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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

1938

1ST JANUARY TO 31ST DECEMBER

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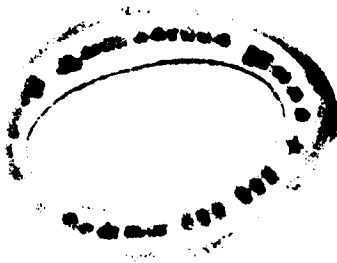
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THE INDIAN LAW REPORTS

(MADRAS SERIES)

PRIVY COUNCIL.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
APPELLANT,

J.C.*
1937,
June 14.

v.

B. J. FLETCHER, RESPONDENT.

• [ON APPEAL FROM THE HIGH COURT AT MADRAS]

Indian Income-tax Act (XI of 1922), sec. 4 (3) (v)—Accumulated bonuses paid to officer of a company on retirement, whether taxable.

An "Officers' Retiring Fund" was established by a company and, under the rules made in connection therewith, bonuses were, in the discretion of the directors, allotted to the fund and accumulated. The bonuses were proportioned to the salaries of the officers. No officer had a claim to the fund till he left the service of the company. After satisfactory service for a period of years, his accumulated bonuses were, on his retirement, to be paid to him. In the event of his death during service, his bonuses accumulated up to the date of his death were to be paid to his legal representative. In the event of his leaving the service of the company before the expiry of the fixed period, or of his being dismissed, he forfeited his claim to the bonuses.

Held, that the sum paid to an officer under the stated rules, on his retirement, out of the "Officers' Retiring Fund", was not income liable to tax.

* *Present* :—LORD MAUGHAM, SIR LANCELOT SANDERSON and
SIR GEORGE LOWNDES.

LAS

COMMISSIONER
OF
INCOME-TAX,
MADRAS
v.
FLETCHER.

APPEAL (No. 122 of 1936) from a judgment of the High Court (April 24, 1935) on a reference by the Commissioner of Income-tax under section 66 (2) of the Income-tax Act.

The judgment of the High Court is reported as *Commissioner of Income-tax, Madras v. Fletcher*(1).

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

Tucker K.C. and Wallach for appellant.—There is no material difference between the provisions of the Indian Act governing this case and the corresponding provisions of the English Act. Section 3 of the Indian Income-tax Act, 1922, compares with section 1 of the English Income-tax Act, 1918, and section 7 of the Indian Act compares with Case II of Schedules D and E of the English Act. Section 7 of the Indian Act, however, contains a statutory definition of "salaries". By this definition there are included not only gratuities but also profits received in addition to salaries or wages.

When the company in this case decided to set aside a sum of money for the "Officers' Retiring Fund" the employee became entitled to his share of that sum subject to the subsequent fulfilment of certain conditions. These conditions having been satisfied, the employee was absolutely entitled, on the termination of his employment, to claim payment of the sum standing to his credit as shown in his pass book. The sum so received by the employee came to him under his contract of employment and fell within the charging words of the Act. It was not a windfall, nor was it received in commutation of a pension within the meaning of section 4 (3) (v) of the Act.

[The following cases were cited: *Henry (H.M. Inspector of Taxes) v. Arthur Foster*(2), *Edwards (H.M. Inspector of Taxes) v. Roberts*(3), *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(4) and *In re The Commissioner of Income-tax, Burma v. The Rangoon Electric Tramway & Supply Co., Ltd.*(5).]

(1) (1935) I.L.R. 59 Mad. 216.

(2) (1932) 16 T.C. 605.

(3) (1935) 19 T.C. 618.

(4) (1932) L.R. 59 I.A. 206; I.L.R. 59 Cal. 1343.

(5) (1933) I.L.R. 11 Ran. 70, 71.

Needham K.C. for respondent.—*Henry (H.M. Inspector of Taxes) v. Arthur Foster*(1) indicates that what must be looked at in the first place is the bond of service. The real clue to the case here is to be found in the judgment of *Cornish J.* in which the right view, it is submitted, was taken.

Secondly, the company is, in respect of the fund, a trustee. That is an element which should be taken into consideration as it shows the nature of the payment. In a sense it is a reward for services. The real question is whether the payment is income or capital. It is paid after completion of service. If the officer retires before six years, he is not entitled to payment out of the fund. The amount is accumulated year by year. The yearly credit is not taxable. The tax is for a particular year. The accumulated sum cannot be the income of the last year to be taxed as the income of that year.

Under rule 3 of the company's rules the period of service is six consecutive years before there can be a claim. Under section 7 (1) of the Act, the charge is limited to actual receipts. The question is how far the expression "salary" is extended by other words in the section. There is a difference between the English and the Indian Acts in the charging sections. In the English Act the expression is "profits whatsoever". There are no corresponding words in the Indian Act. The Indian Act is narrower. Section 4 (3) (v) deals with exemptions. There is no pension here which is commuted.

[The definition of "commute" in the Oxford Dictionary was cited.]

Talbot following—referred to the difference between the English and Indian Acts. The exemptions throw light on the meaning of section 7. In every case in which a payment is made at the end of the service the question is whether the payment is a part of the salary or a gratuity. There is a distinction between an agreement to serve for a definite term on a salary to be paid periodically with an additional lump sum to be paid at the end of the term and an agreement for payment of a sum on retirement at the age of fifty-five years. The payment here is of a sum on retirement. Section 4 (3) (v) includes a capital sum. The section is put in to remove doubts, e.g., as to pension commutation, pension being taxable.

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Tucker K.C. in reply.—Under *Henry (H.M. Inspector of Taxes) v. Arthur Foster* (1) there must be a contractual right as distinguished from a mere gratuity. Here there is a contractual right, even though the sum was to be paid at the end of the service. If there is an enforceable obligation to pay, the sum paid is taxable.

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The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE LOWNDES.—The question for determination in this appeal lies in a small compass but it involves a question of considerable nicety under the provisions of the Indian Income-tax law. It is in effect, whether a sum of money payable to the respondent on his retirement after long service with an Indian company is taxable as part of his income of the year in which his retirement took place. The learned Judges in the Madras High Court by whom the case was heard have—not unreasonably, as their Lordships think—differed in their conclusions and in the reasoning upon which those conclusions were arrived at.

The facts may be stated shortly. The respondent was an employee of the Buckingham and Carnatic Company Ltd., and was paid a monthly salary with a half-yearly bonus, both of which were taxed in the ordinary course, and his liability in this respect was not challenged. He retired in February 1933, and was then entitled to receive from the company a sum of Rs. 36,794 which stood to his credit at that date in a fund called the "Officers' Retiring Fund". It is with this sum that the present appeal is concerned.

The fund was constituted and managed by the company under the following rules:—

"1. All bonuses which the Company may from time to time allot to credit of this fund shall be invested and

(1) (1932) 16 T.C. 605.

accumulated at the discretion of the Directors. All interest accruing on the fund shall be dealt with in the manner provided in the next rule and as if such interest was a bonus allotted by the Company.

2. Every bonus shall in the first instance be apportioned as between the officers of the Company for the time being in proportion to the salaries drawn by them respectively at the date of the allotment of such bonus by the Company and shall be credited in such proportions to such officers in account with the fund. Provided always that no officer shall have any claim against the Company in respect of any bonus or otherwise as regarding this fund until he leaves the service of the Company and shall have previously served the Company continuously and satisfactorily for the period required of him under these rules.

3. The period of such service shall as regards all officers who shall have come out from England to join the service of the Company be six consecutive years and shall in the case of officers who have been engaged by the Company in India or any place east of Suez be ten consecutive years. Provided always that the Directors may in their discretion vary such latter period of ten years to one of six years.

4. On any officer who shall have served the Company for the full consecutive period required of him by these rules leaving the service of the Company, the Company will pay to him the aggregate amount of his share in the various bonuses that may have been credited to the fund by the Company during the period of his service with the Company.

5. In the event of the death of any officer during, or after having completed, the said term of service, the shares standing to the credit of the deceased shall be paid to his legal representative.

6. In the event of any officer leaving the service of the Company or being dismissed before having completed the term of service hereby required, the sums standing to his credit shall be apportioned to the credit of the other officers then in the employ of the Company in the same way as if such sums were a bonus allotted by the Company.

7. Nothing herein contained shall in any way be taken as restricting the powers of the Company from at any time dispensing with the services of, or dismissing any officer, and

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any officer whose services shall be dispensed with or who shall be dismissed before the full period of service required of him under these rules, shall have no claim whatsoever against the fund.

8. The Directors of the Company for the time being shall have full discretion as to which of the officers or employees of the Company shall from time to time be eligible for the benefit of this fund, and as to any alteration or addition to these rules, and the decision of the Directors on such points, and as to the meaning of these rules, and on all other matters in any way connected with the fund or the administration of the same shall be final and conclusive."

The rules were apparently communicated to the employees, and those who were placed upon the fund were given "pass books" in which were entered the amounts credited to them from time to time under the rules. Their Lordships think that the effect of this procedure was to create a trust in their favour which each of them could enforce upon fulfilment of the conditions by which his interests were bound, and it is not disputed that the respondent was so entitled. But their Lordships do not think the equitable nature of the respondent's claim affects in any way the question now in issue.

On the respondent's retirement, the company, acting under section 18 (2) of the Income-tax Act, (XI of 1922), deducted from the Rs. 36,794, which the assessor claimed to be part of his salary, the appropriate tax, and presumably passed it on to the Government. The respondent claimed a refund but this was refused, and after the usual departmental references the matter came up to the High Court under section 66 (1) of the Act.

The question referred for the Court's determination was whether the sum of Rs. 36,794 paid to the respondent in 1932-33 was income liable

to tax or was a capital sum exempted under section 4 (3) (v) of the Act or otherwise. The reference also covered another question which is not material to the present appeal and has not been discussed before the Board.

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Section 4 (3) (v) is in the following terms :—

"Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund."

The reference was heard by the CHIEF JUSTICE sitting with CORNISH and PANDRANG ROW JJ. Separate judgments were delivered by each of them.

The learned CHIEF JUSTICE held that the respondent was rightly assessed upon the sum in question. He was of opinion that the case could not be brought within the exemptions referred to by the Commissioner; that the allotments made to the respondent from time to time, which resulted in the total sum of Rs. 36,794, were made for current services, and so were a part of his regular remuneration; that the sum in question was not a gift or an act of grace on the part of the company or in the nature of a windfall, but that it was in reality payment of deferred salary and therefore taxable in the year in which it was paid.

CORNISH J. took the opposite view. He thought that the nature of the fund from which the payment was made showed that it was not part of the respondent's "salary" but that it was a lump sum paid on retirement, in its nature indistinguishable from a similar sum paid under

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a provident fund which, apart from its specific exemption under the Act, could not, in accordance with the judgment in *Shaw, Wallace's case*(1), be regarded as income.

PANDRANG ROW J. came to the same conclusion as CORNISH J., but on somewhat different reasoning. He thought that the payment was made by the company not as employer but as trustee and that this was in itself sufficient, apparently, to take it out of the category of salary—a view with which their Lordships are unable to concur. He also held that it was a lump sum payment *in lieu* of a pension, and therefore equivalent to a pension commutation which is specifically exempted under section 4 (3) (v).

The question referred by the Commissioner was, in accordance with the opinion of the majority of the Court, answered in favour of the respondent. The present appellant, the Commissioner of Income-tax, was, by Order in Council dated 30th April 1936, granted special leave to appeal upon the condition that he paid in any event the costs of the respondent as between solicitor and client.

Before their Lordships it has been contended that the sum in question is taxable under the head "salaries" which by section 7 (1) of the Act includes any profits received by an assessee in addition to his salary, and the judgment of the CHIEF JUSTICE is supported on this ground. Their Lordships have also been invited to consider the corresponding provisions of the law in this country and the cases decided thereunder, special reliance being placed on the judgments of the

(1) (1932) L.R. 59 I.A. 206, 214; I.L.R. 59 Cal. 1343.

Court of Appeal in *Foster's case*(1). Their Lordships are, however, unwilling to embark on a critical comparison of the two Acts which admittedly differ widely in their scope and details: this has been laid down in a previous judgment of the Board in *Shaw, Wallace's case*(2) and their Lordships see no reason to adopt a different course in the present case.

Assuming that the sum in question was a "profit" arising from the respondent's employment, the question still remains whether it was received by him as income or was in the nature of a capital receipt. If it represented merely the payment of accumulated portions of a salary held up by the employers until the employee's retirement it would, their Lordships think, be received by him as deferred income and therefore be taxable, and it is on this question that the decision of the case must turn. Their Lordships have no doubt that the answer must depend mainly on the constitution of the fund. The first point that emerges from an examination of the rules set out above is that the sums to be allotted were entirely in the discretion of the company. They were not bound to make any allotment in any year, and it was only if an allotment was in fact made that the officer concerned could have any claim. This of itself tends to negative the idea that the allotments were part of the officer's current salary. Nor is it suggested that it was part of the respondent's original contract of service that he should have the benefit of this fund; and unless the company chose to put him on the list he would

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(1) (1932) 16 T.C. 605, 625.

(2) (1932) L.R. 59 I.A. 206, 212; I.L.R. 59 Cal. 1343.

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have no interest whatever in it. Even when so listed he would have no rights until he had served continuously and satisfactorily for a period of six years. And in no case could he make any claim upon the sums allotted to him until he retired. If he died before retirement the payment of his share would be made to his legal representative, and the appellant's Counsel concedes that in that event no tax would be payable. The consideration of these factors leads their Lordships to the conclusion that the allotments made to the fund in the name of an officer of the company were not in the nature of salary for current services, but were merely the measure of a sum which the company volunteered to pay to him on the termination of his service, and that this sum when paid was not "income" and therefore not taxable.

The company did not pension its officers, but in lieu of doing so, and no doubt with the object of keeping deserving employees in its service, it promised such persons a lump sum on retirement to be computed on terms formulated by the rules of the fund.

This was not, their Lordships think, within the specific exemptions of section 4 (3) (v), and they are unable to accept the dictum of PANDRANG Row J. that a lump sum in lieu of a pension, where no pension is payable, is the same thing as the commutation of a pension already earned, and therefore within the words of the exemption. But they agree with CORNISH J. in thinking that such a payment is just as much a capital receipt in the hands of an employee as would be the payment of a lump sum from a provident fund

on the employee's retirement. The latter would, apart from the specific exemption in the clause under consideration, be, by its nature, capital and not income [see *Shaw, Wallace's* case (1) at page 214], and it follows that the sum now in question must be treated in the same way.

For the reasons given above their Lordships will humbly advise His Majesty that the first of the two questions submitted to the High Court should be answered as follows:—"The sum of Rs. 36,794 payable to the respondent out of the 'Officers' Retiring Fund' in 1933 was not income liable to tax"; and that the appeal should be dismissed.

The order for costs will follow the terms of the Order in Council of 30th April 1936.

Solicitor for appellant: *The Solicitor, India Office.*

Solicitors for respondent: *Percy Short & Cuthbert.*

C.S.S.

(1) (1932) L.R. 59 I.A. 206; I.L.R. 59 Cal. 1343.

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ORIGINAL TESTAMENTARY JURISDICTION
—FULL BENCH.

Before Sir Owen Beasley, Chief Justice,
Mr. Justice Venkatasubba Rao and Mr. Justice Mockett.

P. THAYARAMMAL AND ANOTHER, PLAINTIFFS,

v.

PITTY KUPPUSWAMY NAIDU, DEFENDANT.

M. KRISHNAMMAL BY HER POWER AGENT,

T. BALASUBRAMANIAM PILLAI, APPLICANT.*

Practice—Audience in Court—Agent with power of attorney to appear and conduct judicial proceedings—Audience in Court—Right of—Notice on principal desiring to appear and conduct proceedings himself or by appointing an Advocate—Right to—Carrying on business as solicitor or attorney—Right of—Code of Civil Procedure (Act V of 1908), O. III, rr. 1 and 2—Letters Patent (Madras), Cls. 9 and 10—Indian Bar Councils Act (XXXVIII of 1926), ss. 8 and 9—Original Side Rules (Madras High Court), O. XXXIX, rr. 1, 2, 2-A, 3 and 5—Effect of.

An agent with a power of attorney to appear and conduct judicial proceedings has no right of audience in Court and is not entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an Advocate to appear for him. Such an agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process, and charge fees to the principal.

Civil Miscellaneous Petition No. 498 of 1911, *Hurchand Ray Goburdhon Das v. The Bengal-Nagpur Railway Co.*(1) and *In re Eastern Tavoy Minerals Corporation, Ltd.*(2) relied upon.

ON THE REFERENCE :

T. R. Srinivasa Ayyangar for applicant (Krishnammal).—The right of a practitioner to act and appear is under the control of the Court. The right of a suitor to act and appear is confined

* Testamentary Original Suit No. 7 of 1935. Application No. 1964 of 1936.
(1) (1914) 19 C.W.N. 64. (2) (1933) I.L.R. 61 Cal. 324.

to himself. No person who has not been enrolled as an Advocate is entitled to act and appear in Court as of right. The Legal Practitioners' Act provides for the practising of pleaders and mukhtears also. No other person is entitled to practise. In all the cases, qualifications are laid down for the different classes of persons entitled to practise. Section 32 of the Legal Practitioners' Act provides a penalty for persons practising unauthorisedly. If a power of attorney agent can appear, a disbarred practitioner can obtain a power of attorney and act and so circumvent his being disbarred. Rules 2-A and 5 of Order XXXIX of the Original Side Rules do not assist the agent because they are confined only to pleaders. [Reference was made to Order III, rules 1 and 2, Civil Procedure Code; Clauses 9 and 10 of the Letters Patent; sections 4, 8, 9, 10, 14 and 19 (1) of the Indian Bar Councils Act; sections 6, 17, 20, 32, 33 and 34 of the Legal Practitioners' Act; Order V, rule 10, Order VIII, rule 20, and Order XXXIX of the Original Side Rules; and Rules 5, 16-A and 17 of the Appellate Side Rules.] These references show the control which the Court has over practitioners and the conditions subject to which alone they can practise. A power of attorney agent will be subject to no control whatever. [Reliance was placed upon the decision in Civil Miscellaneous Petition No. 498 of 1911 and upon *Hurchand Ray Gobourdhon Das v. The Bengal-Nagpur Railway Co.*(1), *In re Eastern Tavoy Minerals Corporation, Ltd.*(2) and *Jivan Lal v. Property of Ram Ratan*(3).] No person other than an Advocate, attorney, vakil or mukhtear can appear and argue before a Court.

[Suppose it is held that a power of attorney agent is not entitled to appear and plead in Court, how far can he go?—BEASLEY C.J.]

He can appear, etc., for a client under disability but he cannot do so for a person who is himself competent to act on receipt of a fee. If he is allowed to do so it will mean that he is allowed to practise. [Reference was made to *In the matter of the petition of Khoda Bux Khan*(4) and *Tussudug Hosain v. Girhar Narain*(5).] The test to see whether a power of attorney agent practises in Court is whether it

(1) (1914) 19 C.W.N. 64.

(2) (1933) I.L.R. 61 Cal. 324.

(3) (1936) 161 I.C. 538.

(4) (1888) I.L.R. 15 Cal. 638, 644.

(5) (1887) I.L.R. 14 Cal. 556 (F.B.).

KRISHNAMMAL v. BALASUBRAMANIAM. is his habit to appear for litigants on receipt of remuneration. If so, he cannot be allowed to do so. If he appears in an individual case and on behalf of a party under disability, it will be a different matter. On the Original Side an agent desiring to appear on behalf of a litigant is bound to obtain the permission of the Assistant Registrar. In the mufassal, under the Civil Rules of Practice, he has to file an affidavit. Order III, rule 1, Civil Procedure Code, cannot help the agent because (a) it does not entitle him to plead, (b) it does not apply to the Original Side of the High Court and (c) it is controlled by other provisions in the Letters Patent, etc. The respondent's claim that his authority cannot be revoked because of his having an interest in the subject-matter is unsustainable. [Sections 202 and 203 of the Indian Contract Act were referred to.] The respondent is entitled only to a remuneration

T. M. Krishnaswami Ayyar for the Bar Council.—A power of attorney agent cannot claim to plead as of right. He may do so if the Court permits him and the limit of the extent to which the Court will permit him is indicated in *P. Charles Kinnell & Co. v. Harding, Wace & Co* (1).

[What is the limit to the agent's acting outside Court, e.g., filing a pleading, etc.?—VENKATASUBBA RAO J.]

He can do all that a party who has engaged an Advocate or attorney can do.

[Do you mean to say that he can do everything except plead in Court? If he can do all that and makes it his calling, what sort of control has the Court over him?—VENKATASUBBA RAO J.]

It is in that connection that *Tussudug Hosain v. Girhar Narain*(2) and *In the matter of the petition of Khoda Bux Khan*(3) are of help.

[What is the provision of law empowering the Court to control him?—VENKATASUBBA RAO J.]

The Court can deal with him as for contempt of Court. [Section 8 of the Indian Bar Councils Act and *Ainsworth, In re. The Law Society, Ex parte*(4) were referred to.] Section 32 of the Legal Practitioners' Act gives ample power to the Court to deal with such persons.

(1) [1918] 87 L.J.K.B. 342, 346.

(3) (1888) I.L.R. 15 Cal. 638.

(2) (1887) I.L.R. 14 Cal. 556 (F.B.).

(4) [1905] 2 K.B. 103.

[That section seems to deal with persons who are qualified to plead but have not obtained the necessary certificate.—KRISHNAMMAL v. BALASUBRAMANIAM. BEASLEY C.J.]

Section 32 applies to persons unqualified and qualified. Section 3 defines legal practitioners. Rule 16 of the Civil Rules of Practice contemplates the passing of an order permitting an agent to appear or act. An agent's act cannot be recognised by the Court until such permission is given. Rule 17 states the precautions to be taken by the Court. Interest in the subject-matter of the suit cannot convert an agent into a legal practitioner. He may be entitled to damages for the termination of his agency or he may apply to be impleaded in the suit.

G. Lakshmanan for the Advocates' Association.—Section 2 (15), Civil Procedure Code, defines a "pleader". He must be a person who has a status which entitles him to appear and plead in Court apart from any agreement between him and a litigant. "Pleader" in Order III, rule 1, Civil Procedure Code, means a pleader as defined in section 2 (15). A recognised agent, if he wants to practise, must be a person entitled to practise by virtue of his status as a practitioner. The real distinction is between a case in which an agent appears in an individual case on behalf of a party under disability and a case in which he habitually does so for remuneration and therefore must be said to practise.

O. T. G. Nambiar for the Attorneys' Association.—As to the extent to which an agent can act, see Clause 10 of the Letters Patent and section 8 of the Indian Bar Councils Act. These provisions are saved by Order III, rule 1, Civil Procedure Code. They are express provisions to the contrary—at any rate in the High Court. Order II, rule 6, of the Original Side Rules is the only provision authorising an agent to do anything with reference to the Court. [Reference was made to Order II, rule 7.] An agent can only sign and verify a plaint. He cannot do anything else. All else must be done by the party himself or his pleader. An agent cannot take a plaint and file it in Court because that is doing an act with reference to the Court.

R. N. Aingar for the Bar Association.

Respondent appeared in person.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by BEASLEY C.J.—This matter has been referred to us by GENTLE J. The following questions have been raised, viz.,

“(i) Whether an agent with a power of attorney to appear and conduct judicial proceedings has the right of audience in Court ;

(ii) Whether the agent is entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an Advocate to appear for him ; and

(iii) Whether the power of attorney agent can carry on business as a solicitor or attorney drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal.”

That all three questions stand to be answered in the negative seems to us to be clear ; but as the respondent has definitely asserted a right to the notice specified in question No. (ii) and certainly by strong implication if not by his conduct to the right of audience stated in question No. (i) and the matters in question No. (iii) also arise both out of his conduct and claim, we consider that this matter, which is of course of extreme importance to the legal profession, should be fully discussed by us.

The matter arises in the following way. The respondent is the holder of a power of attorney given to him by one Krishnammal, a widow. Krishnammal had filed a suit in the Madras City Civil Court against her sister Thayarammal to get her half share in the assets of one Palla Kuppammal deceased and it was necessary to apply for a search and get copies of the records

in Original Petition No. 58 of 1935 (Testamentary Original Suit No. 7 of 1935) on the file of the High Court and to take further proceedings therein. Being unable to stay in Madras she appointed the respondent as agent

“to search the records and apply for copies thereof in the above matter, to file into and receive from Court all papers relating thereto, to swear affidavits, to file necessary petitions and to verify and sign the same, to appear and plead in Court in person on my behalf, to engage Advocates if necessary and to sign in their vakalaths, to do all acts necessary in the conduct of the above proceedings and in furtherance thereof”.

In the before-mentioned litigation (Testamentary Original Suit No. 7 of 1935) a petition was posted on 16th November 1936 before the Master and on that date, when the petition was called on, Mr. T. R. Srinivasa Ayyangar appeared on behalf of Krishnammal having been given a vakalath by her. The petition was adjourned and the respondent filed an affidavit on 26th November 1936 stating that Krishnammal had neither orally nor in writing intimated to him that she did not wish him to appear in the litigation and without revoking his power of attorney (which he marked as an exhibit) had engaged Mr. T. R. Srinivasa Ayyangar, and he further stated that Krishnammal did this in order to deprive him of the remuneration due to him payable by her ; and he claimed that the power of attorney was of the same force and validity as that of a vakalath and that, unless it was revoked by formal proceedings through Court, no orders could be passed on the petition. Therefore, by reason of the authority given to him in the power of attorney he claimed the same right as a legal practitioner who has been given a vakalath ; and since the power of attorney

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authorises him to plead in Court it follows that he claims that right ; and indeed we are informed that either in these proceedings or in some other LAKSHMANA RAO J. allowed him to address the Court. In view of the claim put forward by the respondent in the affidavit referred to, the Master posted the matter before GENTLE J. for orders and he has referred the matter to us and it has been fully argued here by the learned Counsel for the petitioner Krishnammal, the Bar Council, the Advocates' Association and the Attorneys' Association ; and we have also heard the respondent in person.

We may say at once that there is an unreported Bench decision of this High Court directly in point on the first question, Civil Miscellaneous Petition No. 498 of 1911, where it was held by BENSON and SUNDARA AYYAR JJ. that a right to appear in Court for his principal given to a recognised agent by Order III, rules 1 and 2, Civil Procedure Code, does not include a right to plead, that it means simply that one can take proceedings to submit oneself to jurisdiction, that the High Court has under the Letters Patent and the Legal Practitioners' Act and under sections 119 and 122, Civil Procedure Code, power to make rules as to who shall plead for parties before the High Court in its original and appellate jurisdiction and in the lower Courts, that Clause 10 of the Letters Patent makes provision with regard to who alone can plead before the High Court and that others, such as recognised agents, cannot have the right to plead. There are also two decisions of the Calcutta High Court upon this point, viz., *Hurchand Ray Gobourdhon Das v.*

The Bengal-Nagpur Railway Co.(1) and In re Eastern Tavoy Minerals Corporation, Ltd.(2). In the former, a recognised power of attorney agent claimed a right to plead in Court on behalf of his principal under Order III, rule 1, Civil Procedure Code, but it was held by JENKINS C.J. and CHATTERJEA J. that he had no right of audience ; and in the latter case, a director of a company, holding a power of attorney authorising him to appear for and on behalf of the company and to conduct and represent the company in the proceedings, claimed the right of audience on behalf of the company and, applying the ruling in the former case, it was held that he had no right of audience. It is plain from these three cases that rules 1 and 2 of Order III, Civil Procedure Code, do not give the recognised agent any right to plead in Court on behalf of his principal either in the appellate or original side of the High Court and, even if it could be contended successfully that Order III gives a right to a recognised agent to plead in Court on the appellate side, it is clear that he can have no such right of audience on the original side because of section 119 which provides :

" Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have, in the exercise of the power conferred by its Charter, authorised him so to do, or to interfere with the power of the High Court to make rules concerning Advocates, vakils and attorneys."

The respondent certainly has not been authorised by the High Court to do so. In this connection Clauses 9 and 10 of the Letters Patent

(1) (1914) 19 C.W.N. 64.

(2) (1933) I.L.R. 61 Cal. 324.

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are important. Clause 9 relates to the powers of the High Court as to the admission of Advocates, vakils and attorneys; and such Advocates, vakils and attorneys as have been approved, admitted and enrolled by the High Court are authorised to appear for suitors in the High Court and plead or act for them according as the High Court may by its rules and directions determine and subject to such rules and directions; and Clause 10 gives the High Court power to make rules for the qualifications and admission of proper persons to be Advocates, vakils and attorneys and empowers the High Court to remove or suspend from practice on reasonable cause Advocates, vakils or attorneys and enacts thus:

"No person whatsoever but such Advocates, vakils or attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor."

These two clauses are sufficient to dispose of the respondent's claim, and in addition section 8 of the Indian Bar Councils Act is equally definite. It is as follows:

"No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of Advocates of the High Court maintained under this Act: provided that nothing in this sub-section shall apply to any attorney of the High Court."

Section 9 empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be Advocates of the High Court. It must be observed that section 8 is not limited to the right to "plead" but to the right to "practise". The Legal Practitioners' Act is similarly decisive as regards the mufassal Courts. The answer to

question No. (i) is so clear that no further reference to statutes or decided cases is necessary and it must be in the negative.

The respondent's contention regarding question No. (ii) is based on the claim that because of his power of attorney he stands in the same position as that of an Advocate holding a vakalath by reason of Order XXXIX of the Original Side Rules. Rule 1 of that Order prohibits a pleader from appearing, pleading or acting in any suit unless he has filed his vakalath in Court in accordance with the rules and his appointment continues under Rule 2 until the death of his client or it is revoked under Rule 3 which provides that the appointment may be revoked by an order upon a Master's summons in Chambers. Under Rule 2-A, if there is already a pleader on record, a pleader proposing to file an appointment in the suit may not do so unless he produces the written consent of the pleader on record or unless, where the consent of such pleader is refused, he obtains the special permission of the Court; and Rule 5 prevents a party who has filed an appointment of a pleader from appearing before the Court except in the absence of his pleader or to make any application or do any act in person so long as the appointment is in force; and there are similar provisions in the Appellate Side Rules. By reason of these rules the respondent claims that as his power of attorney authorising him to appear in Court and plead on behalf of Krishnammal has not been revoked, she is not entitled to give an appointment to Mr. T. R. Srinivasa Ayyangar to act for her. But as an agent under a power of attorney has no right

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of audience in Court, it follows that the power of attorney authorising him to plead is of no force whatsoever and upon that ground alone his contention must fail. But quite apart from that difficulty, there is no warrant whatever for putting a power of attorney given to a recognised agent to conduct proceedings in Court in the same category as a vakalath given to a legal practitioner, though probably the latter may also be described as a power of attorney. The very rules upon which the respondent relies show that such a power of attorney or appointment as it is called is confined only to pleaders, i.e., those who have a right to plead in Courts; and question No. (ii) must, therefore, also be answered in the negative.

Question No. (iii) raises some important points and, as it is drafted, does not present any difficulty. Obviously a power of attorney agent cannot carry on "business" as a solicitor or attorney. To carry on business in such capacity is to practise. What exactly the word "practise" used in section 8 of the Indian Bar Councils Act means is not defined in the Act but it certainly must be taken to mean and include everything that a legal practitioner does as such in the High Court such as question No. (iii) refers to, namely, drafting, engrossing and filing plaints, Judge's summons, affidavits and generally issuing legal process; and, although it is not necessary to say what would constitute carrying on a "business", and each case would depend upon its facts, a clear case of it would be where an agent has made a habit of doing so, though even one instance might be sufficient, or if an agent were to take business premises and to hold himself out as a law agent

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prepared to act in such matters for remuneration. Even one isolated act has, in England, been held to constitute "acting as a solicitor" rendering persons guilty of such conduct liable to be dealt with under section 26 of the Solicitors Act of 1860 for contempt of Court; *Ainsworth, In re. The Law Society, Ex parte*(1). In that case, an unqualified person gave as agent for the defendant in an action the notice of appearance to the writ required by Order XII, rule 9, of the Supreme Court Rules to be given by the defendants to the plaintiff or his solicitor, and he was held to be acting in contravention of section 2 of the Solicitors Act of 1843 which prohibits any unqualified person from "acting as a solicitor" or "carrying on any proceeding" in the superior Courts. There, the unqualified person does not appear to have done this for remuneration at all and there does not seem to be any reason why even one isolated instance here should not suffice to constitute carrying on business or practising. As it stands, therefore, question No. (iii) has clearly to be answered in the negative also.

In conclusion we would add the following general observations with regard to what the claim put forward by the respondent really amounts to. It is that he should be accorded all the rights and privileges which are enjoyed by members of the legal profession whose qualifications for admission to its ranks are laid down in the rules made by the Bar Council with the sanction of the High Court, and whose professional conduct thereafter is regulated by rules of practice

(1) [1905] 2 K.B. 103.

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and professional etiquette and who are subject to the disciplinary control of the High Court; whereas the respondent need possess no qualifications whatsoever as regards education and character and is not bound by any rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of anyone, and there can be no better example than this case itself affords of the highly objectionable result such a claim may lead to and actually has led to here, because the respondent claims to be remunerated by his principal for his services in question and before us stated that the condition regulating his payment is that he is to receive it only if the result of the proceedings is successful but not otherwise. On his own admission, this is a transaction which, if entered into by a legal practitioner, would at once render him liable to strong disciplinary action, for to engage in speculative litigation is a grave breach of professional conduct. Yet his claim is that he is free to undertake such business and this is only one example of probable resultant evils.

A.S.V.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

1937,
April 29.

v.

DEWAN BAHADUR S. L. MATHIAS, RESPONDENT.*

*Indian Income-tax Act (XI of 1922), sec. 4 (2), proviso 2—
Coffee estates in Native State owned by assessee, a resident
of British India—Income from produce of—Exemption
under sec. 4 (2), proviso 2, in respect of—Assessee's right
to—Extent of—Coffee cleaned and sold in British India
and sale proceeds received and retained in British India.*

The assessee who owned coffee plantations in the Mysore State was a resident of British India (Mangalore). While he maintained an office in the Mysore territory to supervise the cultivation work there, the labour required for the cultivation was recruited in Mangalore, materials required for the estates, like manure, tools, spray materials, crop-bags, etc., were purchased at Mangalore, the harvested crops were brought to Mangalore in their raw state to be dried and cleaned there in the factories of a company, the selling agents of the assessee, and sold there by that company. The sale proceeds were received and retained at Mangalore and a separate staff was maintained by the assessee at Mangalore to attend to the above operations. The point for determination was whether, in respect of the income derived by the assessee from the produce of his coffee estates in Mysore, he could claim exemption under the second proviso to section 4 (2) of the Indian Income-tax Act of 1922 and, if so, to what extent.

Held that the assessee was entitled to claim the benefit of the second proviso to section 4 (2) of the Act and that the whole income derived by the assessee by the sale in Mangalore of the produce of his coffee estates in Mysore was exempt from taxation.

* Original Petition No. 181 of 1936.

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T. R. Venkatarama Sastri for *M. Subbaraya Ayyar* for assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

The facts necessary for the case and the arguments of Counsel appear from the judgment.

Cur. adv. vult.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The question referred to this Court for decision is whether, on the facts set out in the Commissioner's statement, any part of the income derived by the assessee from the produce of his coffee estates in Mysore is exempt from taxation under the second proviso to clause 2 of section 4 of the Indian Income-tax Act.

The assessee who owns coffee plantations in the Mysore State is a resident of British India (Mangalore); and the case states that, while he maintains an office in the Mysore territory to supervise the cultivation work there, the labour required for the cultivation is recruited in Mangalore, materials required for the estate, like manure, tools, spray materials, crop-bags, etc., are purchased at Mangalore, the harvested crops are brought to Mangalore in their raw state to be dried and cleaned there in the factories of Pierce Leslie & Co., and sold there by Pierce Leslie & Co., the selling agents of the assessee. As the sale proceeds are received and retained at Mangalore and a separate staff is maintained by the assessee at Mangalore to attend to the above operations, the Commissioner was of opinion that the assessee

was liable to be taxed as one carrying on "business" and receiving the income or profits thereof in Mangalore.

As both section 4 and section 6 of the Indian Income-tax Act are qualified by the opening words "save as hereinafter (otherwise) provided", the point for determination is whether the assessee can claim exemption under the second proviso to section 4 (2) and if so, to what extent. The Commissioner has expressed the opinion that proviso 2 to section 4 (2) has no application here, because the profits of the business are received in Mangalore and "the agricultural processes carried on in Mysore" are not in themselves a source of income but merely "an element in the business which produces the income". In support of this view, he has relied on the decisions in *Ponnu-swami Pillai v. Commissioner of Income-tax, Madras*(1) and *F. L. Smidth & Co. v. F. Greenwood*(2) but it must be observed that even in *Ponnu-swami Pillai v. Commissioner of Income-tax, Madras*(1) the proviso now to be interpreted did not come up and could not have come up for consideration and there can be little doubt that but for that proviso, the assessee in the present case will be liable to be assessed in respect of the profits to the extent determined by the authorities. After this reference had been made, the scope and effect of the proviso was considered by a Division Bench of the Calcutta High Court in *In the Matter of Mohanpur Tea Company, Ltd.*(3) and the judgment is a direct authority in favour of the Commissioner's view. We have

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(1) (1929) 3 I.T.C. 378.

(2) (1921) 8 T.C. 193, 204.

(3) I.L.R. [1937] 2 Cal. 201.

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carefully considered the reasoning in that judgment but, with all respect to the learned Judges, we are unable to follow that decision.

The basis of the Calcutta decision and of the Commissioner's opinion is that when a person who owns lands outside British India sells the produce of those lands in British India, no income, profits, or gains can be said to arise or accrue until the produce is sold and that in such cases there is accordingly no room for the application of the proviso which only relates to "income . . . arising or accruing" in an Indian State. The learned Judges emphasise the distinction between the place where the income accrues and the source from which it accrues and point out that the proviso is not concerned with the source. As a corollary, they think that if the sale also had taken place outside British India, the income thus realised, even if subsequently received in British India, would be exempt as income from agriculture that had arisen or accrued in the State, within the meaning of the proviso. Whatever may be said as to "profits" or "gains", the view that "*income from agriculture*" can be said to arise or accrue only when and where the produce is sold and converted into money seems to us, with all respect, difficult to reconcile with the reasoning in *Commissioners of Taxation v. Kirk*(1).

Reliance was placed before us in this connection on the observation of the Judicial Committee in *Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company*(2) that the term "income" in the Indian Income-tax Act connotes a "periodical monetary return" coming in with some sort

(1) [1900] A.C. 588.

(2) (1932) L.R. 59 I.A. 206 ; I.L.R. 59 Cal. 1343.

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of regularity or expected regularity from definite sources ; but their Lordships were then laying emphasis not on the distinction between receipt in money and receipt in kind but between *recurring* receipts from a business continuously carried on and an occasional receipt of the kind then in question. On the other hand, they refer in the course of their judgment to income being likened to the "crop of a field". In *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga*(1) the Privy Council affirm that "a receipt in kind may be taxable income" ; they only add that what is received in kind should be money's worth. It was admitted before us by Mr. Patanjali Sastri that in respect of the produce of land in British India, the Indian Income-tax Act recognises the receipt of income or rent *in kind* as receipt or accrual of income ; it is difficult to see why, as a matter of language, the expressions "receipt" or "accrual" of income should not have the same significance when used in connection with the receipt of produce from lands outside British India.

In *Kirk's case*(2), the question arose as to the assessment to be levied in New South Wales on a company which extracted ore from mines owned by it in New South Wales and converted it into a merchantable product there but carried the product to Victoria for sale, the sale proceeds being received either in London or in Melbourne. The Judicial Committee overruled the view taken by the New South Wales Court that "the income was not earned in New South Wales because the finished products were sold exclusively outside

(1) (1933) I.L.R. 12 Pat. 318, 336 (P.C.).

(2) [1900] A.C. 588.

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that Colony". Referring to the several steps which had to be gone through, from the extraction of the ore to the receipt of moneys on the sale of the merchantable product, their Lordships held that to the extent of two of the steps, viz., extraction of the ore from the soil and conversion thereof into a merchantable product, "the income was earned and arising and accruing in New South Wales". In the Calcutta case, the learned Judges distinguish this decision as turning on the language of the particular statute and take it as only relating to the *source* from which the income accrued and not to the place where it accrued. With all respect, it seems to us that this way of distinguishing *Kirk's* case(1) fails to take note of certain portions of the argument as well as of the judgment. In the New South Wales Act, there was an exemption [section 27 (3)] to the effect that no tax shall be payable in respect of income earned *outside* the Colony of New South Wales. On the strength of this provision, it was contended before their Lordships, on behalf of the assessee, that "the income was derived from the sales, that is from the business carried on outside the Colony". This argument they repel with the remark that it is fallacious as "leaving out of sight the initial stages and fastening attention exclusively on the final stage in the production of the income". These relevant parts of that judgment do not seem to us to turn on any peculiarity of the New South Wales Act but to recognise that as a matter both of language and of business, receipt of produce *in kind* may well be spoken of

(1) [1900] A.C. 588.

as receipt or accrual of income at the place where the produce is received.

