister of Venkatakrishna, Sundarathammal (the second defendant in the suit), and her son, who allege that under the Act they have a preferential right to the succession; and if this contention is well founded, the plaintiffs would cease to be the nearest or presumptive reversioners. Act No. II of 1929 received the assent of the Governor-General on 21st February 1929, on which date it came into force. The short question to be decided is, whether the succession to Venkatakrishna, who died before the Act leaving his mother as his immediate heir, is governed by that Act or by the law in force previously. This in turn depends upon the question, when does the succession to a Hindu male open?

This Act, as its preamble shows, has been passed with a view to alter the order of succession to a Hindu male dying intestate. In the present case, if Venkatakrishna who was succeeded by his mother is to be deemed as having died in 1927, the provisions of this Act can have no operation. But the true principle seems to be that, under the Hindu law, it is the death of the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes, therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his

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death is for this purpose postponed to the death of the limited owner. If this principle is kept in mind, the question presents no difficulty. It would be begging the question to say that to adopt this view would be to give retrospective effect to the Act. If a male intestate succeeded by a female heir is assumed as dying on the day of his actual death which happens to be before the Act, to apply the provisions of this enactment to such a person would undoubtedly amount to giving it retrospective effect. But the true doctrine of the Hindu law is thus declared by their Lordships of the Judicial Committee:

"The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband, if he had lived up to and died at the moment of her death." *Moniram Kolita v. Keri Kolitani*(1).

The position of a Hindu widow or other female heir is an anomalous one, for although she is said to possess a qualified interest, she can in certain circumstances alienate the entire estate. That she is thus in one sense the heir of the last male holder, cannot be disputed. Referring to the widow, their Lordships say that what she holds is "an estate of inheritance to herself and the heirs of her husband". *Moniram Kolita v. Keri Kolitani*(1).

The persons described here as the heirs of the last male holder are the reversioners, whose interest, so long as the female holder is alive, is only contingent, "differentiated little, if at all, from a *spes successionis*"; *Janaki Ammal v. Narayanasami Aiyer*(2). The case last cited is an instructive one. There, the Courts in India declared the

(1) (1880) L.R. 7 I.A. 115, 154; I.L.R. 5 Cal. 776.
(2) (1916) L.R. 43 I.A. 207, 209; I.L.R. 39 Mad. 634.

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plaintiff to be the nearest reversionary heir of the deceased Ramaswami Iyor after the lifetime of defendants Nos. 1 and 2, his widow and mother. Their Lordships of the Judicial Committee held that such a declaration was both unavailing and premature, for, as they point out,

"the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives—that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother".

The Hindu law conception is this: so long as a female heir is alive, no one can claim any vested interest in the succession; *a fortiori* there is no vesting at the date of the male holder's death, in other words, the crucial date is that of the death of the female heir, on whose death alone the succession opens.

The Judicial Committee has repeatedly declared that the succession opens only on the death of the female heir. In *Moniram Kolita v. Keri Kolitani*(1), as already stated, their Lordships observe:

"The succession does not open to the heirs of the husband until the termination of the widow's estate."

Again, in *Jaipal Kunwar v. Indar Bahadur Singh*(2), after refusing to interfere with a declaration granted by the lower Courts in favour of certain reversionary heirs, their Lordships, in order to guard against any possible misapprehension, emphasise:

"Whenever the inheritance opens by the death of the widow, the present decision will have settled nothing as to who should succeed."

(1) (1880) L.R. 7 I.A. 115, 154; I.L.R. 5 Cal. 776.
(2) (1904) L.R. 31 I.A. 67, 70; I.L.R. 26 All. 238.

The same idea, that the succession does not open prior to the death of the female heir, is again expressed in *Janaki Ammal v. Narayanasami Aiyer*(1), already quoted, at page 209.

The plaintiffs' learned Counsel has argued that there is what is known as a fixed line of succession, with which the Act would not have intended to interfere. The answer is simple. There is no interference with any vested rights at all. During the lifetime of the female heir it cannot be predicated who would be the reversioner who would succeed. Possibly none who was alive at the death of the last male holder would eventually survive to succeed to his estate; how can it be then stated that anyone's vested rights are interfered with? Again, a case may be conceived where a suit is brought for the safeguarding of the estate by the presumptive reversioner on behalf of all the reversionary heirs, but at the death of the female heir, not one of the reversioners existing at the date of the action may be alive to reap the benefit of the decree. The notion therefore of a fixed line of succession seems opposed to the principles governing this branch of the law.

In our opinion, therefore, the plaintiffs are not the presumptive reversioners of Venkatakrishna, and we base that view upon what we consider is the true doctrine of the Hindu law. As for the authorities, in all the decided cases this view has been taken, excepting in *Gavarammal v. Manikkammal*(2). In our opinion, that case, with great respect, was wrongly decided and it is unnecessary, having regard to what we have said, to discuss it

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(1) (1916) L.R. 43 I.A. 207, 209; I.L.R. 39 Mad. 634.
(2) (1933) I.L.R. 57 Mad. 718.

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in any detail. Moreover, in Allahabad, Lahore and Patna the view that we have indicated has prevailed—*Bandhan Singh v. Mt. Daulata Kuar*(1), *Rajpali Kunwar v. Sarju Rai*(2), *Shib Das v. Nand Lal*(3), *Shrimati Shakuntla Devi v. Kaushalya Devi*(4) and *Chulhan v. Mt. Akli*(5)—and in some of those cases, especially in *Shrimati Shakuntla Devi v. Kaushalya Devi*(4), the arguments adopted in *Gavarammal v. Manikammal*(6) have been fully answered.

In the result, we would answer the reference by stating that in a case like the present the succession opens to the heirs of the last male holder after the passing of the Act and is therefore governed by its provisions.

[The appeal and the memorandum of objections came on for final hearing after the expression of the above opinion of the Full Bench before MADHAVAN NAIR and STODART JJ.]

S. Srinivasa Ayyangar and *P. N. Appuswami Ayyar* for appellants.

T. M. Krishnaswami Ayyar for first respondent.

R. Krishnaswami for second respondent.

Cur. adv. vult.

MADHAVAN
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The essential facts necessary for the disposal of the appeal have been stated in our Order of Reference to the Full Bench. The suit was instituted by the plaintiffs who were the nearest reversioners to the estate of the last male holder at the time of the institution of the suit. But the question was raised by the second defendant, having regard to Act II of 1929, that she and

(1) A.I.R. 1933 All. 152.

(3) (1931) I.L.R. 13 Lah. 178.

(5) A.I.R. 1934 Pat. 324.

(2) (1936) I.L.R. 58 All. 1041 (F.B.).

(4) (1935) I.L.R. 17 Lah. 356.

(6) (1933) I.L.R. 57 Mad. 718.

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her son were nearer reversioners than the plaintiffs and that the latter are therefore not entitled to maintain the suit. The Full Bench has now answered the question that in a case like the present the succession opens to the heirs of the last male owner after the passing of the Act and is therefore governed by its provisions. It would follow from this decision that the second defendant and her son, that is the sister and her son, are nearer reversioners to the estate of the late Venkatakrishna Ayyangar than the plaintiffs. It may be mentioned here that the son of the second defendant, who is a minor under her protection, is not a party to the suit.

On the answer of the Full Bench it is argued by the appellants that the plaintiffs not being the nearest reversioners, are not entitled to institute the suit and it must therefore be dismissed. On the other hand the respondents argue that the suit of the plaintiffs being of a representative character, need not necessarily be dismissed and that the merits of the appeal should be gone into. On these arguments the first question for our decision is whether the appellants' contention should be accepted and the suit should be dismissed.

The appellants' learned Counsel referred to various cases. In the leading case of *Rani Anand Kunwar v. The Court of Wards*(1) to which reference is usually made in all the decisions dealing with this question, their Lordships of the Privy Council laid down the general rule that a declaratory suit

"must be brought by the presumptive reversionary heir—that is to say, by the person who would succeed if the widow

(1) (1880) I.L.R. 6 Cal. 764, 772-73 (P.C.).

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were to die at that moment . . . such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering . . . The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue . . . In such a case . . . , the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

In *Kali Charan Singh v. Bageshra Kunwari*(1) it was held that there is no ground for the proposition that it is competent to persons who are not in fact the nearest reversioners to sue where the actual nearest reversioner is a minor. In that decision it was pointed out by the learned Judges :

"Indeed, so far as we are aware, there is nothing to prevent the minor suing through a next friend at this stage."

In *Shib Das v. Nand Lal*(2), Mst. R. having succeeded to the property of her deceased son made a gift of the same to her daughter's son. The reversioners in the fourth degree were in April 1925 granted a decree declaring that the gift would not affect their rights after the death of Mst. R. but while the appeal from this decision was pending and while Mst. R. was still alive, the Hindu Law of Inheritance (Amendment) Act II of 1929 came into force. This altered the order of succession so as to make the donee (sister's son) rank before the plaintiffs-reversioners. It was held that, as Mst. R. was still alive at the date of the coming into force of the new Act, the appeal must be

(1) (1925) I.L.R. 47 All. 929.

(2) (1931) I.L.R. 13 Lah. 178.

accepted and the suit must be dismissed. (See the headnote.) In *Sita Saran v. Jagat*(1) it was held, following the Privy Council decision in *Rani Anand Kunwar v. The Court of Wards*(2), that if the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. Amongst the other cases cited, reference may be made to *Ram Tawakal v. Mt. Dulari*(3) and *Chulhan v. Mt. Akli*(4).

Relying on these cases the appellants' learned Counsel argues that the plaintiffs had no justification to proceed with the suit seeing that they are not the nearest reversioners, especially so since they did not make the minor son of the second defendant a party, even though it was pointed out to them that they should do so having regard to Act II of 1929.

The respondents contend that, though suits by remote reversioners when nearer reversioners are in existence have been dismissed, it does not necessarily follow that they should in all cases be dismissed, that the Court has a discretion in such

(1) (1927) I.L.R. 49 All. 815.
(3) A.I.R. 1934 All. 469.

(2) (1880) I.L.R. 6 Cal. 764 (P.C.).
(4) A.I.R. 1934 Pat. 324.

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cases and that the plaintiffs may be allowed to go on with the suit. In *Deoki v. Jwala Prasad*(1) the plaintiff alleging himself to be the nearest reversioner of her husband brought a suit against a Hindu widow. At the time of the suit there was in existence a nearer heir, a minor daughter of the defendant who lived with her, but she was not made a party to the suit. The learned Judges pointed out that, although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male heir, yet even without any express proof of refusal, concurrence, or collusion on her part, the Court may exercise its discretion and grant declaratory relief to the male reversioner without insisting upon the female heir being joined in the suit provided such a course is not prejudicial to her interests. This case is strongly relied upon by the respondents to show that cases may arise where even when a nearer reversioner is not made a party relief may be given in a suit by a remote reversioner. In *Subba Rao v. Venkayya*(2):

"Plaintiffs as reversioners brought this suit in 1927 for a declaration that an adoption alleged to have taken place in June 1921 was neither true nor valid. By the time the suit came on for trial Act II of 1929 had been passed, with the result that defendants 5 to 7 became nearer heirs than the plaintiffs, and got themselves impleaded as parties. Defendants 5 to 7 did not support the adoption but asked for a declaration in terms of the plaint. It was contended that the plaintiffs ceased to be the nearest reversioners as soon as Act II of 1929 came into force and that they had no *locus standi* to maintain the suit. The learned Judges held that there was no legal bar to the maintainability of the suit and that the declaration could be granted. A dismissal of the suit in the circumstances would practically amount to the preclusion of

(1) (1928) I.L.R. 50 All. 678.

(2) 1936 M.W.N. 1111.

the possibility of the declaratory suit in this case and defeat the policy of the law underlying the principle that suits relating to the status of a person should as far as possible be tried within a reasonable time and before evidence bearing upon the question is lost by lapse of time." (See the head-note.)

Reference was also made to the decision in *Baldeo Dube v. Shamdhur Pande*(1) to show that declaratory reliefs are always matters of discretion for the Court.

An examination of the above decisions reveal that though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence. In this connection attention may be drawn to the following passage in *Rani Anand Kunwar v. The Court of Wards*(2) already quoted:

"In such a case . . . the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearest reversioner to be made a party to the suit."

In the present case, the entire evidence with respect to the relief asked for has been given by the plaintiffs and Exhibit G has been declared by the lower Court to be valid only during the lifetime of the first defendant. The acts of the first and second defendants have been shown to be prejudicial to the interest of the plaintiffs. They may be prejudicial to the interest of the minor son of the second defendant also. Of course the second defendant sided with the first defendant,

(1) (1914) 23 I.C. 809.

(2) (1880) I.L.R. 6 Cal. 764 (P.C.).