Mr. Patanjali Sastri had to concede that on the principle of the decision in *Commissioners of Taxation v. Kirk*(1), the assessee in this case might well be held by the Mysore State to have received the income within that State, but he contended that the remedy for any hardship arising from that possibility must be had by invoking the provisions of the Act relating to double taxation. We are not concerned here with any question of double taxation or hardship caused thereby; but we refer to this aspect of the matter only to point out that if for assessment in Mysore, the assessee can in the ordinary sense of the words (and not by any fiction of law) be held to have received the income in Mysore, there is no reason why for purposes of the second proviso to section 4(2) the income should not in this case be held to have arisen or accrued in Mysore. The decision in *In re Port Said Salt Association, Ltd.*(2) does not materially help the Referring Officer in this connection. The learned Judges recognised in that case that *part* of the profits might have been "earned" elsewhere, but they held that if the whole is "received" in British India, no portion could escape taxation unless there be a convention to limit the claim of one State against the nationals of others. The second proviso is in a sense the result of such a convention; the case cannot throw light on the interpretation of the scope of that convention.

Reliance was also placed by Mr. Patanjali Sastri on the observation in *Jiwan Das v. Income-tax*

(1) [1900] A.C. 588.

(2) (1932) I.L.R. 59 Cal. 1226.

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Commissioner, Lahore(1) to the effect that the place where the sale is effected and the price realised is the principal place, if not *the* place, of the accrual of profits. That statement must be understood in the light of the fact that the case then under consideration related to the liability of a British Indian assessee who only *purchased* goods in British India but sold them outside and never received or brought the proceeds into British India. Following *Sulley v. Attorney-General*(2), the learned Judges held that the mere purchase of goods will not amount to the carrying on of trade (except in the cases provided for in section 42) and in the circumstances there was nothing like receipt of income or gains or profits in British India. There was no question in that case of the receipt of produce from one's own estate; but the way the learned Judges deal with *Kirk's case*(3) shows that if the facts before them had been similar to those in *Kirk's case*(3) or to those in the present, they would have held that the receipt of the produce would amount to receipt of income.

Accepting our interpretation of the decision in *Kirk's case*(3), Mr. Patanjali Sastri advanced an alternative argument. Assuming that the income might be held to have "accrued" or "arisen" to the assessee in Mysore, he maintained that it might nevertheless be held to have been "received" by the assessee in British India not merely within the meaning of clause 2 of section 4 but even within the meaning of the first part of clause 1. The purpose of this argument was in any event to exclude the operation of the second

(1) (1929) I.L.R. 10 Lah. 657 (F.B.).

(3) [1900] A.C. 588.

(2) (1860) 2 T.C. 149.

proviso which is worded as a proviso only to sub-section 2 and not to sub-section 1. The first clause deals with two kinds of receipt in British India: one, receipt in the ordinary sense of that word and the other, in an artificial or extended sense and the second clause defines the artificial or extended meaning. If the second proviso qualifies only this "artificial" sense of receipt, it would have no operation in cases where the receipt of income in British India can be held to amount to "receipt" in its natural or ordinary sense. In support of the contention that income may "accrue" or "arise" in one place and yet be held to have been "received" in another place, he relied on the decision of the Judicial Committee in *Pondicherry Railway Company v. Commissioner of Income-tax, Madras*(1).

We may observe at the outset that in the *Pondicherry Railway Company's case*(1), their Lordships were not called upon to decide whether the "receipt" of income by the Company was a receipt in the grammatical sense or in the extended or artificial sense, because the Company's contention was that there was no receipt at all, by or on their behalf, in British India and that they received the income only in London. If that decision gives us any guidance at all in the present case, it may well be held that on the facts here, the receipt of the produce in Mysore itself by the assessee's men on the spot will correspond to the receipt by Mr. Rothera in the *Pondicherry Railway Company's case*(1) and the assessee's receipt of the income in British India can only be a receipt in the secondary stage, just like the receipt

(1) (1931) I.L.R. 54 Mad. 691 (P.C.).

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by any Nattukkottai Chetti here of profits earned by a business carried on on his behalf in foreign countries. Even apart from this view of the facts, it does not seem to us necessary or reasonable to read clauses 1 and 2 of section 4 as mutually *exclusive*. The first clause comprises "receipts" falling under the second clause as well and when the facts of a case clearly bring it within the terms of the second proviso, it is obviously a case which on grounds of policy the Legislature intended to exempt and it does not seem to us right to deprive the subject of this exemption by holding that the "receipt" in British India is in the primary sense and not in the secondary sense especially when the second clause as well as the second proviso speak only of "accruing" or "arising" outside British India and not also of being "received" outside British India. There can be no doubt that in this case the income "accrued or arose" outside British India and was "received or brought into British India". We would give the same answer to the argument founded on clause 3 of section 42 which provides for the taxability in British India of merchandise exported to British India from outside. Reading the clause as a whole, it is evident that it refers to a person who sells goods *purchased* by him and not to one who sells the produce of his own lands. It is significant that the clause deals only with "profits" or "gains" and not with *income* generally.

The circumstances in which the second proviso came to be inserted do not suggest any intention to make the kind of differentiation now insisted

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on by the Referring Officer. Prior to 1933, it was only "profits or gains of business" outside British India that were taxed when brought into British India. The amending Bill of 1932 sought to make *all income* (not merely profits from business) accrued outside British India taxable if and when brought into British India; the Bill therefore sought to amend only clause (2) of section 4. The kind of income exempted by the second proviso is undoubtedly *foreign* income and when the Legislature resolved to exempt foreign income of the particular kind dealt with in that proviso, it seems to have been thought sufficient to enact the exemption as a proviso to the second clause which was then being amended for the very purpose of including "foreign income" generally. We are accordingly of opinion that the assessee in this case is entitled to claim the benefit of the second proviso to section 4 (2).

It remains to determine the *extent* of the exemption which the assessee can claim. It was contended on his behalf that the *whole* of the price realised by him by the sale of the Mysore coffee in Mangalore should be excluded, but it was maintained on behalf of the Referring Officer that the assessee is at best only entitled to a deduction of the value of the coffee beans in a raw state in Mysore. The statement of the Commissioner and an affidavit of Mr. Kirkbride, Manager of Pierce Leslie & Co., set out in detail what happens to the beans between the time when they are picked and the time they are actually sold. If the processes subsequent to the picking can be regarded as in the nature of *manufacture*, the assessee will, on the analogy of the rule applicable

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to tea [see *Killing Valley Tea Company, Ltd. v. Secretary of State for India*(1) and Rule 24 of the Rules framed under section 59 of the Act], he entitled to deduct only the agricultural part of the income. But the affidavit states that in the case of coffee, the process is not in the nature of a "manufacturing" process but only a process "ordinarily employed by the cultivator to render the produce fit to be taken to the market" [see section 2 (1) (b) (ii)]. The learned Counsel appearing for the assessee definitely asserted that in respect of coffee grown on assessed lands in British India, this is the view adopted in practice by the Income-tax authorities and we have been shown nothing to the contrary. We have accordingly come to the conclusion that if the assessee can claim to be treated as on the same footing with one selling coffee grown on one's own land in British India, he is entitled to exemption in respect of the *whole* price realised by the sale of his coffee. This leads us to the consideration of the question whether the exemption under the second proviso to section 4 (2) is of the same scope as the exemption applicable to "agricultural income" as defined in section 2 (1) of the Act.

Mr. Patanjali Sastri is certainly right in his contention that the statutory definition of "agricultural income" does not in terms apply to cases falling within the proviso now in question. If the definition in the Act is one which is intended to include what will not otherwise be ordinarily comprehended in the meaning of the expression "agricultural income", the assessee in the present case cannot claim the benefit of the full scope of

(1) (1920) I.L.R. 48 Cal. 161.

the definition because it applies only to income derived from lands in British India. But we are inclined to agree with the learned Counsel for the assessee that the statutory definition involves no artificial extension but merely embodies the significance attaching in a business sense to the word "income" when applied to agriculture. As pointed out by ROWLATT J. in *Back v. Daniels*(1), if a farmer is entitled to sell his produce in the village he is equally entitled to take it to a market town and it cannot be said that he is "commencing a new business from the time when he took his crops from the farm on the way to market". The same principle must apply to what he may do to make it fit for the market unless it involves such a distinct process as to justify its being regarded as in the nature of a manufacturing process. In the Court of Appeal, SCRUTTON L.J. took the view that even if cultivation of land to grow produce for the purpose of sale is to be regarded as a trade, the State, by its separate system of taxing land, may reasonably be taken not to have intended to deal with it as a trade; *Back v. Daniels*(2). Mr. Patanjali Sastri pointed out that our conclusion would practically amount to reading the proviso in section 4 into the definition of "agricultural income" when the Legislature had not (as it might well have done) included in that definition income from assessed lands in Indian States. Having regard to the manner in which amendments have been from time to time inserted in the Act, the argument founded on the particular place where an amendment is inserted cannot have the same force here

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(1) [1924] 2 K.B. 432.

(2) [1925] 1 K.B. 526, 543.

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as in the case of a provision which formed part of the original scheme of the Act. As we have already explained, section 4 (2) might well have been thought to be the proper place for the insertion of the proviso. On the other hand, we have not been shown any reason why the proviso was inserted at all and why it should have been limited to lands paying assessment to an Indian State if it was not the intention to treat the owners of such lands as on the same footing as owners of assessed lands in British India. The policy clearly was to avoid double taxation; not double taxation in the sense of payment of income-tax in two places but of taxing a person who in respect of the same subject-matter has already paid a reasonably heavy land-tax, whether in British India or in an Indian State.

Our answer to the question referred is that the whole income derived by the assessee by the sale in Mangalore of the produce of his coffee estates in Mysore is exempt from taxation. The assessee will be entitled to Rs. 250 for his costs and also to refund of the deposit of Rs. 100.

A.S.V.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and
Mr. Justice Varadachariar.

N. SHANMUKHAM CHETTY (SECOND DEFENDANT),
APPELLANT,

1937,
July 22.

v.

M. GOVINDA CHETTY AND FOUR OTHERS (PLAINTIFFS ONE
AND THREE AND DEFENDANTS THREE TO FIVE),
RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 92 (2)—Scope of
—Suit by a trustee against co-trustee for accounts—If falls
within section—Nature of reliefs sought in a suit—If a proper
test for finding out whether the suit falls under sec. 92 (2).*

The correctness of the Full Bench decision in *Appanna Poricha v. Narasinga Poricha*(1) to the effect that a suit by a trustee of a public charitable or religious trust against a co-trustee for accounts does not fall within section 92 of the Code of Civil Procedure and as such may be brought without the sanction of the Advocate-General, has not been shaken by the decision of the Judicial Committee in *Abdur Rahim v. Mahomed Barkat Ali*(2).

Per VARADACHARIAR J.—Sub-section 2 of section 92, though expressed in general terms, must be read along with sub-section 1, and it follows on such reading that it is not every suit claiming any of the reliefs specified in sub-section 1 that should be brought with the consent of the Advocate-General, but those suits only which, besides claiming any of these reliefs, are brought by individuals as representatives of the general public. It is therefore not right to make the nature of the reliefs prayed for in a suit the conclusive and exclusive test in determining the applicability of section 92. The dictum of CORNISH J. in *Janaki Bai v. Thiruchitrambala Vinayakar*(3), viz., "whether the suit falls within section 92 depends not upon the character in which the plaintiff sues but upon the nature of the relief sought", is incorrect.

* Original Side Appeal No. 2 of 1937.

(1) (1921) I.L.R. 45 Mad 113 (F.B.). (2) (1927) I.L.R. 55 Cal. 519 (P.C.).
(3) (1935) I.L.R. 58 Mad. 988 (F.B.).

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APPEAL from the judgment of WADSWORTH J. and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 231 of 1933.

K. V. Sesha Aiyangar and R. Gnanasambandam for appellant.—The suit is filed in connection with a public trust. It is based upon a breach of trust and prays for a relief which falls under section 92 (1) of the Code of Civil Procedure. As such, the suit is not maintainable without the sanction of the Advocate-General; see section 92 (2). The necessity for sanction does not depend upon the nature of the legal character of the parties suing but upon whether the relief prayed for comes under section 92 (1). In *Abdur Rahim v. Mahomed Barkat Ali*(1) the Judicial Committee put the same construction on section 92 (2). To the same effect are the decisions in *Janaki Bai v. Thiruchitrumbala Vinayakar*(2) and *Krishna Aiyangar v. Alwarappa Aiyangar*(3). *Appanna Poricha v. Narasinga Poricha*(4) requires reconsideration in view of *Abdur Rahim v. Mahomed Barkat Ali*(1). The prayer by which one trustee asks for accounts against his co-trustee is not made exclusively for the vindication of his private rights but primarily for safeguarding the interests of the institution. Such a suit would be covered by section 92 (2); see *Sundara Ayyar v. Varada Ayyar*(5) and *Krishna Aiyangar v. Alwarappa Aiyangar*(3).

K. Narasimha Ayyar for respondents.—Section 92 cannot apply to suits for the establishment of rights of one co-trustee against another for the vindication of his private rights but only to suits brought in his representative capacity for the vindication of public rights. So far as Madras is concerned, *Appanna Poricha v. Narasinga Poricha*(4) is still of binding authority, and it is not shaken by the decision of the Judicial Committee in *Abdur Rahim v. Mahomed Barkat Ali*(1) or by the dictum of CORNISH J. in *Janaki Bai v. Thiruchitrumbala Vinayakar*(2). Making the reliefs prayed for a conclusive test for finding out whether a suit falls under section 92, is not correct.

Cur. adv. vult.

(1) (1927) I.L.R. 55 Cal. 519 (P.C.).

(2) (1935) I.L.R. 58 Mad. 988 (F.B.).

(4) (1921) I.L.R. 45 Mad. 113 (F.B.).

(3) (1932) 63 M.L.J. 703.

(5) (1935) 42 L.W. 264.

JUDGMENT.

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LEACH C.J.—This appeal arises out of a suit for an account and other reliefs instituted by certain trustees against their co-trustees on the Original Side of this Court. In Royapuram, Madras, there is a Hindu temple known as Subramanyaswami Koil which belongs, according to the pleadings, to the Pattinava sect of the Hindus. The plaintiffs' case is that in 1922 a meeting of the members of the community was held at Royapuram at which the plaintiffs and defendants 1 to 3 were elected trustees for the purpose of collecting subscriptions for the improvement of the temple, for the performance of the rites therein and for the conduct of festivals and other cognate matters, with power to spend the collections on these objects. It is common ground that this meeting was held and that the plaintiffs and defendants 1 to 3 were elected trustees for these purposes. The contesting defendants, defendants 2 and 3, however, aver that the duties of the trustees were not confined to the temple and say that they were also given authority to collect and spend for the good of the community in general and for purposes of general utility. The plaintiffs allege that defendants 1 and 2 were acting as the managing trustees and were throughout in charge of all the monies collected and the accounts, defendants 1 and 2 being the only literate members of the board. The third defendant admittedly never took any part in the management of the affairs of the trust and as the first defendant died after the institution of the suit the case is really confined to the question of the liability of the second

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defendant. The plaintiffs further allege that from 1922 to the date of the suit large sums of money were collected by defendants 1 and 2 who utilised them for their own purposes and suppressed the accounts. The contesting defendants deny that there is any truth in the allegation that defendants 1 and 2 utilised the trust monies for their own purposes or that they suppressed the accounts. It is clear from their written statement, however, that defendants 1 and 2 did participate in the management of the trust and are liable to account, and the learned trial Judge so held. Accordingly, he directed that accounts should be taken from 9th November 1925 (the date from which the defendants admit the collections began) and referred the case to the Official Referee for the purpose.

It is not in dispute that this is a public trust and it is conceded that the second defendant is liable to account. But it is said that the decision of the learned trial Judge is erroneous for two reasons; (i) because the suit could not be instituted without the sanction of the Advocate-General, and (ii) because the learned trial Judge did not decide issue No. 4 before referring the suit to the Official Referee. Issue No. 4 is as follows:—

“What, if any, were the accounts maintained for the collections and by whom?”

The argument with regard to this issue is based on the contention that the plaintiffs are also accounting parties. Before the learned trial Judge there was no suggestion that they should also be made liable to account; the only question

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in this connection was with regard to the liability of the second defendant. The learned trial Judge was therefore justified in adopting the course which he did.

The contention with regard to the necessity for the prior approval of the Advocate-General needs more consideration as it is said that the decision of this Court in *Appanna Poricha v. Narasinga Poricha*(1) is no longer good law. In that case it was held by a Full Bench of five Judges that a suit by a trustee of a public charitable or religious trust against a co-trustee for account does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General. It is said that this decision has been set at nought by the judgment of their Lordships of the Privy Council in the case of *Abdur Rahim v. Mahomed Barkat Ali*(2) and that of this Court in *Janaki Bai v. Thiruchitrambala Vinayakar*(3). I can see nothing in these decisions to warrant any such assertion. Before referring to them, however, it is necessary to refer to the provisions of section 92 of the Code of Civil Procedure. This section deals with the procedure to be adopted in a representative suit for relief in respect of a public trust. But, to come within the section, there must be a breach of trust or the necessity for the direction of the Court with regard to the administration of a trust. The section requires that there shall be at least two plaintiffs and that the Advocate-General must give his sanction to the institution of the suit. If these conditions

(1) (1921) I.L.R. 45 Mad. 113 (F.B.).

(2) (1927) I.L.R. 55 Cal. 519 (P.C.). (3) (1935) I.L.R. 58 Mad. 988 (F.B.).

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are fulfilled a suit can be launched under the section. It was never intended in my opinion that this section should take away the right of a trustee to launch a suit for an account against a co-trustee unless he obtained the approval of the Advocate-General and I consider that it has not this effect. That a trustee has such a right cannot be denied. The right is necessary for his own protection; otherwise, he might be made liable for acquiescing in unlawful dealings with the trust funds.

In *Abdur Rahim's* case(1) the Judicial Committee were careful to point out that in a Code regulating procedure it is unlikely that the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at the time when the Code was enacted. If the argument advanced on behalf of the appellant were sound, it would mean that a trustee could not proceed against a co-trustee for an account without joining a third party and he could never proceed at all if the Advocate-General refused his sanction. This was pointed out by OLDFIELD J. in *Appanna Poricha v. Narasinga Poricha*(2) and it appears to me to provide a complete answer to the appellant's case. The learned Advocate for the appellant has relied on a passage in the judgment in *Abdur Rahim's* case(1) where it was pointed out that in inserting sub-section 2 of section 92 the Legislature adopted the view of the Bombay High Court that a suit which prays for reliefs mentioned in section 92 can only be instituted in accordance with the provisions of that section. But it must be a suit

(1) (1927) I.L.R. 55 Cal. 519 (P.C.). (2) (1921) I.L.R. 45 Mad. 113 (F.B.).

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contemplated by that section and, as I have already mentioned, the Judicial Committee in this very case expressed the opinion that the section did not operate to abolish existing rights. With regard to *Janaki Bai v. Thiruchitrumbala Vinayakar*(1) the learned Judges who decided that case pointed out that it was entirely a different case to that of *Appanna Poricha v. Narasinga Poricha*(2) and there is nothing in the judgment which throws the slightest doubt on the correctness of the former decision.

We have been referred to two other cases; *Krishna Aiyangar v. Alwarappa Aiyangar*(3) and *Sundara Ayyar v. Varada Ayyar*(4). In the first of these cases it was held that a trustee could not, apart from section 92, ask for the framing of a scheme and a suit which did ask for the framing of a scheme and did not comply with the section was bad to that extent. This is so, but the decision does not in any way assist the appellant in this case. It does not affect the question under discussion at all. The case of *Sundara Ayyar v. Varada Ayyar*(4) was a decision of my learned brother VARADACHARIAR J. My learned brother there held that the mere fact that the plaintiffs may in a sense be trustees will not necessarily preclude the application of section 92 of the Code of Civil Procedure, if the reliefs in the suit relate not to the vindication of their personal rights, but to the advancement of the interests of the institution itself by securing more efficient management. A perusal of that judgment shows that the learned Judge was careful to distinguish the

(1) (1935) I.L.R. 58 Mad. 988 (F.B.). (2) (1921) I.L.R. 45 Mad. 113 (F.B.).
(3) (1932) 63 M.L.J. 703. (4) (1935) 42 L.W. 264.

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case where a plaintiff is suing to vindicate a personal right, and that is what the plaintiffs are doing in the case out of which the present appeal arises. The correctness of the Full Bench decision in *Appanna Poricha v. Narasinga Poricha*(1) is unshaken and we are bound by it. We accordingly hold that the learned trial Judge was right in deciding that the suit did not require the sanction of the Advocate-General before institution.

I might mention that one of the prayers in the plaint asks for an injunction restraining the second defendant from acting further as a trustee. The question whether such a prayer can be included in the present suit does not arise in the appeal and therefore I express no opinion on it.

The appeal fails and must be dismissed with costs.

VARADACHARIAR J.

VARADACHARIAR J.—I respectfully agree. But, in view of the state of the authorities, I think it right to add a few observations on the question of the applicability of section 92 of the Code of Civil Procedure to a suit like the present. If the matter were *res integra* it may be contended that there is a fair volume of authority in favour of the wider construction of section 92 contended for by Mr. Sesha Ayyangar on behalf of the appellant. The decisions referred to in the judgments in *Appanna Poricha v. Narasinga Poricha*(1) are themselves sufficient to show this. I may add that even more recently the Bombay High Court has expressed views which seem to lend considerable support to the appellant's contention; see

(1) (1921) I.L.R. 45 Mad. 113 (F.B.).

Narayan v. Vasudeo(1) and *Chhaganlal v. Sobharan*(2). So far, however, as this Court is concerned we have to start with the fact that a Bench of five Judges have decided in *Appanna Poricha v. Narasinga Poricha*(3) that section 92 has no application to a suit like the present. The principle underlying that decision is perhaps best stated in the words of Sir F. Mulla (see page 309, tenth edition, Civil Procedure Code), viz., that sub-section 2 of section 92 though expressed in general terms must be read along with sub-section 1 and it follows on such reading that

"it is not every suit claiming any of the reliefs specified in sub-section 1 that should be brought with the consent of the Advocate-General, but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public".

In a suit like the present, the relief, though it may be of the kind mentioned in section 92, sub-section 1, is not sought in the larger interests of the public but is merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust. That in certain circumstances similar reliefs may have to be prayed for in the one kind of action as in the other is pointed out in the judgment of KUMARASWAMI SASTRI J. in *Appanna Poricha v. Narasinga Poricha*(3). It therefore does not seem to me right to make the nature of the relief prayed for in a suit the conclusive and exclusive test in determining the applicability of section 92.

Mr. Sesha Ayyangar had in view of the Full Bench decision to contend that that decision can

(1) (1924) 26 Bom. L.R. 950.

(2) (1933) 35 Bom. L.R. 1119.

(3) (1921) I.L.R. 45 Mad. 113 (F.B.).

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no longer be regarded as authoritative after the decision of the Judicial Committee in *Abdur Rahim v. Mahomed Barkat Ali*(1). I agree with my Lord that there is nothing in the judgment of their Lordships of the Judicial Committee which throws doubt on the authority of the Full Bench decision. As pointed out in the judgment just delivered, their Lordships have there taken care to say that it is too much to presume that the Legislature intended to make any serious alteration in the previous state of the law or to extinguish or impair pre-existing rights of action and that the main purpose of the enactment of sub-section 2 of section 92 was to settle the conflict of the previous state of the decisions in India. To understand the effect of this observation of their Lordships, some regard must be had to the previous state of authority in this country and attention must also be bestowed on the circumstances in which the question arose before the Judicial Committee. In that case, the action had been brought by certain Mahomedan inhabitants of the neighbourhood who were interested in the institution. The suit was therefore not one by trustees who had any personal rights of their own to assert, but corresponded to what is spoken of as a representative suit on behalf of the public. The contention before the Judicial Committee on the one side was that wherever the litigation related to a public trust the suit could be framed only in accordance with the provisions of section 92, Civil Procedure Code, and the reference in sub-section 2 of section 92 to the nature of the reliefs prayed for in such a

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suit was sought to be ignored by the appellant's learned Counsel. It was in those circumstances that their Lordships emphasised the antithesis between a suit praying for reliefs specified in sub-section 1 of section 92 and for reliefs outside that sub-section, and they observed that section 92 could apply only to suits praying for reliefs specified in sub-section 1. But as I have already pointed out the whole discussion arose in connection with what was undoubtedly a representative suit. It does not seem to me right to ignore that circumstance and read the judgment as laying down that, even where a suit is not in any sense of a representative character, the mere fact that the reliefs asked for in the suit may fall within sub-section 1 of section 92, Civil Procedure Code, was intended by their Lordships to be a conclusive test. Mr. Sesha Ayyangar relied on one observation on page 529 as supporting his contention that their Lordships must have had even suits based on individual rights in their contemplation when they laid down their proposition. This observation relates to the previous cases in India which had held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature as above mentioned. It seems to me that Mr. Sesha Ayyangar's contention does not give effect to the words used in that sentence. That sentence clearly relates to cases where a representative suit *could* have been or *might* have been brought and not to cases where the cause of action sued on was such that no representative suit could have been brought. An examination of the earlier cases in India will

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show that, even when a suit was not intended to enforce a right in the nature of the rights of a trustee but related to the enforcement of the obligations of the defendant in the performance of the trust for the benefit of the public, it had been held that a suit of that kind need not necessarily be brought only in conformity with the provisions of section 539 of the old Code but may be brought either under Order I, rule 8, of the present Code, or even independently of it. It is in this sense that their Lordships point out that the question had arisen in this country whether the provisions of section 539 were merely permissive or mandatory. The question of permissive or mandatory cannot possibly arise in respect of a suit which cannot be brought in a representative character at all. All that the Judicial Committee intended to lay down and did lay down was that, wherever the cause of action on which the suit is founded is one which could have sustained a representative suit, the procedure prescribed by section 92 must necessarily be followed and no suit could be maintained in any other form. I particularly wish to point out that, in this judgment, their Lordships did not add the sentence which is somehow introduced in a later judgment of this Court, namely, that the character of the plaintiff is immaterial. It is only in the judgment of this Court in *Janaki Bai v. Thiruchitrumbala Vinayagar*(1) that CORNISH J., in attempting to state the effect of the Privy Council decision, puts the antithesis in the following words :

“Whether the suit falls within section 92 depends not upon the character in which the plaintiff sues but upon the nature of the relief sought.”

(1) (1935) I.L.R. 58 Mad. 988 (F.B.).

With great respect, I would state that this is not the proper test to be applied and was certainly not the test laid down by the Judicial Committee.

It has sometimes been said that, whenever relief is sought on the allegation of a breach of trust, the suit must necessarily be brought in conformity with section 92, if it in any manner relates to a public charitable trust. Here again, I think this will not be a safe or conclusive test, because an allegation of breach of trust may in certain circumstances be necessary even when a co-trustee is trying to assert or vindicate his own rights against other co-trustees who are in management ; see *Narayanan v. Mootha Poduval*(1). The test seems to me to have been stated with fulness and accuracy in the passage that I have already cited from Sir F. Mulla's book. Even in Bombay, the principle that section 92 will not apply to suits instituted for the vindication of the right of management vested in the plaintiffs has always been recognised [see *Navroji Manekji Wadia v. Dastur Kharsedji Mancherji*(2) and *Narayan v. Vasudeo*(3) particularly the judgment of FAWCETT J.], but differences have arisen mainly on the construction of the scope of the plaint in each case. In the view that we are bound by the judgment of the Full Bench in *Appanna Poricha v. Narasinga Poricha*(4) and that its authority has not been shaken by the decision of the Judicial Committee in *Abdur Rahim v. Mahomed Barket Ali*(5) we have no alternative but to disallow the appellant's contention.

G.R.

(1) (1929) I.L.R. 53 Mad. 214. (2) (1903) I.L.R. 28 Bom. 20, 54.
(3) (1924) 26 Bom. L.R. 950. (4) (1921) I.L.R. 45 Mad. 113 (F.B.).
(5) (1927) I.L.R. 55 Cal. 519 (P.C.).

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APPELLATE CIVIL.

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

SWAMINATHA ODAYAR (SIXTH RESPONDENT), APPELLANT,
v.

T. S. GOPALASWAMI ODAYAR AND SIXTEEN OTHERS
(RESPONDENTS 2 AND 3; THIRD PETITIONER, RESPONDENTS 9,
10, 27, 28, 31, 33 TO 37 AND NIL), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLI, r. 20—
“Person interested in the result of the appeal” within the
meaning of—Test to be applied to find out who is.

In order to find out whether a person is “interested in the
result of the appeal” within the meaning of Order XLI, rule 20,
of the Code of Civil Procedure, the test to be applied is, would
the parties not impleaded be prejudiced by modifications made
behind their backs in the decree under appeal?

Subramanian Chetty v. Veerabadran Chetty(1) followed.
V. P. R. V. Chokalingam Chetty v. Seethai Acha and others(2)
relied on.

APPEAL against the decree of the Court of the
Subordinate Judge of Kumbakonam dated 26th
September 1932 and passed in Interlocutory
Application No. 695 of 1930 in Original Suit
No. 22 of 1924.

V. Radhakrishnaiya and S. Ramanuja Ayyangar for appellant.

T. R. Venkatarama Sastri and K. S. Desikan for
third respondent; *N. A. Krishna Ayyar* for first
and second respondents; *T. R. Srinivasa Ayyangar*
for fourth respondent; *S. Venkatesa Ayyangar*
for fifth respondent; *S. R. Subramania Ayyar*
for sixth respondent; *P. R. Ganapathi Ayyar*
and *N. K. Ananta Padmanabhan* for seventh
respondent; *K. Bashyam Ayyangar and V. C.*

* Appeal No. 60 of 1933.
(1) (1908) I.L.R. 31 Mad. 442. (2) (1927) L.R. 55 I.A. 7; I.L.R. 6 Ran. 29.

Veeraraghavan for eighth and ninth respondents; *SWAMINATHA ODAYAR*
R. Viswanathan and S. Thiagarajan for eleventh,
twelfth and thirteenth respondents; *R. Raja-*
gopala Ayyangar for sixteenth and seventeenth
respondents; *K. S. Sankara Ayyar* for eighteenth
respondent; *S. Sankara Ayyar* for nineteenth
respondent; *T. Krishnaswamy Ayyar* for twen-
tieth respondent.

Respondents ten, fourteen and fifteen were
unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered
by VENKATASUBBA RAO J.—An objection which
ought to have been taken *in limine* has been
raised at the closing stage of a long argument, to
the effect that the appeal is incompetent on
account of certain parties not having been added
as respondents. We do not at present propose to
set out the history of this long-drawn litigation,
for it is sufficient to state just a few facts in order
to deal with the contention raised. This was a
partition suit commenced nearly two decades ago
and the members of the family, to which the
action relates, owned considerable properties
when it started, but they have since been reduced,
with the exception of the sixth defendant, to such
straits that some are represented by the assignees
in insolvency, and the others by the trustees
under a composition deed. The only solvent
member of the family now is the sixth defendant
and he is the appellant before us. There are
several memoranda of objections in the nature of
cross-appeals which have been filed. The prin-
cipal contesting respondent is the third defend-
ant represented by the Receiver in insolvency and

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the preliminary objection referred to above has been raised by his Counsel, Mr. Venkatarama Sastri. In the action, originally the family was divided into three branches; the first consisting of the plaintiff, the second of defendants 1 and 2 and the third of defendants 3 to 8. The preliminary decree of the trial Court passed in 1924 separately allotted to the sixth defendant of the third branch a distinct share, the integrity of this branch not having been otherwise disturbed. We must observe that defendants 3, 4, 5, 7 and 8 form two sub-families; (i) defendant 3 and his sons defendants 5 and 7 and (ii) defendant 4 and his son defendant 8. An appeal from the preliminary decree was filed here, and during its pendency the third defendant was adjudicated insolvent in 1925 and the fourth defendant in 1927. With only one aspect of the appellate decree passed by the High Court we are now concerned, namely, that it effected a further sub-division of shares as between the third and the fourth defendants. The ultimate position as settled by the High Court's decree, so far as the shares were concerned, was this:

	SHARE.
(1) Plaintiff	...
(2) Defendants 1 and 2	1/5th
(3) Defendant 6	4/15ths
(4) Defendant 3 and his sons, defendants 5 and 7	4/15ths
(5) Defendant 4 and his son, defendant 8	2/15ths
	2/15ths.

The case went back to the trial Court which in due course passed a final decree, which the sixth defendant as the appellant now attacks.

The preliminary decree, which was confirmed by the High Court, has held defendants 3 to 8

jointly accountable to the other branches of the family in respect of certain matters, that is to say, the question, as between defendants 3 to 8 on the one hand and the plaintiff and defendants 1 and 3 on the other, is concluded by the judgment already pronounced by the High Court; but the point yet remained to be decided, namely, as among themselves (i.e., defendants 3 to 8) how much of this common burden was each of the sub-groups to bear, in other words, how much was to be borne by the third defendant's sub-group consisting of himself and his sons, defendants 5 and 7, and how much by the fourth defendant's sub-group consisting of himself and his son, defendant 8, and how much by the sixth defendant? The learned Subordinate Judge, after dealing under various heads with sums of money amounting to several lakhs, passed a final decree, containing in the result, *inter alia*, the following directions:

- (i) The sixth defendant shall pay Rs. 2,177-9-0 to the plaintiff's branch, Rs. 10,515-7-6 to defendants 1 and 2, and Rs. 18,385-1-6 to the fourth defendant's branch.
- (ii) The third defendant's branch shall pay the fourth defendant's branch Rs. 10,932-2-3.

The sixth defendant complains that the Subordinate Judge has wrongly apportioned the liability, his contention being that, had the learned Judge given effect to correct legal principles, a large amount would have been found payable to him by the third defendant's branch.

The preliminary objection arises thus. While the third and the fourth defendants (through the Official Receiver of West Tanjore and the Official Assignee of Madras respectively) have been

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impleaded as respondents to the present appeal, their sons have not been, and it is argued that their non-joinder is fatal to the appeal. Mr. Radhakrishnayya, the appellant's learned Counsel, in answer contends that the sons of the third and the fourth defendants, though proper parties and might have been joined as a matter of convenience, are not necessary parties. This argument, in our opinion, is well founded. The lower Court throughout refers to the entities known as the third defendant's branch and the fourth defendant's branch; nowhere does it in its long judgment refer to their sons as possessing any individual or distinct interest. Indeed, they have been so treated as if their individuality has become merged in that of their fathers and their separate existence has not been recognized or even noticed. This is not surprising, as the judgment of the High Court did not direct an *inter se* division, notwithstanding that their fathers had been adjudicated insolvents. What is more, when the various points bearing on the question of the apportionment were being considered in the lower Court all the parties concerned assumed without hesitation that the Official Receiver in each case represented adequately and properly the interests of the sub-family as a whole; not a single point seems to have been put forward as affecting the interests of the sons as distinct from those of their fathers. In fact, if the sub-group gained, each member of it gained also; if it lost, it was equally patent that every member likewise lost. This being so, the learned Subordinate Judge in the decretal portion of his judgment directs the third defendant's branch to pay and the fourth defendant's

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branch to receive. Though, therefore, in the lower Court the sons were formally on the record, they had no separate entity and the decree passed does not recognise their existence. They are in our view therefore proper but not necessary parties to this appeal. The appellant's Counsel, however, as a matter of expediency and convenience, now applies that they should be added as respondents. Much time and money has already been wasted and every step should be taken, if possible, to prevent the remnant of this estate from being wrecked. We therefore comply with his request and direct the sons or their representatives to be joined.

Granting, however, that the parties sought to be added are not merely proper but necessary parties, the effect of whose non-inclusion is fatal to the appeal, the question arises, whether the defect can be cured under Order XLI, rule 20, Civil Procedure Code, which runs thus:

"Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent."

Mr. Venkatarama Sastri broadly argues, relying upon the decision of the Judicial Committee in *V. P. R. V. Chokalingam Chetty v. Seethai Acha and others*(1), that no person, against whom the right of appeal has become barred, can ever be added as a respondent under this provision. We are unable to agree that this is the effect of the decision cited above. It must be remembered that

(1) (1927) L.R. 55 I.A. 7; I.L.R. 6 Ran. 29.

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their Lordships' judgment delivered by Sir JOHN WALLIS confirmed the judgment of the Rangoon High Court in *V. P. R. V. Chokalingam Chetty and one v. Seethai Acha*(1) and that the Judges of the Rangoon Court in their judgment followed the Madras decision in *Subramanian Chetty v. Veerabadran Chetty*(2) to which Sir John WALLIS was himself a party. The point is fully and clearly dealt with in the Madras case, and to understand the Privy Council decision we must turn to the exposition of the law contained in the judgment of the Madras High Court. Now let us turn to the facts in *V. P. R. V. Chokalingam Chetty v. Seethai Acha and others*(3) to appreciate the real import of that decision. There were two suits, but, for the present purpose, it is sufficient to advert to one of them. The plaintiff there challenged the transfer made by the insolvent to the first defendant and by the first to the second defendant, Singaram Chetty, the defendant in possession. The District Judge dismissed the suit, holding that the sales were perfectly valid and not benami as alleged. The plaintiff filed an appeal to the High Court at Rangoon, but did not implead the first defendant as a respondent. The constitution of the appeal was impeached on the ground that the first defendant, a necessary party, had not been impleaded. An application was then made under Order XLI, rule 20, but the learned Judges rejected it, holding that the first defendant, who was sought to be newly added, was not "a person interested in the result of the appeal" within the meaning of the decision in *Subramanian Chetty v. Veerabadran Chetty*(2) which they were prepared

(1) (1924) I.L.R. 2 Ran. 541.

(2) (1908) I.L.R. 31 Mad. 442.
(3) (1927) L.R. 55 I.A. 7, I.L.R. 6 Ran. 29.

to follow. In the last-mentioned case the learned Judges (WHITE C.J. and WALLIS J.) explain that the section was inserted

"to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal".

Then, turning to the words "interested in the result of the appeal", the learned Judges observe that they imply that the party whom it is sought to bring on record must be shown to be interested in the result of the appeal before he is brought on, for,

"once he is brought on, he may be said to acquire an interest as a result of being brought on".

Now, applying that test, it is perfectly clear that in the Rangoon case the first defendant, whom it was sought to bring on the record newly, was not a person "interested in the result of the appeal". Supposing the appeal had gone on, and as a result, the sale in favour of the second defendant, Singaram Chetty, had been set aside by the appellate Court, how could it be said that the absent first defendant was "interested in the result of the appeal"? The decision of the High Court could not in the slightest degree affect the trial Court's finding (which had become *res judicata*), that as between the plaintiff and the first defendant the sale was perfectly valid. In that case, therefore, the first defendant had no possible interest in the result of the appeal; it mattered little to him whether it succeeded or failed. It is unnecessary to refer at any length to the facts of *Subramanian Chetty v. Veerabadran Chetty*(1), but it will be seen that there, as in the Rangoon case, the parties newly sought to be added were not interested in

(1) (1908) I.L.R. 31 Mad. 442.

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the result of the appeal ; in other words, to them it was a matter of perfect indifference whether the appeal was allowed or rejected.

The test in each case therefore is, as put in the Madras case, would the parties not impleaded be prejudiced "by modifications made behind their backs in the decree under appeal" ? Let that test be applied here. Supposing the appellate decree modifies the trial Court's decree by imposing a larger burden upon the third defendant, what happens ? The sons are not directly affected by the appellate decree, they not being parties to it. That is undoubtedly so, but yet the result of any diminution of their father's assets will *ipso facto* be to diminish the extent of their own assets ; in other words, in the language of *Subramanian Chetty v. Veerabadran Chetty*(1), they will be "prejudiced by modifications made behind their backs in the decree under appeal".

Ma Than May v. Mohamed Eusoof(2), upon which the third defendant's Counsel relies, does not, if properly understood, help him. There, the second defendant, who was sought to be impleaded, does not answer the description of a person "interested in the result of the appeal". He had obtained a certain right under the trial Court's decree and that right, whatever might happen to the appeal, could not have been affected by its result. Thus, the actual decision in *Ma Than May v. Mohamed Eusoof*(2) does not conflict with the view we have taken. Granting therefore that the parties sought to be added are necessary, as distinguished from, proper parties,

(1) (1908) I.L.R. 31 Mad. 442.