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her mother. What the attitude of the minor son in this matter may be, cannot be stated at the present moment because he is not a party to the suit. As pointed out in *Rani Anand Kunwar v. The Court of Wards*(1) and in *Kali Charan Singh v. Bageshra Kunwari*(2), it appears to us that the proper action to be taken in this case should be to ask the plaintiffs-respondents to make the minor son of the second defendant a party-defendant to the suit, so that the case on behalf of the reversioners may once for all be tried and disposed of. At present the second defendant's son is a minor and under the protection of his mother. He being a minor, his interests will have to be represented by a guardian. In the circumstances of this case it will not be proper to make the mother his guardian. We would therefore set aside the decision of the lower Court and give permission to the plaintiffs to proceed with the suit making the second defendant's minor son a party to the suit represented by a proper guardian. We are told that his paternal uncle and paternal grandfather could well represent his interests but who his proper guardian should be must be left for the decision of the parties and of the Court. After the minor son is made a party-defendant, if his guardian wishes, he may transpose himself as a plaintiff if necessary. We asked the Counsel whether they would be in a position to agree, after making the second defendant's son a party to the suit, to accept the evidence already recorded as evidence for the purpose of the continuance of the case, but they have not been able to give us any assurance on the point. If the guardian

(1) (1880) I.L.R. 6 Cal. 764 (P.C.). (2) (1925) I.L.R. 47 All. 929.

insists that the case must go on afresh, he may file his statement and the case will have to be heard and tried *de novo*. We set aside the decision of the lower Court and remand the entire case for proper disposal according to law in the light of our observations. Having regard to the course the case has taken, we express no opinion on the various findings recorded by the lower Court. The appellants are entitled to get the costs of this appeal. No costs on the memorandum of objections. The other costs will be provided for in the decree of the lower Court.

The court-fee will be refunded both in the appeal and in the memorandum of objections.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Venkataramana Rao.

1937,
January 15.

SESHAN PATTTER'S SON AMBI alias SUBRAMANIAN PATTTER
AND ANOTHER (PLAINTIFF AND NIL), PETITIONERS,

v.

THANDAN KAVUKAL VEERAN'S SON KELAN AND TWO OTHERS
(DEFENDANTS 1 TO 3), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 64—"Claims enforceable under the attachment"—Land—Attachment of, and subsequent attachment of rents due in respect thereof—Mortgagee of land under mortgage executed in interval by judgment-debtor—Right to rents of—Affected by attachment, if—Joint Hindu family—Manager—Mortgage in name of, allotted to younger brother at partition—Suit by manager subsequent to partition on mortgage, impleading that younger brother as defendant—Decree in, dismissing suit—Appeal by younger brother against—Competency of—No appeal by manager—Partition arrangement—Deed of, inadmissible in evidence because unregistered.

Certain land belonging to R was attached before judgment in a suit filed against him by the respondent and the decree made in that suit specifically mentioned that the attachment before judgment was confirmed. Subsequent to the date of the said decree, that is on 24th June 1928, the said land was mortgaged to the petitioner. On 12th September 1928 the respondent attached the rents due in respect of the said land for a portion of the year 1928 and on 15th November 1928 the respondent was appointed receiver in execution for the purpose of collecting the rents attached. In suits filed by the petitioner, on the strength of his mortgage, claiming rent, the question arose which of the two persons had a valid right to the rents claimed—the petitioner, the mortgagee, or the respondent, the decree-holder-receiver. The respondent's contention was that the mortgage in favour of the petitioner, effected as it was

* Civil Revision Petitions Nos. 1923 of 1929, 74, 75, 163, 164 and 172 to 174 of 1930 and 219 to 246 and 581 of 1935.

during the subsistence of, and contrary to, his attachment, was void.

Held that the petitioner and not the respondent was entitled to the rents claimed.

The effect of section 64 of the Code of Civil Procedure is not to make a private transfer pending an attachment absolutely void but to make it void only as against all claims enforceable under the attachment. The claim to rent put forward by the respondent arose, not in virtue of the first attachment pending which the mortgage in favour of the petitioner was made, but of the second, prior to which the said mortgage was made.

Mina Kumari Bibi v. Bijoy Singh Dudhuria, (1916) L.R. 44 I.A. 72; I.L.R. 44 Cal. 662, relied upon.

At a partition between brothers, members of a joint Hindu family, the debt evidenced by a mortgage which had been taken in the name of A, one of the brothers and the manager of the joint family, was allotted to R, another of the brothers. The partition arrangement was in writing. The writing was, however, not registered and was therefore inadmissible for proving the terms of the partition. On the strength of the mortgage A filed suits for rents in his own name impleading R as defendant. The trial Court dismissed the suits holding that the mortgage in favour of A was fraudulent. A did not appeal from the decrees made in the said suits but R did. The question was whether the appeals filed by R were competent.

Held that the appeals filed by R were competent. R was on the record as a party and the judgment dismissing the suits negatived his right. He had therefore an independent right of appeal. The effect of the partition arrangement being inadmissible in evidence was that the mortgage still remained the property of the joint family. It would therefore be open to any member of the joint family, even if he had not been on the record and *a fortiori* if he was on the record as a party, to challenge the judgment negating its right.

PETITIONS under section 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the District Munsif of Palghat dated 11th April 1929 and made in Small Cause Suit No. 2 of 1929, dated 4th July 1929 and made in Small

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Cause Suits Nos. 14, 101, 46 and 234 of 1929, dated 11th April 1929 and made in Small Cause Suits Nos. 3 to 5 of 1929 respectively; and petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the decrees of the Court of the District Judge of South Malabar dated 29th September 1934 and made in Appeal Suits Nos. 16 to 22, 25 to 41, 44, 45, 42, 43 and 46 of 1934 respectively preferred against the decrees of the Court of the District Munsif of Palghat dated 28th August 1933 and made in Original Suits Nos. 59, 41 to 46, 57, 58, 60 to 67, 71, 72, 104, 232, 319 to 321, 324, 325, 322, 323 and 408 of 1932 respectively.

B. Sitarama Rao and *C. S. Swaminathan* for petitioners.

T. C. Ravivarma Raja for *D. A. Krishna Variar* for first respondent.

Second respondent not represented.

P. Govinda Menon for third respondent.

VENKATA-
SUBBA RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—These are two batches of civil revision petitions and although they both arise out of similar claims, the contentions that have been put forward and therefore require to be considered are different. For a proper appreciation of the points raised, it will be necessary at the outset to set out the relevant dates:

(i) On 11th November 1927 Kunjunni Nair (the respondent) in the suit filed by him against one Ramaswami Pattar (Original Suit No. 45 of 1927) attached the land in question before judgment.

(ii) On 8th December 1927 a decree was made in that suit and we understand (although this is of no consequence) that in it it was specifically

mentioned that the attachment before judgment was confirmed.

(iii) On 24th June 1928 the suit land, attached as mentioned above, was mortgaged to Ambi alias Subramania Pattar (the petitioner before us) who, on the strength of his mortgage, filed most of the suits in the Courts below claiming rent.

(iv) On 12th September 1928 Kunjunni Nair, the decree-holder in Original Suit No. 45 of 1927, attached the rents due in respect of the suit land for a portion of the year 1104 (1928 A.D.) payable in the month of Kanni. As will be observed, what was attached before judgment was the land itself; the attachment now effected was of the rents due for a period.

(v) On 15th November 1928 Kunjunni Nair, the decree-holder, was appointed receiver in execution for the purpose of collecting the rents attached.

In the first batch of petitions (Nos. 1923 of 1929 and 74, 75, 163, 164 and 172 to 174 of 1930) the question raised is, which of the two persons has a valid right to the rents claimed—Ambi, the mortgagee or Kunjunni Nair, the decree-holder-receiver? As will appear presently, in the second batch of cases the mortgage in favour of Ambi was impugned as fraudulent, but that contention does not seem to have been raised in the lower Court in the present batch. The only question therefore that arises for decision in the first batch of petitions, as already stated, is, which of the two rival claimants is entitled to the rents? It was argued by Mr. Govinda Menon for the respondent that the mortgage in favour of Ambi, effected as it was during the subsistence of, and

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contrary to, his attachment, would be void. If this contention were right, Ambi's claim to rent would fail. But the learned Counsel's argument ignores, as Mr. Sitarama Rao rightly points out, the effect of the cardinal words in section 64 of the Code of Civil Procedure, which make it perfectly clear that any private alienation pending an attachment is to be void only "as against all claims enforceable under the attachment". The question shortly therefore is, does the claim put forward on behalf of the receiver answer this description? The transfer in favour of Ambi was made, as the dates show, subsequent to the first attachment, but what we have to decide is whether the claim now made by the respondent is one arising under *that* attachment, for the effect of the section is, not that a private transfer is absolutely void but void only as against the claims enforceable under the attachment. If therefore the respondent's claim can in law be regarded as one made *under the first attachment*, it must take precedence of the mortgagee's right. But the claim to rent which the respondent puts forward arises not in virtue of the first attachment but of the second. It is perfectly true that the decree-holder could have taken further proceedings without effecting a second attachment, but what in actual fact happened was, that the rents as distinguished from the property were attached and they were the subject-matter of the second attachment and it was in furtherance of the last-mentioned attachment that the receiver was appointed. The private transfer in favour of Ambi was on a date previous to the second attachment and could not be affected by any claim

arising under it. Going back to the first attachment effected of the land, granting that this was followed up by further proceedings, would the purchaser at an execution sale or, for that matter, a receiver that might be appointed in execution, be entitled to the rents? It cannot admit of doubt that such a person can have no claim to the rents during the intervening period, i. e., between the date of the attachment of the land and the Court sale, or the appointment of the receiver, as the case may be. In short, the claim of the respondent is one arising under the second and not the first attachment, and the transfer in favour of Ambi, though subsequent to the latter, was antecedent to the former, and it follows from this that the respondent's contention cannot prevail. *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(1) is an instructive case. There were two decrees and there was an attachment under each of them. The private transfer in favour of the appellant was made five years after the attachment A but one day before the attachment B and it was at the sale held in pursuance of the attachment B that the respondent purchased the property. It was held that the earlier attachment, whether it was subsisting or not, did not give the respondent any right to the property as against the appellant. Referring to section 276 of the Code of 1882, corresponding to the present section 64, their Lordships observe :

"That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the

(1) (1916) L.R. 44 I.A. 72; I.L.R. 44 Cal. 662.

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attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in Execution Case No. 16 of 1907, or in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment."

In the result, the following civil revision petitions (Nos. 1923 of 1929 and 74 and 172 to 174 of 1930) are allowed, but we make no order as to costs here or in the Court below. In each case there will be a decree for the amount claimed.

* * *

We now turn to the second batch (Civil Revision Petitions Nos. 219 to 246 and 581 of 1935). Here, as already observed, the mortgage in favour of Ambi *alias* Subramania Pattar was impeached, but the lower appellate Court has found, differing from the Court of first instance, that the transaction is valid and we see no reason for disturbing that finding of fact.

But the question that has been argued arises in somewhat curious circumstances. Ambi, on the date of the mortgage in question, was the manager of a joint Hindu family consisting of himself and his brothers, Narayana Pattar and Rama Pattar. Subsequently there was a partition and it was to Rama Pattar that the debt evidenced by the mortgage was allotted. The partition arrangement was in writing, which however was not registered. Under the decisions, such a writing, though affording evidence of a division in status, is inadmissible for proving the terms of the partition. Ambi, realising this, filed suits for rents in his own name, impleading, however, (quite unnecessarily) Rama Pattar as a defendant. The first Court holding, as already stated, that the mortgage in his favour was fraudulent,

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dismissed his suits. The learned District Judge on appeal, though he reversed the first Court's finding of fact, still confirmed its judgment. It happened in this way. The appeals before him were filed not by Ambi, the unsuccessful plaintiff, but by Rama Pattar who, as already stated, was impleaded as defendant. The learned Judge held that the appeals filed by him were incompetent and dismissed them for that reason, thus upholding, though on a different ground, the first Court's judgment. The short question is, were the appeals filed by Rama Pattar incompetent? The partition arrangement not having been registered, the suits, it must be held, were properly instituted in the name of Ambi. He was not only the manager of the family but the person in whose name the mortgage was taken. So he rightly instituted the suits as plaintiff; but should the Court hold that the writing was admissible, the right would vest in Rama Pattar, in whose favour alone a decree could be passed. Therefore it is not surprising that Ambi claimed that a decree either in his favour, or, in favour of Rama Pattar, in the alternative, should be passed. But, whether the procedure was right or wrong, he was there on the record as a party and the judgment dismissing the suits negatived his right. We fail to see why in these circumstances he should not have an independent right of appeal. Ambi, who had nothing to lose by the adverse judgment, was content to leave the matter there. But does that prevent any member of the family, whose interest is imperilled, from filing an appeal? To all intents and purposes, the mortgage still remained the property of the joint family; that is the

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effect of the partition arrangement being inadmissible in evidence. If this be so, it ought to be open to any member of the joint family to challenge the judgment negating its right. Rama Pattar was one such member and even had he not been on the record, it would have been open to him, with the Court's leave, to file an appeal. But, owing to what must now be regarded as an accident, he was on the record as a party and that, if at all, should be an additional ground for holding that the appeal was competent.