(2) (1931) I.L.R. 9 Ran. 624.

we have no doubt whatever that Order XLI, rule 20, applies.

A little reflection will show that Mr. Venkata-rama Sastri's contention cannot be correct, for, as already observed, according to him no person against whom the right of appeal has become barred, can ever be added as a respondent under this provision. If this argument be sound, Order XLI, rule 20, can never be brought into play ; it must for all practical purposes remain a dead letter. It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded by the time the appeal comes on for hearing ; for under the rule, be it noted, the action to be taken is at the hearing of the appeal.

Lastly, it remains to observe that the power given to the Court is discretionary under the rule in question. The point then is, in view of all the circumstances of the case, is the discretion to be exercised in favour of the appellant or not ? In the first place, it is significant that, although the fifth defendant had died about two years previous to the judgment under appeal, no one thought it necessary to bring his representatives on the record in the lower Court. So much for the fifth defendant. Now turning to the seventh, it is not a little strange that, even in the decree passed by the lower Court in 1932, he was described as "minor male child, not named". That was the way in which he was originally described in the plaint filed in 1919 ; he still remained in 1932 "a minor, not named". That shows what little importance was attached to his presence on the record. Secondly, the same Advocate, curiously

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enough, represented in the lower Court the appellant and the seventh defendant, although their interests directly conflicted. Now turning to the eighth defendant (the fourth defendant's son), it is inexplicable how he came to be represented by the same Advocate as represented the twenty-seventh respondent. A glance at the decree will show how their interests conflicted. Our object in referring to these facts is to point out that in the lower Court no one thought that the sons possessed any interest whatever which required a separate representation. Thirdly, as already observed, under the lower Court's judgment the sons had no separate entity, which fact might well have misled the appellant. Strong grounds exist therefore in our opinion to induce us to exercise our discretion in favour of the appellant.

The question then is, what is the proper order to make? The fifth defendant, as already observed, had died during the pendency of the suit in the lower Court. In this case, from the previous judgment of the High Court there was an appeal filed to the Privy Council by the ninth defendant with whom we are not concerned at this stage. In that appeal, the fifth defendant's sons (two in number) were brought on the record as his legal representatives. It has been held in *Brij Indar Singh v. Kanshi Ram*(1) that the substitution of a new party for one stage of a suit is effective for all future stages of that suit; we may therefore regard the fifth defendant's sons as having been constructive parties to the suit in the lower Court. We learn that one of these two sons

(1) (1917) L.R. 44 I.A. 218; I.L.R. 45 Cal. 94.

has since died; we therefore direct the surviving son of the fifth defendant, the seventh defendant and the eighth defendant to be added as respondents. Notice will issue to them immediately and the further hearing of the appeal is adjourned to 30th March 1937.

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Before Mr. Justice Venkataramana Rao.

KUPPU GOVINDA CHETTIAR (PLAINTIFF), PETITIONER,

1937,
January 29.

v.

UTTUKOTTAI CO-OPERATIVE SOCIETY BY ITS
LIQUIDATOR (DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922), sch. II, art. 17-A (iii)—Co-operative society—Liquidator of—Order of, under sec. 42 (2) (b) of the Co-operative Societies Act (Indian) (II of 1912)—Suit for declaration that such order is null and void—Court-fee payable on.

The court-fee on a plaint which prays for a declaration that the order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under section 42 (2) (b) of the Co-operative Societies Act is null and void has to be calculated under article 17-A (iii) of Schedule II to the Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922).

PETITIONS under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act, praying the High Court to revise the orders of the District Court of Chingleput in Original Suits Nos. 1 and 12 of 1935 respectively.

* Civil Revision Petitions Nos. 692 and 693 of 1936.

V. Ramaswami Ayyar with V. Seshadri and N. G. Krishna Ayyangar for petitioner.

K. S. Champakesa Ayyangar for Government Pleader (K. S. Krishnaswami Ayyangar) on behalf of the Crown.

Respondent was unrepresented.

Cur. adv. vult.

JUDGMENT.

The question raised in this revision petition relates to the amount of the court-fee leviable on a plaint which prays for a declaration that an order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under section 42 (2) (b) of the Co-operative Societies Act is null and void. The case of the plaintiff was that he ceased to be a member in or about June 1930, that more than two years after he ceased to be a member an order for contribution was made against him on 25th November 1933 directing him to pay a large sum, namely, Rs. 8,000, and that the liquidator had no jurisdiction to pass such an order and he therefore prayed for a decree that such an order was "illegal, void and of no effect and unenforceable against the plaintiff". He paid a court-fee of Rs. 100 under article 17-A (iii) of Schedule II to the Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922). The learned District Judge held that the plaintiff should have valued the claim under section 7 (iv-A) of the said Amending Act. This order of the learned Judge is canvassed as being unsound by Mr. V. Ramaswami Ayyar for the plaintiff. The question is, is the order of the liquidator a decree for money within the meaning

of the said section 7 (iv-A)? The term "decree" therein connotes a final order of a Court, whether civil or revenue, in a suit, and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money, will not come within its purview. The Co-operative Societies Act itself draws a distinction between an order and a decree. Section 42 (5) of the Act says that orders made under the said section, when made by a liquidator, shall be enforced by any civil Court in the same manner as a decree of such Court. In construing an analogous provision, section 15 of the Indian Arbitration Act, which provides that an award shall be enforceable as if it were a decree of Court, VISCOUNT CAVE observed thus in *Sassoon & Co. v. Ramdutt Ramkissen Das*(1) :

"Section 15 does not enact that an award when filed is to be deemed a decree of the Court but only that it is to be enforceable as if it were a decree", and refused to apply the bar of section 47, Civil Procedure Code, to a suit to have an award declared null and void.

Thus, applying the said principle, from the Co-operative Societies Act itself it is abundantly clear that the order of the liquidator under section 42 (2) (b) cannot be a decree for money within the meaning of section 7 (iv-A), not having been passed by any Court in a suit. A subject cannot be taxed unless he comes within the letter of the law and in case of reasonable doubt, a construction most beneficial to the subject is to be

(1) (1922) L.L.R. 50 Cal. 1, 9 (P.C.).

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adopted. I am therefore of the opinion that section 7 (iv-A) would not apply to the case and that the court-fee paid is proper. I accordingly set aside the order of the learned District Judge and allow the revision petition.

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APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Lakshmana Rao.

V. RAMANNA SHETTY (RESPONDENT), PETITIONER,
v.

INSPECTOR OF LOCAL BOARDS, MADRAS, AND
ANOTHER (PETITIONERS), RESPONDENTS.*

Madras Local Boards Act (XIV of 1920)—Rules with respect to decision of disputes as to validity of elections—R. 10 (b) of—"Election"—"Result of the election"—Distinction—Cl. (ii) of r. 10 (b)—Corrupt practice under—Supplying of petrol to private cars used for election of candidate, if—Corrupt practice—Election of candidate "induced" by—Use of motor bus and cars for a day for taking voters to the poll—Election of candidate, if "induced" by corrupt practice in case of—Validity of his election in case of.

Rule 10 (b) of the rules with regard to the validity of elections held under the Madras Local Boards Act, 1920, is directed to two totally different circumstances, namely, the election itself and the result of the election. The word "election" is very much wider than the words "the result of the election", and contemplates something more like the conduct of the election as differentiated from the purely isolated fact of the result.

The supplying of petrol to private cars used for the purpose of the election of a candidate comes under the head of a payment or promise of payment to any person whomsoever on account of the conveyance of an elector to or from any place for the purpose of recording his vote as defined in clause (ii) of rule 10

* Civil Miscellaneous Petition No. 4729 of 1936.

(b) of the Election Rules and amounts to corrupt practice under that clause.

Where it appeared that a twenty-two seater motor bus and cars were used by the successful candidate for the period of a day for taking voters to the poll contrary to the provisions of rule 10,

held that the election of the successful candidate must, especially in the case of a small constituency, be considered to have been induced by those corrupt practices and that his election was void on that ground.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the papers in Original Petition No. 20 of 1935 on the file of the Election Commissioner of South Kanara and quash the order of the said Election Commissioner in the said original petition.

K. Rajah Ayyar and B. Rajeeva Shetty for petitioner.

N. Srinivasa Ayyangar for the Government Pleader (K. S. Krishnaswami Ayyangar) for first respondent.

B. Sitarama Rao and K. Y. Adiga for second respondent.

THE ORDER of the Court was delivered by MOCKETT J.—The petitioner was elected as a member of the District Board of South Kanara for the Kundapur Circle. His election was declared void by the Election Commissioner. He comes before us for a writ of *certiorari* to quash that order.

The facts are very simple. A large number of corrupt practices were alleged against the petitioner but he was absolved from all those allegations except under one main heading. Under the

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rules with regard to the validity of elections held under the Madras Local Boards Act, 1920, there is rule 10 which materially bears on the question before us. It is as follows :—

“ If, in the opinion of the Election Commissioner,

(a) the returned candidate, his agent or any other person with the connivance of such candidate or agent, has committed, or abetted the commission of any election offence falling under section 58 of the Act or under Chapter IX-A of the Indian Penal Code, or

(b) the election of the returned candidate has been procured or induced or the result of the election has been materially affected, by any of the following corrupt practices :—

(i) any election offence falling under section 58 of the Act or under Chapter IX-A of the Indian Penal Code when committed by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent ;

(ii) any payment or promise of payment to any person whomsoever on account of the conveyance of any elector to or from any place for the purpose of recording his vote ;

(iii) the hiring, employment, borrowing or using for the purposes of the election of any boat, vehicle or animal usually kept for letting on hire or for the conveyance of passengers by hire ;

... the election of the returned candidate shall be void.”

It was alleged that the petitioner was guilty of corrupt practices under both (ii) and (iii). Under (ii) it was alleged that he had supplied petrol to two private cars which were used for the purpose of his election and under (iii) that he had hired a twenty-two seater motor bus, and had used it for the purpose of conveying voters to the poll. The finding of the Election Commissioner with regard to that can be shortly summarised. With regard to the allegation under (ii), he said that the supplying of petrol to those cars under the circumstances alleged did not amount to corrupt practice under

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clause (ii), but we take a different view with regard to that, and we consider that such a course of action will come under the head of a payment or promise of payment to any person whomsoever, etc., as defined in clause (ii) on account of the conveyance of an elector to or from any place. With regard to (iii), his finding was that the motor bus and cars were used during the election day for the purpose of taking voters to the poll, and he drew the inference that those voters might be taken to have voted for the petitioner who had supplied the cars. He also found that the same corrupt practices had been adopted by the respondent when he too had hired and used motor vehicles for the purpose of taking voters to the poll contrary to the provisions of rule 10. He held that the result of the election had not been materially affected by the corrupt practices alleged but that the election had been procured and induced by those practices and, on the latter ground, declared the election void. Now, it is most important to consider the exact wording of rule 10 (b). It will be observed that two circumstances are contemplated. With regard to the procuring or inducing, it is the election of the returned candidate that is in contemplation ; with regard to the material effect, it is the result of the election that is contemplated. On the grounds that both sides had indulged in these wrong practices and also having regard to the majority, the Commissioner held that the result had not been materially affected. With regard to the other aspect, he took the view that he must exclude from his consideration, in order to arrive at a decision, the fact of the wrongful use of vehicles by the respondent. The

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argument before us of Mr. Rajah Ayyar for the petitioner amounts to this, and it must amount to this, that if the result has not been materially affected, it is impossible to say that the election has been procured or induced. It is necessary to examine this rule, because it will be seen that two positions must be proved: first of all, the fact of the wrongful practice prohibited and secondly, the effect of procuring or inducing the election or the fact of the result being materially affected. We consider that, with regard to the result being materially affected, there was material on the record on which the Commissioner might arrive at the conclusion at which he did arrive, but we are equally clear that there was ample material on the record on which he could arrive at the finding that the election was "induced". It is quite clear that the rule contemplates a difference between the election and the result of the election. And it would seem that the word "election" is very much wider than the words "the result of the election", and contemplates something more like the conduct of the election as differentiated from the purely isolated fact of the result. Now, can it be doubted, especially in a small constituency like this, when a twenty-two seater motor bus and cars were used for the period of a day for taking voters to the poll, that the election of the successful candidate has not been procured or induced by these facts? No authorities have been cited to us which are of any assistance. We have therefore to construe this rule according to its meaning as it seems to us, and we have emphasised that the rule is directed to two totally different circumstances, namely, the election itself and the result

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of the election. It was argued before the Commissioner that the proviso to rule 10 had some bearing on this question. That proviso however can only be used when the corrupt practice is committed by somebody other than the candidate himself. Therefore, the proviso is not material except that it is interesting to see that, even under the circumstances contemplated by the proviso, namely, the commission of a corrupt practice by an agent or some other person without the candidate's connivance, relief is only allowed when those corrupt practices are trivial, unimportant and of a limited character. There is no such provision in rule 10 (b) (i) to (iii). Unquestionably the finding here is that this corrupt practice was not of a limited character but was very much the opposite, owing to the circumstances we have referred to. The result is, in our opinion, one for satisfaction because it would be most undesirable that it should go forth from this Court that, if corrupt practices on both sides are proved, that should have the effect, as it were, of cancelling out each other and give a sort of unlimited licence to people to do all those things which they are expressly prohibited from doing under the rules relating to elections. The result is that this petition will be dismissed with costs of the second respondent which we fix at Rs. 100 which will be paid by the petitioner. It may be added that on the facts no possible question of jurisdiction can arise and for that reason also this petition must fail.

A.S.V.

APPELLATE CIVIL.

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

EVELYN POPALY (SECOND RESPONDENT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (APPELLANT),
RESPONDENT.*

Presidency-towns Insolvency Act (III of 1909), sec. 36, sub-sec.

(5)—*Scope of—Wife of insolvent—Examination of, under sec. 36, sub-sec. (5), to determine the question of insolvent's title to certain immovable property in her possession—Sec. 7—Proceedings under, against insolvent's wife, if barred by such examination.*

Sub-section 5 of section 36 of the Presidency-towns Insolvency Act relates only to property admittedly belonging to the insolvent and not to property, the ownership of which is in dispute. Proceedings by the Official Assignee under section 7 of the Act against the wife of an insolvent to determine the question of the insolvent's title to certain immovable property in her possession are not barred by reason of her having been examined under section 36 of the Act.

APPEAL from the order of WADSWORTH J. dated 12th February 1937 and passed in the exercise of the insolvency jurisdiction of the High Court in Application No. 12 of 1937 in Insolvency Petition No. 271 of 1936.

V. *Rajagopala Ayyar* and *K. G. Srinivasa Ayyar* for appellant.

K. S. Krishnaswami Ayyangar for respondent.
Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The Official Assignee applied to the Insolvency Court under section 7 of the

* Original Side Appeal No. 13 of 1937.

Presidency-towns Insolvency Act for a declaration that certain houses are the property of the insolvent purchased in the name of his wife, the second respondent, or in the alternative that the insolvent has a half interest in those houses. At the hearing before WADSWORTH J. the second respondent raised the preliminary objection that, as the second respondent had been examined under section 36 of the Act, the proceedings against her under section 7 were barred. That objection the trial Judge overruled holding that the previous examination under section 36 of the Act was no bar to the proceedings before him. The hearing of the application has been stayed pending this appeal.

The point before us is, to what extent this case is covered by the Full Bench decision in *Official Assignee, Madras v. Narasimha Mudaliar*(1), and for its determination depends upon whether the subject-matter of the application is one which falls within sub-section 5 of section 36 of the Act.

The summons under section 36 reads as follows :

“Take notice that you are hereby required to appear before the Master in Chambers on Thursday the 20th day of August 1936 at 3 p.m. and to give evidence touching the insolvent, his dealings and property and regarding the properties standing in your name and suspected to be his properties and to produce any documents in your possession or control relating to the said properties standing in your name and acquired by you since 1928 and the pass books of all the banks in which you have had accounts from the commencement up to date and also all documents relating to the fixed deposit and chit transactions had by you.”

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

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From the questions put in the examination of the second respondent it is perfectly clear that the sole object of the examination was to establish the fact that the houses had been purchased by the insolvent in her name, that is to say, that the purchases were *benami*. The second respondent denied that the property had been purchased with her husband's money, and asserted that she had herself purchased the houses out of her own funds. The appellant's case is that this was an examination to establish that the second respondent had in her possession property belonging to the insolvent and that no admission to that effect having been got from her, proceedings under section 7 of the Act could not be taken against her without her consent by reason of the amendment of section 7 by section 2 of Act XIX of 1927 which adds the following proviso :

" Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section."

In *Official Assignee, Madras v. Narasimha Mudaliar*(1), which was a case of a simple money claim, it was held that, when once the Official Assignee has summoned a witness under section 36 of the Act and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit unless the witness agrees to the disposal of the matter in the Insolvency Court. In a later decision, namely, *Chinnappa Mudali v. Official Assignee, Madras*(2), it was held that the amendment of section 7 of the Act by section 2 of the amending Act (XIX of 1927)

(1) (1929) I.L.R. 52 Mad. 717 (F.B.)
(2) (1931) I.L.R. 55 Mad. 385.

refers only to such proceedings under section 36 of the Act as come under sub-section 4 which deals with simple money claims and sub-section 5 which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters and that sub-section 5 of section 36 does not touch the case of a person who is examined for the purposes of ascertaining whether the status of joint family is subsisting between the insolvent and the other members of the family and whether a business is a joint family business. The Full Bench case was on the question of simple money claims and was distinguished in *Chinnappa Mudali v. Official Assignee, Madras*(1) on that ground. On page 387 it is stated :

" Throughout the decision in that case the only case in contemplation was the case of a simple money claim."

The appellant's endeavour, in consequence of these two decisions, has been to show that the matter is one under sub-section 5 of section 36, contending that the sub-section embraces not only cases where the property admittedly belongs to the insolvent but also where the Official Assignee contends that property admittedly in the possession of the person examined belongs to the insolvent and not to the person in whose possession it is and that if the person examined denies that the property belongs to the insolvent and asserts that it belongs to him or herself, it is a denial that that person is in possession of property belonging to the insolvent and therefore the sub-section applies. On the other hand, Mr. K. S. Krishnaswami Ayyangar contends that

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(1) (1931) I.L.R. 55 Mad. 385.

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the section has in contemplation only cases where it is conceded that the property belongs to the insolvent and its possession is alleged to be with the person examined and not cases where the title to property is in issue. It is for us to decide which of the two contentions is correct. The matter is singularly bare of authority and the two cases already referred to and the Calcutta decision to which reference is made in the Full Bench case and an earlier decision of this High Court, namely, *Abdul Khadar Sahib v. The Official Assignee of Madras*(1), appear to be the only ones relating to it. In the last-named case the scope of section 36 was discussed and it is stated that the main object of section 36 is discovery. There, the facts were that property had been transferred by the insolvent four months before the order of adjudication though under circumstances which might render the transfer voidable under section 55 of the Presidency-towns Insolvency Act, and it was held not to be "property belonging to the debtor" within the meaning of section 36 (5) of the Act, and that it was not therefore open to the Court under that section on the examination of the transferee to declare the transaction bad under section 55 and direct the delivery of property to the Official Assignee, and that the object of section 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary

(1) (1913) 25 M.L.J. 308.

transfers, fraudulent preferences and cognate matters. On page 310 WHITE C.J. says :

"Now, I do not think it can be held that the property in question in this case at the time that this examination was held can be said to be property belonging to the insolvent within the meaning of the sub-section. *Prima facie* it belonged to the man in whose name the title deeds stood and who had taken a transfer of property in January 1912, i.e., about four months before the date of adjudication."

This case, in my opinion, strongly supports the contention of the respondent. It shows that the sub-section has in view only the case of property admittedly belonging to the insolvent at the time of the examination. The object of the sub-section is to enable the Official Assignee to discover its whereabouts. The procedure in sub-sections 4 and 5 of section 36 is of the most summary nature; and before the amendment of those sub-sections, if the Court, on the examination of the person, was satisfied under sub-section 4 that he was indebted to the insolvent and under sub-section 5 that he had in his possession any property belonging to the insolvent, the Court could at once order the payment of the amount owing or the delivery up of the property to the Official Assignee. Clearly sub-section 5 at that date did not enable the Court to pass any such drastic order under this very summary procedure in cases where the title to property was in issue. The amendment substituted for "if on the examination of any such person the Court is satisfied" the words "if on his examination any such person admits". The amendment does not touch the words "property belonging to the insolvent". "Property belonging to the insolvent" both before and after the amendment has the same meaning.

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I am satisfied that sub-section 5 to section 36 relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under section 7 of the Act are therefore not barred by reason of the examination of the second respondent under section 36 of the Act and this appeal fails and must be dismissed with taxed costs.

CORNISH J.

CORNISH J.—I agree. In his application to have Mrs. Popaly examined the Official Assignee stated that she had considerable properties in her name and that his information was that these properties were purchased with moneys belonging to her husband, the insolvent. Neither the application nor the summons indicates the character of these properties, but it appears from the examination of Mrs. Popaly that they are houses. The purpose of the examination was, therefore, to discover whether Mrs. Popaly or the insolvent was the owner of this immovable property. This involved enquiry into the title to the property, which is a different thing from discovery whether Mrs. Popaly was in possession of property belonging to her husband. Indeed, property which *prima facie* belongs to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within the meaning of section 36 (5); *Abdul Khadar Sahib v. The Official Assignee of Madras*(1). There is nothing in the amended section 7 of the Act to prevent the Insolvency Court from deciding a disputed question of title between the Official Assignee and some other person. It is open to the Court if it thinks fit to refer the question for determination.

(1) (1913) 25 M.L.J. 308.

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in a suit. That is a matter within the Court's discretion. But whether the Official Assignee proceeds under section 7 or by suit, he can only recover by the strength of the insolvent's title to the property which he is asserting, and which he must establish. The jurisdiction given to the Insolvency Court by section 7 to decide all questions arising in any case of insolvency is qualified only to the extent laid down in the proviso to the section. What exactly is intended by the words in the proviso "any matter arising under section 36" is not at all clear, but I do not think they necessarily mean any matter which has been the subject of examination under section 36. If that had been the intention the Act could easily have said so. The result of the Full Bench ruling in *Official Assignee, Madras v. Narasimha Mudaliar*(1) and the later Bench decision in *Chinnappa Mudali v. Official Assignee, Madras*(2) is that there are two matters arising under section 36 which are subject to the special provision, namely, the question under sub-section 4 whether the person examined is indebted to the insolvent, and under sub-section 5, whether he is in possession of property belonging to the insolvent. If he admits indebtedness or possession there is nothing for the Court to decide; an order for payment or delivery may be made on the application of the Official Assignee. But if he denies indebtedness to the insolvent or possession of the insolvent's property, then, unless the parties otherwise agree, the jurisdiction of the Insolvency Court to decide the matter is excluded and the Official Assignee must proceed

(1) (1929) I.L.R. 52 Mad. 717 (F.B.). (2) (1931) I.L.R. 55 Mad. 385.

by suit to enforce his claim. The subject-matter of Mrs. Popaly's examination, however, is not a matter arising under section 36, sub-section 4 or sub-section 5. It is a question of title which falls outside the scope of these sub-sections. I am accordingly of opinion that the objection raised to the Insolvency Court's power to decide it is ill-founded and that the appeal fails.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice King.

IN RE VELAYUDHAM PILLAI AND ANOTHER
(ACCUSED), APPELLANTS.*

1937,
April 6.

Indian Penal Code (Act XLV of 1860), ss. 28, 232, 235 and 243
—Coins made to resemble genuine coins—Maker's intention to foist a false case—Counterfeit coins, if, within the definition of the Indian Penal Code.

If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of counterfeit coins given in the Indian Penal Code.

APPEAL against the judgment dated 11th November 1936 of the Additional Sessions Judge of the Court of Session of the Coimbatore Division in Case No. 130 of the Calendar for 1936.

V. L. Ethiraj (with him A. S. Sivakaminathan) for appellants.
—The conviction of the appellants is illegal. Section 28 of the Indian Penal Code defines "counterfeit coins". The intention required thereunder is "to practise deception or knowing it to be likely that deception will thereby be practised". According to the prosecution case, the coins here were made with the

* Criminal Appeal No. 666 of 1936.

intention of foisting a false case upon P.W. 6. Such intention is not practising deception. It is just the reverse. By giving false information against P.W. 6, into whose house the first accused got the coins introduced he wanted that the police officers should be the first persons to see the coins and not be deceived by them, for, if the police were deceived, the purpose of making the complaint against P.W. 6 would be defeated. Hence the coins in this case are not "counterfeit coins" as defined in section 28, Indian Penal Code, and the conviction of the accused cannot stand. It may be that they could be prosecuted for other offences, viz., under section 211, Indian Penal Code, for foisting a false case upon P.W. 6, or under section 195 of the Penal Code for fabricating false evidence against him. But they are not guilty under the sections charged for the manufacture of "counterfeit coins" as defined in the Indian Penal Code. Further, it was not even suggested by the prosecution that the accused had put these coins into circulation. When they made the coins it was never their intention to cause loss to the currency-owning public or to infringe the monopoly of the mint. In view of that, even if the accused are deemed to be guilty, the offences committed are only technical and the accused should be acquitted.

Parakat Govinda Menon for Public Prosecutor (L. H. Bewes) for the Crown.—The coins in this case resembled genuine coins. People are likely to be deceived thereby. In those circumstances, the presumption to be drawn is that the accused intended "to practise deception"; *vide* Explanation 2 to section 28, Indian Penal Code. The first accused asked the second accused to make for him counterfeit coins. The second accused made them. There is no direct evidence to show what the accused said when they were discussing their plot. It does not appear that either at the time when the first accused asked the second accused to make the counterfeit coins, or at the time when the second accused made the counterfeit coins they had any other purpose in view. The presumption to be drawn in those circumstances under Explanation 2 to section 28, Indian Penal Code, is that they intended to practise deception. This is strengthened by the fact that some counterfeit coins were also found in the cash box of the first accused. That could only be to use them. No doubt some of the counterfeit coins were used to foist a false case on P.W. 6. But that was not the intention when the first

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VELAYUDHAM, accused caused them to be made or when the second accused made them. So the coins in this case are "counterfeit coins" as defined in section 28, Indian Penal Code, and the conviction of the accused is legal.

V. L. Ethiraj replied.

JUDGMENT.

The two appellants have been convicted in this case by the learned Additional Sessions Judge of Coimbatore of various charges connected with the manufacture of what, according to the prosecution, are counterfeit King-Emperor's coins during May 1936. The facts found by the learned Judge and, in view of the legal argument to which I shall refer later, not seriously challenged in the appeal before me, were that the first appellant instructed the second appellant to make for him a number of two-anna pieces and that when these pieces were manufactured he made most of them up into a bundle which he gave to P.W. 3, his servant, with instructions that P.W. 3 should surreptitiously introduce them into the shop of P.W. 6 with whom he had lately conceived various grounds of enmity. P.W. 3 accordingly took the bundle and placed it in P.W. 6's shop. Information was then given to the police to the effect that if they searched P.W. 6's shop and house they would discover that he had counterfeit coins in his possession. A search was accordingly made and the bundle was duly discovered. It is on these facts that the two appellants were charged. There were four charges against them. The first was against the first accused that some days before 24th May 1936 he had abetted the counterfeiting of King-Emperor's two-anna coins by the second accused and therefore he had committed an offence punishable under sections 109

and 232, Indian Penal Code. The second charge was that the second accused had actually counterfeited those coins and committed an offence under section 232, Indian Penal Code. The third charge was that the first accused had on 24th May 1936 been in possession of certain materials knowing or having reason to believe that they were intended to be used for the purpose of counterfeiting coins, an offence punishable under section 235, Indian Penal Code. And fourthly, the first accused was charged with being at about the same time and place in possession of counterfeit coins fraudulently or with intent that fraud might be committed, an offence punishable under section 243, Indian Penal Code. I ought at this stage to add that in addition to the counterfeit coins discovered by the police in P.W. 6's shop a few more coins said to be similar in design to those were also discovered in a cash box in the first accused's house.

The argument that has been pressed before me in appeal is a very ingenious one which does not seem to have occurred either to the learned Additional Sessions Judge or to any of the parties at the trial. It is this, that if coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of "counterfeit coins" given in the Indian Penal Code. I think there can be no doubt that this argument must be accepted. The definition of "counterfeit" is to be found in section 28, Indian Penal Code:

"A person is said to 'counterfeit' who causes one thing to resemble another thing, intending by means of that

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The important words for our present purpose in that definition are "intending by means of that resemblance to practise deception". Now if the intention of a person who makes or causes coins to be made is to use them in order to commit some other offence such as giving false information against an enemy, that intention *prima facie* is not to practise such deception. If we examine the situation in the present case we find that it was exactly the reverse of that intention. It was obviously the intention of the first accused that the police officers should be the first to see these counterfeit coins and that they should not be deceived by their appearance because if they were deceived then the whole purpose of making the complaint to the police against P.W. 6 would be frustrated. It is clear therefore that if the object of the manufacturer was to carry out this nefarious scheme of foisting a false case on P.W. 6, these coins are not counterfeit because they do not fall within the definition of section 28. Of course there is no direct evidence in this case that the first accused and the second accused were heard talking over the details of their plot. It is conceivable, theoretically, that all that the first accused did was to go to the second accused and ask him to make counterfeit coins without disclosing to him the reason why he wanted them. But, on the other hand, it is quite clear from the way in which the case has been treated and discussed in the judgment of the learned Additional Sessions Judge, and clear also from the actual four charges which

have been framed in this case that the prosecution case was this, that the manufacture was for the deliberate purpose of foisting a false case on P.W. 6. There is nothing at all to suggest in this case that either the first accused or the second accused had attempted or intended to attempt to put these coins into circulation. And although some little difficulty is introduced into the case by the fact that certain coins were found not only in P.W. 6's shop but also in the first accused's cash box, that difficulty ought not to outweigh the fact that in the case as a whole stress was laid by the prosecution on the fact that both these coins and the others must have been recently made by the second accused, and no kind of suggestion was made that either of the accused wished at any time to put these coins into circulation.

I am therefore of opinion that what has happened in this case is that the prosecution has misconceived entirely the sections under which the accused ought to have been prosecuted. The real complaint of the Crown or of Society against these accused was not that they made a number of coins to look like genuine two-anna coins but that they dishonourably attempted to bring an innocent man, P.W. 6, to trouble by means of the coins which they made. They ought certainly to have been prosecuted for the real offences which on the evidence, if believed, they must have committed, viz., falsely causing criminal proceedings to be instituted against P.W. 6 under section 211, Indian Penal Code, or fabricating false evidence against him under section 195, Indian Penal Code. I do not know why no attempt was

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VELAYUDHAM, *In re.* made to prosecute the two appellants or at any rate the first appellant under these sections. It is obvious that the appellants are not persons who are manufacturing coins with the intention of infringing the monopoly of the mint or of causing loss to the currency-owning public. As I have already said more than once, there is nothing in the case to show that they intended any of these coins ever to be put into circulation. Therefore, even if they could be rightly held to be guilty under the sections under which they have been charged, their offences would in one sense of the word be only technical offences under those sections. However, I have held that the coins which were seized in this case and which are the subject-matter of the charges are not counterfeit coins, because it was the clear prosecution case that the intention of the appellants in manufacturing them was merely to make use of them in order to assist them in filing a false charge.

The result is that the appellants must be found not guilty and acquitted and their bail bonds cancelled.

V.V.C.

ORIGINAL INSOLVENCY.

Before Mr. Justice Wadsworth.

IN THE MATTER OF NAMBI CHETTY, AN INSOLVENT.*

1937,
September 6.

*Presidency-towns Insolvency Act (III of 1909), sec. 49 (3)—
Official Assignee intending to launch litigation in respect of
assets of insolvent—Agreement between him and indemnify-
ing creditor giving the latter a percentage of net realisation
— Validity of.*

A proposal by the Official Assignee, (i) that an indemnifying creditor shall be promised a percentage of the net realisations to the estate from a litigation which the Official Assignee proposes to launch as the purchase price for his assistance, (ii) that this price shall be treated as "costs of administration" under section 49 (3) of the Presidency-towns Insolvency Act and (iii) that all the creditors (including the indemnifying creditor) shall share rateably in the balance of the realisations, does not offend against the principle of equality of distribution of assets and as such could be approved by the Court.

Guy v. Churchill(1) followed. *In the matter of V. Purushothamdoss & Brothers*(2) referred to.

PETITION No. 453 of 1936 taken out by the Official Assignee for directions.

Official Assignee (F. H. Wilson) appeared in person.

JUDGMENT.

This application by the Official Assignee relates to a difficult and important question which is constantly arising in insolvency work, namely, how is an individual creditor, who is willing for a consideration to finance and indemnify the Official Assignee in an attack on an alleged fraudulent alienation, to be compensated for the

* Petition No. 453 of 1936.

(1) (1888) 40 Ch. D. 481.

(2) (1927) 55 M.L.J. 657.

NAMBI CHETTY, risk which he runs, without offending against the principles on which the insolvency law is based. A former proposal, that the financing creditor should be rewarded by having his debt paid in full in priority to the other creditors out of any amount that might be recovered, was disapproved by VENKATASUBBA RAO J. in *In the matter of V. Purushothamdoss & Brothers*(1) as being opposed to the policy of equal distribution of assets—though the then CHIEF JUSTICE in the appeal from that decision (Original Side Appeals Nos. 150 of 1927 and 5 of 1928) observed that such an arrangement might be unobjectionable if the other creditors consented to it.

In his present report the Official Assignee suggests another way of attaining the same end and asks for the Court's directions. He desires to attack a purchase by the insolvent in the name of his wife as fraudulent. The creditors as a body are not willing to act and no individual creditor is prepared to run the risk of indemnifying the Official Assignee unless he gets some substantial benefit (in addition to his rateable dividend) out of the proceeds in case of success. This seems to me perfectly reasonable—the creditor who risks having to pay all the costs of failure naturally looks for something more than those who have refused to bear their share of the risk, in case of success. All that he will get by way of preferential rights under the Insolvency Rules (Order VI, rule 9) is a first charge on the realisations for any actual disbursements with interest thereon. Obviously this is not a very powerful inducement to altruistic action. The Official

(1) (1927) 55 M.L.J. 657.

Assignee therefore proposes that the indemnifying creditor shall be promised twenty-five per cent of the net realisations to the estate from this litigation as the purchase price for his assistance, that this price shall be treated as “costs of administration” under section 49(3) of the Presidency-towns Insolvency Act, and that all the creditors (including, of course, the indemnifying creditor) shall share rateably in the balance of the realisations.

I can see no legal nor practical objection to this proposal. It is in effect a scheme whereby the Official Assignee, just as he buys the services of an Advocate and debits the estate, may buy the services of a guarantor and debit the estate. There is no offence against the principle of equality of distribution of assets; all that is proposed is to treat as a legitimate expense to the estate the cost of procuring for the Official Assignee an insurance against the consequences of failure. The scheme is, in fact, very similar to that approved in *Guy v. Churchill*(1), whereby when bankruptcy intervened in the middle of an action by the bankrupt and the trustee was unwilling to incur the risk of continuing it, one of the creditors was permitted to do so at his own expense and risk in return for three-fourths of the net realisations from the action. It was held that this arrangement offended neither against the law of maintenance nor against the law of bankruptcy.

The only difference between that case and the present proposal is that we are now concerned with a new litigation, not with the continuance of a pending action. This difference does not

(1) (1888) 40 Ch. D. 481.

NAMBI CHETTY, *In re.*, affect the recognition of the principle, viz., that it is lawful for the trustee in bankruptcy to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat this expenditure as a legitimate part of the cost of getting in the assets of the estate. I therefore approve of the Official Assignee's recommendation.
G.R.

PRIVY COUNCIL.

MURUGAPPA CHETTI AND ANOTHER, APPELLANTS,

v.

THE OFFICIAL ASSIGNEE OF MADRAS, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Trust—Fund entrusted to agent for investment—Use of part of trust fund by agent in his own business—Interest paid on sums so utilized and accounts rendered—Accounts received without demur—Fiduciary position of agent, whether altered.

J.C.*
1937,
July 22.

A firm of bankers and merchants, entrusted in 1900 with a Hindu joint family fund to be invested in other firms, employed a portion of the fund in their own business and from time to time submitted accounts to P, the managing member of the family, showing the actual disposal of the fund and credit of interest and debit of agency charges in respect of the sums utilized by themselves. The accounts were received by P without demur.

In 1915, by a partition decree, a share of the fund was allotted to minor members of the family and P was appointed their guardian. The terms of the decree were communicated to the firm.

In 1918, P died and no one was appointed guardian of the infants in his place.

In 1925, the firm was adjudicated insolvent. On a claim for the moneys that fell to the share of the minors as moneys held in trust,

held, that the mere receipts of the accounts without demur did not prove a variation of the original contract and the firm was from the beginning, with regard to the whole fund, in the position merely of agents entrusted with money to invest and this relationship still existed unchanged at the date of P's death when the firm became (if indeed it had not already become, as from the date when the terms of the partition decree were communicated to it) trustees for the minors.

Haridas Ranchordas v. Mercantile Bank of India(1) referred to.

* Present: LORD ALNESS, SIR GEORGE LOWNDES AND SIR SHADI LAL.
(1) (1919) L.R. 47 I.A. 17; I.L.R. 44 Bom. 474.

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CONSOLIDATED APPEAL (No. 89 of 1935) from an order of the High Court in its appellate jurisdiction which varied an order of the Court in its insolvency jurisdiction (May 9, 1932).

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

Sir Herbert Cunliffe K.C., Sidney Smith and Mrs. Clark for appellants.—There is a concurrent finding as to the terms of the original contract. Ar. Ar. Sm. were employed as agents for investment. If employed to invest, it was a breach of contract to take the money for their own business. It would be an astonishing doctrine to say a new contract can be founded on a breach of trust. Pending investment, or between calling in and re-investing, an agent may keep the money or put it in his bank, but he cannot keep it for an indefinite or unreasonable period. If he cannot find an investment, he should communicate with his principal; Lewin on Trusts, Chapter XIV, section 4. When the terms of a contract have been defined, a new contract cannot be found from the course of dealing or inferred from silence. The partition decree did not alter the contract. It remained an agency contract. The moneys of the minors were held by Ar. Ar. Sm. firm from the time of the partition, which was communicated to them, with the knowledge that it was minors' money and they were fixed with a trust. The law applicable is the law of British India. Ar. Ar. Sm. firm knew it would not be a proper thing for a guardian to put it into a business. They participated in a breach of trust by the guardian and, after his death, went further and used the money in their own business, committing a breach of trust themselves. After the death of the guardian they became trustees. A third party receiving money with notice of the trust is in the same position as a trustee; Indian Trusts Act, sections 20 and 66, *British America Elevator Co. v. Bank of British North America*(1) and Lewin on Trusts (13th edition), page 932. The firm were trustees even if not under the Trusts Act. They mixed the trust money with their own. The assets represent the heap into which they put the trust money. It is not open to the respondent to raise the question of tracing. The point was not raised in the Courts below. For the mean-

(1) [1919] A.C. 658.

ing of a "maraldar" reference was made to *Arunachalam Chetty v. Vayiravan Chetty*(1).

Roxburgh K.C. and Bennett for respondent.—(i) There was no trust but a contract which could be and was varied. (ii) To bring the case within the doctrine of tracing, it is not sufficient to find the fund in an account. It must be traced to a particular asset. It must be shown as comprised in some existing asset.

The trial Judge proceeded on a document which he treated as an agreement and found the contract in that. The appellate Court proceeded on a different basis. It said the facts must be looked at as a whole. It cannot, therefore, be said that the findings are concurrent findings of fact. It is submitted that the trial Judge was wrong in treating the document, Exhibit E, as an express contract, but even if it was an express contract, it is clear that it was immediately departed from. There was a variation by the taking by the firm of sums as a loan to themselves and this variation was adopted by Pethaperumal by copying the accounts in his own books. He either authorized the loans to the firm or ratified them. The contract was made in Rangoon and never came into being as a trust. It was a chose in action. There was a species of agency, but no fiduciary relationship is established where it is not established that it was the duty of the agent to keep the moneys of his principal at all times separate, not only separate in accounts but separate altogether. Pethaperumal on receiving the accounts entered them in his books and said nothing. If there was an intention to charge for a breach of trust there was a duty to speak. If before Pethaperumal's death the relationship was one of debtor and creditor, then the position on his death was that the firm could not discharge their debt except by payment to some one who could give a valid receipt. They could have ear-marked the sum, but then no interest would run. There was no duty to actively invest. If the minors' shares had been actually separated and ear-marked, then the sum would have been impressed with a trust. If, after that, it was used, interest would be payable. Up to the time of appropriation there is only a right *in personam*. The duty to segregate gives rise only to a right *in personam*. There is no *res* till segregation. Assuming the Trusts Act applies, section 66 would not apply. To make the section, which

(1) (1929) 57 M.L.J. 628 (P.C.).