The lower Court observes that had Rama Pattar applied to it to be transposed as plaintiff, his application would have been barred by limitation. This question does not really arise but we must point out that the learned Judge's view is wrong. The general rule enacted in section 22 of the Limitation Act as to the effect of substituting or adding a new party is subject to certain exceptions mentioned in clause 2 of that provision, one of them being that the rule of limitation enacted in the main part does not apply where there has been a transposition of the parties already on the record.

In the result, except as regards the petition to be mentioned, all the other petitions are allowed; in each case the plaintiff will have a decree for the amount claimed. There will be no order as to costs either here or in the Courts below. As to Civil Revision Petition No. 581 of 1935, it is dismissed but without costs.

We have now to make orders in respect of certain matters which are common to both sets of civil revision petitions. The need for those orders has thus arisen. In the first place, the tenants

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have not been represented in this Court. Secondly, while general questions have been argued, the Counsel have not been in a position to deal with such facts as are peculiar to each case. The following order is made by consent:

i. Mr. Govinda Menon believes that in some cases to which Ambi or his brother has been a party, the claim of his client has been affirmed to rents due from some tenants. If any such judgments are produced in three weeks from to-day the decrees in the concerned cases will be vacated; otherwise they will stand.

ii. If in any one of the cases before us the tenants have pleaded that rents had previous to the suits been paid to the respondent, to that extent there will be no decrees against the tenants and this will be taken note of by the office when drafting the decrees.

iii. If the respondent, in pursuance of the lower Court's decrees, has, before this date, been paid by any of the tenants any rents, the petitioner or his brother will not be entitled to have restitution of those rents. It is stated that wherever there has been such receipt of rents, it has been under orders of Court.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Venkataramana Rao.

IN RE N. DURAISWAMI IYER, RECEIVER,
PUNGANUR ZAMINDARI (DEFENDANT), APPELLANT.*

1937,
January 25.

Court Fees Act (VII of 1870), Sch. II; art. 17-B—Applicability—Madras Estates Land Act (I of 1908)—Sec. 112—Ryot's suit contesting landholder's right to sell holding—Value of subject matter of—Appeal by landholder against decree decreeing ryot's suit—Court-fee payable on.

The value of the subject-matter of a suit filed by a ryot under section 112 of the Madras Estates Land Act contesting the landholder's right to sell his holding for arrears of rent due is the annual rent which is claimed by the landholder to be in arrear and the recovery of which is resisted by the ryot.

Where in such a suit the ryot succeeded in the Courts below and the landholder filed a second appeal in the High Court,

held that the proper court-fee payable on the appeal was the amount payable *ad valorem* on the annual rent claimed.

Aiyaswami Aiyar v. District Board, Tanjore, (1929) I.L.R. 52 Mad. 972, disapproved.

Bunwari Lal v. Daya Sunker Misser, (1909) 13 C.W.N. 815, referred to.

APPEALS against the decrees of the District Court of Chittoor in Appeal Suits Nos. 98 and 133, 134, 132, 111, 99 and 135 to 140 of 1934 preferred respectively against the decrees of the Court of the Sub-Collector of Madanapalle in Summary Suits Nos. 7, 5, 6, 4, 3 and 8 to 14 of 1933 respectively.

B. Somayya and N. C. Vijiaraghavachari for appellant.

* Second Appeals Nos. 50 to 61 of 1937 (Serial Register Nos. 12284, etc., of 1935).

Government Pleader (K. S. Krishnaswami DURAISWAMI IYER, In re, Ayyangar) for Government.

Cur. adv. vult.

The ORDER of the Court was delivered by VENKATASUBBA RAO J.—The question raised in this batch of second appeals is, what is the right principle to be applied in regard to valuation of suits filed under section 112 of the Madras Estates Land Act? Chapter VI of that Act deals *inter alia* with the sale of the ryots' holdings for arrears of rents due. Section 111 provides that when an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof in the prescribed manner. Section 112 then enacts that it shall be incumbent on the landholder intending to avail himself of this power, to serve a written notice on the defaulter, first stating the amount due and secondly informing him that in default of his paying the amount or of his filing a suit contesting the landholder's right to sell within the time specified, the holding or a part thereof, as the case may be, will be sold. The present appeals arise out of suits filed by the tenants concerned under the last-mentioned section. In both the Courts below, the tenants were successful and the second appeals here have been filed by the landholder. The question is, what is the proper court-fee payable on these appeals? The landholder contends in the words of the office note, that "the value of the subject-matter is not more than the annual rent the recovery of which is resisted" and on that basis he has paid an *ad valorem* court-fee in each appeal. As, however, a different view prevailed

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in *Aiyaswami Aiyar v. District Board, Tanjore*(1), the question was referred to one of us, VENKATA-
RAMANA RAO J., who, in view of the importance of the point raised, has directed the matter to be placed before a Bench. It is thus that these cases have come to be heard by us.

The only case in which this question directly arose is *Aiyaswami Aiyar v. District Board, Tanjore*(1) decided by ANANTAKRISHNA AYYAR J. The learned Judge there held that, in the case of a suit under section 112,

"it is not possible to estimate at a money value the subject-matter in dispute",

and that therefore article 17-B of the Second Schedule applies. In arriving at this decision, he relied, by way of analogy, upon certain (three) classes of cases, where in the circumstances existing in them, it was held that the subject-matter was incapable of valuation. The reasoning of the learned Judge seems, with great respect, far from convincing; on the contrary, there is another case, *Maharaja of Pittapuram v. Chelikani Venkatarayanim Garu*(2), decided by ANANTAKRISHNA AYYAR J. himself, which, on account of its resemblance to the present case, may be said to have a greater bearing on the point raised. The question raised was, what was the proper court-fee payable in respect of suits filed under section 95 of the Madras Estates Land Act? That section, like section 112 (the provision with which we are dealing), also occurs in Chapter VI of the Act and refers to a suit by the ryot to contest the distraint effected by the landholder. It provides that a notice shall be

(1) (1929) I.L.B. 52 Mad. 972.

(2) (1929) 57 M.L.J. 260.

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served on the defaulter, requiring him either to pay the amount demanded or to institute a suit contesting the distraint within the specified period. It will be seen that these two sections 95 and 112 occur not only in the same chapter, but have been enacted to serve the same purpose and prescribe similar, if not identical, procedure. The learned Judge has held that, where suits are filed under section 95, it is possible to estimate the subject-matter in dispute; if that conclusion is right (and in our opinion it is), it is reasonably clear that the same view should prevail in respect of suits under section 112.

The notice mentioned in section 112 is required to state, in the first place, the amount due for arrears which amount, it is obvious, represents both the extent of the tenant's alleged liability and the measure of his interest in the intended suit. The learned Judge observes that, in a suit to be filed by the tenant, he may direct his attack not against the quantum of the rent claimed, but against the sufficiency of the service of notice and therefore concludes that the amount of rent cannot be the criterion. With great deference, there is some fallacy which seems to underlie this reasoning. From the tenant's point of view, what he contests is the landholder's right to sell for the arrear claimed, and if he succeeds, his opponent's right to proceed with the intended sale comes, for the time being, to an end—on what particular ground the tenant makes good his contention being, for this purpose, a matter of no consequence. As observed in *Bunwari Lal v. Daya Sunker Misser* (1), the word used in article

(1) (1909) 13 C.W.N. 815.

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17-B is "estimate" which involves the "idea of approximation", that is to say, all that is contemplated is that the subject-matter is capable of being approximately, and by no means accurately, valued. ANANTAKRISHNA AYYAR J. observes, as a further argument in support of his conclusion, that in the case of a taxing statute a construction most beneficial to the subject should be adopted. This canon has obviously no application. In the case decided by the learned Judge, *Aiyaswami Aiyar v. District Board, Tanjore*(1), the landholder was interested in arguing, having regard to the amount of the fee payable on the *ad valorem* basis, that article 17-B applied; in the present cases, he is interested in putting forward the very opposite of that contention, as the court-fee which he would be liable to pay, were that article applicable, would be greater than the amount payable *ad valorem* on the annual rent claimed.

In the result, we decide that the contention of the landholder's Counsel must prevail. The learned Government Pleader, we may observe, has supported that contention, stating frankly that his desire is to obtain a considered ruling.

We think that as between the Government and the Government Pleader Rs. 75 for the whole batch would be the proper fee.

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(1) (1929) I.L.R. 52 Mad. 972.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice.

CHIDAMBARAM MUNICIPALITY REPRESENTED BY ITS
COMMISSIONER (PLAINTIFF), PETITIONER,

1937,
February 8.

v.

P. VENUGOPALA PILLAI (DEFENDANT), RESPONDENT.*

*Madras District Municipalities Act (V of 1920), Sch. IV,
r. 29—Notice contemplated by—If condition precedent to
filing of suit by municipality in civil Court to recover tax.*

The requirements as to notice under rule 29 of Schedule IV of the Madras District Municipalities Act are confined to the enforcement of payment of the tax by distraint or prosecution in the criminal Court but no such notice need be given by the municipality as a condition precedent to the filing of a suit in a civil Court to recover the tax.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the judgment and decree of the Court of the District Munsif of Chidambaram dated 18th September 1935 and passed in Small Cause Suit No. 1429 of 1934.

C. S. Rama Rao Saheb for M. Patanjali Sastri for petitioner.

R. Viswanathan for J. R. Gundappa Rao for respondent.

JUDGMENT.

The question here is not free from difficulty. The suit was by the Chidambaram Municipality to recover house-tax and water-tax for the year ending 31st March 1934 in respect of houses belonging to the defendant. The point to be decided

* Civil Revision Petition No. 1690 of 1935.

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here is whether the suit was maintainable by the municipality in the absence of a proper and legal notice of demand previously served upon the defendant by the municipality. There were other points raised but it is this question which has given rise to this petition. The learned District Munsif has held that the plaintiff-municipality did not sufficiently prove that it had served what it was alleged was the required notice upon the defendant and that, in the absence of such proof, the municipality was not entitled to file the suit. The question of whether the notice was really served is one of fact and, therefore, if it had been the only question, the lower Court's judgment could not be interfered with, although I am bound to say that there appears to me to have been certainly *prima facie* proof that the defendant was served with a notice of his liability to pay the tax and the defendant did not go into the witness-box and deny the receipt of the notice, merely contenting himself with a denial in his written statement. But the question here is whether, even if such a notice of demand has not been given, the municipality is entitled to sue. The statute imposes a clear liability to pay tax in respect of property and, therefore, there is that statutory liability. The question is whether there are any rules which provide that, as a condition precedent for the enforcement of that liability upon the owner of property, there must first have been a demand in compliance with the rules. The only rules relating to the collection of taxes are rules 29 onwards in Schedule IV of the District Municipalities Act. Rule 29 provides for a notice or a bill to be served upon a person containing

"(a) a statement of the period and a description of the occupation, property or thing for which the tax is charged; and (b) a notice of the liability incurred in default of payment".

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When is a notice in that form required? Rule 29 says that this notice or bill is to be served before the provisions of rule 30 are to be enforced. Rule 29 (I) reads :

"The (executive authority) shall serve upon such person bill for the sum due before he proceeds to enforce the provisions of rule 30".

What is provided for in rule 30? First of all, there is the very summary and salutary provision that, if the amount due on account of any tax is not paid within fifteen days from the service of the notice, the tax may be recovered by distraint under warrant and sale of movable property of the defaulter. That is rule 30 (1).

Sub-rule (2) of the same rule provides :

"If for any reason the distraint, or a sufficient distraint, of the defaulter's property is impracticable, the executive authority may prosecute the defaulter before a Magistrate."

Sub-rule (3) says :

"Nothing herein contained shall preclude the Council from suing in a civil Court for any tax due to it under this Act".

There is another sub-rule to which reference must be made, viz., sub-rule (3) of rule 29 ; and it is as follows :

"Where a notice, bill or direction referred in sub-rule (1) has not been served or given either in the half-year in which the tax became due or in the succeeding half-year, the tax for the half-year first mentioned in this sub-rule shall not be demanded."

Having set out the material rules, two points of view present themselves, namely, one, does this provision with regard to the serving of a notice or sending of a bill form a condition precedent to the

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enforcing of the very salutary provisions of rule 30, or, two, is it a condition precedent also to any claims made in a civil suit? Rule 30 provides a very special procedure for the collection of the tax, i.e., by distraint of movable property and prosecution in the Magistrate's Court; and it is to be enforced where there has been a failure to comply with the demand or bill after fifteen days. In my view, sub-rule (3) of rule 30 means merely that this very special procedure is not to take away the right of the municipality to sue in a civil Court in the ordinary way, a right that it has like any other individual. My conclusion is that the requirements as to notice are confined to the enforcement of payment by distraint or prosecution in the criminal Court; and certainly, sub-rule 2 (b) of rule 29 which requires that the bill must contain "a notice of the liability incurred in default of payment" is a reasonable and necessary provision if it relates to these two liabilities, but I see no necessity for persons liable to pay tax being told that they may be sued for it in the civil Court if they do not pay that which they are liable to pay under section 81 of the Act. I do not think that sub-rule (3) of rule 29 really presents any difficulty or gives support to the respondent's contention. In my view, what is there meant is that no distraint or criminal prosecution can be made in respect of the tax which is due for any half-year as regards which the bill or notice has not been served. I am of opinion, therefore, that no notice such as is specified in rule 29 need be given by the municipality as a condition precedent to the filing of a suit in the civil Court to recover the tax. Of course a

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demand ought to be made upon the person liable before a suit is filed, that is to say, a suit ought not to be filed without some notice being given to the defendant or the person liable to pay of the intention to do so and a request for payment. In the present case, the Special Officer of the municipality wrote to the defendant a letter dated 28th July 1934 as follows:

"Sir,

A sum of Rs. 145-13-2 is due from you as house-tax for the items and periods mentioned below. Please remit it at once as it is already long overdue."