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embodies the English rule of Equity, apply, it would be necessary to find (i) the trust property and (ii) that it was mingled.

Assuming the original contract is construed against the respondent, it is submitted that it was varied; *Bruner v. Moore*(1) and *Haridas Ranchordas v. Mercantile Bank of India*(2).

Alternatively the dealings were ratified. A new contract or sub-contract would carry the whole fund. Ratification would go only, so far as investments were concerned, to fixing the apportionment such as the appellate Court has done. There was ratification by the copying of the accounts by Pethaperumal. Bowstead on Agency (8th edition), page 59, article 29. Ratification may be by silence or acquiescence; *Prince v. Clark*(3). The Indian Contract Act, sections 196-200, does not exclude the English authorities. The English authorities show mere silence is sufficient.

[Sir GEORGE LOWNDES: The whole facts must be known. There is no evidence that it was known whether other investments were available or not.]

Section 198 means knowledge only of what the agent has done; *Lapraik v. Burrows*(4), *Robinson v. Gleadow*(5) and *Saturjit Pertap Bahadoor Sahi v. Dulhin Gulab Koer*(6).

Ratification would extend to the maximum sum taken at any time, but if it is held that any money which came back and was invested should be taken out, then the ratification should stand at the figures as at Pethaperumal's death.

If the agent is entitled to mix moneys with his own, then the relationship is not fiduciary; *Henry v. Hammond*(7). [Reference was made to *Kadiresan Chettiar v. Ramanathan Chetti*(8), *Lyell v. Kennedy*(9) and *Burdick v. Garrick*(10).]

[Sir Herbert Cunliffe K.C.—The Official Assignee cannot raise the point that the sum entrusted has not been

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traced because (i) the point was not raised in the Courts below and (ii) he is prevented by his pleadings. If the point had been raised, the claimants would have had the opportunity of a minute examination of the accounts and could have traced. It would be a hardship to allow the point to be raised now—*Secretary of State for India v. Raja Jyoti Prashad Singh*(1) and *Secretary of State v. Parashram Madhavrao*(2)].

The matter has been raised on the pleadings and dealt with by the trial Judge. Even if not raised before, it is a matter which the Official Assignee should be allowed to raise now. The contention is not that the funds were not mixed with the assets but that there is no charge on the whole of the assets. It is an issue of law and arises on facts which have been pleaded; Safford and Wheeler, Privy Council Practice, page 851.

Merely to prove that a man is a trustee and that he has committed a breach of trust carries one no further than an unsecured creditor when one is claiming in insolvency. In order to get a preferential claim a claimant must allege and prove that there is to be found in the hands of the Official Assignee something which can be shown to be trust property. The onus is on the claimant. He must point to a specific asset which is the subject of the trust. In the case of money, the sum must be traced. If the sum is exhausted in the dealing, then there is nothing which can be followed; *Sinclair v. Brougham*(3). *Official Assignee, Madras v. Krishnaji Bhat*(4) is consistent with this except that it lays down a rule as to onus which, it is submitted, is wrong. [Reference was made to *In re Hallett & Co., Ex parte Blane*(5), *James Roscoe (Bolton), Limited v. Winder*(6) and *Ex parte Hardcastle; Re Mawson*(7)].

Bennett following.—Assuming there was a contract that Ar. Ar. Sm. firm should invest in other firms and that there was a ratification of loans to themselves by the entries in Pethaperumal's books, then on his death there would be two funds. The relationship in respect of the sums taken

(1) (1926) L.R. 53 I.A. 100, 107; I.L.R. 53 Cal. 533.

(2) (1934) L.R. 61 I.A. 190, 196; I.L.R. 58 Bom. 306.

(3) [1914] A.C. 398.

(4) (1933) L.R. 60 I.A. 203; I.L.R. 56 Mad. 570.

(5) [1894] 2 Q.B. 237.

(6) [1915] 1 Ch. 62.

(7) (1881) 44 L.T. 523.

(1) [1904] 1 Ch. 305, 312.

(2) (1919) L.R. 47 I.A. 17; I.L.R. 44 Bom. 474.

(3) (1823) 1 B. & C. 186; 107 E.R. 70.

(4) (1859) 13 Moo. P.C. 132, 158; 15 E.R. 50.

(5) (1835) 2 Bing. (N.C.) 156; 132 E.R. 62.

(6) (1897) I.L.R. 24 Cal. 469.

(7) [1913] 2 K.B. 515.

(8) A.I.R. 1927 Mad. 478

(9) (1889) 14 App. Cas. 437, 457.

(10) (1870) L.R. 5 Ch. 233, 240.

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by Ar. Ar. Sm. firm for their own use would be that of debtor and creditor.

Sir Herbert Cunliffe K.C. in reply.—The original contract was clearly one of agency to invest in other firms. The best evidence of it is the statements made by the firm in writing, communicated to Pethaperumal and used by the firm as instructions to its servants. A contract cannot be construed by what happened afterwards when there is a document containing it. It is true that large sums of money were not invested in accordance with the contract. All that that shows is that the firm held large sums of money which they did not invest as they should have done. In *Haridas Ranchordas v. Mercantile Bank of India*(1) there was no new contract or alteration of the original contract. A gap in the original contract was filled up. It was a case of supplementing and not substituting. Absence of protest might amount to acquiescence, but it would be acquiescence in holding particular sums for a time, not indefinitely.

The cases on ratification cited by the respondent are cases in which the agent entered into contracts with third parties which he was not authorized to make. An agent cannot contract with himself. Here there is no evidence as to what the new contract was. There is, on the other hand, evidence that the firm still considered themselves agents. They charged commission and repudiated loss on investments. The true conclusion is the contract was not altered. After the partition decree, the firm knew they were dealing with minors' money and participated in a breach of trust. After Pethaperumal's death, they knew there was no one to give instructions. They knew the money was trust money and they were not merely participators in a breach but were committing a breach of trust themselves. [Reference was made to *Lewin on Trusts*, Chapter XXXI, section 1, *Gray v. Lewis*(2), *Sinclair v. Brougham*(3) and *British America Elevator Co. v. Bank of British North America*(4).] The onus is on the person who holds the money to show that the trust money is not the money which he has. It is not open to the Official Assignee in view of the pleadings and admissions to contend that the

(1) (1919) L.R. 47 I.A. 17; I.L.R. 44 Bom. 474.
(2) (1869) L.R. 8 Eq. 526, 543. (3) [1914] A.C. 398.
(4) [1919] A.C. 668.

claimants must trace the money to the assets. There are concurrent findings that the fund which the Official Assignee has represents the fund into which the firm placed the money received from Pethaperumal. [Reference was made to the Indian Evidence Act, section 106, Taylor on Evidence (11th edition), page 284, and *In re Hallett's Estate. Knatchbull v. Hallett*(1)].

Roxburgh K.C. distinguished the cases and authorities newly cited in reply.

The JUDGMENT of the Judicial Committee was delivered by Sir GEORGE LOWNDES.—These consolidated appeals arise out of a petition presented by Murugappa Chetti and his brother Ramaswami Chetti (since deceased and now represented by his widow Minakshi Achi) in certain insolvency proceedings in the Madras High Court. The petitioners will for convenience be referred to as the appellants. The Official Assignee of Madras represents a firm known as Ar. Ar. Sm., trading in British India and having a branch in Rangoon, who were adjudicated insolvent on 15th July 1925, and against whose assets the claim of the appellants is made. He will be referred to as the respondent and the Ar. Ar. Sm. firm as the insolvents.

In 1900 one Pethaperumal Chettiar, the grandfather of the appellants and manager of the joint Hindu family of which they were minor members, transferred sums totalling Rs. 76,000 to the insolvents in Rangoon. There is no formal record of the terms upon which this transfer was made and the question is in dispute before the Board. The appellants assert that it was an agency transaction under which the insolvents were to invest the money in other Chetti firms in Rangoon; the

(1) (1879) 13 Ch. D. 696, 719.

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respondent, on the other hand, contends that under the original arrangement, they were at liberty either so to invest the moneys or to utilise all or any part of them in their own business.

In 1915 a partition decree was made by the Chief Court of Pudukotta, a Native State in Southern India of which the joint family were subjects. By this decree three-sixteenths of the moneys in question were allotted to the share of the appellants, and the grandfather, Pethaperumal Chettiar, was appointed guardian of their property. It is not disputed that the terms of the decree were communicated to the insolvents in Rangoon. Pethaperumal Chettiar died on 18th September 1918, and no guardian was appointed in his place though both the appellants were then, and until shortly before the date of the insolvents' adjudication, minors under the law of Pudukotta. In 1919 or 1920 at the instance of Muthayya Chettiar, the father of the minors, the original account in the books of the insolvents appears to have been closed, and a separate account was opened in their books of the appellants' three-sixteenths share. There was then a sum of Rs. 27,000 standing to their credit which was increased to Rs. 44,503 at the date of the insolvency. The appellants by their petition claimed that these moneys were in effect a trust fund in the hands of the insolvents, and should be paid over to them with interest by the respondent in priority to the claims of other creditors, which the respondent denied.

The petition was heard in the High Court by STONE J. who upheld the claim and made an order for the payment to them of the Rs. 44,503

with further interest and costs. The respondent appealed and the learned Judges of the appellate Court (REILLY and BURN JJ.) varied the order of the lower Court and held that the appellants were only entitled as preferential creditors to a portion of the said amount, and must prove in the insolvency for the balance along with the other unsecured creditors. Both parties have appealed to His Majesty in Council, the appellants asking for the restoration of the trial Judge's order and the respondent seeking to get rid of so much of the appellate Court's order as gave the appellants priority in respect of a part of the fund.

The main questions in the appeal are as to the terms upon which the insolvents accepted the original sum of Rs. 76,000 in 1900, and whether the relationship so established was subsequently changed. No receipt or written acknowledgment is forthcoming. The appellants are, of course, unable to depose themselves as to the transaction and their father, Muthayya Chettiar, died before the present question arose. There is, however, in the record a letter from the head firm of the insolvents at Devakotta, dated 7th November 1900 and addressed to the Rangoon branch, by which the latter were instructed to lend the money "to our Chetti firms", meaning clearly, as their Lordships think, other Chetti firms with whom the Rangoon branch had business dealings. Subsequent letters make it evident that this was understood to be the arrangement by the Rangoon branch: see in particular the Rangoon letters of 25th July 1908 and 5th December 1911.

This their Lordships hold to be confirmed by the depositions of various employees of the

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insolvents in Rangoon, and they have little doubt upon this evidence that the money was entrusted to the insolvents to invest in other Chetti firms, and that they had no authority to employ any part of it in their own business. It is, however, clear that from a very early date they did so employ a part of the fund, and that this practice was by degrees so expanded that shortly after Pethaperumal's death Rs. 93,594 out of the moneys then representing the fund was being utilised in the insolvents' business and only Rs. 38,567 was out on loan to other firms.

It is also established that the insolvents furnished accounts from time to time of their dealings with the fund showing its actual disposal and that Pethaperumal copied these accounts into his own books apparently without demur.

The respondent contends that if the original arrangement was merely of an agency character (as their Lordships have found) this course of dealing established a new contract between the parties by which Pethaperumal authorised the insolvents to deal with the fund in this way, or alternatively that it constituted such a ratification of their dealings with the fund that it should be held that the whole must be regarded at the date of Pethaperumal's death as merely a bank deposit with the insolvents, in respect of which the appellants could claim no priority over other creditors. In support of the first branch of this contention the respondent's Counsel cites the judgment of Sir JOHN EDGE in *Haridas Ranchordas v. Mercantile Bank of India*(1), but their Lordships think it affords no support to the contention

as in that case all that the subsequent dealings were held to establish was a term upon which the original contract was silent. Their Lordships are quite unable to agree that a new contract, or a variation of the original contract, can be proved by such means, even were the terms of the supposed new contract less vague than is suggested here. Nor do their Lordships think that the doctrine of ratification can be applied so as to turn the fund originally held by the insolvents as agents in a fiduciary capacity into a mere deposit with them on ordinary banking terms. There is nothing whatever to show that Pethaperumal had full knowledge of the facts (see section 198 of the Indian Contract Act which admittedly applies). He was living in a remote village in a Native State in India, the accounts furnished to him were very obscure, and no attempt was made to explain to him what his agents in Rangoon were doing, or why they had so deviated from their original instructions. It is also at least doubtful whether what the agents did could be regarded under the circumstances as acts done on his behalf—see *per* LORD MAUGHAM in *Imperial Bank of Canada v. Begley*(1)—and it is admitted on the evidence that the insolvents charged the account in every case, whether the interest credited to Pethaperumal came from themselves or from outside investments, with the regular agents' commission, and when there was a question of loss on an investment, made it quite clear that no responsibility for any loss rested upon them.

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(1) [1936] 2 All E.R. 367.

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On the whole their Lordships are satisfied that from the beginning the insolvents were, with regard to the whole fund, in the position merely of agents entrusted with money to invest, and that this relationship still existed unchanged at the date of Pethaperumal's death, when they became (if indeed they had not already become, as from the date when the terms of the partition decree were communicated to them) trustees for the minors.

This was the conclusion to which the learned Judge in the lower Court came and upon which the order made by him was based. The appellate Court, on the other hand, thought that the nature of the fund must be taken to have changed by the time of Pethaperumal's death owing to his acquiescence in the dealings by the insolvents, and that only so much of the fund as was then invested outside the insolvents' firm could be treated as a trust fund in their hands, but that *qua* the larger part of it which had been utilised in the insolvents' business there was no fiduciary relationship remaining. It is possible that the acquiescence of Pethaperumal in the unauthorised dealings by the insolvents might have debarred him from claiming compensation in any shape in respect of particular transactions—their Lordships have not to come to any conclusion as to this—but in their opinion it could not affect the fiduciary position in which the insolvents stood towards the minors' three-sixteenths share.

This should, their Lordships think, be the end of both appeals. But Counsel for the respondent has contended before the Board that the appellants, in order to succeed in their claim as against

the general body of creditors, must go further, and trace the fund *in specie* as in the hands of the insolvents at the date of their adjudication.

It is objected on behalf of the appellants that no such case was made in the Indian Courts, and that it ought not therefore to be allowed here.

It is obvious that if this contention had been put forward in India it would have applied to the whole fund as dealt with by the first Court, and to the portion held to be a trust in the hands of the insolvents by the appellate Court. But beyond possibly a passing reference to the question in the judgment of STONE J., there is no discussion of it in either Court, and it is admitted that the appellate Court did not take it into consideration at all. Their Lordships can only conclude that no serious argument on the matter was addressed to either Court. If it had been put forward, their Lordships think that further investigation of the insolvents' accounts might have enabled the appellants to meet the objection, and they must, therefore, in accordance with the well-established practice of the Board, refuse to go into the merits of this contention.

Under these circumstances their Lordships find it unnecessary to consider the question as to where the burden of proof lies in such a case, or as to any possible conflict between the principles enunciated in *Sinclair v. Brougham*(1) and the judgment of this Board in *Official Assignee, Madras v. Krishnaji Bhat*(2).

For the reasons given above, their Lordships will humbly advise His Majesty that the appeal of M. P. M. Murugappa Chetti and Minakshi

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(1) [1914] A.C. 398. (2) (1933) L.R. 60 I.A. 203; I.L.R. 56 Mad. 570.

Achi should be allowed ; that the order of the appellate Court, dated 30th August 1933, should be set aside and that of the lower Court, dated 9th May 1932, restored ; and that the appeal of the Official Assignee should be dismissed. The costs both in the High Court and before this Board must be paid by the Official Assignee.

Solicitors for appellants : *Douglas Grant & Dold.*

Solicitors for respondent : *Burton, Yeates & Harte.*

C.S.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Chief Justice, Mr. Justice Mockett and Mr. Justice Horwill.

IN THE MATTER OF A FIRST GRADE PLEADER,
VIZAGAPATAM.*

Legal Practitioners Act (XVIII of 1879), sec. 13 (b) — Legal practitioner—Misconduct—Use of client's money temporarily for practitioner's own purposes—Professional misconduct, if—Absence of intention to defraud client—Subsequent agreement between practitioner and client for restoration of money by former and for receipt thereof by latter—Effect of.

A legal practitioner who has intentionally used his client's money for his own purposes without his client's permission does so wrongfully and is guilty of professional misconduct, and it is not necessary to prove an intention to defraud his client, the temporary conversion of his client's money being quite sufficient. When once such an act of professional misconduct has been committed, any subsequent agreement by the legal practitioner to restore the money and by his client to receive it back does not make the act any the less one of professional

* *In re* A First Grade Pleader.

misconduct though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, the charge cannot be permitted to be "squared".

PROCEEDINGS under section 13, clause (b), of the Legal Practitioners Act, calling upon a First Grade Pleader, Vizagapatam, to show cause why disciplinary action should not be taken against him for his grossly improper conduct in the discharge of his professional duty.

The facts of the case are set out in the judgment.

R. Ramamurti for Advocate-General (Sir A. Krishnaswami Ayyar) for the Crown.—The client's money was with the legal practitioner. He used it for his own purpose without the consent of the client. Registered letters were written by the client to return the money. There was no reply and the money was not returned. This is clearly professional misconduct. It may be that afterwards the client and the Vakil have adjusted the matter. Even then, it is misappropriation, though temporary. When a case of professional misconduct has once been brought to the notice of the Court, the client cannot be permitted to withdraw the charge.

Kasturi Seshagiri Rao for the practitioner.—No doubt it was wrong of the legal practitioner to use his client's money for his own purpose. But he had no fraudulent or dishonest intention. He wanted to return the money to the client later on. To go to a village in West Godavari in connection with his father-in-law's sudden death, he spent the money. He *bona fide* thought that his client would approve of the diversion of the fund for that purpose. The client asked him to hand over the papers in the case to another Vakil to conduct the litigation. Not knowing the reason for it, he wanted to make the client go over to him. That was the reason for his not replying to the letters. Subsequently the matter was amicably settled by the parties. So the client should be allowed to withdraw the charge. At least that circumstance may be considered in awarding punishment.

Cur. adv. vult.

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The ORDER of the Court was delivered by BEASLEY C.J.—These proceedings relate to a sum of Rs. 70-10-0 which belonged to one Aletti Mallikarjunudu, a client of the respondent (pleader) and which sum the respondent by a letter of 4th February 1934 (Exhibit A-3) admitted that he had in his possession. The respondent did not return that money to his client in spite of repeated requests in writing to do so and eventually the client sent a registered letter of demand on 24th December 1934 which the postal acknowledgment shows was received on 2nd January 1935 by the respondent. This registered letter, however, did not produce any reply. A further registered letter was sent to the respondent on 14th March 1935 demanding the return of Rs. 65 within four days and telling him to hand over the papers in the suit to another Advocate at Vizagapatam and that he was to take no further steps with regard to this suit. This letter is shown by the postal acknowledgment to have been received by the respondent on 19th March 1935. No reply was made to this letter also. Eventually on 11th June 1935 a petition against the respondent was presented to the District Munsif of Vizagapatam by the client, A. Mallikarjunudu, setting out the facts and stating that the petitioner believed that the respondent had appropriated his funds for his own needs. He further charged him with not opposing an insolvency petition filed by the judgment-debtor in the suit, in which the respondent had acted on the petitioner's behalf, in spite of his instructions. Subsequently the petitioner met the respondent in October 1935 and then the latter admitted that he had used the money temporarily

for his own sudden and unforeseen private purpose, namely, for his journey to a village in West Godavari in connection with his father-in-law's sudden death and said that he thought that the petitioner would not mind his using the money for such a sudden private purpose. It appears that the petitioner after this explanation readily forgave the appropriation of the money and it was arranged that of the amount owing, Rs. 40 was to be paid in cash and the remaining Rs. 30-10-0 should be kept by the respondent in payment of future professional work to be done by him. The Rs. 40 cash payment is represented by payments in two instalments of Rs. 20 each in October 1935. Subsequently an endorsement was made on Exhibit A-4, which is the copy of an account furnished by the respondent to the petitioner on 4th February 1934, as follows :—

“The matter has been adjusted, and it need not be pressed.”

There seems to be some confusion with regard to this endorsement, which is Exhibit A-7, as the District Judge states in his report that when asked by his predecessor Mr. Lancashire on 22nd July 1936 about his petition the petitioner endorsed on it that the matter had been adjusted and the petition was not pressed. It would appear from this that the endorsement was made upon the petition and not on Exhibit A-4. However, that is immaterial. The position at that time was, therefore, that the respondent had had in his hands money belonging to his client for a considerable time and that in spite of repeated demands he did not return the money to him but instead, upon some date about which no information has

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been given by him, used his client's money for his own purposes and did so without having first of all obtained his client's permission to do so or told him about it after he had done so. This was, therefore, a clear case of the wrongful use for his own purposes by a legal practitioner of his client's money ; and it is obvious that the money was so used because the legal practitioner had not sufficient money of his own. That these facts disclose a case of professional misconduct is obvious ; and although the respondent may have been accused by the client of fraudulently and dishonestly using the money, it is not necessary that fraud or any other criminal offence should be proved. It is sufficient if it is shown that a legal practitioner has intentionally used his client's money for his own purposes without his client's permission ; and it is quite unnecessary to consider whether he did so with any intention of defrauding his client. He may have every intention of restoring the money to his client later on but he is nevertheless guilty of professional misconduct in converting the money to his own use even temporarily. It is not out of place to observe that it is probable that in most cases which end disastrously for persons entrusted with the money of others there is an original intention to restore the money. The clerk entrusted with his master's money may gamble with it hoping that the gamble will be successful in which case he returns his master's money and his master remains in ignorance of the use to which it was temporarily put. But gambles are not so often successful and the money cannot be returned and disaster is the result. Legal Practitioners who

have in their hands the money of their clients must under no circumstances utilise that money for their own purposes without the sanction of their clients ; and even to take a loan from a client is undesirable, so much so that in the "Instructions to the Members of the Bar issued by the (Madras) Bar Council, dated 2nd April 1933", it is laid down :

"Practitioners should avoid arrangements by which clients' moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client."

This instruction was given in pursuance of views expressed by the Judges of this High Court. That being so, how is the charge of misconduct affected by the amicable settlement of the matter come to between the petitioner and the respondent once such an offence has been brought to the notice of the Court ? The answer is that, when once an act of professional misconduct has been committed such as the one here, any subsequent agreement by the legal practitioner to restore the money and his client to receive it back does not make the act any the less one of professional misconduct, though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be "squared". Clients whose money legal practitioners have wrongly utilised have no interest at all except to get their money back and, if they do, are quite prepared to withdraw the charges. They are not in the least degree interested in any rules of professional conduct, although many of these are framed for the benefit

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of the public, nor do they care anything about the prestige and honourable name of the legal profession ; and where the disciplinary functions of the Courts have been invoked and the money has been returned to them, they are not interested in the control of the Courts over legal practitioners. This however is the concern of the Courts ; and mere restoration of the money to the client by a legal practitioner who has improperly used it for his own purposes cannot be any ground for allowing the withdrawal of such a charge. The Court's concern is to exercise its control over legal practitioners who have converted their clients' money to their own use ; the client's concern is to get his money back. We have dealt with this topic at some length because it has been made clear to us not only in these proceedings but in similar proceedings that there is an impression that charges like this when they have once been made to the Court, can be "squared" in the same way as this obviously has been ; and we are all the more constrained to say what we have, because it appears to us that to some extent the District Judge is under the same misapprehension. He finds that the legal practitioner appropriated this money to his own sudden and unexpected private use in the *bona fide* belief that his client would not mind it in the circumstances and without any fraudulent or dishonest intent to misappropriate the amount and further that he foolishly detained the money and failed to reply to his client's letters owing to his pique at another Vakil having been engaged and was expecting his client to go to him in person and was intending to return the money then after

some rebuke for having engaged another Vakil. He thinks that the legal practitioner believed that his client would approve of this diversion of his funds for his own private purpose in the special circumstances and that this cannot be said to be wholly unreasonable in view of the relationship as lawyer and client and the sudden death and the consequent urgent journey rendered necessary by it, and indeed his client's readily forgiving the diversion is itself proof, he thinks, of the reasonableness of the legal practitioner's belief. In other words, in order to escape serious consequences of his conduct a legal practitioner who converts his client's money to his own use has only got to say that he thought that his client would not object to its use in that way and subsequently by agreeing to repay the money to his client obtain his client's forgiveness. The District Judge in the end certainly says that the legal practitioner deserves to be severely censured for utilising his client's money for his private use without having previously obtained his client's permission to do so. We are quite unable to understand why in the circumstances of this case the District Judge should think that the legal practitioner's belief that his client would not object to the use of his money by him was reasonable or even *bona fide*. The circumstances to which we refer are his studied neglect to tell his client that he had done so or to comply with his client's demands to return the money or even to reply to them and his obvious difficulty in repaying only a part of the money in October 1935. The reasonableness of the legal practitioner's belief and his *bona fides* at the time when he so

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used the money seem to us to be better tested by these latter facts than by the subsequent forgiveness of his conduct by his client upon his agreeing to restore the money to him. We, on the contrary, think that the legal practitioner's belief was not a reasonable one at all and indeed it is difficult to accept his statement that he had such *bona fide* belief. We are clearly of the view that the legal practitioner was guilty of professional misconduct and, were it not for the fact that the suspension of the renewal of his sanad pending the proceedings in this High Court has resulted in his being unable to practise for some time, we should not be satisfied with the punishment proposed by the District Judge, namely, severe censure. We think, however, that in view of what we have stated no further punishment need be inflicted upon him. The order of the Court is that the Pleader is severely censured for his conduct.

V.V.C.

APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and
Mr. Justice Varadachariar.*

LALA GOKULDAS AND ANOTHER (PLAINTIFFS), APPELLANTS,

1937,
July 29.

vs.

JOHN KANTARAJ (DEFENDANT), RESPONDENT.*

Indian Christian Marriage Act (XV of 1872), ss. 4, 5, 19, 38, 42, 44, 66 and 77—Consent of father of minor girl not given to her marriage with a person who was a major—Parties living in a particular marriage district—The person filing false declarations about their residence and about the girl's age to the effect that she was a major before Marriage Registrar of another district—The Marriage Registrar solemnizing marriage on the faith of these declarations—Validity of the marriage in spite of such false declarations—Penalty for false declarations under sec. 66.

J.K., an Indian Christian who had attained his majority, wanted to marry M.L.T., an Indian Christian girl aged eighteen and a half years and a minor under the Indian Christian Marriage Act (XV of 1872). Both were residing at the time in Madras. The consent of the father, contemplated by sections 44 and 19 of the Act, to the marriage had not been obtained. J.K. gave notice of the said marriage to the Marriage Registrar of S under section 38, took oath under section 42 and made two false declarations in the course of his statement: (i) that M.L.T. was of age and (ii) that both the parties (i.e., J.K. and M.L.T.) lived within the limits of S. As a result of the said declarations, J.K. obtained a certificate from the Marriage Registrar which entitled J.K. to marry M.L.T., there being no statement in it showing any lawful impediment to the marriage. Subsequently, a suit was filed by M.L.T. and her father against J.K. for a declaration that the marriage was a nullity. It was contended that the solemnization was invalid because of the false declarations made by J.K.

* Original Side Appeal No. 63 of 1936.

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Held: (i) On a proper construction of sections 4, 5 and 77 of the Act the marriage, having been solemnized by an official authorised by law in that respect, could not be declared void in the circumstances of the case.

(ii) There is no provision in Part V or in any other portion of the Act which rendered the marriage illegal by reason of the said false declarations, though J.K., having by such false declarations, induced the Marriage Registrar to solemnize the marriage rendered himself liable to severe punishment under section 66 of the Act.

APPEAL from the judgment and decree of GENTLE J., dated 25th August 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 151 of 1935.

[The trial Judge, GENTLE J., after stating the facts and the points for decision, discussed the evidence and proceeded as follows as regards the questions of law involved in the case :—]

It is necessary to consider several sections of the Indian Christian Marriage Act of 1872. Under section 4: "Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void." The next following section, section 5, so far as it is material for this matter, provides thus: "Marriages may be solemnized in India . . . (4) by, or in the presence of, a Marriage Registrar appointed under this Act." As I have said, the Registrar in question here, it is admitted, is appointed under the provisions of this Act, and section 7 authorises the Local Government to make such appointment. The part of the Act in question is Part V which deals with marriages solemnized by, or in the presence of, the Marriage Registrar. Section 44 enacts that the provisions of section 19 apply to every marriage under this part where either of the parties is a minor; section 19 enacts that the father of a minor may give consent to the minor's marriage and "such consent is hereby required for the same marriage unless no person authorised to give such consent be resident in India". Therefore it would

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seem *prima facie* that the consent of the father is essential to the validity of this marriage. Section 38 is to the effect that when a marriage is intended to be solemnized one of the parties shall give notice in writing in the form contained in the first schedule to the Act to any Marriage Registrar of the district within which the parties live. Under section 39 the Marriage Registrar shall on receiving such a notice, when one of the parties intending marriage is a minor, within twenty-four hours send copies to the other Registrars. Then it becomes necessary for a certificate for the marriage to be issued by the Registrar to one or the other of the parties, and in order to obtain that an oath has to be made. Section 41 provides that the Marriage Registrar shall issue such certificate upon an oath being made, provided there is no lawful impediment, and provided also where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired. Section 50 provides that the certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in a particular form; and section 51 says, so far as the words are necessary for this case: "After the issue of the certificate of the Marriage Registrar, . . . marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt." When once the certificate is issued, the marriage may take place. It seems to me that, whatever may have been stated in the notice or given on oath in regard to the age or residence of a party, when once that certificate has been issued and the marriage ceremony is performed, thereafter that marriage is a subsisting marriage provided there is no lawful impediment.

It is true that the Act provides that the consent of the father is required to the marriage and also that the proper address of the parties should be given; but nowhere in the Act is there any provision that, if the father's consent in the case of a minor is not given or a wrong address is supplied in order to obtain a certificate from a particular Registrar, the marriage following these irregularities is a marriage which is void. The Act, in Part VII, does provide for penalties by way of imprisonment when wrong information is given and an oath is taken by a party which is false and also when the Registrar is derelict in the carrying out of his duties. It follows that, when these

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requirements of the Act are not followed, there is sanction provided in Part VII of the Act itself, namely, various punishments to which it is unnecessary for me to refer in detail.

It is not without interest to consider the position according to the law of England. Mr. Coelho agrees that although the English Statute, and I shall refer to it in a moment, provides that the father's consent is necessary when there is the father and a minor is about to be married, yet when a marriage ceremony has been performed, whether it be in a church or in a registry office, one of the parties being a minor and the father's consent not being given, that marriage is a subsisting marriage and cannot be set aside or declared to be invalid because of the absence of the father's consent; see *Plummer v. Plummer*(1). Section 10 of the Marriage Act of 1836 provides thus: "After the said 1st day of March the like consent" (i.e., father's consent in this case) "shall be required to any marriage in England" solemnized in the way indicated in the section. The wording of section 19 of the Indian Act is, "the father . . . of a minor . . . may give consent to the minor's marriage, and such consent is hereby required for the same marriage . . ." The wording of these two sections is very similar. But the matter does not rest there. One has also to refer to section 77 of the Indian Act which is as follows: "Whenever any marriage has been solemnized in accordance with the provisions of sections 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely:—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law:

(4) the time and place at which the marriage has been solemnized: . . ."

Mr. Coelho says that the word "irregularity" in the section does not include fraudulent misstatements made to the Registrar giving the age of one of the parties as having attained majority when in fact that party is a minor and giving a wrong address in order to give jurisdiction to the Registrar to celebrate the marriage. But on an examination of the New English

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Dictionary one finds that "irregularity" is defined as "deviation from, or violation of, a rule, law or principle; an irregular, lawless or disorderly act". Mr. Coelho says that an irregularity is something far less than intentional misstatements of the nature I have indicated. In my view that is a wrong contention. An irregularity can be a lawless act or something less in the light of the definition in the dictionary. The failure to obtain a father's consent to a minor's marriage and making misstatements concerning the age of a party and giving wrong addresses are lawless acts and therefore irregularities. Mr. Coelho further says that the irregularity as to consent is different to the irregularity as to place of residence in the statement. He contends that since section 19 enacts that the consent by a parent or guardian is required for the marriage of a minor, a misstatement regarding the minor's age is fatal to the legal celebration of the marriage. A false statement that a party is of full age is equivalent to a false statement that the necessary consent to a minor's marriage has been given; see *Attorney-General v. Severne*(1). Correct statements regarding place of residence must be given, under section 38, to the Registrar of the District in which each of the parties lives. A Registrar to whom such notice is given is authorised under section 41 to issue a certificate for celebration of the marriage after the fulfilment of other requirements, which it is unnecessary to mention. Unless such certificate is issued a marriage cannot take place and the giving of false information regarding a party's place of residence enables a certificate to be obtained from a Registrar who would not but for the misstatement regarding the dwelling place be authorised to give a certificate. The certificate would not have been issued unless misstatements regarding both age and residence had been made and when it is issued the marriage can be celebrated. There is no difference between either irregularity and section 77 provides that when celebrated a marriage shall not be void on account of either of such irregularities. Further, under section 10 of the Indian Act it is provided that every marriage shall be solemnized between the hours of six in the morning and seven in the evening. The language of that section is equally as mandatory as is the language of section 19 dealing with the requirement of the father's consent. Yet section 77 provides that any irregularity

(1) (1844) 1 Coll. 313; 63 E.R. 435.

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in respect of the time at which the marriage has been solemnized shall not of itself make the marriage void. Mr. Coelho says that an irregularity of that kind can be cured and it does not go to the root of the marriage. How a marriage celebrated at 8 o'clock in the evening when it should have been celebrated before 7 o'clock according to the provisions of the Act is an irregularity which can be cured, he has entirely failed to tell me; it is impossible to imagine such irregularity being cured. The matters which go to the root of every marriage are considerations such as the consanguinity of the parties and the survival of a previous spouse of one of the parties during the subsistence of the earlier marriage. If either of these elements is present, it goes to the root of, and is a lawful impediment to, the marriage itself. Although the Act provides that the consent of the father is necessary when a party is a minor, and that the proper address should be given, these two matters to my mind do not go to the root of a marriage and are not lawful impediments to it. The Act provides sanctions when the sections dealing with these matters are infringed. This marriage was performed at St. Thomas' Mount by the Registrar duly appointed for that district, there being no lawful impediment to such marriage. In my view it is a marriage which is not void. There are no grounds in this suit justifying the Court finding that this marriage should be set aside. It follows that this suit fails and is dismissed with costs.

T. R. Venkatarama Sastri and T. Krishnarajan
for appellants.

F. S. Vaz for *T. A. Srinivasan* for respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The appellants, who are father and daughter, were plaintiffs in the Court below. They sued for a declaration that the marriage of the second appellant to the respondent solemnized before the Registrar of Marriages at St. Thomas' Mount on 17th July 1934 is a nullity. The parties are all Indian Christians. At the time of the marriage the second appellant was eighteen and a half years of age, and was a student at the Women's Christian College, Madras. Both she

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and the respondent who had attained his majority at the time were resident in Madras. The respondent gave notice of the marriage to the Registrar at St. Thomas' Mount and falsely declared before him that the second appellant was of age. There being no impediment to the marriage it was duly solemnized on the date mentioned. The learned Judge declared for the validity of the marriage. The appellants challenge this decision on the ground that it conflicts with the express provisions of the Indian Christian Marriage Act of 1872. It is therefore necessary to examine the relevant sections of that statute.

Section 4 provides that every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of section 5; and any such marriage solemnized otherwise than in accordance with such provisions shall be void. Section 5 states that marriages may be solemnized, *inter alia*, by a Marriage Registrar appointed under the Act. The marriage in question having been solemnized before a Marriage Registrar, it is necessary to turn to Part V of the Act, which commences with section 38. This section states that, when a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the prescribed form to a Marriage Registrar of the district within which the parties have dwelt; or, if the parties dwell in different districts, they shall give notice to the Registrar of each district, and shall state therein the name and surname, and the profession or condition of each of the parties

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intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized. The notice given by the respondent in this case stated that both the parties resided at St. Thomas' Mount, and was, therefore, deliberately false. On receipt of the notice, the Registrar shall under section 39 publish it, and under section 40 enter it in the Marriage Notice Book. Section 41 provides that if the party by whom the notice was given requests the Marriage Registrar to issue the certificate mentioned in the section and if one of the parties intending marriage has made oath as required, the Marriage Registrar shall under his own hand issue a certificate of such notice having been given and of such oath having been made. There are several provisos to this section but it is only necessary to refer to the last of them which says that if one of the parties is a minor the certificate shall not be issued until fourteen days after the entry of the notice have expired. Turning to section 42 we find that the certificate shall not be issued by a Marriage Registrar, until one of the parties intending marriage appears personally before him, and makes oath—

"(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has had their, his or her usual place of abode within the district of such Marriage Registrar, and, where either or each of the parties is a minor,

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that

there is no person resident in India authorised to give such consent, as the case may be."

Section 19 of the Act requires, in the case of a minor's marriage, the consent of the father, if living, or, if the father be dead, of the guardian of the person of such minor, and, in case there is no such guardian, then of the mother of the minor. This is made applicable to marriages under Part V of the Act by section 44. The respondent took the oath required by section 42 and made two false declarations in the course of his statement: (i) that the second appellant was of age and (ii) that the parties lived within the district. By section 51, after the issue of the certificate of the Marriage Registrar, the marriage may, if there be no lawful impediment to the marriage of the parties described in the certificate, be solemnized between them, according to such form and ceremony as they think fit to adopt. Now, in this case, as the result of the false declaration which the respondent made, he obtained a certificate which entitled him and the second appellant to be married, there being in it no statement showing any lawful impediment to the marriage. The last section we need refer to is section 77 which states that, whenever any marriage is solemnized in accordance with the provisions of sections 4 and 5, it shall not be void merely on account of any irregularity in respect *inter alia* of the following matters:

"(i) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law:

(ii) the notice of the marriage:".

It is not disputed that the marriage was solemnized by the Registrar on 17th July 1934.

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But it is said that the solemnization was invalid because of the false declaration which the respondent made. This argument, however, ignores the provisions of sections 4 and 5 and would read into Part V provisions which are not there. The Registrar who solemnized this marriage was authorised by law to solemnize it, and having been solemnized by an official authorised in this respect it cannot be declared to be void under section 4. As I have pointed out, there was no lawful impediment shown in the certificate issued by the Registrar and therefore there was nothing to prevent the Registrar solemnizing the marriage. The respondent of course induced the Marriage Registrar to solemnize this marriage as the result of a false declaration and he has rendered himself liable to severe punishment under section 66 of the Act, but that is a quite different thing from saying that under the provisions of the Act this marriage is not lawful. There is no provision in the Act which renders this marriage illegal by reason of the false declaration of the respondent. The law is the same in England, and the Indian Christian Marriage Act of 1872 follows English legislation of a similar nature. The parties were in a position to contract a lawful marriage and such a marriage was solemnized by the Registrar in accordance with the provisions of the Act.

For these reasons we think that the decision of the learned trial Judge was correct, and the appeal will accordingly be dismissed with costs.

G.R.

APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Varadachariar.*

C. MUNISWAMI NAIDU (DEBTOR-RESPONDENT), APPELLANT,

v.

S. RANGACHARI AND ANOTHER (CREDITOR-PETITIONER AND
NIL) RESPONDENTS.*

Presidency-towns Insolvency Act (III of 1909), sec. 9—Commission of act of insolvency as defined by the Act—Condition precedent to adjudication—Agreement between creditor and debtor that failure by the latter to pay an instalment should be treated as an act of insolvency—Debtor, if estopped from pleading to the contrary—Suspension of payment of debt—Notice of—Amounts to an act of insolvency, if and when.

A debtor had agreed with his creditor to treat the failure to pay any instalment due under a mortgage as a suspension of payment within the meaning of section 9 of the Presidency-towns Insolvency Act. On default, a petition for adjudication was presented stating, *inter alia*, that the debtor had committed an act of insolvency under section 9 in that he had suspended payment as per the terms of the above agreement. On the question whether the debtor was estopped from raising any contention to the contrary,

held: (i) The law of estoppel does not operate and cannot operate to prevent the provisions of the Presidency-towns Insolvency Act having effect. (ii) It is an act of insolvency if the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts generally; it is not enough if the notice is with respect to a particular debt. (iii) What the Court has to consider is whether an act of insolvency as defined by the Act has been committed, and in deciding the question it can only look at the provisions of the Act.