And on 13th September 1934 the defendant replied as follows:

"Sir,

With reference to your letter which was duly received by me on 1st August 1934 I shall remit the amount of my house-tax before the end of September 1934. Please excuse for the delay."

In my opinion, this point was wrongly decided in the lower Court. The civil revision petition is allowed with costs and the order of the lower Court set aside and a decree passed in favour of the plaintiff-municipality for the amount claimed with costs.

G.R.

APPELLATE CIVIL.

*Before Mr. Justice Cornish and Mr. Justice King.*1936,
December 14.THE BENGAL INSURANCE AND REAL PROPERTY
COMPANY, LIMITED, CALCUTTA (FIRST DEFENDANT).
APPELLANT,

v.

VELAYAMMAL (PLAINTIFF), RESPONDENT.*

Life Insurance Policy—Amount due under—Trust in favour of nominee-wife in respect of—Condition—Married Women's Property Act (III of 1874), sec. 6—Effect of—Right to enforce trust—Suit to recover policy amount—Cause of action, where arises—Policy amount, joint family property or self-acquisition of assured, a member of a joint Hindu family—Presumption.

V the widow of a deceased Hindu, sued a Life Insurance Company, having its head office in Calcutta, for the recovery of the money due on a life assurance policy between the deceased and the company. The proposal for the policy was made through the company's agent at Erode. The agent was only authorized to canvass for proposals for insurance and had no authority to accept a proposal. The proposal for the suit policy was accepted by the company at Calcutta. Under the terms of the contract the policy money was payable in Calcutta. The assured died in Bangalore which is foreign territory. It was stated in the declaration, which was expressly incorporated in the policy, that the policy was for the benefit of the assured or his wife. Her right to the benefit depended upon the contingency of her surviving her husband if he died before the named date. The money for the premium was paid by the assured who was receiving money for his personal use from the funds of the joint family of which he was a member. The suit was filed in the Court of the Subordinate Judge, Coimbatore, which decreed the suit overruling the company's objection as to jurisdiction.

* Appeals Nos. 50 of 1935 and 239 of 1934 and Civil Miscellaneous Petition No. 342 of 1933.

Held: no part of the cause of action arose within the Coimbatore Sub-Court's jurisdiction; but as the company had not been prejudiced by the trial being held within the particular jurisdiction, the decree of the Court below could not be interfered with in appeal by reason of the provisions of section 21, Civil Procedure Code.

Held further: a trust was created in favour of V by operation of section 6 of the Married Women's Property Act (III of 1874), the Official Trustee of Bengal would be the trustee and he alone would be competent to sue for the enforcement of the trust. But under Order VIII, rule 2, Civil Procedure Code, the Company could not be allowed to have the benefit of a defence which it did not raise in its written statement.

The circumstance that a benefit to the wife is of a contingent character does not prevent it from being a benefit within the Married Women's Property Act.

Held also that in the circumstances of the case the policy money did not belong to the joint family and that the widow was entitled to it absolutely.

Where an assured is shown to have had money available from private as well as from joint family sources, the presumption is that the assured paid the premia from his own money.

Case law discussed.

APPEALS against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 134 of 1933.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to pass an order extending the time granted by the order in Civil Miscellaneous Petition No. 1810 of 1935 for furnishing the succession certificate by three months from the date of the final order in the proceedings for succession certificate in the lower Court.

APPEAL No. 50 of 1935.

T. R. Venkatarama Sastri (with him *M. Sriramamurti*) for appellant.—As regards the question of jurisdiction; the agent

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of the Insurance Company canvassed for the insurance policy at Erode. He had no authority to accept the proposal which can only be done by the head office at Calcutta. The offer was complete only when it reached the head office. The acceptance also took place at Calcutta. Hence no part of the cause of action arose at Erode. The lower Court had no jurisdiction to entertain the suit; *Appu Thamban v. Foulkes*(1), *Mylappa Chettiar v. Aga Mirza*(2) and *The National Insurance Co., Ltd., Calcutta v. Seethammal*(3).

The plaintiff is not entitled to sue. In the declaration it is mentioned that the benefit under the policy was for the wife of the assured. The declaration should be treated as part of the policy; *Re. Norwich Equitable Fire Assur. Soc., Claim of Royal Insur. Co.*(4). No doubt the benefit conferred is of a contingent character, as the wife gets it only on her surviving the husband if he died before the named date. Still it comes within the purview of section 6 of the Married Women's Property Act; *Fleetwood's Policy, In re.*(5). Here a trust was created for her benefit and the Official Trustee of Bengal would be the trustee and he alone would be competent to enforce the claim; *Lakshmi Ammal v. Sun Life Assurance Co., Canada*(6).

K. V. Ramachandra Ayyar for first respondent.—Part of the cause of action arises also where the proposal was made. This was at Erode where the assured also lived. The offer was complete when the proposal was handed to the company's agent at Erode; *Bowden v. London, Edinburgh, & Glasgow Assur. Co.*(7). The cause of action arises also at the place where the assured died; *Vishvendra Thirtha v. National Insurance Co., Ltd.*(8). Even if the lower Court had no jurisdiction to try the suit, the appellate Court should not interfere unless the defendant satisfies the Court that he was prejudiced by the trial and there was a consequent failure of justice. [Section 21, Civil Procedure Code, and *Bengal Provident and Insurance Co. v. Kamini Kumar Choudhury*(9) were referred to.] That the widow cannot sue and that the Official Trustee of Bengal alone can sue is a new defence. It was not pleaded in the written statement or before the lower Court. So the Company should not

(1) (1919) 10 L.W. 445.

(3) (1933) 65 M.L.J. 455.

(5) [1926] 1 Ch. 48.

(7) (1892) 61 L.J. Q.B. 792.

(2) A.I.R. 1920 Mad. 177, 180.

(4) (1887) 57 L.T. 241.

(6) (1933) I.L.R. 57 Mad. 536.

(8) (1917) 41 I.C. 392.

(9) (1918) 44 I.C. 694.

be permitted to raise it now. [Order VIII, rule 2, Civil Procedure Code, Order XIX, rule 15, of the English Supreme Court Rules and *Robinson's Settlement, In re. Gant v. Hobbs*(1) were referred to.] The Official Trustee can only recover it for the widow. The failure to implead him is a formal defect and it can be set right by adding him as a party to the appeal if necessary.

APPEAL No. 239 OF 1934.

K. Bhushyam Ayyangar and *V. C. Viraraghavan* for appellant.—The assured was the senior member and of right the manager of the joint family. He invested the family funds for insuring his life. So the policy should be deemed to be an acquisition for the benefit of the family. After his death, the surviving coparcener is entitled to the money covered by the policy; *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(2) and *Srinivasa Iyengar v. Thiruvengadathaiyengar*(3).

K. V. Ramachandra Ayyar for respondent.—The assured's mother was managing the family property. She was giving him some money for his personal use. The assured utilised a portion of it to pay the insurance premium. So the amount due under the policy was his self-acquisition and the joint family has no claim to it; *Lachmeswar Singh v. Manowar Hossein*(4). The assured was also borrowing from other persons to meet his expenses. In such circumstances, the presumption should be that the insurance premium was paid from his own private resources; *Balamba v. Krishnayya*(5).

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CORNISH J.—The appellant in Appeal Suit No. 50 is the Bengal Insurance and Real Property Company, having its head office in Calcutta. It was sued by the plaintiff, the widow of one Sengottiah Goundan, to recover the money due on a life

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(1) [1912] 1 Ch. 717, 728.

(2) (1911) I.L.R. 35 Mad. 162.

(3) (1914) I.L.R. 38 Mad. 556.

(4) (1891) L.R. 19 I.A. 48; I.L.R. 19 Cal. 253.

(5) (1913) I.L.R. 37 Mad. 483 (F.B.).

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assurance policy between her husband and the Company. The proposal for this policy was made through the Company's agent at Erode on 24th August 1927. The proposal was accepted by the Company on 8th September 1927. Thereupon a half year's premium became payable within five days from the date of the Company's notice of acceptance of the proposal. But this premium not having been paid, a fresh certificate of health, as required by the Company's notice (Exhibit XXIII), had to be furnished by the assured to the Company. This he did on 22nd January 1928, and the declaration or certificate is Exhibit I. It stated that he was at the time in good health, and that since his medical examination on 30th August 1927 he had not consulted any medical man or suffered from any illness. The policy was issued on 5th May 1928. In a little over three months, namely, on 16th August 1928, the assured died of pernicious anaemia.

The plaintiff's claim to recover the money was resisted by the Company on two principal grounds: the written statement alleged (1) that the policy was made void by the fraudulent suppression of a material fact by the assured, viz., his disease, of which he must have been aware at the time when he made his declaration of good health on 22nd January 1928; and (2) that the trial Court at Coimbatore had no jurisdiction over the suit as no part of the cause of action had arisen within the limits of that Court's jurisdiction.

There is no evidence that the assured was ill when he made the declaration or that he was suffering then from the ailment which was so

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soon to be fatal to him. The doctor who examined him in August 1927 certified the assured as a first class life for insurance. This witness says that he had never seen a case of pernicious anaemia; but he has read about this ailment and he stated that he saw none of its symptoms in the assured when he examined him. The widow of the assured (P.W. 2) says that her husband was in good health until about a month and a half before his death. He was then advised to go to Bangalore for a change, and he died in Bangalore. The doctor who attended him there has not given evidence. He gave the certificate that assured was under his treatment for pernicious anaemia and that he died of this disease. This information is expanded in a later letter to the effect that the assured was under his treatment from 29th July till his death. But there is no evidence when this ailment seized the assured. Reference has been made to standard medical books, from which it appears that pernicious anaemia is an insidious complaint which may run its course rapidly within a period of six to twelve weeks. Upon this state of the facts it is impossible to hold that the defendant Company has succeeded in showing that the assured knew that he had this disease, or, indeed, that he had it, in January 1928 when he signed the declaration of his good health, or even in April when he paid the premium.

The learned Advocate for the appellant briefly referred to the question whether the plaintiff's suit might not be barred by article 85 of the Limitation Act, the suit having been brought more than three years after the proof of the death of the assured. But he very fairly conceded that it

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was difficult to maintain this position in the face of Exhibit XII. This document is a clear admission by the Company of the claim and is sufficient to save the bar of time. We are of opinion that the suit is not time-barred.

The main argument turned on the question of jurisdiction. The lower Court held that a part of the cause of action arose within its jurisdiction inasmuch as the offer of the assured was made at Erode. Undoubtedly the making of an offer may be part of the cause of action in a suit upon a contract which has resulted from that offer. But the material question is, where was the offer made? For until a proposal is received there is no complete offer; *Appu Thamban v. Foulkes*(1), *Mylappa Chettiar v. Aga Mirza*(2) and *The National Insurance Co., Ltd., Calcutta v. Seethammal*(3). The defendant Company's agent at Erode was only authorized to canvass for proposals for insurance. This is apparent from the instructions to agents which are printed at the top of the proposal forms with which the agents were supplied. These instructions inform the agent that he should see that the proponent answers all questions in the form properly in order to avoid correspondence and consequent delay in finally disposing of the proposal. From this it is clear that the agent had no authority to accept the proposal. All he had to do was to see that the proposal form was correctly filled up and to send it to the head office in Calcutta for disposal there. Until the proposal reached the head office there was no offer. The offer was made in Calcutta; it

(1) (1919) 10 L.W. 445.

(2) A.I.R. 1920 Mad. 177, 180.

(3) (1933) 65 M.L.J. 455.

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was accepted in Calcutta; and under the terms of the contract the policy money was payable in Calcutta. The cause of action arose entirely in Calcutta. We do not think that any particle of a cause of action in Erode can be extracted from the circumstance that when the half-yearly premium became payable, the Company, instead of sending its demand to the assured, directed its local agent to collect the money from him.

It has been held that in a suit to recover money payable on an insurance policy the cause of action arises at the place where the assured died; *Vishvendra Thirtha v. National Insurance Co., Ltd.*(1). But this will not help the plaintiff; for the assured died in Bangalore, and Bangalore, including the Civil and Military Station, is foreign territory: *Hayes, In re*(2). We think that no part of the cause of action arose within the Coimbatore Sub-Court's jurisdiction. But even so, section 21, Civil Procedure Code, provides that an appellate Court shall not allow an objection on the ground of want of jurisdiction of the Court of first instance, notwithstanding that the objection has been taken at the earliest opportunity, unless there has been a consequent failure of justice. This means that before an appellate Court will interfere on the ground of the lower Court's want of jurisdiction the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction: *Bengal Provident and Insurance Co. v. Kamini Kumar Choudhury*(3). The appellant's learned Advocate has not suggested that his client has

(1) (1917) 41 I.C. 392.