The agreement between the parties cannot be deemed to constitute the non-payment an act of insolvency.

* Original Side Appeal No. 73 of 1936.

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APPEAL from the order and judgment of WADSWORTH J., dated 5th October 1936 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 293 of 1936 in Insolvency Petition No. 363 of 1936 (in the matter of C. Muniswami Naidu, an insolvent).

A. V. Viswanatha Sastri for *M. S. Srinivasaraghavan* for appellant.

E. R. Krishnan for first respondent.

Second respondent not represented.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—In 1935 the appellant was indebted to one S. Rangachari in the sum of Rs. 317-12-0 (in respect of which a decree had been obtained against him) and a sum of over Rs. 2,000 due under a promissory note. In execution of the decree the creditor attached a house belonging to the appellant. The attachment continued for more than twenty-one days and this was made the basis of a petition filed in February 1936 in this Court asking that the appellant be adjudicated an insolvent. This petition was withdrawn in April of that year as the result of an arrangement made between the parties. It was agreed that the appellant should execute a mortgage in favour of Rangachari to secure his indebtedness to him and that the appellant should repay this debt in the following instalments : Rs. 400 to be paid on or before 15th July 1936 ; Rs. 500 to be paid on or before 15th December 1936 ; and the balance in two equal instalments within a period of one year from 15th December 1936. It was also agreed that in case of default in the payment of any instalment the creditor should be at liberty to take "further"

proceedings in insolvency. It was also provided in the document which was drawn up that

"the mortgagor shall not raise any objection thereto and this act of default itself will then be treated as an act of insolvency on the part of the mortgagor as amounting to a suspension of payment within the meaning of the Act".

It was on these terms that the petition for adjudication was dismissed.

The appellant failed to pay the first instalment and on 15th August 1936 his creditor filed a fresh petition for adjudication. In this petition three acts of insolvency were alleged : (i) that the insolvent had suspended payment

"as per the terms of the said deed of 17th April 1936 and had thus committed an act of insolvency under section 9", (ii) that he had departed from his dwelling house with intent to delay his creditors and (iii) that he had secluded himself so as to deprive the creditors of the means of communicating with him. The learned Judge before whom the petition came ordered the adjudication of the appellant on the first ground and did not deal with the two other grounds. The learned Judge was of the opinion that, inasmuch as the appellant had agreed to treat the failure to pay an instalment as a suspension of payment within the meaning of section 9 of the Presidency-towns Insolvency Act, he was estopped from raising a contention to the contrary. With great respect, we are unable to concur in this decision.

The law of estoppel does not operate and cannot operate to prevent the provisions of the Presidency-towns Insolvency Act having effect. It is an act of insolvency if a debtor gives notice to any of his creditors that he has suspended or that he

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is about to suspend payment of his debts, but it must be noticed that he is suspending the payment of his debts generally and not that he is suspending the payment of a particular debt. The fact that the insolvent and his creditor had agreed that default in payment of an instalment under the mortgage should be treated as an act of insolvency does not make it incumbent upon the Court to regard it as an act of insolvency. What the Court has to consider is whether an act of insolvency as defined by the Act has been committed, and in deciding the question it can only look at the provisions of the Act. In our opinion, the agreement between the parties cannot be deemed to constitute the non-payment an act of insolvency. The appeal will, therefore, be allowed and the case remanded to the Insolvency Court for investigation of the two other grounds alleged in the petition. We make no order as to costs.

G.R.

APPELLATE CIVIL.

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

T. RAJAGOPALA AYYANGAR (APPLICANT), APPELLANT,

v.

THE COLLECTOR OF SALT REVENUE (OUT PORTS),
MADRAS, (RESPONDENT), RESPONDENT.*

1937,
April 6.

Advocate—Right to be represented by, in a case not coming under O. III, r. (1), of the Code of Civil Procedure (Act V of 1908)—Indian Bar Councils Act (XXXVIII of 1926), sec. 14 (1) (b)—Relevancy of, to such a case—Specific Relief Act (I of 1877), sec. 45—Writ of prohibition—Civil Services (Classification, Control and Appeal) Rules—Rr. 49 and 55—"Direct an enquiry" and "Officer conducting the enquiry" in R. 55—Meaning and import of—Power of Collector to conduct enquiry when under R. 49 only censure and suspension could be inflicted by him—Power of Central Board of Revenue to dismiss on the materials collected by Collector in such enquiry—Repugnancy to sense of justice, if—"To be heard in person" in R. 55—Meaning of—Right of person charged to be represented by an Advocate in such enquiry—Absence of.

Under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, the Collector of Salt Revenue, Madras, was conducting an enquiry into certain charges against an Assistant Commissioner of Salt and Customs who was appointed to that post by the Central Board of Revenue. The said Assistant Commissioner took out an application in the Original Side of the High Court under section 45 of the Specific Relief Act for an order restraining the Collector by a writ of prohibition from conducting or holding or proceeding with the enquiry into his conduct on the following among other grounds: (i) The body which had authority to remove, dismiss or reduce him was the Central Board of Revenue which appointed him to that post and the enquiry should be held by them and not by the Collector, and (ii) he was entitled to be represented at the

* Original Side Appeal No. 19 of 1937 and Civil Miscellaneous Petition No. 1058 of 1937.

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enquiry by an Advocate, and, that having been denied to him, the enquiry was not in conformity with the provisions of law. The Central Board of Revenue has by delegation by the Governor-General in Council the power to impose the penalties contained in Rule 49 of the Civil Services (Classification, Control and Appeal) Rules, which are seven in number, including dismissal, and only two of them, viz., censure and suspension, could be imposed by the Collector.

Held: (i) The words, "direct an enquiry" and "Officer conducting the enquiry", in Rule 55 clearly indicate that the Collector has also got the power to conduct the enquiry, though he is empowered to inflict only suspension or censure, and if the case is such that it should be dealt with by the Central Board of Revenue, the latter could act on the materials collected by the Collector during the course of the enquiry, and there is nothing repugnant to a sense of justice that the person charged should defend himself with his witnesses before one tribunal and be dismissed by another body of authority which has not had the advantage of hearing the witnesses or observing their demeanour.

(ii) The words "to be heard in person" in Rule 55 must be given their natural and ordinary meaning, which is inconsistent with appearance by agent or Counsel, and in this case, which does not come under Order III, rule (1), Civil Procedure Code, the question is not whether an Advocate under section 14 (1) (b) of the Bar Councils Act has got a right to appear in those proceedings but whether the person charged has got a right to be represented by an Advocate.

In re Prince Blucher. Ex parte Debtor(1) and *The Queen v. Mansel Jones*(2) relied on.

APPEAL from the judgment and order of GENTLE J., dated 26th February 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 349 of 1937.

K. S. Jayarama Ayyar (with him K. Venkataraghavachari and V. K. Parthasarathy Ayyangar) for appellant.—The enquiry should be held by the Central Board of Revenue

(1) [1931] 2 Ch. 70.

(2) (1889) 23 Q.B.D. 29.

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which alone has authority to remove, dismiss or reduce the appellant and not by the Collector. The appellant was appointed to his post by the Central Board of Revenue. Under section 96-B (1) of the Government of India Act no person in the service of the Crown in India can be dismissed by any authority subordinate to that by which he was appointed. So the Collector of Customs has no power to dismiss the appellant. The Governor-General in Council has delegated the power to impose certain penalties (seven in number) enumerated in Rule 49 of the Civil Services (Classification, Control and Appeal) Rules. The Collector of Customs has power only to censure or suspend and no power to impose other penalties, such as, dismissal, etc. So the enquiry under Rule 55 could be conducted only by the Central Board of Revenue. The learned trial Judge laid undue stress on the words "direct" and "office" as indicating an intention that the enquiry could be held by some one other than by the "authority concerned" (which is the Central Board of Revenue in this case). If there is any ambiguity in the meaning of the words, the benefit should be given to the appellant. It is repugnant to all ideas of justice that when grave offences entailing dismissal are concerned the enquiry should be conducted by one body and the order should be made by another body which has had no opportunity of observing the demeanour of the witnesses and in such a case the order could be based only on a perusal of the oral and documentary evidence and the report; see *In re Chandi Charan Dey*(1) and *In the matter of Southekal Krishna Rao*(2). The next grievance which the appellant has is that he has been denied the right to be represented at the enquiry by an Advocate. There was always a common law right in a party to be represented by an agent. Perhaps it might be too high if it is contended that a party had also a common law right to appear through an Advocate. Section 14 of the Indian Bar Councils Act gives an unqualified right to an Advocate to appear. Unless otherwise provided, an Advocate has, as of right, a right to practise. It is not necessary that a corresponding legal right should exist in a party to appear by an Advocate. The words, "heard in person", in the Civil Services (Classification, Control and Appeal) Rules do not deny such a right to a party but are merely put in

(1) (1908) 12 C.W.N. 842.

(2) (1887) I.L.R. 15 Cal. 152 (P.C.).

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in contradistinction to "being heard on paper". Order III, rule 1, Civil Procedure Code, merely deals with the manner of appearance. Rule 55 of the Civil Services (Classification, Control and Appeal) Rules gives power to the "officer" to receive evidence and sections 4 and 5 of the Indian Oaths Act give power to the "officer" conducting the enquiry to administer oaths. He is in the nature of a quasi-judicial tribunal. *Queen-Empress v. Tulja*(1) has been dissented from in *Atchayya v. Gangayya*(2).

Advocate-General (Sir A. Krishnaswami Ayyar) with N. Rajagopalan for respondent.—The first point deals with the power of the Collector of Customs to conduct the enquiry. The "officer conducting the enquiry" need not be the "authority concerned" mentioned in the previous clause; and the words are wide enough to cover persons other than the Central Board of Revenue. There is no repugnance to any sense of justice in the procedure intended to be adopted. Section 14 of the Legal Practitioners Act permits such a procedure; see *In re Rasik Lal Nag*(3). This was followed in *Re Mahendra Lal Roy*(4). See also *Local Government Board v. Arlidge*(5). The Public Servants (Inquiries) Act deals only with certain classes of public servants who are not removable except with the consent of Government. Every public servant cannot demand an enquiry under the Act.

[The CHIEF JUSTICE.—You need not address us further as regards the first point.]

The question in this case is whether the appellant has got a right to be represented by an Advocate. What is the right that is claimed by the appellant in this case? Is it the right of the Advocate to appear or the right of a client to instruct an Advocate to appear for him? The Indian Bar Councils Act does not confer such a right on a client. Section 14 (1) (b) of the said Act deals only with the rights of Advocates. Before an Advocate can exercise his right to appear for a client, he (the Advocate) has got to be appointed by the client which can only happen if he (the client) has a right to be represented by an Advocate. The scheme of Legislature has been to confer a right on a client to be represented by an Advocate whenever

(1) (1887) I.L.R. 12 Bom. 36.

(3) (1916) I.L.R. 44 Cal. 639, 647. (2) (1892) I.L.R. 15 Mad. 138 (F.B.).

(4) (1922) 27 C.W.N. 88, 91.

(5) [1915] A.C. 120, 132, 133, 134.

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it wants to confer such a right. The mere fact that a particular body exercises quasi-judicial functions does not entitle a party to instruct an Advocate to appear for him in the proceedings before it. Such a right would be available to a party only if specifically given by the statute; see section 30 of the Indian Railways Act of 1890, section 14 of the Trade Disputes Act (VII of 1929), section 14 of the Workmen's Compensation Act (VIII of 1923), section 76 of the Patents and Designs Act, section 31 of the Native Converts Marriage Dissolution Act, Order III, rule 1, and Order XXXIII, rule 3, of the Code of Civil Procedure, and section 340 of the Code of Criminal Procedure. In *In re Prince Blucher. Ex parte Debtor*(1) the words "signed by the debtor" appearing in sub-section 1 of section 16 of the Bankruptcy Act, 1914, were held not to connote the idea conveyed by the words "signed by a person duly authorized by the debtor". In *The queen v. Assessment Committee of Saint Mary Abbots, Kensington*(2) the party had a right to have his objections heard. It was construed as not being confined to "hearing the objectors only". So it was held that the objections could be heard when mentioned by an agent, Counsel, etc. In *The Queen v. Mansel Jones*(3) the words "shall give him an opportunity of being heard by himself" were construed to exclude the right of being heard by agent, Counsel or Solicitor.

[The CHIEF JUSTICE.—At common law, in criminal cases, even when all the forces of the Crown were arraigned against an accused, he had to appear himself and conduct the trial. Later on, he got the right to have the assistance of Counsel on questions of law. Later, he got the right as regards facts also. How did it happen?]

In *Ex parte Death*(4) the right to appear by Counsel was negatived. In *The King v. The Sheriffs of York*(5) the right to appear by attorney was negatived. Before the Statute of Merton no person could appear by an attorney. See also Halsbury's Laws of England, Hailsham's Edn., Vol. II, section 680. If section 14 of the Bar Councils Act is construed as

(1) [1931] 2 Ch. 70.

(2) [1891] 1 Q.B. 378.

(3) (1889) 23 Q.B.D. 29, 34.

(4) (1852) 18 Q.B. 647; 118 E.R. 244, 249.

(5) (1832) 3 B. & Ad. 770; 110 E.R. 282.

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giving such a right to the client, the latter portion of the section would be unmeaning.

K. S. Jayarama Ayyar in reply.—Excepting the Trade Disputes Act, all the other Acts were before the passing of the Indian Bar Councils Act. Section 4 of the Legal Practitioners Act may be compared with section 14 of the Indian Bar Councils Act. The latter Act gives more extended powers on Advocates by including within its ambit other tribunals and persons allowed by law to take evidence. Order III, rule 3, Civil Procedure Code, gives only a statutory definition of appearance. The present case is similar to *The Bewdley* case(1). In *The Queen v. Mansel Jones*(2) the words "heard by himself" restricted the scope of appearance. In the present case the Act uses the words "heard in person" as opposed to being "heard by a written statement". The words "heard in person" include a right to be represented by Counsel. In *Pallonji Merwanji v. Kallabhai Lallubhai*(3) it was held that in judicial enquiries a party was entitled to have such professional assistance as he wanted. When the appellant says that he wants to be "heard in person" as opposed to being "heard by written statement" the enquiry starts. It is only after this stage the judicial enquiry starts and the client has the right to be represented by an Advocate from this stage onwards and not in the previous stages.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This appeal is from an order passed by GENTLE J. on two applications under section 45 of the Specific Relief Act praying for an order restraining the Collector of Salt Revenue, Madras, by a writ of prohibition from conducting or holding or proceeding with an enquiry into the conduct of the two applicants. The appellant was the applicant in Application No. 349 of 1937. The order passed by GENTLE J. covered the contentions of both the applicants which were identical.

(1) (1869) 1 O'Mall. & H. 174.

(2) (1889) 23 Q.B.D. 29.

(3) (1887) I.L.R. 12 Bom. 85.

An interim injunction had been granted on 8th February. GENTLE J. by his order dissolved that injunction, discharged the rule *nisi*, and dismissed the applications.

The appellant is an Assistant Commissioner of Salt and Customs, Central Division, Madras, to which office he was appointed on 16th March 1936, before which date he was Inspector of Salt and Customs, Negapatam. Certain charges had been made against the appellant and an enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules was proceeding on the date of the applications, the enquiry being conducted by the Collector of Salt Revenue, Madras, Mr. H. Greenfield. Previously, on 5th November 1936, Mr. Greenfield ordered the suspension of the appellant pending investigation of his conduct, and that of the other applicant before GENTLE J., whilst in charge of Karaikal frontier, Negapatam Circle. The applicant, as already stated, sought to restrain the Collector by a writ of prohibition from proceeding with the enquiry. The applicants alleged that the enquiry was irregular and contrary to law in the following respects, viz., (a) the body which has authority to remove, dismiss or reduce the applicants is the Central Board of Revenue and the enquiry should be held by them and not by the Collector of Customs (Salt Revenue), (b) the applicants are entitled to be represented at the enquiry by an Advocate, and this having been denied to them, the enquiry is not in conformity with the provisions of law, and (c) they have not had communicated to them in respect of the charges made against them a statement of the allegations on

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which each charge was based. In the appeal, ground (c) was not pressed by the appellant.

I do not propose to set out in this judgment in detail all the facts or all the relevant rules of the Civil Services (Classification, Control and Appeal) Rules, because they have been fully set out in the judgment of the learned trial Judge ; I will refer only to those which are absolutely necessary for the disposal of the questions before us.

With regard to ground (a), section 96-B (1) of the Government of India Act says that no person in the service of the Crown in India may be dismissed by any authority subordinate to that by which he was appointed ; and it is common ground that the appellant was appointed by the Central Board of Revenue. Therefore he can only be dismissed by that authority and not by the Collector of Customs and the Central Board of Revenue cannot delegate that power to the Collector of Customs. The Central Board of Revenue has by delegation by the Governor-General in Council the power to impose the penalties contained in Rule 49 of the Civil Services (Classification, Control and Appeal) Rules. They are seven in number including dismissal, and only two of them, viz. (i) and (v)—censure and suspension—may be imposed by the Collector of Customs. It follows, therefore, that if charges of a sufficiently grave nature as to justify dismissal are proved, only the Central Board of Revenue has the power to order it, and this is the foundation for the argument in support of point (a), which is, that it is only the authority having the power to dismiss the servant that can hold the

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enquiry under Rule 55, and upon this point we have had addressed to us a very careful and learned argument by Mr. Jayarama Ayyar. The learned trial Judge has to a large extent based his view upon the words of Rule 55, and it is, that the rule contemplates an enquiry by some authority other than the Central Board of Revenue (the authority having the power of dismissal, removal or reduction). By Rule 55 of the Civil Services (Classification, Control and Appeal) Rules the member of the service is to be given an adequate opportunity of defending himself, and the grounds on which it is proposed to take action are to be reduced to the form of a definite charge or charges which must be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders in the case. The person charged is required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person. Here follow some words which the learned trial Judge considers have a very material bearing upon the question, viz.,

“if he so desires or if the authority concerned so direct, an oral enquiry shall be held”.

GENTLE J. considers “the authority concerned” to be the Central Board of Revenue and lays emphasis upon the fact that this authority can “direct” an oral enquiry to be held and is of the opinion that, if the rule contemplated that only the authority concerned should hold the enquiry, the wording of the rule would have been different

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and it would have read "an oral enquiry shall be held by them" or "by the authority concerned". In my opinion, the words "direct an oral enquiry" indicate that it is some one else that is to hold the enquiry, although of course it may be argued, not unreasonably, that an authority may issue a direction that something is to be done and itself do it. For instance, a Court may direct an examination of certain witnesses and may, and frequently does, conduct such examination. But in my view the words indicate the former rather than the latter intention. They mean, I think, that the Central Board of Revenue may, even in cases where the person charged may not desire an oral enquiry, nevertheless direct that there shall be one. Further light is thrown upon the meaning of the rule by the words which follow later :

"Provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness."

GENTLE J. considers that this indicates that the enquiry is to be held by some person other than the authority concerned. I agree and think that, had the latter body been in contemplation, the words "authority concerned" would have appeared instead of "the officer". Mr. K. S. Jayarama Ayyar has argued strenuously to the contrary on the ground that it is fundamentally wrong that any person should defend himself with his witnesses before one tribunal and be dismissed by another body of authority which has not had the advantage of hearing the witnesses or observing their demeanour, that, when so grave a penalty as dismissal is involved, the dismissing authority should not exercise its powers merely on an

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examination of the record before them and the report of the officer conducting the enquiry, and he also contends that the words of Rule 55 are not either expressly or by implication clear enough to support the learned trial Judge's view, and that, if there is any ambiguity in the words, the benefit should be given rather to the person charged than to the respondent. On the first point, it seems to me that there is nothing repugnant to a sense of justice in the procedure objected to by Mr. Jayarama Ayyar. If the Collector with or without an enquiry imposes the penalties which he is empowered to inflict, e.g., suspension or censure, the servant has a right of appeal against such order to the Central Board. If there is an enquiry by him, the Board will have the necessary information before them to exercise such powers as are vested in them regarding penalties. They will have the finding of the officer who conducted the enquiry upon the evidence and, from any order which they may pass, the person charged has a right of appeal to the Governor-General in Council, and Indian legislation has recognized that there is no injustice in the procedure so strongly criticised by Mr. Jayarama Ayyar, and, to give one instance of a statute which empowers one tribunal to conduct the enquiry and another to inflict the penalties, the Indian Bar Councils Act (section 10) and others were cited, but Mr. Jayarama Ayyar refers to *In re Chandi Charan Dey*(1). There, it was held that, before proceeding to declare a person to be a tout, the District Magistrate should himself make an enquiry as to the person's antecedents and give

(1) (1908) 12 C.W.N. 842.

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him an opportunity to show cause. There, a Sub-divisional Officer called on a person to show cause why he should not be declared a tout and he showed cause and the Sub-divisional Officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate and the latter after perusing them passed orders declaring the person to be a tout ; and it was held that the order should be set aside. It must be observed however that that case was a decision on section 36 of the Legal Practitioners Act as it then stood, but by Act XV of 1926 the words "or to the satisfaction of any subordinate Court" were added to the words as they stood before the amendment, i.e. :

"Every High Court, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue Officer, not being below the rank of a Collector of a District, and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court and the Courts, if any, subordinate thereto) may frame and publish lists of persons proved to their or his satisfaction,".

These are important words, because at that date the case had to be proved to the satisfaction of the Court publishing the list of touts, whereas by reason of the amendment referred to a Court subordinate to the Court inflicting the penalty is empowered to find on the question of proof. In *the matter of Southekal Krishna Rao*(1) was also cited by Mr. Jayarama Ayyar. There, a charge of unprofessional conduct brought against a legal practitioner, holding a certificate under Act XVIII of 1879, having been found to be established by a subordinate Court which also considered that he

(1) (1887) I.L.R. 15 Cal. 152 (P.C.).

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in consequence should be dismissed and the same having been reported in conformity with section 14 of that Act to the principal Court in the province, such dismissal was ordered and it was held however that the practitioner could not be dismissed or suspended under that section without his having been allowed under section 40 an opportunity of defending himself before that Court. What happened there was that the practitioner was fully heard by the Commissioner of Coorg and the practitioner adduced his evidence which was also heard, and their Lordships expressed the opinion :

"The petitioner had the opportunity of adducing such evidence as he might think fit, and that his complaint on that head was not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report or order : 'I have gone very carefully again through all the papers connected with this case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order or to alter the conclusion arrived at'. He therefore concludes : 'I confirm my former order striking the petitioner off the rolls'. This order was made without the petitioner's having had the opportunity of being heard before the Acting Judicial Commissioner after the evidence had been taken, and in that respect their Lordships are of opinion that there has been a plain irregularity,"

This case, with all respect to Mr. Jayarama Ayyar's argument, is not at all helpful on this point. It is quite clear that one tribunal heard the evidence and that the higher tribunal on that evidence inflicted the penalty, which is the very procedure objected to by Mr. Jayarama Ayyar. Their Lordships do not criticise that procedure in the least. What they do say is that after the evidence had been taken the practitioner was not

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given an opportunity of being heard by the higher tribunal and they refer to the words of section 40 of the Act which reads as follows:—

“Notwithstanding anything hereinbefore contained no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authority *suspending or dismissing him*.”

That makes the position quite plain. Rule 55 however says that

“no order of dismissal, removal or reduction shall be passed on a member of a service . . . unless . . . he has been afforded an adequate opportunity of defending himself”, and the words

“before the authority suspending or dismissing him” are significantly absent. Mr. Jayarama Ayyar has also referred to the Public Servants (Inquiries) Act (XXXVII of 1850). It is conceded of course by him that that Act does not apply to the present case. He relies upon that Act however in support of his argument that, unless there is an express power to delegate to some other body or person the holding of an enquiry into the conduct of a person or persons, such as there is in section 3 of that Act, then, it is the right of every person to defend himself before the authority dismissing him and of placing his evidence before that body. There is however no statutory provision to that effect and in none of the authorities cited by him is it laid down that in the absence of an express power of delegation the enquiry must be held by the authority imposing the penalty, and, as regards the words of Rule 55, I think that the learned trial Judge’s view is correct. I should also add, although this is not a guiding test, that it has not been the practice for such enquiries to be

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conducted by the Central Board of Revenue which is in Delhi and the inconvenience of an enquiry by such an authority is manifest. In the present case, a member or members of the Board—and we are told that there are only two—would either have to come to Madras in order to hold the enquiry or the appellant would have to go to Delhi with all his witnesses.

With regard to point (b), namely, the right of the appellant to be represented by Counsel, Mr. Jayarama Ayyar relies upon section 14 (1) (b) of the Bar Councils Act which reads as follows:—

“An Advocate shall be entitled as of right to practise . . . (b) save as otherwise provided by sub-section 2 or by or under any other law for the time being in force, in any other Court in British India and before any other tribunal or person legally authorised to take evidence.”

Under Rule 55 the person holding the enquiry is legally authorised to take evidence and hence he argues that an Advocate is entitled as of right to appear at such an enquiry. But the Advocate-General argues that the real question is not whether an Advocate has a right to appear but whether his client has a right to be represented by him, that is to say, is the enquiry one at which the person charged is entitled to appear at all, or to appear in person only, or by himself or by his agent? Mr. Jayarama Ayyar has conceded that there is no right at common law to appear by an agent and the Advocate-General argues that there is no such general right and that the scheme of the Indian Legislature is to confer only a special right to be represented by an Advocate or agent such as that given by section 340 of the Criminal Procedure Code. Such a statutory right is also given under Order III, rule 1, Civil Procedure

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Code. Also, Order XXXIII, rule 3, enables a person to present an application through an authorised agent if he is exempted from appearing in Court. Section 31 of the Native Converts' Marriage Dissolution Act entitles a person to appear by his Advocate in cases under that Act. Section 76 of the Patents and Designs Act is another instance in point. So also are, section 30 of the Railways Act of 1890, section 14 of the Trade Disputes Act and section 24 of the Workmen's Compensation Act. There is very little authority in the shape of decisions but the Advocate-General cites a case where the Court denied the right of a person to appear except by himself, viz., *In re Prince Blucher. Ex parte Debtor*(1). By section 16, sub-section 1, of the Bankruptcy Act, 1914, where a debtor intends to make a proposal for a scheme of composition in satisfaction of his debts he shall within the time thereby limited lodge with the Official Receiver a proposal in writing signed by him, etc. In that case, the debtor was unable through serious illness to sign the proposal which was signed on his behalf by his solicitors and nevertheless it was held that the words "signed by him" were explicit and consequently no proposal for a composition had been lodged within section 16, sub-section 1, of the Act. He distinguishes the case of *The Queen v. Assessment Committee of Saint Mary Abbots, Kensington*(2), cited in the trial Court, on the ground that there the statute, namely, the Union Assessment Committee Act of 1862, provides that the Assessment Committee ought to hear and determine the objections of any person aggrieved by a valuation list, not that they are to

(1) [1931] 2 Ch. 70.

(2) [1891] 1 Q.B. 378.

hear the objectors only. LORD ESHER M.R. at page 382 speaking of the Assessment Committee says :

"The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorises them to limit, as they have done, the rights of persons to whom the Legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorised by them."

Another case referred to by the Advocate-General is *The Queen v. Mansel Jones*(1). The decision there turned upon the words of section 38 of the Corrupt and Illegal Practices Prevention Act, 1883. There, before a person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed, is reported by an Election Court to have been guilty of any corrupt or illegal practice, the Court shall cause notice to be given to him and, if he appears,

"shall give him an opportunity of being heard by himself, and of calling evidence in his defence to show why he should not be so reported".

It was held that this section excluded the person's right to be heard by his Counsel or solicitor. On page 32 LORD COLERIDGE C.J. says :

"As I have often said in this Court, I prefer that mode of construing a statute by which you look at the words used, and, if they are plain, give effect to them, to the mode of construction by which you first satisfy yourself what Parliament ought to have meant and then interpret the statute by saying that it has so said. Here the Act has said as plainly as possible that the person shall be heard 'by himself'. I am of

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opinion that those words exclude him from being heard either by Counsel or solicitor."

There being no common law right to be represented by Counsel, if there are statutes directing how a person is to be heard as in the case referred to, then the words of the statute alone afford a solution of the question. Are there any words in Rule 55 which sufficiently clearly show how the person charged may appear at the enquiry? The rule provides that the person charged shall be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard *in person* and that he is entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish. In my view, the words "to be heard in person" must be given their natural and ordinary meaning; and the other provisions already referred to appear to me to be consistent with an appearance in person and not by agent or Counsel and, adopting the method of construing a statute preferred by LORD COLERIDGE C.J. in *The Queen v. Mansel Jones*(1), I look at the words used which appear to me to be sufficiently plain to give effect to them. That being so, in my view, they exclude the appellant from being heard by Counsel or otherwise than in person. I agree with the Advocate-General's contention and the view of the learned trial Judge that this question has to be determined not by Counsels' right of audience in inferior Courts but by the right of the client to be represented by him, and any argument based on section 14 (1) (b) of the Bar Councils Act

(1) (1889) 23 Q.B.D. 29.

therefore does not assist the appellant. If there is any hardship caused to the appellant by his being deprived of the assistance of Counsel, though I do not think that there is in the present case, the construction of a statute is not to be governed by any such consideration. In my view, the appeal fails and must be dismissed. No costs.

CORNISH J.—I am of the same opinion. Rule 55 of the Civil Services (Classification, Control and Appeal) Rules provides for the case of a departmental inquiry into charges against a Government servant, who is subject to the Rule, independently of the formal and public inquiry which might be held under the Public Servants (Inquiries) Act. The rule contains a safeguard. None of the graver penalties—dismissal, removal or reduction—which the Central Board of Revenue, in this instance, is alone empowered to inflict, can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. He may be content to put in a written statement by way of defence to the charges; or, if he so desires or if the authority concerned, which must mean the Central Board, so directs, there is to be an oral inquiry at which evidence can be called and witnesses examined and cross-examined. But the Rule does not state that the Central Board shall conduct the inquiry. Nor is there to be found in the rule any provision, similar to that contained in section 36 (1) of the Legal Practitioners Act, from which it is to be implied that the Board must itself have held the inquiry to enable it to inflict one of the penalties referred to. On the contrary, the allusion in the rule to "the officer

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conducting the inquiry" denotes that the Board is competent to depute some subordinate officer, such as the present respondent, the Collector of Salt Revenue, to hold the inquiry. In short, the purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which is to be departmentally investigated. And so long as the conditions of the rule are followed there seems to be nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the Board itself or by one of its members, but by some subordinate officer deputed by the Board for that purpose. The officer conducting the inquiry is required by the rule to record the evidence and to state his findings and grounds thereof. The Board has, therefore, all the necessary material before it to come to a decision regarding the penalty to be imposed, if it is satisfied that the charge against the Government servant is established; though the Board is not bound to accept the findings of the officer who conducted the inquiry.

With regard to the only other subject of this appeal, I agree that the Government servant in an inquiry under Rule 55 has no right to appear by Counsel and, having no such right, no case for mandamus to the respondent to permit the appellant to have the assistance of Counsel at the inquiry has been made out. There is in British India no common law right in a party to a proceeding to be represented by Counsel. The right, wherever it exists, will be found to be given by enactment. The Advocate's right of audience since the Indian Bar Councils Act depends on

section 14 of the Act. This right, "save as otherwise provided by any other law for the time being in force", includes the right of audience before any tribunal or person legally authorised to take evidence. The officer conducting an inquiry under Rule 55 is clearly a person legally authorised to take evidence. The statutory rule confers on him this authority. But the Advocate's right of audience is necessarily inseparable from his client's right to appear by Advocate before a particular tribunal. If the client is expressly denied the privilege of being heard by Counsel, it is obvious that the Indian Bar Councils Act will not save him from the disability. Rule 55 limits the Government servant's right to be heard "in person". In *The Queen v. Mansel Jones*(1) it was held that a right given by statute to a person to be heard "by himself" meant that he had no right to be heard by anybody but himself; and I think that the right given by Rule 55 to be heard "in person" is similarly restricted to the person of the Government servant. It may be that there is no apparent reason in justice or expediency why a Government servant, who has undoubtedly the right to appear by Counsel in an inquiry into his conduct under the Public Servants (Inquiries) Act, should be deprived of this privilege in an inquiry under Rule 55 when the consequences may be equally serious to him. But this is a consideration which cannot be allowed to affect the plain language of the rule.

G.R.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice
Pandrang Row.

1937,
March 8.

KOTAMBIYAKATH PATHU KUTTI UMMA AND THREE
OTHERS (DEFENDANTS 1 TO 4), APPELLANTS,

v.

THE NEDUNGADI BANK, LIMITED, CALICUT, AND
OTHERS (PLAINTIFF, FIFTH DEFENDANT AND NIL), RESPONDENTS.*

*Mahomedan law—Shafi and Hanafi schools—Wakf under—
Delivery of possession, if necessary to validate a.*

According to both the Shafi and Hanafi schools of Mahomedan law, delivery of possession is not necessary to validate a wakf which is otherwise valid.

Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government(1) dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Original Suit No. 56 of 1927.

B. Pocker and K. T. M. Ahmad Ibrahim for *P. Kunhammad Kutti* for appellants two to four.

T. L. Venkatarama Ayyar for first respondent.
Other respondents were unrepresented.

Cur. adv. vult.

JUDGMENT.

PANDRANG ROW J.—This is an appeal from the decree of the Subordinate Judge of South Malabar at Calicut, dated 11th December 1930, in Original Suit No. 56 of 1927, a suit to set aside an order passed in execution proceedings in Original Suit No. 63 of 1924, which was a suit on foot

* Appeal No. 202 of 1931.
(1) (1893) I.L.R. 15 All. 321.

of a mortgage executed by the fifth defendant in favour of the plaintiff, the Nedungadi Bank, Limited. The mortgage deed, Exhibit C, was one dated 8th May 1922. In execution of the decree the bank purchased the mortgaged property but when an attempt was made to obtain delivery of possession there was resistance by defendants 1 to 4 in respect of the particular item which is the subject-matter of the present suit, there being in all twenty-one mortgaged items. The resisters relied upon a wakf deed executed by the fifth defendant, namely, Exhibit II, dated 29th September 1921, i.e., about seven months before the mortgage in favour of the bank. An application by the bank to remove the resistance of these defendants was made in 1926; that application was dismissed by the Subordinate Judge who upheld the contentions of defendants 1 to 4, though the plaintiff-bank relied on a cancellation deed whereby the wakf was revoked or cancelled not only by the fifth defendant but also by defendants 1 and 2 and some others in April 1922, Exhibit B. The present suit was one instituted with a view to set aside this order and the suit has been decreed by the Subordinate Judge, the main ground being that, though the cancellation of a valid wakf is invalid, the wakf itself had not been completed or become valid by reason of the fact that there was no delivery of possession of the property. The decree was also based on a finding to the effect that there was an estoppel in favour of the plaintiff-bank; but this ground of the decision of the Court below has not been seriously supported in the arguments in this appeal. It is sufficient to say in this connection that, so far as defendants 3

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and 4 are concerned, there can be no estoppel as they are not parties to the cancellation deed, the estoppel being based on what is contained in the deed. Even as regards the other defendants there is no evidence to show that the plaintiff-bank took the mortgage on the strength of any recitals contained in the cancellation deed. There is indeed no evidence whatever which bears on the plea of estoppel, and the finding of the Court below on the question of estoppel cannot therefore stand. It is also conceded during the arguments that if the wakf deed is valid the cancellation is of no force.

The main point therefore that was argued, and indeed the only point on which serious argument was possible, was that delivery of possession is not necessary to validate or complete a wakf which is otherwise valid. This is not a case in which it is found that the wakf deed was executed with a view to defeat or delay creditors; nor is there anything alleged against the deed which will have the effect of invalidating it except the want of delivery of possession. On this point the finding of the Court below was that there was no delivery of possession. The correctness of this finding has been questioned in appeal by the appellants (defendants 1 to 4), but there is really no sufficient reason why the finding of the trial Court on a question of fact of this kind should be disregarded, especially in view of the fact that that is based on the recitals in Exhibit B itself to which defendants 1, 2 and 5 were parties. I must therefore proceed on the basis that this finding to the effect that there was no delivery of possession is

correct, and address myself to the pure question of law, whether delivery of possession is necessary in order to constitute a valid wakf. On this point there is some difference of opinion; but there can be no doubt that the weight of authority is in favour of the view that delivery of possession is not necessary. The executant of the wakf in this case is a Mapilla of South Malabar and it is well known that Mapillas in South Malabar are generally followers of the Shafi school of Mahomedan law. The Court below has however treated the question as if the law which applies to the present case is the Hanafi school of law. So far as the Shafi school is concerned, there is no doubt that delivery of possession is not necessary to constitute a valid wakf. In this connection I may refer to page 231 of Ameer Ali's Mahomedan Law, Vol. 1, 4th Edition, where there is a quotation from Ramz-ul-Hakaik to the following effect:—

“According to Abu Yusuf, merely saying that ‘I have made this property wakf’ is sufficient to extinguish the proprietary right of the wakif, for by that the property is assigned over to God like the emancipation of a slave; and in this view the other three Imams agree, [viz., Shafei, Malik and Ibn Hanbal].”

Even according to the Hanafi school it does not appear that delivery of possession is necessary to constitute a valid wakf, the only authority to the contrary being that of certain decisions of the Allahabad High Court. These decisions of the Allahabad High Court can be traced finally to *Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government*(1) on which the subsequent decisions are based. The decision in

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Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government(1) appears to be based on a mistaken notion of what was stated by a majority of the Full Bench of the Calcutta High Court in *Bikani Mia v. Shuk Lal Poddar*(2). This point has been noticed by more than one text-book writer, and also in one comparatively recent decision of the Allahabad High Court itself. For instance, on page 15 of Mulla's Principles of Mahomedan Law, 10th Edition, the learned author says :

"It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails. Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf. When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred."

In the foot-note to the last sentence the learned author refers to the decision in *Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government*(1) and points out that the Court in that case thought erroneously that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf because it was so laid down by the Full Bench in *Bikani Mia v. Shuk Lal Poddar*(2). In Wilson's Anglo-Muhammadan Law, 5th Edition, page 92, it is stated that the decision in *Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government*(1)

"was in fact based on a statement that in . . . *Bikani Mia v. Shuk Lal Poddar*(2) the comparative authority of Abu Yusuf on questions of Muhammadan Law among Sunnis was

(1) (1893) I.L.R. 15 All. 321.

(2) (1892) I.L.R. 20 Cal. 116 (F.B.).

discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Muhammad".

The learned author adds that the report of the Calcutta Full Bench case

"shows that no general proposition of the sort was affirmed, but that while the one dissentient Judge based his opinion partly on a general preference for Abu Yusuf, partly on a number of untranslated Arabic authorities, the majority took their stand on a series of British decisions which were, as it happened, in agreement with Muhammad on the particular point in question, and refused to go behind those decisions, or to be drawn into a discussion about the relative weight of the ancient authorities".

Finally, in *Muhammad Shafi v. Muhammad Abdul Aziz*(1) ASHWORTH J. observes as follows :—

"This decision [*Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer to Government*(2)] purports to follow a Full Bench decision of the Calcutta High Court in *Bikani Mia v. Shuk Lal Poddar*(3). I have examined that decision of the Calcutta High Court, but cannot find that it expressly states that Imam Muhammad is to be preferred to Abu Yusuf. . ."

The learned Judge also says that the contrary opinion of Mr. Ameer Ali would require to be given due weight and that in Mr. Ameer Ali's Handbook of Muhammadan Law published in 1925 he reiterated the view expressed by him in *Bikani Mia v. Shuk Lal Poddar*(3) that Imam Muhammad's opinion is not recognized among the Hanafis of India. It would therefore appear that the decisions of the Allahabad High Court to the effect that delivery of possession is necessary to validate a wakf according to the Hanafi law are to some extent the result of a misapprehension of what was decided by the majority of the Full Bench in *Bikani Mia v. Shuk Lal Poddar*(3). It may also

(1) (1926) I.L.R. 49 All. 391.

(2) (1893) I.L.R. 15 All. 321.

(3) (1892) I.L.R. 20 Cal. 116 (F.B.).