(2) (1888) I.L.R. 12 Mad. 39.

(3) (1918) 44 I.C. 694.

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been prejudiced or handicapped by the fact of the trial having taken place in Coimbatore instead of in Calcutta.

These conclusions would suffice to dispose of the appeal had not the plaintiff's pleader in the course of his argument in the trial Court, for the purpose of repelling the claim made by the second defendant to the policy money, raised the question of a trust created in favour of the plaintiff by operation of section 6, Married Women's Property Act. The learned Subordinate Judge pursued this argument at some length in his judgment, though the topic was not the subject of an issue, and came to the decision that section 6 had no application.

Section 6 enacts that a policy of insurance effected by a married man on his own life and expressed on the face of it to be for the benefit of his wife, shall enure and be deemed to be a trust for the benefit of the wife. One looks in vain in Exhibit XI, which is described as the policy, and the schedule attached to it, for an expression of the policy being intended for the benefit of the assured's wife. This is to be found in the declaration. If the declaration is part of the contract of insurance, it will be part of the policy; for a contract of insurance if created by any binding means is a policy to all intents and purposes: *Re. Norwich Equitable Fire Assur. Soc., Claim of Royal Insur. Co.*(1). But Exhibit XI states that the declaration is part of the policy, so there is no doubt that this document is incorporated in and is part of the policy. In the declaration it appears that in answer to question 12—"Name of the nominee or

(1) (1887) 57 L.T. 241.

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nominees who would receive the sum assured", the assured had stated:—"Self or wife, Velayammal". This shows that the wife was intended to have a benefit from the policy. According to the terms of the policy the money was payable in the event of the assured surviving 11th April 1943 or at previous death. Obviously he could not receive payment if he died before that date, but his wife could. It is true that her right to the benefit depended upon the contingency of her surviving her husband if he died before the named date. But the circumstance that a benefit to the wife is of a contingent character does not prevent it from being a benefit within the Married Women's Property Act; *Fleetwood's Policy, In re*(1). If there was a trust, as in our judgment there was, for the benefit of the wife in the event which happened, it would follow from section 6 that the Official Trustee of Bengal would be the trustee, and he alone would be competent to sue for the enforcement of the trust: *Lakshmi Ammal v. Sun Life Assurance Co., Canada*(2).

But, as already observed, the point about the application of section 6 of the Married Women's Property Act arose somewhat adventitiously. The defendant Company did not plead it as a defence to the maintainability of the suit by the plaintiff. It ought to have done so, if it had intended to rely upon it. Order VIII, rule 2, Civil Procedure Code, requires that the defendant shall raise by his pleading all matters which show that the suit is not maintainable. The rule follows Order XIX, rule 15, of the English Supreme Court Rules. With reference to this latter rule it was

(1) [1926] 1 Ch. 48.

(2) (1933) I.L.R. 57 Mad. 536.

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observed by BUCKLEY L.J. in *Robinson's Settlement, In re Gant v. Hobbs*(1) :

"The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over."

The defendant Company could only have relied upon this defence to the maintainability of the suit by obtaining leave to amend its pleadings. Not having done that the Company cannot be allowed, by reason of the accident that the plaintiff's pleader argued the question of the applicability of section 6, Married Women's Property Act, to have the benefit of a defence which it did not plead. The plaintiff's learned Advocate has suggested that the Official Trustee should be made a party. It is not necessary in this case, because all that the Trustee would have to do would be to receive the money from the Company and, after deducting his charges, pay it to the beneficiary.

We now turn to Appeal Suit No. 239, the appeal of the second defendant. He is the younger and undivided brother of the assured, and claims that as the money for the one and only premium paid was furnished from the joint family funds the policy money must be regarded as an acquisition for the joint family, and he, the surviving coparcener, is entitled to it. His learned Advocate has argued that the assured being the eldest brother was by right the manager, and that a

(1) [1912] 1 Ch. 717, 728.

manager cannot take money from the family funds for his own aggrandisement. What the position would have been had the assured been the managing member of this family, it is not necessary to decide. The cases cited, *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1) and *Srinivasa Iyengar v. Thiruvengadathaiyangar*(2), leave the question of a manager's power to insure his life, paying the premium from the family money, for the benefit of some members only of the joint family, in some uncertainty. But the evidence is that the assured was not the manager. His mother, who has given evidence as D.W. 1, has said that she had been managing the family property since her husband's death seventeen years ago. It is not unlikely that the assured, who was only twenty-three years of age when he died, would have been content to leave his mother in the management. She says that she used to pay money to the assured for his personal expenses, and that she paid him Rs. 175 (the amount required for the half-yearly premium) for insuring his life. Her further story that she paid this money to him in the presence of the Company's agent has been disbelieved by the learned Subordinate Judge, and indeed it is noteworthy that no question was put by the defence to the agent to confirm this assertion. She does not pretend that the assured told her that he wanted to insure his life to make some additional provision for the family. His statement in the declaration shows that he had no such intention. The question then is, whether any profit made out of money paid to a

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(1) (1911) I.L.R. 35 Mad. 162.

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member of a joint family by the manager for his personal use, which he is free to spend as soon as he receives it, must, because he chooses to invest it for some purpose which is clearly not intended to be for the benefit of the family, be deemed to be a family acquisition. A profit made by the member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property; *Lachmeswar Singh v. Manowar Hossein*(1). When money is given to a member of a family by the manager from family funds to be spent by him for his personal use, it seems to us that any profit made by him can hardly be said to be in detriment of the joint property.

But apart from these considerations there is his mother's own evidence that the assured was borrowing money from other persons, and that after his death she defended four suits by creditors in respect of such loans. She successfully pleaded in those suits that the debts incurred by the assured were not for the purpose of the family. Now as it appears that the assured was obtaining money for his needs from other sources, and as the evidence does not establish that the sum of Rs. 175 received from his mother was in fact utilized to pay the premia, we think that we are justified in applying the presumption, which SANKARAN NAIR J. in *Balamba v. Krishnayya*(2) said would arise where an assured is shown to have money available from private as well as from joint family sources, namely, that the premia for a policy on his life would be paid

(1) (1891) L.R. 19 I.A. 48, I.L.R. 19 Cal. 253.

(2) (1918) I.L.R. 37 Mad. 488 (F.B.).

from the man's own money. We accordingly hold that the policy money did not belong to the joint family and that they have no claim to it. And as there is nothing in the declaration by the assured to show that he intended his wife to have only the limited estate of a Hindu widow in the policy money, she is entitled to it absolutely.

The result is that the appeals are dismissed and the decree of the lower Court stands. The first defendant, the Company, will pay the plaintiff her costs in Appeal Suit No. 50, and the second defendant will pay her costs of the appeal in Appeal Suit No. 239. The plaintiff's costs in the lower Court including court-fee will be paid by the first defendant. The second defendant will pay his own costs in the lower Court. The plaintiff having sued as a pauper and succeeded in her suit, we direct her to pay the court-fee to Government.

At the time when judgment was delivered the plaintiff had not obtained a succession certificate. She has since procured it, and she has filed a petition for leave to produce it. The petition is allowed.

V.V.C.

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*Before Mr. Justice Varadachariar and Mr. Justice Burn.*1936,
December 14.KM. KR. KM. KUPPAN CHETTIAR AND TWO OTHERS
(PLAINTIFFS), APPELLANTS,

v.

MASA GOUNDAN AND FOUR OTHERS (DEFENDANTS 2 TO 5
AND FIRST DEFENDANT), RESPONDENTS.**Hindu Law—Father—Money decree against—Attachment in execution of—Property liable for—Partition between father and his sons previous to money decree—Property allotted to sons' shares at—Property allotted at, for maintenance of wife and marriage of daughter with remainder over to sons—Liability to attachment of—Partition a genuine partition.*

A partition between a Hindu and his sons which is a genuine partition, a real transaction and not a mere sham, puts an end to the joint family and to the power of the father to sell his sons' shares for his debts. Property allotted to the shares of the sons at such a partition is not therefore liable to be attached in execution of a money decree obtained subsequently against the father alone.

Sat Narain v. Sri Kishen Das, (1936) I.L.R. 17 Lah. 644 (P.C.), and *In re Balusami Ayyar*, (1928) I.L.R. 51 Mad. 417 (F.B.), followed.

A Hindu has no power of disposing of property allotted, at a genuine partition of the entire joint family property between himself and his sons, for the maintenance of his wife and the marriage of his daughters with a provision that the property so allotted to them should be divided after their lifetime by the sons. Such property is not therefore liable to be proceeded against in execution of a money decree obtained subsequently against the father alone.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 8 of 1932 (Appeal Suit No. 297 of 1931,

* Second Appeal No. 1120 of 1932.

District Court) preferred against the decree of the Court of the District Munsif of Gobichettipalayam in Original Suit No. 66 of 1929.

R. Gopalaswami Ayyangar for appellants.

B. Somayya and *D. R. Krishna Rao* for respondents 1 to 4.

Fifth respondent not represented.

JUDGMENT.

VARADACHARIAR J.—This second appeal arises out of a suit instituted by the legal representatives of a decree-holder to get a claim order set aside.

The father of the plaintiffs obtained a money decree against the first defendant on 17th September 1926 on three promissory notes executed by the first defendant, Exhibits D, D-1 and D-2. Between the dates of Exhibits D and D-1 a partition arrangement was entered into between the first defendant and his sons, defendants 2 to 4; (*vide* Exhibit V dated 13th October 1925). It is alleged that the plaintiffs' father was not aware of this partition and so happened to make further advances to the first defendant under Exhibits D-1 and D-2 in the course of November and December 1925. The suit, Original Suit No. 1400 of 1926, was instituted for the recovery of money due under these three promissory notes but the first defendant alone was impleaded as defendant thereto and a decree was obtained in due course. When the plaintiffs proceeded to attach certain properties in execution of this money decree, defendants 2 to 5 came forward with a claim petition and prayed that the properties which had fallen to their shares under Exhibit V should be

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released from attachment. As the properties were accordingly released the plaintiffs filed this suit to obtain a declaration that they are entitled to attach the properties which defendants 2 to 5 claimed to have fallen to them in the partition.

The question for determination is whether, in spite of the partition evidenced by Exhibit V, the shares taken by defendants 2 to 5 are liable to be proceeded against in execution of the money decree obtained against the father alone. I have dealt with this question at some length in a judgment recently delivered by me, *Thirumalamuthu Adaviar v. Subramania Adaviar*(1), and I do not propose to repeat what has been said there. I shall only add that the case for the decree-holder was much stronger in that second appeal than in the present instance, because in that case I proceeded on the footing that the partition was entered into with a view to defeat the creditor.

Whatever may be the rights under the Hindu law of a father's creditor to secure satisfaction of the debts due by the father from the sons' shares in the joint family, the question arising for determination in this second appeal has to be decided with reference to the language of section 60 of the Civil Procedure Code. In order that properties may be liable to attachment in execution, it must be shown that they either belong to the judgment-debtor or that the judgment-debtor has a disposing power over the properties or their profits, which power he may exercise for his own benefit.

It is well settled, and the proposition has now been placed beyond doubt by the observations of

(1) (1937) 1 M.L.J. 243.

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their Lordships of the Judicial Committee in *Sat Narain v. Sri Kishen Das*(1), that the father's power of sale for his debts exists only so long as the joint family remains undivided. Their reference with approval to the decision of this Court in *In re Balusami Ayyar*(2) shows that even a division in status will suffice to put an end to this power. It would therefore follow that after a division in status the father's creditor cannot, any more than the Official Assignee, claim that the property is saleable by the father and therefore attachable by himself. That the position is different as regards the creditor's remedy by independent suit against the sons has been recognised by the judgment of a Full Bench of this Court in *Subramania Ayyar v. Sabapathy Aiyar*(3). Having regard to this well understood distinction between the creditor's remedy in execution and the creditor's remedy by a separate suit, we are, with due respect, unable to follow the observations which were cited to us from certain decisions of the other High Courts which either ignore this distinction or proceed on a basis different from the Full Bench decision in *Subramania Ayyar v. Sabapathy Aiyar*(3) and hold that after a *bona fide* partition the father's creditor will not even have a right of suit against the sons.

In the above view, it seems to me unnecessary to consider how far the contention on the one side or the other as to whether the partition in this case can be described as *bona fide* within the meaning

(1) (1936) I.L.R. 17 Lah. 644 (P.C.). (2) (1928) I.L.R. 51 Mad. 417 (F.B.).
(3) (1927) I.L.R. 51 Mad. 361 (F.B.).