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be partly due to the fact that, according to Shiah law which is prevalent in the United Provinces, delivery of possession is undoubtedly necessary to constitute a valid wakf. Whatever the case may be, it is only in Allahabad that the view has been taken that delivery of possession is necessary to constitute a valid wakf. Most of the other High Courts have expressed the opposite view. This High Court itself does not appear to have decided the question; at any rate no case of this Court has been brought to our notice. But the view that no delivery of possession is necessary to constitute a valid wakf has been expressed by several other High Courts, namely, *Jinjira Khatun v. Mohammad Fakirulla Mia*(1), *Muhammad Said v. Mst. Sakina Begum*(2), *Abdul Rajak v. Bai Jimbabai*(3), *Husseinbhai v. Advocate-General of Bombay*(4), *Ma E Khin v. Maung Sein*(5) and *Shaikh Muhammad Ibrahim v. Bibi Mariam*(6), and it has also found acceptance in a recent Full Bench decision of the Oudh Chief Court, *Mt. Rahman v. Mt. Baqridan*(7). The view taken in Calcutta goes back to 1838. The case of *Doe Dem Jaun Beebe, &c. v. Abdollah Barber*(8) is of considerable importance and in view of its importance the judgment in that case has been reproduced in full in Amcer Ali's Mahommedan Law, Vol. 1, 4th Edition, page 238. It is important in view of the fact that it was pronounced after consulting the two moulvies attached to the Court and in accordance with the opinion which they submitted and after a consideration of the important authorities

(1) (1921) I.L.R. 49 Cal. 477.

(3) (1911) 14 Bom. L.R. 295.

(5) (1924) I.L.R. 2 Ran. 495.

(7) A.I.R. 1936 Oudh 213 (F.B.).

(8) (1838) 1 Fulton's Rep. 345.

(2) (1934) I.L.R. 16 Lah. 432.

(4) (1920) 22 Bom. L.R. 846.

(6) (1928) I.L.R. 8 Pat. 484.

which were quoted by the learned moulvies in support of their opinion. The exact question which arises for decision in the present case is the second question that was referred to the moulvies, namely, whether delivery of property is essential to render the endowment valid according to the rule which governs other gifts. The answer of the moulvies was :

"Abu Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuwullee as necessary to render the wakf consecration legal. In this opinion Mahommed differs, but the practice is in accordance with the opinion of Abu Yusuf, as written in the Mooneeah, Futhul Kuddeer, Seraj-ul-Wahaj, Hedayah and Veekyat-ul-Rawahij."

This answer is supported by the actual authorities and quotations therefrom subjoined below. This opinion of the moulvies was accepted by the Bench which held that the opinion of Abu Yusuf on both the points must be considered as the law now prevailing and sanctioned by the more recent authorities. They laid stress on the opinion of the translator of the Hedaya (i.e., Hamilton) who himself seemed inclined to Abu Yusuf's opinion, as would appear from his note at page 351 and also from certain passages in the text of the Hedaya itself where it is stated that Abu Yusuf's is the more generally received doctrine. This decision of 1838 has been followed till now, i.e., for nearly a century, in Calcutta. It is sufficient to make a brief reference to the decision reported as *Khajah Hossein Ali v. Hazara Begum*(1) in which KEMP J. followed the ruling of 1838 and quoted with approval the

(1) (1869) 12 W.R. 344, 346.

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following passage from Harrington's Analysis, Volume I, page 229 :

"When the two disciples, Aboo Yusoof and Imam Mahomed, differ from their master Haneefa, the Mahomedan Judge is at liberty to adopt either of the two decisions which may seem to him the more consonant to reason. Fatwas, or law decisions, are given primarily according to Aboo Yusoof, next according to Imam Mahomed."

Reference was made to this observation of KEMP J. by WOODROFFE J. in a later case reported as *Kulsom Bibee v. Golam Hossein Cassim Ariff*(1). He says that where the two disciples differ from their master and from each other it appears that the authority of Abu Yusuf was generally preferred and reference is made to Morley's Digest CCLXIII, Ameer Ali XLIII, XLIV, and Harrington's Analysis, Volume I, page 229, besides *Khajah Hossein Ali v. Hazara Begum*(2). Our attention has been drawn to a decision of the Bombay High Court reported as *Maher Husein v. Alimahomed*(3), where it was said that physical delivery is not essential but such delivery as is possible must be given; this view is however based on the decision of the Privy Council in *Abadi Begum v. Kaniz Zainab*(4), which was a case in which the parties were governed by the Shiah school of law according to which a wakf is not complete unless possession is given. The decision of the Rangoon High Court reported as *Suleman Hassan v. Sheikh Chand*(5) merely decided that the wakif should actually divest himself of the property to be made wakf in order that the wakf may be valid, and this does not

(1) (1905) 10 C.W.N. 449, 488.

(2) (1869) 12 W.R. 344, 346.

(3) A.I.R. 1934 Bom. 257.

(4) (1926) I.L.R. 6 Pat. 259 (P.C.).

(5) A.I.R. 1927 Ran. 125.

necessarily mean that possession must be given to the Mutawalli before the wakf can become valid. The divesting by the wakif himself can be completed by an unequivocal declaration that the property is made wakf. The opinion of the text-book writers is also generally in favour of the view that the authority of Abu Yusuf is generally preferred, though there is no inflexible rule to that effect. I have already referred to the opinion expressed in Mulla's Mahomedan Law at page 15. Abdur Rahim in his Muhammadan Jurisprudence at page 308, when dealing with this question whether delivery of possession is necessary, says :

"The weight of juristic opinion seems to be in favour of Abu Yusuf's view according to which delivery of possession is not necessary."

I may also refer to pages 187 and 188 which deal with the general question of the difference of opinion between the various authorities and in particular to the following passage :

"It is also stated that the learned have given fatwa according to the view of Abu Hanifa on all questions of 'Ibadat' or devotional matters and that, in all judicial matters and in questions relating to the duties of the magistrate and the law of evidence, fatwa is based on the opinion of Abu Yusuf because of his experience as the Chief Qadi of Baghdad, and in questions relating to the succession of distant kindred on the opinion of Muhammad."

Reference may also be made generally to pages 237 and 238 in Ameer Ali's Mahomedan Law, Volume I, where according to several authorities the "fatwa" is that of Abu Yusuf; in other words, the legal decision is to follow the opinion of Abu Yusuf. Wilson at page 344 of

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his Anglo-Muhammadan Law states as follows :—

“The difference between Abu Yusuf and Muhammad on this point follows naturally from their divergence, . . . as to whether wakf can be constituted by a mere declaration of intention without transfer of possession to a mutawalli. But the Fatwa Alamgiri, which on that question declared that opinions were equally balanced, . . . says nevertheless . . . that on this point ‘the moderns decide according to the opinion of Abu Yusuf, and that is approved’.”

The learned author adds that according to M. Clavel such wakfs are common in modern Egypt. This is perhaps because it is Egypt which is the stronghold of the doctrines associated with the name of Shafei which also find acceptance among the Mapillas of South Malabar generally. It will thus be seen, apart from the fact that the executant of the wakf in the present case is governed by the Shafei school of law and therefore the doctrine of Shafei must apply without question to the present case, that even according to the Hanafi school the weight of authority is certainly in favour of the view that no delivery of possession is required to validate a wakf which is otherwise valid. This view would moreover bring all the four schools into line, because there is no doubt that the founders of the other three schools are of this opinion. I am satisfied that the law as actually understood by the Courts, the Mahomedan jurists, and the bulk of the Mahomedans who are governed by the Hanafi law is that delivery of possession is not necessary in order to constitute a valid wakf. The insistence on transfer of possession, in the opinion of Muhammad, must have been due to the importance attached by him to the archaic doctrine

according to which generally possession is regarded as nine points of ownership, and no transfer of property could be conceived of without actual change of seisin or possession. In all comparatively ancient systems of law we find the same stress placed on what the old English lawyers called livery of seisin. No feoffment was regarded as a valid transfer of property unless it was accompanied or followed by livery of seisin, and even in cases where the property to be transferred was such that it lay in grant and not in livery, anyone who took the grant found himself in a very precarious position unless he had taken care to get livery of seisin subsequently. The view taken by Abu Yusuf appears to be more in accordance with modern conditions, and certainly more in accordance with modern legal principles which have found favour with advancing times. I have therefore no doubt that we should regard Abu Yusuf's view which has been accepted by the majority of the High Courts in India and also by most of the text-book writers as the correct view of the law, not only as regards the Mapillas, but also as regards all Muhammadans governed by Hanafi law.

It follows, therefore, that the finding on this point of the learned Subordinate Judge must be set aside, and, as there is no other objection to the validity of the wakf with which we are concerned in this case, the wakf must be declared to be a valid and completed one. It follows that the decree appealed from must be set aside and the suit dismissed with costs in this Court and in the Court below.

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VARADACHARIAR J.—I concur, though not without some hesitation, in allowing the appeal. Once it is found that the wakf has been duly constituted, the plaintiff cannot certainly rely on the deed of cancellation, Exhibit B, either as affecting the operation of the wakf deed or as supporting a plea of estoppel. But in deciding the question of the completeness of the dedication, the statements of fact in Exhibit B, to which some of the defendants are parties, may be used as evidence; and those statements, in the light of the other probabilities appearing in the case, seem to support the finding of the lower Court on the point of fact, namely, that the wakf deed had not been accompanied by a transfer of possession to the mutawalli.

I find nothing in the evidence to suggest that the defendants intended to defraud the bank in the matter of the creation of the mortgage in its favour, or to suggest that the bank acted negligently in taking the mortgage. The bank seems to have acted on legal advice and, though the lawyer's memorandum makes no reference to the deed of cancellation (because it was prepared before the date of Exhibit B) or even to the wakf deed, both parties seem to have acted under the impression that on the facts stated in Exhibit B it was open to the fifth defendant to ignore the wakf and deal with the property as his own. It is this view of the conduct of the parties that inclined me at one stage to consider whether I might not adopt the course recognised by the Mahomedan authorities themselves, that where the muslim jurists have expressed different

opinions, the Court may take that view which is most in accordance with justice in the particular circumstances. If I am right in my opinion that the parties acted honestly in the matter, there can be very little doubt that the justice of the case would require me to uphold the validity of the mortgage. But a view of the above kind, though sanctioned by the Mahomedan authorities, would undoubtedly introduce an element of uncertainty in the law; and it is this consideration which has weighed with me in agreeing with my learned brother in the decree that he proposes to make. I agree with him that the weight of authority, both according to the text-writers and according to the decisions, is in favour of accepting Abu Yusuf's view in the matter and that the decisions to the contrary effect in Allahabad seem to be based upon a misreading of the judgments in *Bikani Mia v. Shuk Lal Poddar*(1).

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(1) (1892) I.L.R. 20 Cal. 116 (F.B.).

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APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Lakshmana Rao.

B. S. MOORTHY, PETITIONER,

v.

ELI VADAPALLI AND TWO OTHERS, RESPONDENTS.*

Election—Madras Legislative Assembly—Reserved seat—Panel of candidates for—Candidate for, elected to reserved seat by virtue of declaration under proviso to Rule 29 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936”—Petition under Rule 103 (b) of said Rules for declaring void and setting aside election of that candidate to reserved seat—Jurisdiction of District Magistrate to entertain—Order of District Magistrate declaring election void—Writ of certiorari in respect of—Jurisdiction of High Court to issue—Rule 7 of said Rules—Effect of.

Rule 103 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936” provides for decision of doubts and disputes as to the validity of primary elections for electing candidates for a reserved seat and not the election of a candidate to a reserved seat as defined in Rule 3 of Part I of “The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936” which cannot be questioned except by an election petition presented in accordance with the provisions of Part III of that Order.

In a case in which there had been an election of a candidate to a reserved seat by virtue of the declaration under the proviso to Rule 29 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936,” a petition, purporting to be under Rule 103 (b) of the said Rules, was presented to the District Magistrate to declare void and set aside the election of the said candidate to the reserved seat and not to set aside his election as a candidate for the reserved seat, and the District Magistrate declared the candidate's election to the reserved seat void.

* Civil Miscellaneous Petition No. 453 of 1937.

Held: (i) that the District Magistrate had no jurisdiction to entertain the petition and Rule 7 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936” did not validate or legalise such proceedings and (ii) that the aggrieved candidate was entitled to the issue of a writ of *certiorari* quashing the District Magistrate's order and Rule 7 aforesaid did not, expressly or impliedly, take away the power of the High Court to issue such a writ.

PETITION praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* to the respondents therein calling for the records relating to the matter of election to the seat reserved for the Scheduled Castes for Cocanada General Rural Constituency, and to quash the order or orders of the District Magistrate of East Godavari passed on 23rd December 1936 and the orders passed by the Returning Officer (Revenue Divisional Officer, Cocanada) dated 31st December 1936.

The facts of the case and the arguments of Counsel appear from the judgment.

B. Jagannadha Das for S. Suryaprakasam for petitioner.

Ch. Raghava Rao for first respondent.

Government Pleader (K. S. Krishnaswami Ayyangar) for respondents 2 and 3.

Cur. adv. vult.

ORDER.

MOCKETT J.—This is a petition for the issue of a writ of *certiorari* praying that the order of the District Magistrate of East Godavari, dated 23rd December 1936, declaring the petitioner's primary election void and the order of the Revenue Divisional Officer of Cocanada, dated 31st

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December 1936, should be quashed. The determination of this matter turns very largely on the construction of the rules framed by the Governor of Madras in Council and it raises a point of some importance relating to the powers of the High Court.

Paragraph 20 of the Fifth Schedule to the Government of India Act, 1935, reads as follows :

"In so far as provision with respect to any matter is not made by this Act, or by His Majesty in Council . . . the Governor, exercising his individual judgment, may make rules for carrying into effect the foregoing provisions of this schedule and the provisions of the sixth schedule and securing the due constitution of the Provincial Legislature and in particular, but without prejudice to the generality of the foregoing words, with respect to—

- (1) the notification of vacancies, including casual vacancies, and the proceedings to be taken for filling vacancies ;
- (2) the nomination of candidates ;
- (3) the conduct of elections..... ;
- (4) the expenses of candidates at elections ;
- (5) corrupt practices and other offences at or in connection with elections ;
- (6) the decision of doubts and disputes arising out of or in connection with elections ; and
- (7) the manner in which the rules are to be carried into effect."

His Majesty in Council has passed an Order entitled "The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936". Rule 2 of Part III of that Order is as follows :

"No election shall be called in question except by an election petition presented in accordance with the provisions of this part of this Order."

And by Rule 3 (1) an election petition against any returned candidate may be presented to the Governor—(a) by any candidate or elector on any

ground ; and by Rule 4 (1) unless the Governor, exercising his individual judgment, dismisses a petition for non-compliance with the prescribed requirements, he shall, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are, or have been, or are eligible to be appointed, Judges of a High Court, and shall appoint one of them to be the President. Under Rule 7 the election of a returned candidate shall be void if in the opinion of the Commissioners (c) the result of the election has been materially affected by the improper acceptance or rejection of any nomination.....Rule 3 (2) of Part I introductory of the above Order is important. It states :

"The provisions of Parts II and III of this Order shall, in relation to constituencies in which seats are reserved for candidates of any particular class, or in which the final voting is by members of an electoral college previously constituted for that purpose, have effect with such exceptions and subject to such adaptations and modifications as may be prescribed, but, subject as aforesaid, any primary election for the purpose of electing candidates for reserved seats, or of constituting any such electoral college, shall be deemed to be part of the election of persons to fill seats to be filled in the constituency."

The Governor of Madras in Council, exercising the powers conferred by paragraph 20 of the Fifth Schedule to the Government of India Act above mentioned, has formulated rules for the conduct of elections for the constituencies of the Madras Legislative Assembly called "The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936". Two sets of rules are provided. Rules 12 to 31 deal with primary elections. Rules 32 *et seq* deal with elections other than primary elections. In certain constituencies

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a seat is reserved for the Scheduled Castes. The primary elections deal with the election of candidates for the reserved seat. The scheme of the rules is that in the first place a panel of candidates should be prepared and in order to be elected to the Legislative Assembly a person must first be elected to the panel, i.e., he must first be nominated as candidate for the panel; secondly, elected to the panel and thirdly, in order to reach the Assembly, elected from the panel to the Assembly. It is enough to say that the rules are elaborate and provide for the manner and time of the nomination by the electors of candidates for the primary election to the panel. The proposers and seconders for the nominations must be qualified voters in the constituency (Rule 13). The nomination paper delivered by or on behalf of a candidate for a seat in a constituency in which he is not entitled to vote shall be accompanied by a "certified copy" [as defined in Rule 2 (3)] of the entry containing his name in the electoral roll for the constituency in which he is entitled to vote [Rule 14 (2)]. Any nomination paper which is not received before 3 o'clock in the afternoon on the date appointed by the Governor for the nomination of candidates shall be rejected (Rule 17). On or before the date appointed for the nomination of candidates, each candidate shall deposit or cause to be deposited with the Returning Officer the sum of fifty rupees in cash; and no candidate shall be deemed to be duly nominated unless such deposit has been made (Rule 22). Rules 28 and 29 are important. They provide for election to the panel. Rule 29 (1): if the number of candidates . . . exceeds four, a poll shall be taken. Rule 29 (2):

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if the number of such candidates is four, all such candidates shall be declared to be elected to the panel. Rule 29 (3): if the number of such candidates is less than four, all such candidates shall be declared to be elected to the panel. And then there is a proviso with which we are much concerned :

" Provided that if the number of candidates nominated is one, such candidate shall at once be declared to be duly elected to fill the reserved seat in the constituency."

It must be remembered that, as pointed out, a tribunal set up by the Governor in Council has to decide the validity of elections to the Assembly. But Rule 103 makes special provision for the decision of doubts and disputes as to the validity of primary elections but (and this cannot be over-emphasised) as regards the election of *candidates* to the panel, the Governor in Council appears to have taken the view that that matter can be decided adequately and conveniently by the local officer and in a summary form, for it provides that an election petition against any candidate elected at a primary election, which we understand to mean elected to the panel, shall be presented in the City of Madras to the Collector and elsewhere in the Presidency to the District Magistrate. Those officers or even an officer deputed by them

" shall after due notice to the respondents hold a summary enquiry at such time and place as he may fix, record evidence in the manner provided for summary trials in the Code of Criminal Procedure, 1898, and pass orders on the petition as quickly as possible on the lines of paragraphs 7 to 10 of Part III of the said Order".

There is a striking contrast in the two procedures: the summary determination of matters relating to election to the panel compared

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to the normal procedure associated with election petitions. A single example will suffice. Under paragraph 5 of the Order of His Majesty in Council dated 3rd July 1936, the Election Commissioners may order the Advocate-General of Madras to attend the hearing.

The above are the relevant provisions of law at this stage. The facts are as follows. In the Cocanada Rural General Constituency with which we are concerned a seat is reserved for the Scheduled Castes. The petitioner was a candidate for the panel and so was Mr. Eli Vadapalli the first respondent in this petition. Nomination papers were filed by five persons, the petitioner, Mr. Eli Vadapalli and three others. The nomination papers of all the candidates except that of the petitioner were rejected. Consequently under the proviso to Rule 29 the petitioner was at once declared elected to the reserved seat in the Legislative Assembly. He was not, it must be noted, elected to the panel because that was, according to the spirit of the rules, unnecessary, there being only one candidate for one seat. He was, as stated above, declared elected to the Legislative Assembly. No question arises with regard to the nominations of the three other candidates but it is well to mention the grounds on which the nomination of the first respondent was rejected. The grounds are twofold: (i) that his nomination paper was received after 3 o'clock and (ii) that in any case there was a non-compliance with Rule 14 (2) mentioned above in that his nomination paper, even if in time, was not accompanied by a certified copy of the entry containing his name in the electoral roll for the

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constituency in which he was entitled to vote, he not being a voter in this constituency. With regard to the merits of these contentions I am of course not concerned, especially in view of the considerations on which I arrive at my decision, but it will be later necessary to say a few words in view of the contention of the first respondent that in any view of the case the merits are such that this Court should not interfere. We are more concerned with the course of events in the two lower tribunals. The Returning Officer decided against the first respondent on both the points abovementioned and declared the petitioner elected to the Madras Legislative Assembly. On this the first respondent filed a petition to the District Magistrate purporting to do so under Rule 103 (b). The form of the prayer to this petition deserves notice. It is as follows:

"The petitioner therefore prays that this Honourable Court may be pleased to declare that the election of the respondent is void and set it aside and order the respondent to pay the costs of this petition to the petitioner."

It must be observed that it is directed and only directed to obtaining a declaration that the election of the respondent (present petitioner) to the Legislative Assembly is void. It does not even refer to the panel. Objection to the jurisdiction of the District Magistrate was at once taken by the petitioner. He argued, what he has argued before us, viz., that the District Magistrate had no jurisdiction in the matter in that Rule 103 related to elections to the panel and that he had been finally elected to the Madras Legislative Assembly. This objection was overruled by the

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District Magistrate who, after considering the lower tribunal's order, passed the following order :

"The Revenue Divisional Officer was not therefore justified in refusing the second nomination paper filed on behalf of the petitioner. Under the circumstances I hold that the result of the primary election has been materially affected by the improper refusal of this nomination paper filed in time on behalf of the petitioner. Under Rule 103 (b) of the Rules, the election of the respondent at the primary election for the reserved seat of the Cocanada Rural Constituency held in pursuance of the notification dated 24th November 1936 is declared void."

In pursuance of that order the Returning Officer passed the following order dated 31st December 1936 :

"In modification of the notification published in this office on 11th December 1936, I do hereby declare that (i) M.R.Ry. Eli Vadapalli Garu and (ii) M.R.Ry. B. S. Moorthy Garu have been duly elected to the panel for contesting the scheduled classes reserved seat in the Rural General Constituency, Cocanada."

The petitioner argues that these orders are bad for lack of jurisdiction and that he having been duly elected to the Legislative Assembly his election can only be declared void by the Governor in Council or a tribunal set up by him. The argument before us by the Government Pleader amounts virtually to this : although it is conceded that elections to the Legislative Assembly can only be declared void by an order of the Governor in Council or a tribunal set up by him and although the District Magistrate is only given jurisdiction to decide questions relating to elections to the panel, yet, in the case of a member of the scheduled caste elected to the Assembly under the proviso to Rule 29, it must be inferred that the Legislature intended that in that case and in that case only even the election to the Legislative Assembly

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could be set aside by the order of the District Magistrate ; in other words, that under Rule 103 (a) an election petition against any candidate elected at a primary election should be understood to mean either to the panel or under the proviso to Rule 29 to the Legislative Assembly. I should have thought that, if it was intended to take away such a valuable right of election to the Assembly by means of the summary procedure prescribed in Rule 103, it would have been expressed in the clearest possible terms and I am most reluctant to draw any inference in favour of such a conclusion unless such inferences are inevitable from the wording of the rules. That the position now before us has escaped the notice of the draftsman of these rules is evident but the rules have got to be construed as they stand. The language of Rules 12 to 31 makes it quite clear that one position and one position alone is contemplated—the nomination and election of candidates to the panel in order to enable them to stand for final election to the Assembly. Those rules are headed "Primary Elections" and they deal with candidates for election to the panel and not to the Assembly. That is a later stage. Rule 29 adumbrates the words "elected to the panel". Rule 103 is at the outset qualified by the words that it relates to primary elections held "*for the purpose of electing candidates for a seat*" and the orders contemplated by Rule 103 (c) clearly relate to orders passed in relation to such candidate. But at the time of the hearing before the District Magistrate the seat had been filled by the election of the petitioner. The order above-mentioned dated 31st December of the Returning

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Officer merely declares that the first respondent and the petitioner had been duly elected to the panel but the order of the District Magistrate admittedly declares the election of the petitioner to the Assembly void. The short question therefore is, has the District Magistrate power to declare the election to the Assembly void, and I am unhesitatingly of the opinion that he has not. I am not even satisfied that the Legislature intended that he should have such powers. There is nothing remarkable to my mind that when once a person has attained the status of a member of the Legislative Assembly he should only be deprived of it by means of a formal election petition and I see no reason to suppose that that procedure which is so carefully elaborated in the rules should not have application to a member of the scheduled caste elected in this manner as much as to any one else. At any rate in the absence of any clear provision to the contrary, I am far from disposed to infer the opposite.

As a result of the above conclusions I hold that the petitioner's election to the Legislative Assembly has been declared to be void by a tribunal which had no jurisdiction to do so and that he is, having been deprived without jurisdiction of a right and one may add a valuable right, *prima facie* entitled to the issue of a writ of *certiorari* quashing that order. But the Crown has raised the point that this Court is not entitled to interfere by means of *certiorari* and relies in support of that proposition on Rule 7 of the Rules for the conduct of elections for the

constituencies of the Madras Legislative Council. It reads as follows :

"Every act done, proceeding taken or decision given under or with reference to these rules, shall, subject to the provisions thereof and those of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, be final and no such act, proceeding or decision shall be called in question by means of a suit or otherwise in a Court of law."

Now that rule purports to be made in accordance with the powers given to the Governor by paragraph 20 of the Fifth Schedule to the Government of India Act, 1935. A perusal of paragraph 20 shows that the rules which the Governor may make are specified as being

"for carrying into effect the foregoing provisions of this schedule and the provisions of the sixth schedule and securing the due constitution of the Provincial Legislature and in particular, but without prejudice to the generality of the foregoing words, with respect to . . . (vi) the decision of doubts and disputes arising out of or in connection with elections".

It is quite obvious from a perusal of the rules that the machinery set up for the purpose of the elections is intended to be final. No appeal lies from the decisions of the District Magistrate with regard to the scheduled caste panels or the tribunals appointed by His Excellency to hear election petitions. The decision of all these matters is left to him. Neither of these tribunals is a Court subject to the machinery of the Code of Civil Procedure and neither can be said to represent a Court for the purpose of invoking the provisions of section 115 of the Code. This position is fully dealt with by a Full Bench of this Court in *Lakshmanan Chetty v. Kannappar*(1). It would appear then that Rule 7 very largely states what

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(1) (1926) I.L.R. 50 Mad. 121 (F.B.).

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is the accepted law. The Government Pleader's argument therefore amounts to this that a combination of paragraph 20 of the Fifth Schedule and Rule 7 of the Madras Legislative Council Rules takes away also the powers of the High Court with regard to the issue of writs of *certiorari*, and to extend that argument to its logical conclusion it must follow that an elected member of the Madras Legislative Assembly whose election has been declared void by a tribunal having no jurisdiction to do so has no remedy in the High Court. Incidentally I might add it does not appear he has any remedy at all if this argument is correct. Under section 223 of the Government of India Act, 1935, the powers of the High Court are the same as before the passing of this Act. But section 223 is subject to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act. The point for decision therefore would seem to be, have the powers of this High Court with regard to writs of *certiorari* been removed? It is I think axiomatic that *certiorari* can only be taken away by express negative words (*Vide* Halsbury's Laws of England, Vol. IX, page 861, paragraph 1455). So long ago as 1760 it was held in *Rex v. Moreley*(1) that

"the jurisdiction of this Court is not taken away, unless there be express words to take it away; this is a point settled".

In that case, those who resisted the writ pleaded that the relevant statute enacted that

"no other Court whatsoever shall intermeddle with any cause or causes of appeal from this Act but they shall be finally determined in the Quarter Sessions only".

(1) (1760) 2 Burr. 1040; 97 E.R. 696.

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The argument addressed to the Court was that

"the above words meant no more than that the facts should not be re-examined but the legality may; or a want of jurisdiction may be taken advantage of"

and this argument appears to have found favour with the Court. In *Ex parte Bradlaugh*(1) MELLOR J. observed:

"It is well established that the provision taking away the *certiorari* does not apply where there was absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleases without question."

Those observations seem singularly applicable to this case. *Ex parte Bradlaugh*(1), above cited, is referred to by RAMESAM J. in *Venkata Narasimha Rao Bahadur v. The Municipal Council of Narasaraopet*(2) and the observations of the learned Judge are material in every aspect of the topic now under discussion:

"Where it is laid down in statutes or bye-laws made under the statutes that proceedings under them shall not be removed by the writ of *certiorari*, then *certiorari* is said to be taken away by such statutes; that is, it is taken away only by express negative words and not merely by words which direct that certain matters should be finally determined. But even in cases where *certiorari* is taken away, a writ may be issued if the authority acted without jurisdiction."

In *The Colonial Bank of Australasia v. Willan*(3) the Judicial Committee declared the law as follows at page 442:

"There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench Division will grant a *certiorari*, but some of those authorities establish, and none are inconsistent with, the proposition that in any such case the Court will not

(1) (1878) 3 Q.B.D. 509.

(2) (1930) 60 M.L.J. 260, 261.

(3) (1874) L.R. 5 P.C. 417. \

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quash or remove, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

In this matter however I am prepared to found my decision on the fact that it does not appear that the provisions upon which the Government relies expressly remove the rights of the High Court with regard to writs of *certiorari*. Nor indeed do I think even by implication it can be so argued. I think the intention and meaning of the rules is that all decisions of the tribunals set up shall be final with regard to all matters which they are competent to decide. It matters not whether those decisions are right or whether they are wrong but it is only in the case of a decision on a matter which such tribunals were never empowered to decide that the orders of this Court can be invoked. The Government of India Act, 1919, section 106 (2), is a clear example of a provision of a statute directly negating the power of the High Courts to issue a writ of *certiorari* or to exercise any jurisdiction in a certain specified matter, i.e., "in any matter concerning the Revenue". In connection with this section VENKATARAMANA RAO J. has considered the powers of this High Court relating to *certiorari* and the history of those powers is fully set out in *Thyagaraja Chettiar v. Collector of Madura*(1). Supposing the Collector of Madras on the hearing of a petition against an election to the panel conceived it his duty for the furtherance of the elections to imprison a candidate, can it be doubted that an application for a writ of *Habeas Corpus* would lie to this High Court? For the

(1) (1935) I.L.R. 59 Mad. 702.

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above reasons, I am satisfied that Rule 7, above referred to, does not prevent this High Court from issuing a writ of *certiorari* in a case where a subject has been deprived of a right by one of the tribunals acting wholly without jurisdiction. In this respect this case differs from the cases cited to us of which a recent case of this High Court reported as *Secretary of State for India v. Meyyappa Chettiar*(1) is an example. That sustainable petitions such as this should be very rare is obvious from these most comprehensive rules and, if the rules are carried out, they should not occur at all. This application is tenable owing to the wording of the relevant rules above cited. The matter can be easily clarified by further rules.

Two further points remain. It has been contended that there has been a submission to the jurisdiction in this matter by the petitioner taking his chance of getting a decision on the merits. That can be dealt with shortly. In the first place, it must be observed that he at once objected to the jurisdiction and there is nothing on the record to show that he took his chance on the merits at all. The whole matter was disposed of in one argument. No evidence was called. As a counsel of perfection perhaps the petitioner might have been well advised to withdraw from the proceedings after making his submissions as to jurisdiction. But there is nothing in his conduct to preclude him from claiming this right. The English cases cited in *Lakshmanan Chettiar v. Commissioner of Corporation of Madras*(2) do not support the Government Pleader's contention. In

(1) I.L.R. [1937] Mad. 211. (2) (1926) I.L.R. 50 Mad. 130 (F.B.).

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none of those cases was objection to the jurisdiction taken at all. The test which is clear from the authorities is whether there was anything in the conduct of the petitioner on which the writ should be refused—and I am quite unable to find any evidence of any such conduct.

Finally it is suggested that on the merits in the lower tribunals this Court should not interfere. It is stated that an election petition may be presented to the Governor in Council and I would have preferred to avoid any discussion on the merits but a few words about them are unavoidable in view of the above submission. Suffice it to say that even in the order of the District Magistrate it is clear that the certified copy of the entry containing the candidate's name in the electoral roll for the constituency referred to in Rule 14 (2) and Rule 2 (3) did not accompany the nomination paper but another document accompanied it which the Revenue Divisional Officer regarded with suspicion. I am most reluctant at this early stage in the new regime to give any sanction to the suggestion that conditions precedent need not be carried out and that substitutes therefor should be admitted apparently according to the discretion of any individual District Magistrate.

As a result of the above conclusions an order will issue quashing the proceedings of the lower tribunals. The result will be that the petitioner has been duly declared elected to the Legislative Assembly.

It is of course open to the first respondent to impugn the validity of the election by an election petition in accordance with the provisions of

Part III of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936. The petitioner will have the costs of this petition, Rs. 100.

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LAKSHMANA RAO J.—I agree and would emphasise that Rule 103 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936” provides for decision of doubts and disputes as to the validity of primary elections for electing candidates for a reserved seat and not the election of a candidate to a reserved seat as defined in Rule 3 of Part I of “The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936” which cannot be questioned except by an election petition presented in accordance with the provisions of Part III of that Order. There was in this case an election of a candidate to the reserved seat by virtue of the declaration under the proviso to Rule 29 of “The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules” and the petition to the District Magistrate was to declare void and set aside the election of the petitioner to the reserved seat. The petition was not to set aside the election of the petitioner as a candidate for the reserved seat nor is it suggested that there are any grounds therefor. That being so, the District Magistrate had no jurisdiction to entertain the petition, and Rule 7 of the Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules does not validate or legalise such proceedings. The order of the District Magistrate and the consequential order of the Returning Officer are therefore unsustainable, and *certiorari* can only

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be taken away by express negative words. Rule 7 does not, as pointed out by my learned brother, take it away expressly or impliedly, and it is unnecessary to decide whether *certiorari* can be taken away by rules framed under paragraph 20 of the fifth schedule of the Government of India Act, 1935, and, even if it can be and is so taken away, *certiorari* may not be granted where the tribunal has acted without or in excess of jurisdiction.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice King.

1937,
July 16.

IN RE DASTAGIR alias GULAM DASTAGIR AND THREE
OTHERS (ACCUSED NOS. 1 TO 4), PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), sec. 162—Copy of a statement to the police—Grant to accused of—Contradiction, if exists—Duty of Court to satisfy itself about.

When an accused person applies, under section 162, Criminal Procedure Code, for a copy of the statement made to the police by one of the prosecution witnesses, it is not the duty of the Court to satisfy itself that a contradiction exists before granting a copy; and, subject to anything that may be found under the second proviso to the section, the Court must grant the copy.

Tahal Saithwar v. Emperor (1), Public Prosecutor, Madras v. Vedi(2) and Babarali Sardar v. Emperor(3) referred to. Jhari Gope v. Emperor(4) and Emperor v. Nga Lun(5) followed.

* Criminal Revision Case No. 385 of 1937 and Criminal Revision Petition No. 353 of 1937.

(1) A.I.R. 1931 All. 34.

(3) A.I.R. 1929 Cal. 182.

(2) 1929 M.W.N. 885.

(4) A.I.R. 1929 Pat. 268.

(5) A.I.R. 1935 Ran. 370 (F.B.).

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Third Presidency Magistrate of the Court of the Presidency Magistrates of Egmore, Madras, dated 5th July 1937 and made in Calendar Case No. 834 of 1937.

V. Rajagopalachari for petitioners.

E. A. Lobo for the Crown Prosecutor (*T. S. Anantaraman*) for the Crown.

Cur. adv. vult.

ORDER.

The petitioners in this case are charged with murder and the preliminary enquiry into the alleged offence is in progress before the learned Third Presidency Magistrate. Prosecution Witness 1 has been examined in chief, and one question has been put to him in cross-examination. At that stage the petitioners' pleader applied under section 162 of the Code of Criminal Procedure for a copy of Prosecution Witness 1's statement to the police. The learned Magistrate refused to grant it. Hence this application in revision. It is a little difficult to understand the precise reason for the refusal. The Magistrate begins by pointing out that the one answer given by the witness in cross-examination does not establish any contradiction; but, if he means by that the accused's pleader must either establish an actual instance of contradiction or lay a foundation for the belief that such a contradiction will be found if the police record is referred to, he is asking the accused's pleader to perform an impossible task; *Tahal Saithwar v. Emperor(1), Public*

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(1) A.I.R. 1931 All. 34.

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Prosecutor, Madras v. Vedi(1) and *Babarali Sardar v. Emperor*(2). From what the Magistrate goes on to say, however, it seems to me that he must also have refused to grant the copy because he did not himself on examining the statement perceive in it anything which contradicted the witness's evidence in Court, though he does not specifically say this. This raises the question whether under section 162 of the Code of Criminal Procedure it is the duty of the Court to satisfy itself that a contradiction exists before granting a copy. There are two cases in which this question has been considered which have been brought to my attention. One is that reported as *Jhari Gope v. Emperor*(3). There it is clearly laid down that section 162 of the Code of Criminal Procedure does not require the Court so to satisfy itself and that, subject to the provisions of the second proviso regarding any part of the statement, the Court must grant the copy and it is for the accused's Counsel to examine it after it is granted to discover whatever contradictions may exist. The other is a Full Bench ruling of the Rangoon High Court, *Emperor v. Nga Lun*(4), which, in a brief paragraph, confirms the view that whether the Court itself finds any contradiction or not in the statement it must nevertheless grant a copy of it. The Magistrate relies upon an unreported judgment of my learned brother BURN J. in Criminal Revision Case No. 44 of 1936. It was not necessary in that case to decide this point and though BURN J. may perhaps have given an indication of this view he

(1) 1929 M.W.N. 885.
(3) A.I.R. 1929 Pat. 268.

(2) A.I.R. 1929 Cal. 182.
(4) A.I.R. 1935 Ran. 370 (F.B.)

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has not definitely said that a Court can refuse to grant a copy if it sees no contradiction itself.

Following, with respect, the Patna and Rangoon decisions referred to above, I hold that the learned Magistrate was wrong in refusing to grant the copy, and, subject to anything which he may find under the second proviso, direct him to grant it and proceed with the enquiry.

V.V.C.

INCOME-TAX REFERENCE.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice King.*

THE TRICHINOPOLY TENNORE HINDU PERMANENT
FUND LIMITED, PETITIONERS,

1937,
October 22.

v.

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

Indian Income-tax Act (XI of 1922), sec. 3—Mutual benefit society—Banking concern or—Company registered under Indian Companies Act whether a—Company a banking concern—Amount paid by, to shareholders and subscribers in excess of their contributions—Deduction in respect of, under sec. 10 (2) (iii) of Act—Company's right to—Res judicata—Doctrine of—Applicability of, to assessment by Income-tax Officer.

The assessee company was a company registered under the Indian Companies Act. Its objects were stated in its original memorandum to be:—“(a) to enable persons to save money; (b) to enable persons to secure loans at favourable rates of interest on sufficient securities; and (c) to do all such other things as are incidental or conducive to the attainment of the above objects”. The company made considerable profits

* Original Petition No. 173 of 1936.

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out of lending money to non-members. The memorandum and the articles of association of the company were subsequently altered. For the word "persons" the word "members" was substituted. After the said alteration the nominal capital of the company was Rs. 9,90,000 divided into seven classes of shares, namely—(a) 1,800 fully paid up "permanent" shares of Rs. 50 each; (b) 2,120 "original" term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2; (c) 400 "A" class term shares of Rs. 93 each payable in 31 consecutive monthly calls of Rs. 3; (d) 2,880 "B" class term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2; (e) 4,600 "C" class term shares of Rs. 88 each payable in 83 consecutive monthly calls of Re. 1; (f) 500 "reserve" shares of Rs. 50 each payable in 10 calls of Rs. 5 each, Rs. 5 on application and the remaining calls whenever required on not less than one month's notice; and (g) 6,000 "ordinary" shares of Re. 1 each fully paid up. The ordinary shares were issued to persons who under the former scheme would have been non-member borrowers. A person who required a loan had under the altered articles to become a member, but he could become a member on payment of one rupee and he was entitled to have that one rupee paid back to him at the end of two years. Though by borrowing from the company the holders of ordinary shares, those who had taken one rupee shares, made for the company large profits, they were not allowed to share therein, nothing being paid to them out of the profits either by way of dividend or in reduction of interest.

Held that in the circumstances it was impossible for the company even after the alteration of its memorandum and articles to contend that it was a mutual benefit society and that, therefore, its income was not taxable.

The holders of ordinary shares were members in name only. Their membership did not in any sense give them the benefits of membership of a mutual benefit society.

Leeds Benefit Building Society v. Mallandaine(1) relied upon.

Board of Revenue v. Mylapore Fund(2) distinguished.

Held further that in computing the assessable income the assessee company was not entitled to claim a deduction in

(1) [1897] 2 Q.B. 402.

(2) (1923) I.L.R. 47 Mad. 1 (S.B.).

respect of the amount paid to the shareholders and subscribers in excess of their contributions as being interest on borrowed capital within section 10 (2) (iii) of the Indian Income-tax Act.

An Income-tax Officer does not constitute a Court and, therefore, the doctrine of *res judicata* can have no application to an assessment made by him.

In the matter of the Indian Income-tax Act XI of 1922.

K. S. Krishnaswami Ayyangar for *N. Srinivasa Ayyangar* for assessees.

M. Patanjali Sastri for Commissioner of Income-tax.

The JUDGMENT of the Court was delivered by LEACH C.J.—The real question involved in this reference is whether the Trichinopoly Tennore Hindu Permanent Fund Limited, a company registered under the Indian Companies Act, is a banking concern or a mutual benefit society. The question was raised on a former occasion, namely in respect of the income-tax year, 1925–26. The Income-tax authorities then treated the company as an ordinary banking concern and taxed it on that basis. At the instance of the company the question was referred by the Commissioner of Income-tax to this Court, which decided that the Income-tax authorities had taken the correct view; *Trichinopoly Tennore Fund v. Commr. of Income-tax*(1). After this decision had been given, the company took steps to alter its memorandum and articles of association. In the original memorandum the objects of the company were stated to be :

"(a) to enable persons to save money; (b) to enable persons to secure loans at favourable rates of interest on

(1) (1927) 2 I.T.C. 386.

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sufficient securities; and (c) to do all such other things as are incidental or conducive to the attainment of the above objects".

For the word "persons" the word "members" was substituted. The company had made considerable profits out of lending money to non-members and this was the reason for the decision that the company was a banking concern and not a mutual benefit society.

The nominal capital was originally Rs. 2,99,970 made up as follows:—(1) 1,800 fully paid up permanent shares of Rs. 50 each, amounting to Rs. 90,000. (2) 2,333 term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2, amounting to Rs. 2,09,970. After the alteration of the memorandum and the articles of association, the nominal capital of the company was Rs. 9,90,000 divided into seven classes of shares, namely:—

	RS.
(a) 1,800 fully paid up "permanent" shares of Rs. 50 each, amounting to	90,000
(b) 2,120 "original" term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2, amounting to	1,90,800
(c) 400 "A" class term shares of Rs. 93 each payable in 31 consecutive monthly calls of Rs. 3, amounting to	37,200
(d) 2,880 "B" class term shares of Rs. 90 each payable in 45 consecutive monthly calls of Rs. 2, amounting to	2,59,200
(e) 4,600 "C" class term shares of Rs. 83 each payable in 83 consecutive monthly calls of Re. 1, amounting to	3,81,800

	RS.
(f) 500 "Reserve" shares of Rs. 50 each payable in 10 calls of Rs. 5 each, Rs. 5 on application and the remaining calls whenever required on not less than one month's notice, amounting to	25,000
(g) and 6,000 "ordinary" shares of Re. 1 each fully paid up, amounting to	6,000
	9,90,000

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A person who required a loan had under the altered articles to become a member, but he could become a member on payment of one rupee, which he was entitled to withdraw at the end of two years. In passing I should mention that it is conceded that the ordinary shares have been issued to persons who under the former scheme would have been non-member borrowers. After the memorandum and the articles had been altered, the company contended that it was in fact a mutual benefit society, and therefore, its income was not taxable. The contention was accepted for the years 1928-29, 1929-30 and 1930-31, but in respect of the 1931-32 assessment the income-tax authorities reconsidered the question and came to the conclusion that the company was in reality still a banking concern. In accordance with this decision they re-opened the assessment for the year 1930-31. In respect of the year 1930-31 the Income-tax Officer assessed the company on an income of Rs. 24,458, which was subsequently enhanced to Rs. 24,995. Thereupon the company asked the Commissioner of Income-tax to state a case to this Court under

the provisions of section 66 of the Act, but the Commissioner declined to do so. An application was then made under section 66 (3) of the Act to this Court and the Commissioner was directed to state a case on the following questions:—

(i) Whether the assessment of the petitioner to income-tax upon a sum of Rs. 24,995 for the year 1930-31 is valid and maintainable?

(ii) Whether the present case is not governed by the decision in *Board of Revenue v. Mylapore Fund*(1) and whether the petitioner is not therefore liable to pay income-tax?

(iii) Whether the petitioner is not entitled to claim in computing the assessable income a deduction of the amount paid to the shareholders and subscribers in excess of their contributions as being interest on borrowed capital within section 10 (2) (iii) of the Act?

(iv) Whether the Income-tax authorities are precluded in law from levying income-tax on the petitioner having regard to the fact that the petitioner was recognised and treated by them as a mutual benefit society and exempted from payment of income-tax since the year 1927?

(v) Whether the assessment of the petitioner for the year 1930-31 under section 34 of the Act is valid and maintainable?

It will be convenient to take questions (i) and (ii) together. The case referred to in question (ii) is that of the *Board of Revenue v. Mylapore Fund*(1). There, the capital of the society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest on loans given to its members, every one of whom was by the rules eligible to take loans. It was held that such income did not constitute "profits" within the meaning of the Income-tax Act, 1918. The Trichinopoly Tennore Hindu Permanent Fund

(1) (1923) I.L.R. 47 Mad. 1 (S.B.).

Limited, however, differs in material respects from the Mylapore Hindu Permanent Fund Limited. In the case of the Trichinopoly Tennore Hindu Permanent Fund Limited, the company obtained, as I have already mentioned, considerable income from loans to non-members. No doubt it now only gives loans to persons who become "members", but it is said that the membership is in many cases merely nominal and that the company carries on in reality the same business as it did before the memorandum and the articles of association were altered. It appears to us that there is much substance in this contention.

A person who wants a loan can obtain one from this company, if he pays one rupee for a share, and he is entitled to have that one rupee paid back to him at the end of two years. Out of a gross income of Rs. 33,954-7-8 for the nine months ended 31st March 1930 a sum of Rs. 14,217-13-9 represented interest on loans granted to persons who had each acquired an ordinary share of one rupee and only Rs. 139-11-4 was paid to these persons by way of dividend. The holders of permanent shares received in dividends Rs. 6,542-2-6, the holders of original term shares Rs. 5,550-9-5, the holders of "B" class term shares Rs. 3,660-5-9, and the holders of "C" class term shares Rs. 3,338-9-5. In other words, the large profits which the company made were distributed to its real shareholders. The nominal members, those who had taken one rupee shares, invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. By borrowing from the company they made for

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the company large profits, in which they were not allowed to share. In the circumstances it is impossible for the company to contend that it is a mutual benefit society and its income is not taxable.

A very similar question to the one which arises here was dealt with in the case of *Leeds Benefit Building Society v. Mallandaine*(1). This society consisted of members who held one or more shares or one or more fifth parts of a share and the shares were divided into two classes : (i) investors' shares and (ii) borrowers' shares. The members were divided into classes according to the shares they held. The society lent money to its members at a fixed rate of interest. The repayment of the loans was by weekly payments of a fixed sum, which covered both principal and interest. No deduction was allowed by the income-tax authorities to be made by the borrower in respect of income-tax and the society was assessed on the interest it received as being interest of money within section 2 of the Income-tax Act, 1853. On a case being stated it was held that the expression "interest of money" in section 2 of that Act was not restricted to annual interest and that the interest received by the society was not in respect of a loan on land, but of a contract relating to interest of money lent, and was, therefore, assessable in their hands to income-tax. In the case before us likewise borrowers become members, but the holders of ordinary shares are members in name only. Their membership does not in any sense give them the benefits of membership of a mutual

(1) [1897] 2 Q.B. 402.

benefit society. Therefore, we consider that the answer to question No. (i) should be in the affirmative and the answer to question No. (ii) should be that it is not governed by the *Mylapore Fund* case(1).

The answer to question No. (iii) has been correctly stated by the Commissioner of Income-tax in his reference. He points out that there is no payment of interest to shareholders or subscribers on the capital subscribed by them. The company pays dividends to its members and these are dependent on the earning of profits. The sums so paid are not in the nature of interest on borrowed capital, which is allowable under section 10 (2) (iii) of the Act. The company is, therefore, not entitled to claim a deduction in respect of these sums.

Questions (iv) and (v) can also be taken together. What is really contended for here is that the doctrine of *res judicata* operates in respect of an assessment made by an Income-tax Officer. This is clearly erroneous. The Income-tax Officer does not constitute a Court, and, therefore, the doctrine can have no application. His assessments are final, unless they can be re-opened under some provision of the Act. Consequently the answer to the question No. (iv) is in the negative and the answer to the question No. (v) is in the affirmative.

As the reference has been answered in favour of the Commissioner of Income-tax he will be entitled to costs, which we fix at Rs. 250.

A.S.V.

(1) (1923) I.L.R. 47 Mad. 1 (S.B.).

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APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Madhavon Nair.

1937,
September 28.

G. TIRUVENGADACHARIAR, OFFICIAL LIQUIDATOR OF THE
NATIONAL LIVE STOCK REGISTRATION BANK, LIMITED
(IN LIQUIDATION) (APPLICANT), APPELLANT,

v.

A. T. VELU MUDALIAR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

*Indian Companies Act (VII of 1913), sec. 235—Share broker
of a company—If an officer—Promoter of a company—
Who is—Misfeasance summons against share broker under
sec. 235—Incompetency of.*

A person appointed as a share broker of a limited liability company, without more, is not an "officer" within the meaning of section 235 of the Indian Companies Act.

A.T.V. and P.M. were partners in a firm. They were appointed share brokers of a limited liability company. Article 9 of the articles of association which came into force at a later date stated that their firm should be the sole selling brokers of the company and under it they were to receive a commission of five per cent on the amount subscribed. After the formation of the company the matter was discussed by the directors and they passed a resolution agreeing to ratify the arrangement subject to an immaterial alteration. The brokers accepted the modification and they were paid Rs. 8,865-11-3 on the basis of the modified agreement, notwithstanding that the directors had exceeded their powers in ratifying it. The company went into liquidation and the Official Liquidator took out a misfeasance summons under section 235 of the Indian Companies Act, 1913, for the recovery of the Rs. 8,865-11-3 on the ground that the agreement in pursuance of which they were paid that sum was *ultra vires*. Both the persons were sought to be made liable as "officers" of the company and A.T.V. on the further ground that he was also a "promoter" of the company. A.T.V.'s

* Original Side Appeal No. 47 of 1937.

signature appeared at the foot of the memorandum of association and he took 100 shares out of 1,200 shares initially subscribed and the money paid by him for those shares was utilised in paying the expenses of formation of the company. Apart from this there was no evidence showing that A.T.V. took any steps in discussing the formation of the company or in bringing the company into being. He had nothing to do with the selection of the directors or the settlement of any contract except the contract under which his firm was to act as share brokers.

Held that neither of them was an "officer" of the company, that A.T.V. was not a "promoter" of the company, and that proceedings under section 235 of the Indian Companies Act against them were incompetent.

Twycross v. Grant(1) followed.

Re The Liberator Permanent Benefit Building Society(2) referred to.

APPEAL from the judgment and order of GENTLE J., dated 28th April 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 845 of 1933 in Original Petition No. 206 of 1932.

C. Narasimhachari for appellant.—The respondents were share brokers of the company. They were paid Rs. 8,865-11-3 by the directors as commission and they received the same with the knowledge that the agreement under which the payment was made was beyond the powers of the directors inasmuch as the articles of association permitted them only to pay a much smaller rate of commission. Really it amounts to an overpayment under an *ultra vires* agreement.

[CHIEF JUSTICE.—The agreement was *intra vires* of the company but was *ultra vires* of the directors.]

Rustomji in his book on Company Law at page 46 defines the scope of an *ultra vires* act as distinguished from an illegal act; vide *Turner v. The Bank of Bombay*(3), *Ashbury Railway Carriage and Iron Co. v. Riche*(4) and *In re Coltman. Coltman v. Coltman*(5). There is no doubt that the amount could be

(1) (1877) 2 C.P.D. 469.

(2) (1894) 71 L.T. 406.

(3) (1900) I.L.R. 25 Bom. 52, 60.

(4) (1875) 7 H.L. 653, 668, 672.

(5) (1881) 19 Ch. D. 64, 69, 72.

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under the name of A. T. Velu Mudaliar & Co. They had no previous experience as share brokers and it is obvious that they owed their appointment to their relationship to V.K. Lakshmana Mudaliar, one of the promoters of the company, who is the son of the second respondent and the brother-in-law of the first respondent. A draft of the agreement under which the respondents were to act as brokers of the company was drawn up in the month of May 1927, and, although the company had not then been registered, it was signed on 31st May 1927. Under it the respondents were to receive a very high commission, Rs. 1-8-0, for every share of the company sold through them, and eight annas in respect of every share sold through other agencies. Article 9 of the articles of association which came into force at a later date stated that the respondents' firm should be the sole selling brokers of the company and under it they were to receive a commission of five per cent on the amount subscribed, but the document of 31st May 1927 purported to fix the commission at fifteen per cent. After the formation of the company the matter was discussed by the directors and on 22nd October 1927 they passed a resolution agreeing to ratify the arrangement, subject to an alteration which amounted to very little. The respondents accepted the modification and were paid on the basis of the modified agreement, notwithstanding that the directors had exceeded their powers in ratifying it. The appeal is not, however, concerned with the liability of the directors in this respect.

The amount paid to the respondents was, as I have already indicated, the sum of Rs. 8,865-11-3

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which the Official Liquidator desired to recover from them on the ground that the agreement was *ultra vires*. Accordingly he took out a summons under section 235 of the Indian Companies Act, 1913, and the matter in due course came before STONE J., who referred the question of what was due under the agreement to the Official Referee. After holding an inquiry the Official Referee reported that the respondents were not entitled to retain the Rs. 8,865-11-3. The Official Referee's report came before GENTLE J., when it was contended on behalf of the respondents that all remedy against the respondents had become time-barred. It was said that the article which applied to the case was article 36 of the Indian Limitation Act, which allows only a period of two years. The Official Liquidator urged that the article which applied was article 120, which allows a period of six years. The learned Judge found that article 36 applied and this appeal has been filed to challenge the finding.

The Court is however not called upon to decide the question, as it is manifest that, for other reasons, the Official Liquidator is not entitled to ask for an order against the respondents under section 235 of the Indian Companies Act, 1913. That section only applies to a person who has taken part in the formation or promotion of the company, to a past or present director, manager or liquidator or to an officer of the company. Neither respondent was ever a director, manager or liquidator of the company, and, for reasons which I shall indicate, I do not think that either can be deemed to be a promoter or officer. As a matter of fact so far as the second respondent is

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concerned, the Court is not asked to hold that he was a promoter.

I will first discuss the question whether the first respondent can be deemed to be a promoter. In *Twycross v. Grant* (1) COCKBURN C.J. defined the word "promoter" as being one who undertakes to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose. Other definitions have been given by learned Judges from time to time, but it is impossible to define accurately what is meant by the word "promoter". The difficulty is discussed at length by the learned author of Palmer's Company Precedents at pages 103 to 109. After referring to a number of the more prominent cases, the learned author observes at page 106 :

"It is obvious, therefore, that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms . . . (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this control which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls.

But a person who has done much less than this—takes a much less prominent part—may bring himself within the meaning of the term and may be held liable as a promoter."

Each case must be decided according to the evidence. If it is clear that the persons charged were merely servants or agents of the promoters or servants or agents of the company, they cannot be classified as promoters, and in this connection

(1) (1877) 2 C.P.D. 469.

the learned author makes mention of brokers, bankers, and solicitors. Of course, brokers, bankers, and solicitors could put themselves in the position of being promoters, but in order to do so they would have to travel outside their ordinary spheres.

Now, what are the facts here? As I have indicated, the question of promotion only applies to the first respondent. It is said that he must be deemed to have taken part in the formation of the company and to be a promoter because he signed the memorandum and articles of association and subscribed for 100 shares. There is no evidence showing that he took any part in discussing the formation of the company or in taking any steps to bring the company into being, apart from the fact that he signed the memorandum of association and paid for 100 shares. It is not even suggested that he had anything to do with the drawing up of the memorandum and articles of association. There is no suggestion that the first respondent had anything to do with the selection of the directors or the settlement of any contract, except the contract under which his firm was to act as brokers. After the company had been formed and had started business the first respondent's firm induced certain people to subscribe for shares, but it is not alleged that they did anything before the company was launched. The minimum subscription was fixed at 500 shares and the signatories to the memorandum of association themselves subscribed for 1,200 shares. In the memorandum of association the only persons referred to as promoters are V. K. Lakshmana Mudaliar and J. W. Samuel.

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It comes to this. The Court is asked to hold the first respondent to be a promoter because his signature appears at the foot of the memorandum and he took 100 shares of the 1,200 initially subscribed. This is a contention which I am unable to accept. The law requires that there shall be seven signatories to the memorandum of association of a public company. A person who has taken no part in the formation or promotion of the company may be asked to sign the memorandum as a subscriber for one or more shares, and this usually happens. It was mentioned in the course of the argument that the money subscribed by the first respondent for his 100 shares was utilised in defraying part of the expenses of forming the company. That may be, but it was a matter which concerned the directors. The application of the money which the first respondent paid for his shares was a matter over which he had no control, and the fact that the money was utilised in paying the expenses of formation cannot make him a "promoter". The agreement with the respondents was an agreement which conscientious directors ought never to have entered into and in doing so the directors deliberately exceeded their powers. But this, of course, has nothing to do with the question whether the first respondent is to be deemed to be a person who took part in the formation and promotion of the company. For the reasons indicated it must be held that the Official Liquidator was not entitled to take out the summons against the first respondent on the ground that he was a promoter.

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Can the respondents be deemed to be officers of the company? Section 2 of the Act defines the word "officer" as including

"any director, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor".

The definition is therefore not exhaustive. The inclusion of the auditor for the purposes of sections 235, 236 and 237 follows the course adopted in England and avoids the discussion which had taken place in the Courts there with regard to the position of an auditor. But it does not follow because an auditor is an "officer" for the purposes of section 235, the company's share broker is in the same position. In *Re The Liberator Permanent Benefit Building Society*(1), where the question was whether a person who was appointed to act as solicitor to the society was an "officer" of the society, CAVE J. observed :

"It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society. All these persons render services to the society but they cannot be said to be in the employment of the society so as to make them officials."

I can see no difference between the position of a broker to a company whose duties are confined to dealing with the shares of the company and the position of the banker who has to deal with the moneys of the company. A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore,

(1) (1894) 71 L.T. 406.

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to classify him as an officer of the company with-
in the meaning of section 235 of the Act would,
in my opinion, be putting too great a strain on the
wording of the section. If moneys had been
wrongly paid to the brokers, the Official Liquidator
had, subject to the law of limitation, other means
of recovering them, but he is not entitled to use
section 235 for the purpose.

For these reasons the appeal fails and must be
dismissed with costs, which will be paid out of
the assets of the company. The Official Liquidator
will be allowed his costs out of the assets.

MADHAVAN NAIR J.—I entirely agree and have
nothing to add.

G.R.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice.

C. S. MAHADEVA AIYAR (DEPENDANT), PETITIONER,

v.

THE MUNICIPAL COUNCIL, MASULIPATAM,
REPRESENTED BY THE COMMISSIONER, MASULIPATAM
(PLAINTIFF), RESPONDENT.*

1937,
August 6.

*Madras District Municipalities Act (V of 1920) as amended by
The Madras District Municipalities (Amendment) Act (X of
1930), sec. 93 and Sch. IV, r. 17—Profession tax—District
Judge of a district remaining on leave outside the municipal
limits preparatory to retirement—District Judge doing
some administrative work from there —If liable to munici-
pality for profession tax on the ground of having had an
office within the municipality within the meaning of r. 17—
Fundamental Rules, r. 72—Government servant on leave
preparatory to retirement—Sanction of Government, if
necessary before he can join duty if he wants to.*

C.S.M. was appointed the District Judge of K with head-
quarters at M on 1st April 1931. The Court closed for the
vacation on 4th May 1931 and he left M never to return,
although he remained the District Judge of K until 31st July
1931, when he retired. The Court re-opened after the vacation
on 6th July 1931. On 22nd April 1931, that is before the
Court closed for the vacation, the Government of Madras
granted him leave on average pay from 6th to 30th July with
permission to prefix the period of the vacation. By the same
order the Government appointed an Additional Sessions Judge
with headquarters at E in order that criminal cases could be
dealt with in the meantime. C.S.M. was actually in the place
M from 1st April to 4th May 1931 and therefore was not
there for sixty days. After he left M he passed an order
appointing a record-keeper and other junior officials which
required no office so far as he was concerned. Under Rule 72
of the Fundamental Rules he could not return to M to act as

* Civil Revision Petition No. 1169 of 1935.

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District Judge, even if he wanted to, before the expiration of the period of leave, without the express sanction of the Government.

Held: Though C.S.M. was holding the office of the District Judge of M from 4th May 1931 to the end of July 1931, he had no office within the municipality of M within the meaning of Rule 17 of the Statutory Rules and he was not liable to profession tax under section 93 of the Madras District Municipalities Act V of 1920 as amended by the Act X of 1930.

Chairman, Ongole Municipality v. Mounsey(1), *Moberly v. The Municipal Council of Cuddalore*(2) and *Hammick v. President, Madras Municipal Commission*(3) referred to.

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 Masulipatam in Small Cause Suit No. 850 of 1934.

R. Swaminatha Ayyar for petitioner.—The municipality of Masulipatam filed a suit against the petitioner for the recovery of profession tax under section 93 of the Madras District Municipalities Act. The petitioner was the District Judge of the place. He did not carry on his profession as a District Judge for a period of sixty days within the municipality. He went away from the place on leave preparatory to retirement. He was charged to profession tax on the ground that he had an office within the municipality during this latter period. No doubt he held the appointment of District Judge but that was not within the municipality. There was the office of the District Judge within the municipality but the petitioner did not hold the office. "Holding an appointment" is different from "having an office". It is true that during this period he did some administrative work with respect to that office from outside the limits of the municipality. That would not make him a person holding the office of the District Judge within the Rules. Under Rule 72 of the Fundamental Rules he could not return to the place to act as District Judge, even if he wanted to, before the expiration of the period of leave, without the express sanction of the Government.

(1) (1894) I.L.R. 17 Mad. 453.

(2) (1914) I.L.R. 38 Mad. 879.
(3) (1898) I.L.R. 22 Mad. 145.

Section 93 of the Madras District Municipalities Act of 1920 has been amended by Act X of 1930. The sense is not altered and Rule 17 has been introduced to give a statutory definition of "having an office". *Chairman, Ongole Municipality v. Mounsey*(1), *Hammick v. President, Madras Municipal Commission*(2) and *Moberly v. The Municipal Council of Cuddalore*(3) are still good law.

V. Govindarajachari for respondent.—The cases cited on behalf of the petitioner were cases before the amendment of the section by Act X of 1930. Rule 17 of Schedule IV was newly added. The old section uses the following words, viz., "who", "exercises" and "within the municipality" in places different from those where they appear in the amended section. The petitioner appointed a record-keeper and did some administrative work during the period when he was on leave in connection with the office of the District Judge. Even during this period he held the office of the District Judge within the meaning of Rule 17. The Fundamental Rules relied on do not state that a person under these circumstances does not hold the office of the District Judge. The cases quoted on behalf of the petitioner were all cases decided before the amendment when there was no rule corresponding to Rule 17 of Schedule IV.

JUDGMENT.

This petition raises the question whether the petitioner, who in 1931 was the District Judge of Kistna with headquarters at Masulipatam, is liable to the Municipal Council of Masulipatam, in the sum of Rs. 93-10-0 by way of profession tax. The petitioner was appointed the District Judge of Kistna on 1st April 1931. The Court closed for the vacation on 4th May 1931 and the petitioner left Masulipatam never to return, although he remained the District Judge of Kistna until 31st July 1931, when he retired. The Court reopened after the vacation on 6th July 1931. On

(1) (1894) I.L.R. 17 Mad. 453.

(2) (1898) I.L.R. 22 Mad. 145.

(3) (1914) I.L.R. 38 Mad. 879.

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22nd April 1931, that is, before the Court closed for the vacation, the Government of Madras granted to the petitioner leave on average pay from 6th to 30th July with permission to prefix the period of the vacation. By the same order the Government appointed an Additional Sessions Judge with headquarters at Ellore in order that criminal cases could be dealt with in the meantime. The petitioner was actually in Masulipatam from 1st April to 4th May 1931 and therefore was not there for a period of sixty days. Section 93 of the Madras District Municipalities Act, 1920, as amended by Act X of 1930, states that if the Council by a resolution determines that a profession tax shall be levied (and this resolution has been passed)

"every person who . . . in any half-year—

(a) exercises a profession, art, or calling or transacts business or holds any appointment, public or private,

(i) within the municipality for not less than sixty days in the aggregate, or

(ii) without the municipality but who resides in the municipality for not less than sixty days in the aggregate, or

(b) resides in the municipality for not less than sixty days in the aggregate and is in receipt of any pension or income from investments,

shall pay a half-yearly tax assessed in accordance with the rules in Schedule IV" of the Act.

The question to be decided is whether the petitioner held his appointment within the meaning of the section for the period requisite to make him chargeable. The District Munsif has held that the petitioner does come within the section and relies for this decision on Rule 17 of the Rules to be found in the Fourth Schedule to the Act. Rule 17 says that a person shall be deemed to have exercised a profession, art or calling or held

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an appointment within a municipality if he has an office or place of business within such municipality. The learned District Munsif was of the opinion that the petitioner had an office within the municipal area notwithstanding that he was on leave.

Before discussing the correctness of this decision I would refer to three decisions, two of which refer to the Madras District Municipalities Act of 1884 and the other to the Madras City Municipal Act of the same year. Section 53 of the former Act provided :

"If the Municipal Council notify, under section 50, that a tax on arts, professions, trades and callings, and on offices or appointments shall be levied, every person who within the municipality exercises after the date specified in the said Notification, any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments specified in Schedule A, shall, subject to the provisions of section 59, pay in respect thereof the sum specified in the said Schedule as payable by persons of the class in which such person is placed."

The Madras City Municipal Act, 1884, was to the same effect.

In *Chairman, Ongole Municipality v. Mounsey*(1) it was held that an officer, whose headquarters were within a municipality, did not *ipso facto* exercise his profession or hold such office or appointment within the municipality so as to render himself liable for the payment of profession tax. Accordingly, an officer who was not personally present at his headquarters in the course of duty for a period of sixty days in the half-year was not liable for the tax. The reason for the decision was that it was an essential condition of

(1) (1894) I.L.R. 17 Mad. 453.

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liability that the profession should be exercised within municipal limits. In *Moberly v. The Municipal Council of Cuddalore*(1) it was found that a District Judge whose usual place of business was within the municipality of Cuddalore had resided for sixty days within another municipality during the annual recess and during that period had done some administrative but no judicial work and it was held that he was not liable to payment of profession tax to the Cuddalore Municipality. It was said that he must be deemed to have held his office of District Judge within the Kodaikanal Municipality, where he spent his vacation, and not at Cuddalore. The case of *Hammick v. President, Madras Municipal Commission*(2) was under the Madras City Municipal Act. The Inspector-General of Police, whose official place of business was in Madras, went on tour, and during his absence the Assistant Inspector-General of Police in Madras signed letters for him. It was decided that in these circumstances he was not liable to the profession tax under the City Act, as he was not holding the office in Madras within the meaning of the statute.

Section 93 of the Madras District Municipalities Act of 1920 as amended by Act X of 1930 has been differently arranged, but the re-arrangement in my opinion does not alter the section and the authorities to which I have just referred would have application if the matter rested there. Rule 17 of the Statutory Rules does, however, make a difference. Under that Rule a person is to be deemed to hold an office within a municipality if he has an office within the municipality

(1) (1914) I.L.R. 38 Mad. 879.

(2) (1898) I.L.R. 22 Mad. 145.

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and it matters not whether he goes outside or remains inside the municipal limits. Therefore, what I have to decide in this case is whether the petitioner must be deemed to have had an office in Masulipatam from 4th May 1931 to the end of July of that year. It is quite clear that he was holding the office of District Judge during this period, but it does not necessarily follow that he had still got an office. The Court room was still there and so was the office room attached to it, but can that room be regarded as a place of business or an office of the petitioner? I consider that it cannot. The petitioner left Masulipatam on 4th May 1931 never to return again. He knew that he was retiring at the end of July and before he left he had arranged for leave to be granted to him for the period between the end of the vacation and the date on which he was leaving the service. Under Rule 72 of the Fundamental Rules he could not return to Masulipatam to act as District Judge, even if he wanted to, before the expiration of the period of the leave, without the express sanction of the Government. His work had finished and he was allowed to spend the remaining days of his service elsewhere. I am asked to hold that he had an office because he passed an order appointing a record-keeper and other junior officials after he had left Masulipatam. These were administrative acts which he was bound to perform and which required no office so far as he was concerned. The Madras District Municipalities Act in this respect is a taxing statute, and must be construed strictly. Before the petitioner can be made liable to the tax imposed upon him it must be clearly shown that

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he comes within the four corners of the section. I am of opinion that on a true construction of the section he is not within its purview.

For these reasons the petitioner succeeds and his petition must be allowed with costs throughout.

G.R.

APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Varadachariar.*

1937,
August 30.

PENTAPATI NAGESWARA RAO (PLAINTIFF),
PETITIONER,

v.

MOKA NARAYANAMURTI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Indian Stamp Act (II of 1899), sec. 35—Promissory note not properly stamped—Admissibility in evidence of, to prove acknowledgment of liability in respect of prior promissory notes.

An improperly-stamped promissory note is inadmissible in evidence to prove an acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. On the wording of section 85 of the Indian Stamp Act, 1899, an improperly-stamped promissory note cannot be admitted in evidence for such a purpose or for any other purpose.

Ramanadha Aiyar v. Narayanasamy Aiyar(1) approved.
Rakkappan v. Suppiah(2) and *Vancheswara v. Narayana*(3) disapproved.

* Civil Revision Petition No. 945 of 1936.
(1) (937) 1 M.L.J. 163. (2) A.I.R. 1930 Mad. 485.
(3) A.I.R. 1933 Mad. 251.

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PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Amalapuram in Small Cause Suit No. 338 of 1935.

V. Viyyanna for petitioner.

Respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question raised by this petition is whether an improperly-stamped promissory note can be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. The petition arises out of a suit filed in the Court of the Subordinate Judge of Amalapuram. The promissory note was in the following terms:

"On account of my necessity this day . . . that is, the amount due for principal and interest on the promissory note executed and delivered on 23rd June 1929 is Rs. 93-3-0; the amount due on the promissory note executed and delivered on 6th July 1929 is Rs. 92-13-0 and the amount due for principal and interest on the promissory note executed and delivered on 14th February 1931 is Rs. 101. The total is Rs. 287. On demand I promise to pay you or order in one lump sum, the (said) principal together with interest thereon at Rs. 1-9-0 (one rupee and nine annas) per cent per mensem, shall get the payment endorsed on this note and take it back. The consideration hereof has been received as aforesaid. This promissory note is executed with consent."

On a stamp of the value of one anna was appended the signature of the executant. The learned Judge before whom the case came refused to admit this document on the ground that its admission was prohibited by section 35 of the Indian Stamp Act, 1899. The learned Advocate for the petitioner contends that this decision is wrong. He says that the learned Judge should have admitted that portion of the document

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which recited the previous promissory notes, and that this would have saved limitation in respect of the earlier instruments. The relevant portion of section 35 reads as follows :

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having, by law or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless such instrument is duly stamped."

It will be observed that the instrument shall not be admitted in evidence for any purpose, nor shall it be acted upon, unless it bears the stamp prescribed by law. I should have thought that on the wording of this section it was clear that the promissory note in suit could not be admitted in evidence for the purpose sought by the petitioner or for any other purpose. But the petitioner's Counsel has quoted two cases decided by KRISHNAN PANDALAI J. which support his contention. He also relies on a passage from the work of the late Sir Dinshah Mulla on the Indian Stamp Act.

Before referring to these authorities I would point out that the words "for any purpose" did not appear in the General Stamp Act, 1869, but were inserted for the first time in the Indian Stamp Act, 1879, and that they were not introduced into the English Act until the year 1891 (54 and 55 Vict. c. 39). In 1849 the question of the admissibility of an improperly-stamped document for collateral purposes was discussed by the House of Lords in the case of *Matheson v. Ross*(1). It was there held that where a paper purported to be a receipt, and, as such, required a stamp, but

(1) (1849) 2 H.L. 286.

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also purported to be an agreed statement of accounts, which did not require a stamp, it might be given in evidence to shew that agreed state of accounts only, though it had not been previously stamped. But it has since been accepted that the amendment in the English Act in 1891 has worked a change.

In *Rakkappan v. Suppiah*(1) KRISHNAN PANDALAI J. held that where a promissory note contained, in addition to the promise, a statement that the amount for which it was given was due in settlement of a previous account, the instrument, although inadmissible as a promissory note for want of sufficient stamp, was admissible to prove an acknowledgment under section 19 of the Limitation Act. The reason given was that section 35 of the Stamp Act merely shuts out the portion of the document which constitutes the promissory note and does not affect other statements in the document. The learned Judge expressed the same opinion in a later case, *Vancheswara v. Narayana* (2), but it did not find acceptance by BEASLEY C.J. in the recent case of *Ramanadha Aiyar v. Narayanaswamy Aiyar*(3). The learned Chief Justice there held that an insufficiently-stamped promissory note could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. This was also a case in which it was sought to save limitation by the admission of the instrument in evidence. In the course of his judgment BEASLEY C.J. referred to the unreported case of *K. M. Subbayyar & Sons v. P. N. Lakshmana Ayyar* and

(1) A.I.R. 1930 Mad. 485.

(2) A.I.R. 1933 Mad. 251.

(3) (1937) 1 M.L.J. 163.

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others (Second Appeal No. 124 of 1930) where he and KING J. sitting as a Bench dissented from the opinion of KRISHNAN PANDALAI J. The learned Advocate for the petitioner has not referred us to any other decided cases which support the proposition which he has advanced ; but has laid stress on a passage to be found at page 122 of the third edition of Sir Dinshah Mulla's work. The conclusion arrived at by the author of that work is to the effect that an instrument not duly stamped may be admissible as proof of a collateral matter, but is not admissible as proof for a collateral purpose. By "collateral matter" is meant any matter the proof of which does not depend upon proof of the transaction, and by "collateral purpose", any matter the proof of which depends upon proof of the transaction. With great respect I consider that this statement conflicts with the wording of the section, which is very precise. Sir Dinshah Mulla would appear to go back to the case of *Matheson v. Ross*(1), which was decided before the words "for any purpose" were introduced into the statute. That the English law since the passing of the Act of 1891 is not the same as it was when *Matheson v. Ross*(1) was decided is to be gathered from the decision of the President of the Probate, Divorce and Admiralty Division (Sir SAMUEL EVANS) and BALGRAVE DEANE J. in *Fengl v. Fengl*(2), where it was held that the effect of the Stamp Act of 1891 is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose. Sir SAMUEL

(1) (1849) 2 H.L. 286.

(2) [1914] P. 274.

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EVANS in his judgment remarked that whatever the law was before 1891 he was of opinion that the instrument with which the Court was then concerned was not admissible. As I have already pointed out, the English Stamp Act of 1891 is the same as the present Indian Stamp Act in this respect.

The Bombay High Court in *Mulji Lala v. Lingu Makaji*(1) held that an acknowledgment of a debt coming under article I, Schedule I, of the Stamp Act I of 1879, could not, if unstamped, be given in evidence for any purpose including the purpose of saving limitation. There have been similar decisions by other High Courts, but it is not necessary to examine them in detail. The section itself in my opinion provides a complete answer to the petitioner's case. If an unstamped document cannot be admitted for any purpose it must mean, if the words are to be given their ordinary and plain meaning, that it cannot be admitted under any circumstances in a civil suit. If the Legislature in placing this provision of law on the statute book had intended to allow unstamped instruments to be admitted for collateral purposes, it would surely have said so. It did not say so, but, on the other hand, it provided that a negotiable instrument which is insufficiently stamped at the time of execution cannot be properly stamped afterwards, even on payment of a penalty which is allowed in the case of other documents.

For these reasons the petition must be dismissed.

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(1) (1896) I.L.R. 21 Bom. 201 (F.B.).

APPELLATE CIVIL.

*Before Mr. Justice Varadachariar.*MARUDAMUTHU POOSARI AND ANOTHER (PETITIONERS),
PETITIONERS,

v.

THE HINDU RELIGIOUS ENDOWMENTS BOARD,
MADRAS, REPRESENTED BY ITS PRESIDENT AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.**Madras Hindu Religious Endowments Act (II of 1927), sec. 84*
—Application under—Applicability to, of O. IX, Civil
Procedure Code (Act V of 1908).

Order IX of the Code of Civil Procedure applies to an application presented to the District Court under section 84 of the Madras Hindu Religious Endowments Act (II of 1927). When such an application is dismissed for default, the Court has power to restore it when it is satisfied that there was sufficient cause for the applicants' non-appearance.

Narayana Iyengar v. Desika Chariar(1) and *Rajagopala Chettiar v. H.R.E. Board, Madras*(2) referred to.

Anantharaju Shetty v. Appu Hegade(3) explained and distinguished.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore, dated 10th July 1934 and made in Interlocutory Application No. 191 of 1934 in Original Petition No. 86 of 1932.

K. S. Desikan for petitioners.

K. Subba Rao for *P. V. Rajamannar* for respondents one and two.

Third respondent was not represented.

* Civil Revision Petition No. 1710 of 1934.
(1) (1933) 65 M.L.J. 315. (2) (1933) I.L.R. 57 Mad. 271 (F.B.).
(3) (1919) 87 M.L.J. 162.

JUDGMENT.

MARUDAMUTHU
H.R.E. BOARD,
MADRAS.

This revision petition arises out of an application made to the lower Court to set aside the dismissal of a petition which had been presented to it under section 84 of the Madras Hindu Religious Endowments Act. The learned District Judge was evidently prepared, so far as the merits of the application went, to hold that there was sufficient cause for restoring the original petition; but he felt constrained to dismiss the interlocutory application because he was of opinion that Order IX, Civil Procedure Code, did not apply to the case before him. I think that this view of the learned Judge rests upon a misapprehension.

It is in a sense right to say that the Religious Endowments Act is self-contained, i.e., that the provisions of the Civil Procedure Code will not by their own force apply to every enquiry to be conducted by the authorities appointed or constituted under that Act. But when that Act allows suits or applications to be filed in a Civil Court in relation to matters arising under the Act, the principle that the Act is self-contained is irrelevant to the question of the procedure to be followed by the Civil Court in dealing with such applications or suits. This will be clearly realised when one bears in mind that there are several sections in the Endowments Act relating to suits to be brought in the Civil Court. I do not suppose anybody will contend that such suits will not be governed by the provisions of the Code, in the absence of a special provision to that effect in the Endowments Act. On the other hand, it seems to me illogical to expect in the Endowments Act a provision to the effect that a suit

MARUDAMUTHU v. H.R.E. BOARD, MADRAS. brought in a Civil Court will be governed by the Civil Procedure Code. I do not see how *applications* to the Civil Court will stand on a different footing. All that can be said is that in dealing with suits, the Court will follow the procedure applicable to suits and in dealing with applications, the Court will follow the procedure applicable to applications. It is on the principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code that second appeals have been permitted from the decisions of District Courts in cases under the Rent Recovery Act and in appeals under the Forest Act. Much the same principle was recognised by a Division Bench of this Court in *Narayana Iyengar v. Desika Chariar*(1), though other reasons were also given in support of the decision.

The learned Counsel for the respondents invited my attention to the decision in *Anantharaju Shetty v. Appu Hegade*(2). The basis of that judgment is not that the Civil Procedure Code cannot be made applicable at all but it is only the provisions relating to the procedure to be followed by the Court that will apply in such cases but not the provisions relating to appeal, review and so on. It is not necessary for me to say whether this distinction between one part of the Code and another part of the Code is justifiable or not ; but that distinction does not affect the decision of the present case. It must also be remembered that that case related to proceedings under section 10 of the old Religious Endowments Act XX of 1863.

(1) (1933) 65 M.L.J. 315.

(2) (1919) 37 M.L.J. 162.

Though it has been held that even when exercising the powers under that section, the District Court was acting as a Court and not as a *persona designata*, there can be very little doubt that a proceeding of that kind is substantially different from applications and suits which are provided for in the present Religious Endowments Act. The Full Bench judgment in *Rajagopala Chettiar v. H.R.E. Board, Madras*(1) proceeded on the footing that the provisions of the Code are applicable to these suits and applications, though the right of appeal was negatived in respect of applications under section 84 on the footing that an order on such an application was not a *decree* within the meaning of the Civil Procedure Code.

The order of the learned District Judge is set aside and he is directed to restore the original petition to file and proceed to dispose of it on the merits. Costs to abide.

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(1) (1933) I.L.R. 57 Mad. 271 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

1937,
March 19.

CHITTALURI SITAMMA *alias* SITABAYAMMA
AND ANOTHER (DEFENDANTS 1 AND 4), APPELLANTS,

v.