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of the authorities is tenable. In my judgment in *Thirumalamuthu Adaviar v. Subramania Adaviar*(1) I have endeavoured to show that the expression "*bona fide* partition" has been used by different learned Judges in different senses. If, as recognized by their Lordships of the Judicial Committee in the recent case of *Sat Narain v. Sri Kishen Das*(2), the father's power to sell is at an end once there is a genuine partition, it does not seem to me material for the purpose of execution proceedings to consider whether the partition is *bona fide* or not, in the sense that it has made sufficient provision for the discharge of the father's debts. Their Lordships, no doubt, recognize that in a suit for partition it is proper that the Court should make provision for the discharge of the father's debts and that the remaining property alone should form the subject-matter of division between the coparceners. But it nevertheless seems to me too much to say that, except in cases where the father's debts are specifically referred to and provided for in a partition deed, the partition deed cannot be regarded as a *bona fide* partition arrangement. In the present case, the finding of the lower appellate Court is not merely that the partition was not nominal but that the plaintiffs had not shown that the share allotted to the first defendant was not enough for the discharge of his debts subsisting at the time of the partition and for his maintenance. There are, no doubt, *dicta* in some of the cases which go so far as to lay down that, unless the partition not merely makes provision for the discharge of the existing debts but allots in addition a share to the

(1) (1937) 1 M.L.J. 243.

(2) (1936) I.L.R. 17 Lah. 644 (P.C.).

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father equal to the shares allotted to the sons, it should not be regarded as a *bona fide* partition. As at present advised, I am unable to concur in that view. But, having regard to the limited scope of the question to be determined in this second appeal, it seems to me unnecessary to express any final opinion on that question.

Some of the cases in the other High Courts draw a distinction between a partition which takes place after the money decree had been obtained against the father and a partition which takes place before the money decree. In that connection, I may point out that in the present case the partition took place nearly a year before the passing of the decree in the money suit and that the suit comprised claims under two promissory notes in respect of which moneys were advanced only after the partition. It is only the claim under Exhibit D, a promissory note for Rs. 500, that had accrued due before the partition. It does not seem to be material whether the plaintiffs' father was or was not aware of the partition. Both the Courts have found that there was no particular attempt to keep the partition concealed from the creditors and we find that the partition deed was presented for registration the very next day after execution.

I am not sure if it is possible to split up a decree like the one obtained by the plaintiffs' father in this case and give the decree-holder a right of execution against the sons' shares in respect of so much of it as may represent the claim under Exhibit D which alone was a pre-partition debt. But that question also is immaterial in the view I have taken. The lower appellate Court

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was, in my opinion, right in dismissing the plaintiffs' suit.

A further point was raised before us that, at least in respect of the properties comprised in the D schedule to the partition deed, the plaintiffs must be entitled to execute the decree obtained by their father. I am unable to accede to this contention. It has, no doubt, been held that the claim which a wife has under the Hindu law for maintenance against her husband cannot take precedence over the claims of his creditors, and the same principle has been applied to a widow's claim for maintenance against her husband's estate. But that is not exactly the position here. I am not satisfied that the learned Counsel for the appellant was correct in the contention that, even when a partition takes place in a joint Hindu family, the Hindu law does not permit of a provision being made by allotment of property for the maintenance of the wife and for the marriage of the daughters as long as the father is alive. The wife has, no doubt, a personal claim for maintenance against her husband independently of the possession of any property, but that does not exclude the liability of the coparcenary property to provide for her maintenance, at any rate when the whole family property is made the subject of a partition between the father and the sons. In the present case, the allotment has been made not merely for the benefit of the wife and the daughters but also with a further provision that the properties so allotted to them should be divided after their lifetime by the sons. Applying the test involved in the language of section 60 of the Civil Procedure Code, it is impossible to hold that

the father any longer continued to have the power of disposing of the property that was allotted to his wife and daughters with remainder over to his sons.

Mr. Gopalaswami Ayyangar finally asks that the suit may at least be permitted to be treated as a suit to recover money from the sons in respect of the claim due under the promissory note Exhibit D. We regret we are unable to accede even to this prayer. It will be wholly changing the nature of the suit, and *prima facie* the suit has been instituted more than three years after the date of Exhibit D. We do not feel that we are justified in allowing the change of the basis of the claim without further information clearly available from the record that the money claim would not be barred by limitation.

The result is that the second appeal fails and is dismissed with costs.

BURN J.—I agree that the second appeal must be dismissed with costs, and I have very little to add. The finding is clear in this case that the partition was a genuine partition, a real transaction and not a mere sham. And that being so, it is clear that it put an end to the joint family in which the first defendant was the father. The motive which was behind this partition is, I think, irrelevant. It follows from the decision in the case of *In re Balusami Ayyar*(1) (in which it was clear that the partition suit was filed on behalf of the minor sons in order to defeat the claim of the Official Assignee who wished to exercise the father's power of disposal of his minor sons' shares) that, even if a partition is entered

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(1) (1929) I.L.R. 51 Mad. 417 (F.B.).

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upon in order to defeat the claims of creditors, nevertheless, provided that it is a genuine partition, division of status takes place, and the power of the father to sell the shares of the sons is brought to an end. If that be so, there can be no possibility of the decree-holder pursuing the shares of the sons in execution of the decree obtained against the father alone.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

1937,
January 7.

KOTIKELAPUDI VENKATARAMAYYA (PLAINTIFF),
APPELLANT,

v.

DIGAVALLI SESHAMMA alias SEETHAMMA AND
FIFTEEN OTHERS (DEFENDANTS 1 TO 16), RESPONDENTS.*

*Hindu Law—Joint family—Member of—Property held by—
Joint family property or self-acquisition of that member—
Onus of proof—Shifting of—Condition—Indian Evidence
Act (I of 1872), sec. 32, cl. 7—Hindu joint family—
Deceased member of—Property held by—Self-acquisition of
that member, if—Evidence as to—Will by deceased member
—Recitals in—Admissibility in evidence of.*

A party alleging that property held by an individual member of a joint Hindu family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. It is only after that is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

* Appeal No. 132 of 1931.

Sankaramarayana v. Tangaratna, A.I.R. 1930 Mad. 662, and
Satchidanandam v. Subbarazu, 1930 M.W.N. 1016, followed.

Narayana Rao v. Venkatakrishna Rao, (1914) 27 M.L.J. 677, and *Dwarkaprasad v. Jamnadas*, (1910) 13 Bom. L.R. 133, referred to.

Karsondas Dharamsey v. Gangabai, (1908) I.L.R. 32 Bom. 479, 492, considered.

On an issue as to whether properties held by a deceased member of a joint Hindu family were his self-acquisitions or joint family properties,

held that statements of facts contained in the deceased's will tending to show that the properties were his self-acquisitions were admissible in evidence under section 32, clause 7, of the Indian Evidence Act, although, in view of the fact that the statements were self-serving, they would justify scrutiny in the light of the other evidence in the case.

Nallasiva Mudaliar v. Ravan Bibi, 1921 M.W.N. 560, *Nagammal v. Sankarappa Naidu*, (1930) I.L.R. 54 Mad. 576, *Appasami Pillai v. Ramu Tevar*, (1931) 61 M.L.J. 887, *Hurronath Mullick v. Nittanund Mullick*, (1873) 10 Ben. L.R. 263, and *Satchidanandam v. Subbarazu*, 1930 M.W.N. 1016, referred to.

Tottempudi Venkataratnam v. Tottempudi Seshamma, (1903) I.L.R. 27 Mad. 228, distinguished.

Nalam Pattabhirama Rao v. Narayanamoorthy, (1921) 15 L.W. 404 (P.C.), explained.

APPEAL against the decree of the Court of the Subordinate Judge of Kurnool in Original Suit No. 3 of 1928.

N. A. Krishna Ayyar and W. Kothandaramayya for appellant.

P. Satyanarayana Rao for respondents 1 to 4.

Other respondents were unrepresented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The appellant instituted the suit on the footing that he had become entitled to the suit properties by the rule of survivorship on the death of his uncle, one

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Subbarayudu, in July 1919. Subbarayudu left a will, Exhibit XVIII dated 12th July 1913, and defendants 1 to 6 claim as legatees under that will. Questions were raised in the lower Court as to the genuineness of this will and, after elaborate trial, the learned Subordinate Judge found that the will was genuine; but, as the plaintiff's claim by survivorship, if well-founded, would by itself suffice to defeat the operation of the will even if it were true, his learned Counsel here did not attack the lower Court's finding on the question of the genuineness of the will and confined his arguments to the plaintiff's claim under the rule of survivorship.

The question argued before us is substantially that raised by the fourth issue in the case. The latter part of that issue related to a contention that, even if the suit properties were in any sense and to any extent the self-acquired properties of Subbarayudu, he had thrown them into the common stock and thereby made them joint properties. This aspect of the matter has not been pressed before us. On behalf of the appellant, Mr. Kothandaramayya's main argument was that at a time when the plaintiff was only an infant, Subbarayudu must on the death of the plaintiff's father have come into possession not merely of the five acres of ancestral lands admittedly belonging to the family in their native village but also of a substantial sum of cash which must have formed a nucleus for Subbarayudu's subsequent earnings. In the lower Court, an argument seems to have been advanced to the effect that even the income from the family lands in the village could have been

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substantial, but the learned Subordinate Judge has found that the lands did not yield anything more than a few rupees in those days and even these few rupees were not shown to have come into the hands of Subbarayudu at any time, as he was serving as a public servant in a place far away from his native village. This part of the lower Court's finding has not been challenged before us either.

The story sought to be developed on the plaintiff's side in the course of the evidence was that about the time of the plaintiff's father's death, i.e., in 1876, some amount, put by one witness at about Rs. 1,600 and by another witness at about Rs. 5,000, stood in deposit in the plaintiff's father's name with a merchant of Cocanada known as Chinna Gopalam and that some years after the plaintiff's father's death this amount was withdrawn by Subbarayudu.

[His Lordship discussed the evidence bearing upon the point, concurred with the Court below in finding against the truth of that story and proceeded:—]

It was next argued as a matter of law that it was for the defendants to prove positively that the amount that stood to Subbarayudu's credit with Chinna Gopalam in 1884 was his separate property and did not constitute joint family property. Reliance was placed in this connection upon the statement in Sir Mulla's Hindu Law, section 233, to the effect that where it is proved or admitted as to a Hindu family that it possesses joint property, the presumption of law is that *all* the property of which it is possessed is joint and that, if any member claims any portion of the

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property as his separate property, the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. There are no doubt observations of this tenor in some of the reported cases, but with all respect we think that this is too broad a statement of the presumption. In a line of cases in this Court beginning with *Narayana Rao v. Venkatakrishna Rao*(1), it has been recognised that the presumption has to be stated with some further limitations and qualifications. Many of the cases bearing upon that point have been referred to in the judgment of ANANTA-KRISHNA AYYAR J. in *Sankaranarayana v. Tangaratna*(2) where the learned Judge points out that a party alleging that property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. The learned Judge takes care to add that it is only after this is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. To the cases cited in this judgment we may also add *Satchidanandam v. Subbarazu*(3). An observation of BEAMAN J. in *Karsondas Dharamsey v. Gangabai*(4) would seem to sound the other way, but the learned Judge himself stated the proposition in more guarded terms in *Dwarkaprasad v. Jamnadas*(5). We notice that none of the later

(1) (1914) 27 M.L.J. 877.

(2) A.I.R. 1930 Mad. 662.

(3) 1930 M.W.N. 1016.

(4) (1908) I.L.R. 32 Bom. 479, 492.

(5) (1910) 13 Bom. L.R. 133.

Madras cases has been referred to in Sir D. F. Mulla's book in this context. As we have already pointed out, no serious attempt has been made to show that Subbarayudu's deposit with Chinna Gopalam in 1884 or any of the subsequent acquisitions of Subbarayudu could have reasonably come out of the ancestral lands.

Reference was next made to certain entries in the accounts of P.W. 16's family relating to some Savings Bank deposit in the plaintiff's name of a sum of Rs. 600 and odd and a story was built with reference thereto that it represented certain moneys given for the plaintiff's benefit into the hands of Subbarayudu by the plaintiff's aunt, the moneys having come into her hands partly from her father and partly from presents given to the plaintiff at the time of his Upanayanam. We are not impressed with the evidence relating to this part of the story.

[His Lordship considered the evidence bearing upon the point and proceeded:—]

The conduct of the plaintiff seems to us to be a matter of some significance in this case, not merely at that particular time in connection with the particular item but with reference to the case generally. Even if it should be assumed that the plaintiff is entitled to invoke some presumption of Hindu law in his favour, the weight of such presumption and the nature of evidence required to rebut the same will vary according to the circumstances of each case; and the stale nature of the plaintiff's claim must certainly count against him. This suit has been filed just on the last day of the expiry of the twelve years' period

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after Subbarayudu's death. The fact that the plaintiff is suing as a pauper is a double-edged circumstance. Poverty may no doubt be a justifiable explanation in certain circumstances, but suing as a pauper equally suggests that this is a mere speculative suit which the provisions of the law relating to pauper suits sometimes encourage. The conduct of the plaintiff during Subbarayudu's lifetime is of even greater significance. If during the best part of Subbarayudu's lifetime, he had treated the plaintiff as one having any legal rights to the properties in his possession, the plaintiff might well claim that there was no occasion for him to go to a Court of law. But the plaintiff's evidence makes it clear that Subbarayudu never countenanced any such claim. For many years, the plaintiff was admittedly out of favour with Subbarayudu. On more than one occasion he applied to Subbarayudu in very submissive terms for help and Subbarayudu did not accede to his request. It is therefore not the case of a person who had been treated as a coparcener but of one whose claims have never been recognised. In those circumstances, even if the plaintiff could invoke any presumptions in his favour, it will be too much to expect from Subbarayudu's representatives any more positive evidence than they have found it possible to produce in this case. The learned Subordinate Judge also points out that by reason of the plaintiff's delay in instituting this suit for so many years even after Subbarayudu's death, many other persons who could have given useful evidence on points material to the case have also died.

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We may refer in this connection to the objection, taken on behalf of the appellant, to the use made by the lower Court of the statements contained in Subbarayudu's will. Relying upon the judgment of SUNDARAM CHETTI J. in *Satchidanandam v. Subbarazu*(1), the learned Subordinate Judge has treated certain statements in Subbarayudu's will as relevant evidence. Before us, Mr. Kothandaramayya has questioned this view and he relied in support of this argument upon the observations in *Tottempudi Venkataratnam v. Tottempudi Seshamma*(2). SUNDARAM CHETTI J. was prepared to go so far as to think that the observation in *Tottempudi Venkataratnam v. Tottempudi Seshamma*(2) as to the inadmissibility of such statements should not be regarded as good law after the judgment of the Privy Council in *Virayya v. Adenna*(3). We do not think it necessary to go so far as that. Statements of facts in a will like that of Subbarayudu must come under clause 7 of section 32 of the Indian Evidence Act, but in this view they will be admissible only if they are statements of a relevant fact and are contained in documents relating to a transaction mentioned in section 13, clause (a). The observation in *Tottempudi Venkataratnam v. Tottempudi Seshamma*(2) is distinguishable, as the statements then in question could hardly be described as statements of fact. The will there in question contained a bald statement that three-fourths of the properties dealt with thereby were the self-acquired properties of the testator. As pointed out in the judgment, it was fairly clear from the

(1) 1930 M.W.N. 1016.

(2) (1903) I.L.R. 27 Mad. 228.

(3) (1929) 58 M.L.J. 245 (P.C.).

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evidence that the testator had acquired the properties by developing his original ancestral properties. The learned Judges accordingly observe that it was merely a statement of the belief of the testator, honest though it might be, that the property thus acquired by him was his self-acquired property. The judgment of the lower Court, as stated in the report of that case, emphasises the distinction recognised in *Patel Vandravan Jekisan v. Patel Manilal Chunilal*(1) between a statement relating to a relevant fact and a statement in respect of a fact in issue, for the purpose of admissibility under section 32, clause 7. Whether the learned Judges meant to adopt that distinction or they were of opinion that the statement in the will then in question was not a statement of fact but merely a statement of opinion, it is not easy to say, because their observations upon this point are contained in a single sentence. But either of those grounds would suffice to distinguish that case from one like the present. We may also add that, as early as in *Nallasiva Mudaliar v. Ravan Bibi*(2), statements similar to those now in question contained in a mortgage deed were held admissible under section 32, clause 7; see also *Nagammal v. Sankarappa Naidu*(3), *Appasami Pillai v. Ramu Tevar*(4) and *Hurronath Mullick v. Nittanund Mullick*(5). Mr. Kothandaramayya drew our attention to an observation of the Privy Council in *Nalam Pattabhirama Rao v. Narayana-moorthy*(6) where their Lordships treated a

(1) (1890) I.L.R. 15 Bom. 565.

(3) (1900) I.L.R. 54 Mad. 576.

(5) (1878) 10 Ben. L.R. 263.

(2) 1921 M.W.N. 560.

(4) (1931) 61 M.L.J. 887.

(6) (1921) 15 L.W. 404 (P.C.).

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statement in a will as irrelevant. No reference is made in that judgment to section 32 apparently because the statement there could not be said to have been made in documents of the kind described in clause 7, i.e., a document relating to a transaction falling under section 13, clause (a). We are accordingly of opinion that statements of facts contained in Subbarayudu's will were rightly held by the lower Court to be admissible in evidence. Statements of that kind will of course justify scrutiny in the light of the other evidence in the case because they are self-serving; but that is different from saying that they are inadmissible in evidence.

In the present case, the facts established by the evidence on the one side or the other substantially go to corroborate the truth of the statements in the will. We may therefore safely accept those statements so far as they go as substantially correct, though Mr. Kothandaramayya is right in saying that those statements throw no light upon the character of the deposit made by Subbarayudu with Chinna Gopalam.

An argument was faintly suggested that Subbarayudu was educated at the expense of his paternal uncle Sriramulu and that that circumstance was sufficient to attract the operation of the rule relating to the partibility even of gains made by learning thus acquired. There is very little proof of Subbarayudu having been educated at Sriramulu's expense. We do not think Exhibits A and B serve to establish that fact. On the other hand, even apart from the recitals in the will, there is a substantial volume of positive evidence that Subbarayudu was educated by his

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paternal aunt's husband. Even assuming for the sake of argument that he received help from Sriramulu, it would not be of much use to the plaintiff's case because the evidence is more in favour of the view that Sriramulu was a divided uncle, though it does not clearly appear when he became divided. Again, on the plaintiff's own showing, Sriramulu was having a lucrative practice as a Vakil and if Subbarayudu had really been educated out of Sriramulu's earnings as a Vakil, that would not suffice to impress Subbarayudu's earnings with the character of joint property. In this view it is unnecessary to consider Mr. Kothandaramayya's argument as to whether Subbarayudu's education was an education of a "special" kind or not within the meaning of the rule of Hindu law.

The appeal accordingly fails and is dismissed with costs. The appellant will pay the court-fee payable to Government on the memorandum of appeal.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

SRI PERARULALA RAMANUJA JEER SWAMIGAL
(DEPENDANT), PETITIONER,

1937,
January 7.

v.

T. S. PICHU AYYANGAR (SECOND PLAINTIFF), RESPONDENT.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 62
—Enquiry under—*Petition rejected by the Hindu Religious*
Endowments Board as the framing of a scheme was un-
necessary—Suit, if maintainable under sec. 63, cl. (4), of
the Act.

On a petition put in by some of the residents of Tirukkurungudi village for the settlement of a scheme under section 62 of the Madras Hindu Religious Endowments Act (II of 1927) for the temple of Sri Alagianambirayar, alleging mismanagement on the part of the trustee, the Hindu Religious Endowments Board, after making the necessary enquiry, came to the conclusion that no case had been made out for the framing of a scheme and rejected the petition. A suit was filed to set aside the said order and for framing a scheme. On a preliminary issue being raised whether a suit lies under section 63, clause (4), of the Act,

held that, on a proper construction of sections 62 and 63 of the Act, when the Board in the exercise of its discretion declines to frame a scheme, the Court has no jurisdiction to interfere and no suit lies.

Ex parte Weir. In re Weir, (1871) 6 Ch. App. 875, referred to.

In the matter of the petition of Hadjee Abdoollah, Reasut Hoossein v. Hadjee Abdoollah, (1876) I.L.R. 2 Cal. 131 (P.C.), 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

* Civil Revision Petition No. 959 of 1936.

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District Court of Tinnevely dated 20th August 1936 and made in Original Suit No. 4 of 1935.

B. Sitarama Rao and K. E. Rajagopalachari for petitioner.—The petition to frame a scheme was enquired into by the Board under section 62 of the Madras Hindu Religious Endowments Act. It decided that no scheme was necessary. Section 63 comes into operation only when there is a preliminary decision by the Board that a scheme is necessary. Under section 63 only three orders are contemplated: (i) an order settling a scheme, (ii) an order modifying a scheme and (iii) an order cancelling a scheme. This view is supported by a reference to the statutory rules framed under the Act. In cases of doubtful and difficult construction of an Act, it is permissible to look into the statutory rules framed thereunder. [Craies on Statute Law, page 144, and *Ex parte Weir*. In *re Weir*(1) were referred to.] Under section 63, clause (4), of the Act, a suit can be instituted in a Court only to modify or set aside an order passed by the Board. The Court has no right to frame a scheme. Only the Board has got that right. The initial decision, whether a scheme is necessary or not, is entirely within the discretion of the Board. The Court has no power to interfere with that decision. If the Board declines to frame a scheme as is the case here, it is not an order under section 63. Hence no suit can be filed to set aside that order. According to the law that obtained previous to the passing of the Madras Hindu Religious Endowments Act, the previous sanction of the Advocate-General was necessary under section 92 of the Civil Procedure Code to file a suit for framing a scheme. If he refused his consent, there was no remedy and no Court could interfere with his decision. For the consent of the Advocate-General the consent of the Board has now been substituted. That is the scheme of the Act. Under section 73 also, the consent of the Board is necessary to file a suit to obtain some of the reliefs previously granted in suits filed under section 92 of the Civil Procedure Code with the sanction of the Advocate-General. So on a proper construction of sections 62 and 63 of the Act, there is no right of suit to set aside an order of the Board declining to frame a scheme.

K. V. Sessa Ayyangar for respondent.—An order refusing to frame a scheme is an order falling under section 63 and

(1) (1871) 6 Ch. App. 875.

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subject to a suit in a civil Court. There is no other section to which such an order can be related. The fact that the section mentions only orders framing a scheme cannot be relied on for excluding from the section orders refusing to frame a scheme; In the matter of the petition of *Hadjee Abdoollah, Reasut Hossain v. Hudjee Abdoollah*(1) and Order XL, rule 1, and Order XXXIX, rules 1 and 2, Civil Procedure Code. The principle of mutuality also supports the existence of such a right. Trustees have got a right of suit against an order framing a scheme. It stands to reason that worshippers should have a similar right. The fact that under the law prior to the Hindu Religious Endowments Act there was no right of suit against an order of the Advocate-General refusing sanction does not affect the position, if on a plain construction of the words of the section such a right exists. A joint reading of sections 63, 64 and 65 shows that it was intended to invest Courts with power to frame a scheme. An order cancelling a scheme already framed is admittedly an order under section 63, and therefore subject to a right of suit. If therefore a suit can be filed and a scheme framed in the first instance by the Court in the case of an order cancelling a scheme, there is no reason why there should not be a similar power in a case where the Board does not frame a scheme at all in the first instance.

Cur. adv. vult.

JUDGMENT.

The question raised in this revision petition is one of some importance. It relates to the construction of section 63 of the Madras Hindu Religious Endowments Act. Under section 62 of the Act a petition was put in by some of the residents of Tirukkurungudi village, Nanguneri taluk, Tinnevely district, for the settlement of a scheme for the temple of Sri Alagianambirayar, Tirukkurungudi, alleging mismanagement on the part of the trustee. The Hindu Religious Endowments Board, after making the necessary enquiry,

(1) (1876) I.L.B. 2 Cal. 131 (P.C.).

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came to the conclusion that no case had been made out for the framing of a scheme and rejected the petition. This suit has been filed for setting aside the said order and for framing a scheme. A preliminary issue was raised whether a suit lies under section 63, clause 4, of the Act. The learned District Judge has held that such a suit lies. It is against the said order that the above revision petition has been filed. It is contended by Mr. Sitarama Rao that, on a proper construction of sections 62 and 63 of the Act, when the Board in the exercise of its discretion declines to frame a scheme, the Court has no jurisdiction to interfere with it. The question is, is this contention tenable? Under section 63, clause 4, the trustee or any person having an interest is entitled to institute a suit in a Court of law to modify or set aside an order of the Board under the said section. The point in controversy now is whether an order by the Board rejecting the petition to frame a scheme would be an order within the meaning of section 63. Section 63 does not expressly provide for such an order. But it is argued that it does by implication. It is contended by Mr. K. V. Sesha Ayyangar that, when section 63 empowers the Board by order to settle a scheme, it necessarily carries with it the power by order to refuse to settle a scheme. To appreciate this contention it is necessary to examine the scope and object of these sections. Before doing so, it is desirable to look into the state of the law at the time the Act was passed and the necessity for the enactment. Before the passing of the Hindu Religious Endowments Act the provision, so far as the mofussil Courts in the Presidency are concerned, for the

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settlement of schemes relating to religious endowments, is section 92, Civil Procedure Code. Under that section the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit for getting any of the reliefs mentioned in that section. It will be noticed that all the reliefs relate to the proper administration and superintendence of the endowments dealt with by the section and the procedure indicated therein was made mandatory. Before any suit can be instituted by persons other than the Advocate-General, the consent of the Advocate-General is a condition precedent. The Advocate-General of his own motion or on the representation of persons interested in the trust after making an enquiry must come to a conclusion that in the interests of the trust a scheme is necessary. If as a result of the enquiry he is not satisfied as to the necessity for framing a scheme, no suit can be instituted and no relief can be given. Nor can any Court of law compel the Advocate-General to give sanction. It has been even held that no writ analogous to that of *mandamus* under section 45 of the Specific Relief Act can issue to him. The reason given by him for his refusal cannot be canvassed in a Court of law. The principle underlying that provision is that the Advocate-General represents the Crown who as *parens patriae* is the guardian of all the charities. Therefore he is the person competent to judge whether it is in the interests of the institution that action should be taken. Again, if the Advocate-General sanctions the institution of the suit, the Court is not bound to frame a scheme.

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The Court also is invested with a discretion to go into the whole matter and finally come to the conclusion that a scheme may or may not be necessary. If it comes to the conclusion that a scheme is necessary it will frame a scheme; otherwise not. Such was the state of the law on the date of the passing of the Act. It was felt that Courts should as far as possible be divested of the burden of superintending religious endowments, that their administration and superintendence should be vested in a body of persons who by experience, habits of thought and their acquaintance with the local conditions would be better able to frame suitable schemes and see that the religious endowments are properly administered and duly appropriated for the purpose for which they were made. By the passing of the Hindu Religious Endowments Act, section 92 has been repealed and the only way to get reliefs provided in that section is by resorting to the procedure indicated in the Act. A comparison of the several sections of the Act will clearly show that the Legislature dealt with every aspect of the administration and management of the religious endowments in the same manner as section 92 was intended to deal with. For the consent of the Advocate-General the consent of the Board has now been substituted. Under section 73 of the Act the Board or any person having obtained the consent of the Board may institute a suit for some of the reliefs which were previously obtained under section 92. In regard to the framing of the scheme the jurisdiction has been conferred upon the Board itself. The underlying policy of the Act is, as already stated, that the

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jurisdiction of the Court to frame a scheme should be taken away and should be vested in a body of persons better competent to do so. If we now turn to sections 62 and 63 of the Act it will be seen that the power to frame a scheme for an excepted temple is solely vested in the Board which power was formerly vested in a Court. In lieu of the safeguard which was provided in section 92 before initiating proceedings for a scheme, viz., the decision of the Advocate-General as to *prima facie* proof of its necessity, the decision of the Board has been substituted in sections 62 and 63. Like the Advocate-General in section 92, the Board must be satisfied that a scheme is necessary. For that purpose it can of its own motion or on the representation of persons interested in the trust, who should be not less than twenty in number, make an enquiry as to the necessity for a scheme. It is only when it is satisfied that the trustee has mismanaged or that in the interests of the proper administration a scheme should be settled, that jurisdiction is conferred upon the Board by order to settle a scheme. If it is not satisfied, it has no jurisdiction to frame a scheme. The order that is specifically referred to in section 63 is only an order settling a scheme. And there is no provision in section 62 or section 63 providing for an order by the Board that a scheme is necessary or not. Section 63 will not come into operation till the initial decision by the Board that a scheme is necessary. Such an order is not one contemplated by section 63. For example, if the Board itself takes the initiative there is no provision in sections 62 and 63 to pass any order that a scheme is necessary or is not necessary because if it comes

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to the conclusion that a scheme is necessary it straightaway assumes jurisdiction under section 63. The order of rejection which is passed after the preliminary enquiry on the petition under section 62 is an order which it is competent to pass as a body empowered to deal with the matter in the ordinary course of its functions. In section 63 only three orders are mentioned, namely, (i) an order settling a scheme, (ii) an order modifying a scheme and (iii) an order cancelling a scheme. Section 63, clause (4), mentions "every order of the Board under this section". *Prima facie* it must relate to the three orders mentioned in section 63, clauses (1) and (3). A reference to the statutory rules made in pursuance of the power conferred by the Act also lends support to the view that the order contemplated in clause (4) can only refer to those three orders and not to any order stating that a scheme is necessary or not. Section 63, clause (4), says that every order of the Board shall be published in the prescribed manner, and the rule made by the Local Government in 1926, after the passing of the Hindu Religious Endowments Act of 1925, in regard to the publication ran in these terms :

"Every order of the Board settling, modifying or cancelling a scheme under section 58 or section 59 (corresponding to section 63 of the present Act) shall be published in the notice board of the temple or math affected by the order and in the district gazette of the district or districts in which the temple or math is situated: where the order affects a temple, it shall also be published in the notice board of the committee, if any, within whose jurisdiction the temple affected is situated."

Thus it will be seen that only three orders are required to be published, i.e., orders settling, modifying or cancelling a scheme. This rule read

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in conjunction with section 63, clause (4), shows that every order of the Board under this section only comprises the above three orders and no other. In the case of doubtful or difficult construction of an Act it is permissible to look into the statutory rules framed in pursuance of the authority conferred under the Act. The rule of construction is thus stated in Craies on Statute Law at page 144 :

"When the language of an Act is ambiguous and difficult to construe, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are by the statute authorising them directed to be read as part of the Act."

In support of this reliance is placed on the observations of MELLISH L.J. in *Ex parte Weir. In re Weir*(1), viz. :

"But we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act it is our duty to adopt and follow that construction."

As already pointed out by me, previous to the passing of the Act, when the Advocate-General declined to give sanction, there was no power in the Court to interfere with it. I do not think any alteration in the law was intended when the consent of the Board was substituted for that of the Advocate-General. And further there is the additional fact that as the refusal by the Advocate-General was not final and it was open to him to alter his decision and subsequently sanction the institution

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of the suit, similarly it would be open to the Board to revise their decision and come to the conclusion that a scheme may be necessary. It is contended by Mr. Sesha Ayyangar that if the Court is invested with a power of cancelling a scheme and in doing so can go into the grounds on which a scheme was considered necessary, it would have been contemplated by the Legislature that the Court can also go into the grounds of refusal. I am not able to agree with this view. When the Board settles a scheme it does interfere with vested rights and therefore a power of revision is conferred on the Court to see that such rights have not been unduly interfered with. The power now given to the Court is the same which was exercised by it previously, namely, where the Advocate-General sanctions the institution of the suit for framing a scheme, still the Court can decline to frame a scheme. There is also another reason which is apparent from the provisions of section 63 and points to the conclusion that it was not in the contemplation of the Legislature that the Court should interfere with the exercise of discretion by the Board in refusing to frame a scheme. So far as the power of interference of the Court is concerned, it can only modify a scheme which had already been made by the Board. It has no power to frame a scheme itself. It can cancel a scheme framed by the Board but it cannot itself frame a scheme though it might modify it. So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame a scheme. Unless the Court has got that

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power it would be futile to set aside such an order. Mr. Sesha Ayyangar contends that such a power can be deemed to be implied is suggested by the wording of section 65. I do not see how. When section 65 says "Any scheme of administration which has been settled by a Court under section 63", it only means a scheme which has been modified by the Court under section 63 and not a scheme which has been settled by itself. Before a Court can function there must be a scheme framed by the Board or else it has no jurisdiction to deal with it.

• Mr. Sesha Ayyangar relied upon a decision of the Privy Council in *In the matter of the petition of Hadjee Abdoolah, Reasut Hossein v. Hadjee Abdoolah*(1) where their Lordships of the Privy Council were construing section 76 of the Registration Act (VIII of 1871) which provided that no appeal lay from an order made under that section. Their Lordships of the Judicial Committee held that an order against which no appeal can be preferred would apply to an order rejecting as well as to an order admitting an application for registration. Similarly, Mr. Sesha Ayyangar contended that the order refusing to settle a scheme must be deemed to have been passed under section 63. As I have already pointed out, an order allowing the petition to frame a scheme is not an order contemplated under section 63. Therefore that decision has no bearing on the facts of this case. I am therefore of opinion that the Court has no jurisdiction to set aside an order made by the Board rejecting the petition under section 62

(1) (1876) L.L.B. 2 Cal. 181 (P.C.).

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of the Act. I therefore allow the revision petition and set aside the order of the learned District Judge and dismiss the suit. But, in the circumstances, I make no order as to costs.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

1937,
February 3.

IN RE ABDUR RAHIMAN KUTTY AND THREE OTHERS
(ACCUSED 1 TO 4), PETITIONERS.*

Child Marriage Restraint Act (XIX of 1929), sec. 8—Additional District Magistrate—Power to try cases under the Act—Code of Criminal Procedure (Act V of 1898), sec. 10 (2).

Under section 8 of the Child Marriage Restraint Act (XIX of 1929) read with section 10 (2) of the Code of Criminal Procedure, an Additional District Magistrate who has been given all the powers of a District Magistrate is empowered to try a case under the Child Marriage Restraint Act also.

Where, therefore, a District Magistrate took cognizance of an offence under the Child Marriage Restraint Act (XIX of 1929), but transferred it to the Additional District Magistrate for trial,

held the latter had power to try the case.

Maria Pillai v. Gopalakrishna Iyer, 1928 M.W.N. 638, explained.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the South Malabar Division in Criminal Appeal No. 2 of 1936 preferred against the judgment of the Court of the Additional District

* Criminal Revision Case No. 362 of 1936 (Criminal Revision Petition No. 363 of 1936).

Magistrate of Malabar in Calendar Case No. 1 of 1935.

V. L. Ethiraj, K. S. Jayarama Ayyar and A. S. Sivakaminathan for petitioners.

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

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ORDER.

The only question in this criminal revision case is whether an Additional District Magistrate is empowered under section 8 of the Sarada Act (Child Marriage Restraint Act XIX of 1929) to try cases under that Act. The District Magistrate took cognizance of the case but transferred it to the Additional District Magistrate for trial; and it is contended that the District Magistrate could not do so, but was bound to try the case himself, even though the Additional District Magistrate was given under section 10 (2) of the Code of Criminal Procedure all the powers of a District Magistrate.

There can be no doubt that if section 8 of the Sarada Act makes it clear that Additional District Magistrates should not try such cases, then the mere fact that an Additional District Magistrate is invested with all the powers of a District Magistrate under section 10 (2) of the Code would not empower him to try a case under the Sarada Act; but it is a well-known canon of interpretation that two statutes should be reconciled if they can be. I agree with Mr. Jayarama Ayyar that an Additional District Magistrate is not a District Magistrate. Section 10 (3) of the Code makes an Additional District Magistrate subordinate to the District Magistrate, so that the District Magistrate has certain powers under section 520 of the Criminal Procedure Code, for

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example, over the Additional District Magistrate. The question is, however, whether section 8 of the Sarada Act intended to exclude trial by Additional District Magistrates. In reading that section it has to be assumed, unless the contrary is quite clear, that it was not intended to take away the powers given to the Additional District Magistrates under section 10 (2) of the Code.

Section 8 reads:

"Notwithstanding anything contained in section 190 of the Criminal Procedure Code, 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act."

It may be noted that no reference is made to section 10 of the Criminal Procedure Code. One would have expected section 10 to have been coupled with section 190 if the Legislature had intended to exclude the jurisdiction of an Additional District Magistrate. If this section had been worded positively, merely empowering District Magistrates to take cognizance of offences under the Act, the present argument would probably never have been put forward; for nowhere in any Act are Additional District Magistrates coupled with District Magistrates; so that where District Magistrates are given any powers, those of the Additional District Magistrates are presumed. A handle for the present contention is afforded by the fact that the section reads more strongly in the negative form:

" . . . no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act."

This negative form is necessitated by the opening words of the section:

"Notwithstanding anything contained in section 190 of the Criminal Procedure Code".

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Had it not been for these words a Subdivisional Magistrate or a Magistrate specially empowered could have taken cognizance of the offence under section 190 of the Code. In order to prevent these officers from taking cognizance of an offence under section 190, Criminal Procedure Code, it was necessary to word section 8 of the Sarada Act so as to limit the taking of cognizance and trial to the other Magistrates mentioned in section 190 of the Criminal Procedure Code, viz., Presidency Magistrates and District Magistrates. Section 8 of the Sarada Act makes no mention of Additional District Magistrates because section 190, Criminal Procedure Code, does not.

I do not therefore find any difficulty in reading section 8 of the Sarada Act with section 10 (2) of the Criminal Procedure Code and holding that an Additional District Magistrate, who has been given all the powers of a District Magistrate, is empowered to try a case under the Sarada Act also.

My attention has been drawn to the judgment of REILLY J. in *Maria Pillai v. Gopalakrishna Iyer*(1). After a trial by a Sub-Magistrate, stolen property was handed over to the accused. An appeal was preferred by the complainant to the Subdivisional Magistrate, who passed an order returning it to the complainant. In revision it was held by a Full Bench that an appeal lay only to the District Magistrate and that the Subdivisional Magistrate had no jurisdiction. The case then went back to the District Magistrate, who transferred it to the Additional District Magistrate. The matter again came before this Court

(1) 1928 M.W.N. 533.

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in revision and REILLY J. passed the following order :

"Following the opinion of the Full Bench I must hold that the Additional District Magistrate had no jurisdiction to hear the appeal. His order is therefore set aside. The appeal is transferred to the District Magistrate."

It is seen that REILLY J. gave no reason at all for his order ; but he apparently felt himself bound by the actual words used by the Full Bench that it was only the District Magistrate who could hear the appeal. The Full Bench certainly did not decide that an Additional District Magistrate specially empowered could not have heard the appeal.

This petition is accordingly dismissed.

V.V.C.