SAPHAR SITAPATIRAO AND FOUR OTHERS
(PLAINTIFF AND DEFENDANTS 5, 7, 10 AND 11),
RESPONDENTS.*

*Benami transaction—Husband—Purchase in wife's name by—
Benami or not—Onus of proof—Tests to find out nature of
transaction—Indian Limitation Act (IX of 1908), arts. 142
and 144—Applicability—Tenants—Property in possession of
—Scramble for several years prior to suit by attempts made
by each of rival claimants to get tenants to attorn to him.*

Where it was alleged that a purchase in the name of a Hindu wife was benami for her husband,

held (i) that the onus lay in the first instance on the party pleading that the transaction was benami; (ii) that the circumstance that the money required for the purchase was contributed by the husband and not by the wife was not conclusive in favour of the benami character of the transaction, though it was an important criterion; and (iii) that where the motive alleged for the benami transaction itself suggested that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference was that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Bilas Kunwar v. Deeraj Ranjit Singh(1), *Rahiman Beebi v. Khathoon Bee*(2), *Thulasi Ammal v. The Official Receiver, Coimbatore*(3) and *Ismail Mussajee Mookerdam v. Hafis Boo*(4) relied upon.

Where the suit was for recovery of possession of properties in the possession of tenants and it appeared that for several

*Appeal No. 112 of 1931 and Second Appeal No. 1214 of 1932.

(1) (1915) I.L.R. 37 All. 557, 564, 565 (P.C.).

(2) (1916) 4 L.W. 193.

(3) (1934) 67 M.L.J. 541.

(4) (1906) I.L.R. 33 Cal. 773, 784 (P.C.).

years prior to the suit there had been a scramble by the attempts made by each of the rival claimants—the plaintiff and the defendant—to get the tenants to attorn to his side, SITAMMA
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held that the principle of article 144 and not article 142 of the Indian Limitation Act was applicable to the case.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 34 of 1927 and SECOND APPEAL against the decree of the District Court of East Gōdāvari, Rajahmundry, in Appeal Suit No. 9 of 1931 preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 17 of 1929.

V. Govindarajachari for appellants.

K. Umamaheswaram and *A. Rama Rao Saheb* for the first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit for recovery of possession of fifteen items of properties on the ground that the plaintiff has become entitled thereto under a gift deed (Exhibit A) executed in his favour by one Seetha Bai Ammal on 4th September 1914. Seetha Bai Ammal was the widow of one Jagannadha Rao and the mother-in-law of the first defendant. As the first defendant is also called Seetha Bai Ammal, we will refer to the first defendant when necessary as the daughter-in-law.

Jagannadha Rao died some time in 1903 leaving him surviving his widow Seetha Bai Ammal and an adopted son Subba Rao, who died in May 1914. The evidence shows that during the last days of Subba Rao or soon after his death the relations

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between the mother-in-law and the daughter-in-law became strained and the plaintiff, who is the grandson of a brother of the mother-in-law and who had been living in Subba Rao's family for some years, managed to persuade the old lady to execute a gift deed in his favour of properties in respect of which the title stood in her name. The old lady died a few months after the date of the gift: and, for several years thereafter, the plaintiff on the one hand and the first defendant on the other have been endeavouring to secure the tenants in possession of these properties to their respective sides till ultimately the plaintiff instituted this suit just when the period of twelve years from the date of the gift deed was about to expire.

The plaintiff claimed that the properties in respect of which the title deeds stood in the donor's name were her stridhanam properties and that she was accordingly competent to make a gift thereof. The first defendant who was the contesting defendant pleaded that though the title to these properties stood in Seetha Bai Ammal's name, they had all been purchased with the funds belonging to Jagannadha Rao, *benami* in her name. A plea of limitation was also raised. The question of *benami* formed the subject of the first issue and the question of limitation of the second issue.

The learned Subordinate Judge found the first issue in the plaintiff's favour; on the second issue, he found that as regards five items, namely 1 to 3, 13 and 15, the plaintiff had not shown that he or his donor had been in possession within twelve years of the institution of the suit but that in respect of the other items the plaintiff's possession

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within the statutory period had been proved. He accordingly dismissed the suit so far as it related to items 1 to 3, 13 and 15 and gave a decree in the plaintiff's favour in respect of the other items. The first defendant has filed this appeal against so much of the decree as is against her and the plaintiff has filed a memorandum of objections in respect of the items disallowed to him.

In dealing with the question of *benami*, we may mention at the outset that it has not been suggested that Jagannadha Rao had any creditors from whom he desired to screen these properties. It is obvious from the written statement that the first defendant was hard put to it to suggest a motive for a *benami* transaction. It is true that Jagannadha Rao took the first defendant's husband in adoption in 1884 and some of the letters exhibited in the case show that as a young boy he was not easily persuaded to come and live with his adoptive parents and preferred to go back to the place where he had theretofore been living. These letters relate to a period when the first defendant's husband was eight or nine years old and it would be too much to suggest that at that time such conduct brought about any *differences* between Jagannadha Rao and the adopted son with reference to which the necessity for resorting to *benami* transactions could be explained. In the third paragraph of the written statement it is stated that Jagannadha Rao took such precautions as he liked in order to avoid among other things the possibility of the adopted son quarrelling with him and squandering the properties and in order to ensure the obedient conduct of the adopted son to his dictates and to avoid the possibility of the

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members of his natural family instigating the adopted son to act adversely to the interests of the adoptive father. In the course of the evidence one or two further reasons have been suggested, such as, a desire on Jagannadha Rao's part to keep apart some properties for the benefit of any *aurasa* son that he still expected might be born to him or a desire to ensure that the adopted son would behave respectfully towards Sita Bai Ammal by making it appear that she was the owner of some properties. We find it hard to believe that any of these motives would have led to a benami transaction rather than to a real transaction in favour of the wife.

The principal argument of Mr. Govindarajachari before us on behalf of the appellant was that as the attempt on the plaintiff's side to establish that these properties were acquired with the lady's funds had failed, it must be held that they were purchased by Jagannadha Rao with funds belonging to the joint family of himself and his adopted son, and that as sufficient provision for her maintenance had been made by Exhibit B and also by the provision in the adoption deed itself in the possible contingency of differences between her and the adopted son, there was nothing to rebut the presumption arising under the law that the purchases made in the wife's name with family funds were only made for the benefit of the family. It seems to us that this argument puts the effect of the evidence much too high and that the legal implications therein contained are not altogether tenable. It appears from the documentary evidence as well as from the admissions made by the first defendant herself

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and by D.W. 13 that Seetha Bai Ammal did have some monies of her own and some money-lending transactions of her own. It is, however, not possible to fix the amount that she was thus in possession of. The evidence also establishes that at least after 1886 she must have been entitled to an annual income of between Rs. 100 and Rs. 200 from the properties set apart for her under Exhibit B, while the collection of that income was being made by Jagannadha Rao himself. In such circumstances, the mere fact that the plaintiff or his witnesses do not now find it possible to connect any of the sale deeds relating to the suit properties with a particular item of asset belonging to the lady does not necessarily lead to the inference that the purchases should have been made with family funds by Jagannadha Rao. Some of the transactions under which the suit properties were acquired were for comparatively small prices. The only substantial acquisition was under Exhibit D in 1896, the consideration therefor being made up of the amount which accrued due on a usufructuary mortgage of 1887 for a sum of Rs. 2,250 and a cash payment of Rs. 700. In the light of the circumstances stated above, there is nothing that necessarily suggests that the Rs. 700 paid in cash at the time of Exhibit D must have been Jagannadha Rao's money and could not have been the lady's. As regards the Rs. 2,250 advanced on the usufructuary mortgage in 1887, we have no evidence suggesting whether it could have been the lady's money or Jagannadha Rao's money. The position therefore at best only comes to this: here is a lady, the wife of a comparatively well-to-do man with an

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income of more than Rs. 1,500 per annum, the lady herself having some means of her own, though the amount thereof is not known. The husband had no intelligible motive for entering into any benami transaction. He gets documents executed in her name with a distinct statement that the monies paid for the purchase constituted the stridhanam property of the lady. In relation to the properties thus acquired, he takes registered lease deeds in the lady's name and also gets a power of attorney executed by that lady appointing her own agent to attend to her affairs. It does not appear that during all the time that Jagannadha Rao was alive, he ever took a single lease deed in his name in respect of these properties, except as regards one house which was leased to the Postal Department. There is no doubt evidence that the realisation of the income from these properties was attended to by Jagannadha Rao or his men, but that would have been equally the case even if these properties belonged to the lady and not to Jagannadha Rao. It is admitted that in respect of a mortgage under which money was due to this lady long prior to the adoption and in respect of the properties settled on this lady by Exhibit B, the interest or income used to be realised by Jagannadha Rao or his men.

It is clear from the adoption deed and from Exhibit B that Jagannadha Rao was alive to the possibility of the relations between his wife and the adopted son turning out to be unfriendly and it is nothing strange if in those circumstances a man in that position desired to put the lady in a position of some independence without depending upon the adopted son or being obliged to sue

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him for maintenance or for a share in terms of Exhibit I. It is also significant that even during the period when he was taking sale deeds in his wife's name in respect of the suit properties, he was entering into other transactions of sale and mortgage in his own name, thus showing that he had no reason at that time to make it appear that he had no properties of his own other than the ancestral properties. Having regard to these circumstances we think the learned Subordinate Judge was justified in coming to the conclusion that the sale deeds relating to the suit properties were not taken in Seetha Bai Ammal's name benami for her husband or for the family. The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that monies belonging to Jagannadha Rao, whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but section 82 of the Indian Trusts Act as well as the observations of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjit Singh*(1) recognise that money may have

(1) (1915) I.L.R. 37 All. 557, 564, 565 (P.C.).

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been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not. The observations in *Sanjivaroya Pillai v. Balambiki Ammal*(1) are not opposed to this view because there was evidence in that case to suggest that the transfers were taken in the wife's name with a view to screen the property from creditors. In *Rahiman Beebi v. Khathoon Bee*(2) and *Thulasi Ammal v. The Official Receiver, Coimbatore*(3) reference has been made to the terms of section 82 of the Trusts Act and an attempt has been made to read the observations of the Judicial Committee in earlier cases consistently with the provisions of that section. The observations of their Lordships in *Ismail Mussajee Mookerdam v. Hafiz Boo*(4) and of VENKATASUBBA RAO J. in *Thulasi Ammal v. The Official Receiver, Coimbatore*(3) also show that where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Mr. Govindarajachari next suggested that, if and in so far as any monies of Jagannadha Rao

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had gone to make the purchases of the suit property in his wife's name, a gift thereof would be invalid as a gift of joint family property. This question was not raised in the Court below in that form and the appellant's learned Counsel explains it by pointing out that the plaintiff's attempt in the lower Court was to establish that the purchases were made with the lady's funds and not with the family funds. Assuming that that contention can be raised at this stage, it will be material to consider it only if there is *positive* evidence that funds belonging to the joint family had been used for the purpose of these purchases. The mere fact that the plaintiff is not able to establish that the purchases were made with the lady's funds will not entitle the first defendant to ask the Court to take it for granted that joint family monies must have been utilised for these purchases. We accordingly confirm the finding of the lower Court on the first issue.

With reference to the plea of limitation, we are not satisfied that the lower Court was justified in dealing with the case as one governed by article 142 of the Limitation Act. The allegations in the plaint as well as the evidence tendered during the course of the trial establish that all the suit properties were in the possession of tenants. It is true that during Subba Rao's lifetime he was taking muchilikas in his name and collecting the income from the suit properties. But as he and his adoptive mother were living together amicably, it cannot be seriously suggested that his possession or management was adverse to the mother's interest. As we have already said, the relations between the mother-in-law and

(1) (1907) 17 M.L.J. 339.
(3) (1934) 67 M.L.J. 541.

(2) (1916) 4 L.W. 193.
(4) (1906) I.L.E. 33 Cal. 773, 784 (P.C.).

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the daughter-in-law became strained as soon as Subba Rao died and the plaintiff's interference with a view to securing some benefit to himself seems to have made matters worse. A scramble accordingly began after Subba Rao's death by the attempts made on each side to get the tenants to attorn to the one side or to the other. In circumstances of that kind, the principle of article 144 and not article 142 should be applied. Considering the evidence on this basis, the conclusion seems to us to be that in respect of most of the suit items, the first defendant has failed to show that she got the tenants in possession to attorn to her more than twelve years before the institution of the suit. In many instances registered muchilikas have been taken from the tenants in the mother-in-law's name and there is evidence that some of these tenants were sued for rent on the basis of such muchilikas and decrees were obtained. As against such evidence on the plaintiff's side, the story related on the first defendant's side of oral arrangements and payments of rent to her can scarcely be seriously pressed.

As regards one of the items of property, namely, item No. 14, a house in Rajahmundry, a further point was pressed before us on behalf of the appellant, namely, that only a part of the house was in the occupation of the tenant who had attorned to the mother-in-law and that the other part was in the possession of a lady named Pankajam who refused to attorn to the old lady. In the suit for rent instituted by the plaintiff against these two tenants, the suit was decreed only against the former and not against the

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latter. It was accordingly contended that at least to the extent of the interest in one half of the house in the possession of Pankajam the plaintiff's suit should be held to be barred by limitation. But if, as we have already pointed out, the principle to be applied is that of article 144, it is not sufficient for the defendants merely to suggest that Pankajam had not attorned to the old lady or to the plaintiff. It is only on proof that she had attorned to the first defendant that the plaintiff's suit could be held to be barred even as regards the portion in her possession. The first defendant's evidence is only that some time after 1915 Pankajam paid ten months' rent in respect of her portion to the first defendant. Even taking this to be true, that is within twelve years of the institution of the suit. We see no reason to differ from the conclusion of the lower Court in respect of items 4 to 10, 11, 12 and 14.

[The portion of the judgment confirming the lower Court's decision in respect of items 1, 13 and 15 and reversing it in respect of items 2 and 3 is omitted as not being necessary for the purpose of the report.]

As regards item 15 it will follow from our finding on the question of benami that the title thereto also is in the plaintiff. But the learned Subordinate Judge has not given the plaintiff a decree in respect of that item because in the connected suit, Original Suit No. 17 of 1929, he held that the present plaintiff had not shown that he had possession of this item within twelve years of the institution of the suit. Apart from the observation we have already made that in the circumstances of the present case the principle of

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article 144 and not article 142 should be applied, the learned Judge's observation that the plaintiff was not in possession of this item within twelve years of the institution of the suit seems to rest upon a misapprehension, because D.W. 9, the tenant who is alleged to have been in possession of this item under the first defendant, admits that for at least a year after Subba Rao's death the plaintiff was occupying a portion of this house. We accordingly hold that the learned Judge's finding on the question of limitation even in respect of this item is not correct. But as his decision has been set aside on appeal by the District Court in Appeal Suit No. 9 of 1931, it is not necessary that we should pass a formal decree for possession in the present plaintiff's favour in respect of this item. It will be sufficient if there is a declaration of title in the plaintiff's favour in respect of this item.

As regards items 2 and 3 which we have allowed in the plaintiff's favour, the plaintiff will also be entitled to mesne profits from the first defendant at a flat rate of thirty rupees per annum for the three years before suit (1923-1925) and future mesne profits at the same rate from 1926 till delivery of possession of the suit items or until the expiry of three years from this date, whichever happens earlier. We do not, however, think it necessary to interfere with the direction in the lower Court's decree as to costs. The appeal is dismissed with costs. In the memorandum of objections there will be no order as to costs as the parties succeed in part and fail in part.

For the reasons given above Second Appeal No. 1214 of 1932 is dismissed with costs.

A.S.V.

ORIGINAL CIVIL.

Before Mr. Justice Gentle.

KUPPAMMAL, PLAINTIFF,

v.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY
COMPANY, LIMITED, AND ANOTHER, DEFENDANTS.*

Negligence—Wall—Fall of—Death caused by—Absence of explanation from person liable to repair—Liability of such person—Madras City Municipal Act (IV of 1919), sec. 258—Scope of—Costs—Plaintiff acting reasonably in suing two persons for damages—Suit decreed against one and dismissed against the other—Power of Court to direct the former to pay the costs of the latter direct.

Under section 184 of the Madras City Municipal Act the Madras Corporation had built a public latrine, the western boundary of which was the compound wall of the M. & S.M. Ry. station and permanent way. The latrine was divided into two parts by a central wall running parallel to the compound wall and to the eastern wall of the latrine. On 16th December 1933 two persons were using the latrine and for that purpose were in the eastern or outer portion. Then, the Railway Company's compound wall fell and in falling knocked over the central wall of the latrine. The two men were killed by the falling of these two walls. Two suits were filed, impleading both the Railway Company and the Corporation as defendants, basing the claim on negligence and nuisance and praying for damages representing the loss of maintenance which the (respective) plaintiffs alleged they had sustained on account of the death of the two deceased who were the wage-earners of their respective families. The negligence that was alleged against the Railway Company was that they left that portion of the compound wall in a state of disrepair; and that alleged against the Corporation was that they failed to keep the western wall of the latrine in a proper state of repair and to inform the Railway Company of the dangerous state in which

* Civil Suits Nos. 96 and 445 of 1934.

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the wall was previous to its fall, which was alleged to be obligatory on them under section 258 of the Madras City Municipal Act. It was found: (i) the fall of the compound wall was caused solely on account of its serious defective condition and by the failure of the Railway Company to carry out the necessary repairs; (ii) in failing to remedy the existing defects the Railway Company did not use ordinary care and skill which they should have used in order to maintain the compound wall in a safe condition; (iii) if they had used ordinary care they would have prevented the said wall from falling; (iv) they knew that a public latrine had been built against their compound wall and that the public had a right to use the same; (v) the central wall of the latrine had been kept in a proper condition by the Corporation and the fall of the central wall of the latrine was caused by the compound wall falling on it; (vi) the Railway Company owed a duty to the lawful users of the latrine, including the two deceased, to take reasonable care to prevent the wall falling and in failing to remedy the defects and to keep the wall in a safe condition the Railway Company had been guilty of a breach of duty which they owed and were therefore negligent.

Held: (i) The plaintiffs were entitled to succeed in both suits against the Railway Company and that the Corporation was not liable in either suit in respect of the fall of the central wall.

(ii) Whilst the erection of a wall upon land was an ordinary user of the land, nevertheless it was an uncommon occurrence for a wall to fall and when a wall did fall an explanation should be forthcoming from those responsible for its repair, and in the absence of an explanation from the Railway Company whose duty it was to keep the wall in a safe condition, they were liable in damages for negligence.

Kearney v. London and Brighton Railway Co.(1) and *Brown v. T. and E. C. Cotterill*(2) followed.

(iii) Section 258 merely empowers the Corporation, if they deem it right so to do, to notify the occupier of defective buildings. It does not, if they fail to exercise their power under that section, give any member of the public a right of complaint against the Corporation, in the absence of language

(1) (1871) 6 Q.B. 759.

(2) (1934) 51 T.L.R. 21.

in the section that the Legislature intended to impose that liability for the breach of duty.

Saunders v. Holborn District Board of Works(1) followed.

(iv) The plaintiffs acted reasonably in suing both defendants and as such the plaintiffs' liability to bear the costs due to the Corporation should be borne by the Railway Company and an order for costs in favour of the Corporation should be made direct against the Railway Company.

Besterman v. British Motor Cab Company, Limited(2), *Sanderson v. Blyth Theatre Company*(3) and *Rudow v. Great Britain Mutual Life Assurance Society*(4) followed.

English practice followed.

M. Chockalingam for plaintiff in C.S. No. 96 of 1934.

T. R. Srinivasa Ayyar and *T. R. Ramachandran* for plaintiffs in C.S. No. 445 of 1934.

C. Krishnaswamy Ayyar for first defendant.

V. Rajagopala Mudaliar for *S. Rajamanikkam* for second defendant.

Cur. adv. vult.

JUDGMENT.

These are two suits brought under the provisions of the Fatal Accidents Act, 1855, and by consent of all parties have been tried together as the facts in regard to both claims are identical, save in respect of the damages which are claimed. In Civil Suit No. 96 of 1934 the plaintiff is the widow of one Venkataswami Naidu. In Civil Suit No. 445 of 1934 the first plaintiff is the widow and the second and the third plaintiffs are the minor children of one Saman. The claims in both the suits are for damages representing the loss of maintenance which the respective plaintiffs allege that they have sustained on account of the

(1) [1895] 1 Q.B. 64.
(3) [1903] 2 K.B. 533.

(2) [1914] 3 K.B. 181.
(4) (1881) 17 Ch. D. 600.

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death of the two deceased who were the wage-earners of their respective families. There has been a considerable body of evidence given in these suits, none of which is very reliable and all the witnesses exaggerated in their evidence as to what, I have come to the conclusion, the real facts were.

The Railway Company (first defendant) own land in Walltax Road upon which is erected a railway station and permanent way. This is bordered on Walltax Road by a wall of the total length of about 3,000 feet running approximately north to south. So far as this case is concerned, a small portion only of that wall is affected, some 300 or 400 yards north of the railway station. At this point there was erected a public latrine. The latrine was 58 feet 6 inches in length and having an over-all width of 16 feet. The railway wall, which I will hereafter refer to as the compound wall, formed the western boundary of the latrine. There were two walls, being the north and south boundaries, running at right angles to the compound wall and joining it. These two walls were about 16 feet in length. The eastern boundary of the latrine was formed by a wall joining the outer ends of the north and south walls. The latrine was divided into two parts by a central wall running parallel to the compound wall and to the eastern wall of the latrine. This wall was about 58 feet 6 inches in length. The compound wall was about ten or eleven feet high and the other walls I have mentioned were about 6 feet 6 inches in height. The entrance to the latrine was gained by two openings made in the north wall. The access to the latrine from Walltax

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Road was gained by means of a passage from that road leading to the latrine, the distance from the road to the latrine being about 53 feet, and around the north, east and south boundaries of the latrine, there was an open space leading from the passage I have mentioned. This latrine was erected by the Madras Corporation (second defendant). Under section 184 of the Madras City Municipal Act, 1919, it is provided as follows:

"The Corporation shall provide and maintain in proper and convenient places a sufficient number of public latrines and shall cause the same to be kept clean and in proper order."

It is admitted by all the parties that this latrine is one coming within the provisions of the above section and therefore it was a latrine belonging to the Corporation (second defendant) for which they were responsible as set out in the above section. At about 8 a.m. on 16th December 1933 the two deceased men I have mentioned were using the latrine and for that purpose were in the eastern or outer portion. The Railway Company's compound wall fell and in falling knocked over the central wall of the latrine. These two men were killed by the falling of these two walls. The part of the compound wall which fell included not only the 58 feet 6 inches bordering the latrine but also about ten feet on the north and south sides, in all about 80 feet of the compound wall fell. The claims against the two defendants are based upon negligence and nuisance. So far as the Railway Company are concerned, in Civil Suit No. 96 of 1934 it is alleged that they left the relevant portion of the compound wall in a state of disrepair and were therefore negligent. After the close of all the evidence and indeed after Counsel on

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behalf of the two defendants had addressed me, an application was made by Counsel on behalf of the plaintiff in that suit to add a claim against the first defendant in nuisance. It was made at a very late stage of the proceedings and I granted this application upon the terms that in the event of succeeding upon that cause of action the plaintiff should pay the costs of the defendants up to the date when the application was made, namely, 5th April 1937. In Civil Suit No. 445 of 1934 the claims of the plaintiffs in that suit are based on nuisance as well as negligence. As regards the Corporation (second defendant) the claim against them is on the ground of negligence, the negligence being that they failed to keep the western wall of the latrine, being the Railway Company's compound wall, in a proper state of repair and also that they failed to inform the first defendant of the dangerous state in which this wall was previous to this fall. The basis of the latter allegations arises from the provisions of section 258 of the Madras City Municipal Act which provides that, if any building be deemed by the Commissioner to be in a ruinous state or dangerous to passers by or to the occupiers of neighbouring structures, the Commissioner may, by notice, require the owner or occupier to fence off, take down, secure or repair such building so as to prevent any danger therefrom. It is contended that the provisions of this section provide a cause of complaint by a member of the public if the Commissioner of the Madras Corporation, that is to say, the second defendant, does not warn the occupier of the dangerous condition of buildings or take the necessary steps to see that dangerous

buildings are prevented from causing danger to the public.

The defences to the claims as pleaded in the written statements in addition to the denials of negligence and nuisance are that the compound wall and central wall fell owing to violent storms of rain and wind amounting to *vis major*. This means that the storms were such as to be beyond the ordinary contemplation of man. During the course of the evidence, with which I shall deal more fully later, it appears that rain had fallen, but the above contention finds no support from the evidence called either on behalf of the plaintiffs or on behalf of the two defendants and indeed neither of the learned Counsel for the defendants really relied upon this in their addresses to me at the close of the evidence. Whilst the erection of a wall upon land is an ordinary user of the land, nevertheless it is an uncommon occurrence for a wall to fall and when a wall does fall, in my view, an explanation should be forthcoming from those who are responsible for its repair. *Kearney v. London and Brighton Railway Co.*(1) was a case in which a brick in a bridge over a highway used by locomotives fell upon a foot passenger and it was held this was an unusual occurrence and the falling of the brick itself was *prima facie* evidence of negligence. In the absence of satisfactory explanation from those responsible for the upkeep of the bridge, it was held, in that case, that the fall of the brick itself was sufficient evidence of negligence to justify the plaintiff succeeding in an action against the

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(1) (1871) 6 Q.B. 759.

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Railway Company. The only explanation for the fall of the compound wall which has been given to me in the present case was that supplied by the Building Inspector employed by the first defendant, P. N. Swami Nayudu, defendants' first witness. It was this : he said that the flooring of the latrine was made of concrete but was not in satisfactory repair inasmuch as there were holes, which he called pits, in the floor. There had been rain in Madras on 14th and 15th December, that is to say, two days previous to the fall of the wall. On account of the defects in the flooring the rain water had not flowed away but had stagnated in these pits against the wall during those two days and in stagnating it had percolated into the compound wall undermining its strength and caused its fall. I cannot accept such an explanation. A copy of the *Fort St. George Gazette* was produced with the concurrence of all parties. It is recorded that on 14th December there was twenty-one inches of rain, on 15th December 2.05 inches, on 16th December, that is to say, the day of the fall of the wall, the rainfall was 6.42 inches. The evidence of the conditions existing at the time of the fall which I accept was that it was drizzling. The accident occurred at 8 o'clock in the morning and there was no evidence before me that between midnight and 8 o'clock in the morning there had been any unusually heavy amount of rain ; and although on the day of the accident there was the quantity I mentioned, I am satisfied that there had been very little of rainfall by the time the compound wall fell at 8 a.m. All the witnesses called for the plaintiffs who were asked in cross-examination regarding wind denied

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that there was any violent wind at the time when the compound wall fell, and no evidence was called on behalf of the defendants to suggest that that part of the plaintiffs' witnesses' evidence was inaccurate. In view of the comparatively small amount of rain falling prior to this accident, and the unacceptable suggestion that pools of water collecting for the short period of two days at the base of a substantial wall would destroy its strength, the explanation which has been given to me as regards this unfortunate accident cannot be accurate and I reject it. The one or two witnesses who arrived after the wall had fallen and helped to extricate the two unfortunate deceased men did not speak to any collection of water in the latrine. It therefore follows that so far as the fall of the compound wall is concerned, no explanation is forthcoming from either of the defendants. I have mentioned already that the witnesses called before me exaggerated matters in their testimony. This also applies to the several witnesses who were called on behalf of the plaintiffs. I accept however from these witnesses that prior to this fall the compound wall showed signs of wear inasmuch as there were many cracks visible in the wall. During the course of the hearing, in the presence of the Advocates on behalf of all the parties I inspected this wall. The rebuilt part which is now in the position occupied by the fallen portion is of course in an excellent condition. Immediately to the south of the new wall there is a length of wall which clearly is not very old and one of the witnesses called on behalf of the plaintiffs told me that some five or six years ago this portion of wall to the south of the

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latrine had been rebuilt and the appearance I saw bears out the evidence of that witness. Further south of this portion to which I have just referred, part of the old wall exists, which part is doubtless similar in age and construction to the fallen part by the latrine. The condition of this I can describe only as deplorable. Large pieces of mortar between the bricks with which this wall was built are missing, in some places to a depth of nearly half an inch; and generally it shows signs of decay and wear. I also saw cracks and loose bricks in this part of the wall. This condition is compatible with the fallen wall as described by some of the witnesses called on behalf of the plaintiffs, the defective condition being clearly visible to anyone including persons with no knowledge of buildings. I accept the evidence of the witnesses called on behalf of the plaintiffs who describe the fallen wall as defective, though not to the extent to which some of these witnesses mentioned. One of them said that there was a hole in the wall through which a man was able easily to pass. I do not believe that part. I do accept their evidence that many other defects were apparent in the compound wall bordering on the latrine, which defects at the time of the accident required urgent repair. In regard to this wall, defendants' first witness, Railway Company's Building Inspector, told me that it was part of his duty every two months to inspect the compound wall in order to see whether any parts were defective and whether any work was required to repair the wall in order to keep it in proper order, and that his last inspection was carried out within two months prior to the accident. He told

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me that at that inspection he found no cracks, that if there had been cracks he would have discovered them, that if there had been defects in the wall which would cause it to fall within two months after his inspection he would have been able to discover those defects and that in his experience he had never known a wall to be caused to fall by the stagnation of water near its base for two days. He also told me that it was his responsibility to his employers, the Railway Company, to inform them of the condition of this wall so that they could carry out the necessary repairs. In the light of the evidence which I have accepted, I am quite satisfied that either he made no inspection, which it was his duty to make, or, if he made it, it was of such a cursory nature that he failed to notice the defects which existed, or, if he did notice them, he failed to report them. The Railway Company, if they were not aware of the defective condition of this wall, certainly should have known of it as every opportunity was available for them to do so through their Building Inspector, plaintiffs' first witness, whose duty it was to inform them.

I am satisfied that the fall of the compound wall was caused solely on account of its serious defective condition and by the failure of the Railway Company to carry out the necessary repairs which were required. By allowing this wall to get into this condition and in failing to remedy the existing defects, the Railway Company did not use ordinary care and skill which they should have used in order to maintain the compound wall in a safe condition. Had they used ordinary care and skill they would have prevented this

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wall from falling. It was not suggested that they were unaware that the latrine had been erected against their compound wall and that they did not know that members of the public had a right to use and were in the habit of using this latrine. Both these matters were within their knowledge. So far as the latrine itself is concerned, whilst it may not have been in a perfect condition, I am satisfied on the evidence I have heard that it was in a reasonably good state of repair and I accept the evidence of the two witnesses called on behalf of the Corporation when they say that a short time before the fall of the compound wall the latrine was white-washed and that the condition of the walls and the floor was reasonably good. It is perfectly clear to me that the fall of the central wall was caused by the compound wall falling on to it and the weight breaking it down and not because of any defect in that wall itself.

I come to the question whether the Railway Company are responsible to the plaintiffs in these suits. In *Heaven v. Pender*(1) BRETT M.R., as he then was, at page 509 in the course of his judgment says:

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In the circumstances which existed here, the Railway Company were aware that members of the

(1) (1883) 11 Q.B.D. 508.

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public, as I pointed out above, were in the habit of using the latrine erected against their compound wall. They would be aware that, if their compound wall were allowed to get into a state in which it would be likely to fall, danger to the members of the public using the latrine would be occasioned; they appreciated this inasmuch as they appointed defendants' first witness to inspect this compound wall, including the part adjoining the latrine, to see if any defects required attention. By doing this one can assume they appreciated that this wall required repeated inspection in order that defects could be remedied and unless they were remedied the wall was likely to fall. The above statement of BRETT M.R. was referred to in *Donoghue v. Stevenson*(1). Lord ATKIN in the course of his speech somewhat criticised the statement of the Master of the Rolls but added that if properly limited that statement appeared capable of forming a valuable practical guide. Later at page 580 Lord ATKIN says:

"You must take reasonable care to avoid acts or omissions which, you can reasonably foresee, would be likely to injure your neighbour. Who then is in law your neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

At page 614 Lord MACMILLAN, having quoted the above passage and another passage of BRETT M.R., says:

"The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism and their universality may require some

(1) [1932] A.C. 562, 580.

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qualification, but as enunciations of general legal doctrine I am prepared like Lord HUNTER to accept them as sound guides."

It appears that the learned Law Lords, whilst to some extent they consider the passage of BRETT M.R., I have quoted above, may be somewhat widely worded, think it is a very sound guide regarding the duties which one member of the public owes to another. In *Brown v. T. and E. C. Cotterill*(1) the plaintiff was lawfully in a churchyard and, whilst there, was injured by the fall of a tombstone which had been erected by the defendants. It was found that the defendants had been negligent in the erection of the tombstone. LAWRENCE J. in his judgment referred to and quoted from *Donoghue v. Stevenson*(2), cited above, and also referred to the question of proximity and the duty owed by one person to another mentioned by Lord ATKIN and Lord MACMILLAN, and later he says :

"The proximity referred to by Lord ATKIN is in my view involved in the fundamental principle of the law of negligence that every one is bound to take the care which an ordinary man would take in the circumstances."

He held that in that case the plaintiff was entitled to recover damages from the defendants who had been negligent in erecting the tombstone, that there was a duty cast upon them to every member of the public who might lawfully enter the churchyard to use reasonable care in its erection and a responsibility to any who might be injured by the fall of the tombstone unless it were properly erected. In the present case, the Railway Company were aware that members of the public used this latrine, that unless the

(1) (1934) 51 T.L.R. 21.

(2) [1932] A.C. 562, 580.

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compound wall was in a satisfactory condition it might or would fall and endanger such persons, it was therefore their duty, with this knowledge, to take reasonable care. Allowing the compound wall to get into the dangerous condition in which it was and in failing to repair the obvious existing defects or otherwise preventing it falling were omissions by the Railway Company which, they could reasonably foresee, might cause injury to the persons using the latrine. These persons were closely and directly affected by these acts which the Railway Company should have had in contemplation. In the respects I have mentioned they failed to take the care which ordinary prudent men would take in the circumstances which existed and were known. I see no difference in principle between the facts in this case and those in *Brown v. T. and E. C. Cotterill*(1), in which it was held there was a duty cast upon the tombstone erectors to every member of the public lawfully entering the churchyard in which it was erected to use reasonable care to prevent injury to such persons. The Railway Company owed a duty to the lawful users of the latrine, including the two deceased, to take reasonable care to prevent this wall falling. In failing to remedy the defects and to keep the wall in a safe condition they have been guilty of a breach of duty which they owed and were therefore negligent. In my view the plaintiffs in these two suits are entitled to succeed against the Railway Company.

In regard to the Corporation, they were not the owners, nor in control, of the compound

(1) (1934) 51 T.L.R. 21.

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wall. The premises for which they were responsible was the latrine which, I have already said, was in a reasonably safe condition. The failure by the Corporation to notify the Railway Company of the unsafe condition of the compound wall, as required by section 258, is not in my view a matter which gives to any member of the public a right to recover from the Corporation on the ground that they did not carry out their duty under this section. The wording of the section is not in its terms mandatory but permissive inasmuch as it provides that the Commissioner, that is, the Corporation, may by notice require the owner or occupier to repair. Apart from the provisions of that section it cannot be, and has not been, contended before me that the Corporation are responsible to the plaintiffs inasmuch as they failed to notify the Railway Company of the defective condition of the wall. This section, in my view, merely empowers the Corporation, if they deem it right so to do, to notify the occupier of defective buildings. It does not, if they fail to exercise their power under that section, give any member of the public a right of complaint against the Corporation. In *Saunders v. Holborn District Board of Works*(1) the defendants were empowered under the Public Health (London) Act, 1891, to remove street refuse from streets. They having failed to remove the refuse, the plaintiff was caused to fall on account of such failure and he claimed damages from the defendants on account of their negligence in

(1) [1895] 1 Q.B. 64.

failing to remove the refuse. MATHEW J. at page 68 says in the course of his judgment :

" It (the result of the decisions) is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute, it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the Legislature is clearly disclosed no action will lie."

Later he says :

" Before the Act the public had no right of action in such a case. Why should it be supposed that the statute creates a new obligation? In my opinion the meaning of the section must be confined to the plain meaning of the words employed."

In *Municipality of Pictou v. Geldert*(1) Lord HOBHOUSE at page 527 says :

" The latest English case is that of *Cowley v. Newmarket Local Board*(2). It must be now taken as settled law that transfer to a public corporation of the obligation to repair does not by itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed."

I cannot find and have not been referred to any part of the City Municipal Act which indicates a liability cast upon the Corporation at the suit of a member of the public for their failure to exercise their powers under section 258 and in this respect the plaintiffs' contention fails. So far as their personal negligence is concerned, whether the two deceased were invitees or licensees, in my view, it is not necessary for me to decide. The premises of the Corporation were in a reasonably good condition ; and neither of the deceased was injured by reason of any defect in the structure of the Corporation's latrine. The Corporation were not the occupiers of the compound wall.

(1) [1893] A.C. 524.

(2) [1892] A.C. 345.

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This was in the occupation of the Railway Company. No authority has been quoted to me which lays down the principle that when a man is upon the premises of one person and is injured on account of the defective condition of another person's property, the person upon whose premises he is at the time of the injury is liable to compensate him for the damages sustained. In my view the Corporation are not liable to the plaintiffs in either of these suits in respect of the fall of the compound wall.

The next question is one of damages. In Civil Suit No. 96 of 1934 the evidence of Kuppammal, the plaintiff, was that her husband gave her one rupee every day out of which she paid the rent of the house in which she lived with her deceased husband. The food for both of them cost about twelve annas a day. Judging as best as one can, I have come to the conclusion that the maintenance which she was receiving from her husband amounted to a sum of about six to eight annas a day. She is about thirty-seven years of age and her husband, the deceased, was about forty. The sum she is entitled to is an amount by which she is a loser in respect of her future maintenance. Many factors have to be considered and borne in mind when endeavour is made to arrive at this sum—the possibility of her own early death, the possibility that her deceased husband might have died from other causes had he not been killed by this accident, the possibility of his losing the employment upon which he was engaged at the time of his death and becoming unemployed. She is not entitled, as it was contended before me, to a sum calculated upon a stated number of years from the

moment of her loss. Allowance must be made because she is now receiving a lump sum. Bearing all these factors in mind I have come to the conclusion that the amount of damages which I should award to her is a sum of Rs. 1,200. In Civil Suit No. 445 of 1934 the dependants of the deceased Saman are his widow, the first plaintiff, who is about thirty-five years of age, the second plaintiff, the son of the deceased, a boy aged 10, and the third plaintiff, a girl, aged five. The deceased was forty-five years of age. The first plaintiff informed me that her husband gave her one rupee a day out of which she paid the rent of the house and bought some of the clothes and spent ten to twelve annas a day on food. Part of it of course would be consumed by the deceased. The deceased no doubt had eaten more food than the other members of the family. The loss of maintenance which these three have suffered appears to be about eight or ten annas a day, being a larger amount per day than in the other suit because there were more members of the family to feed; consequently the deceased would not be able to avail himself of as much of the family contribution. The amount which I have to award must be allocated. Because there are three dependants it does not mean that treble the amount given in the other case must be awarded. It is a sum based upon the actual loss as far as one can estimate it of the three plaintiffs concerned. The same factors must be borne in mind which I have mentioned. I have come to the conclusion that in this case a total sum of Rs. 1,750 is the amount which the plaintiffs are entitled to recover in respect of the damages they have sustained by being

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deprived of their maintenance. This amount I allocate thus : Rs. 1,000 to the first plaintiff, Rs. 250 to the second plaintiff and Rs. 500 to the third plaintiff. The amounts in respect of the minors, namely, the second and third plaintiffs, will be paid into Court. There will be decrees in favour of the plaintiffs in both these suits against the Railway Company with costs. As I have found in Civil Suit No. 96 of 1934 the plaintiff is entitled to succeed upon the plea of negligence, the question of the plaintiff paying the Railway Company's costs up to the date of the amendment of the plaint does not arise. There will be a decree in favour of the Corporation with costs. In regard to this order for costs I intend to follow the English practice. The plaintiffs acted reasonably in suing both defendants and it is therefore proper that the plaintiffs' liability to bear the Corporation's costs should be borne by the Railway Company; see *Besterman v. British Motor Cab Company, Limited*(1). I make an order in favour of the Corporation direct against the Railway Company for costs according to the rule in *Sanderson v. Blyth Theatre Company*(2) and *Rudow v. Great Britain Mutual Life Assurance Society*(3).

These being pauper suits, it is necessary for me to order further that the court-fees due to Government shall be a first charge on the amounts received.

Attorneys for first defendant: *Messrs. King and Partridge.*

G.B.

(1) [1914] 3 K.B. 181.

(2) [1908] 2 K.B. 533.

(3) (1881) 17 Ch. D. 600.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

IN RE SUBBIAH PANDARAM (ELEVENTH DEFENDANT),
APPELLANT.*

1937,
May 6.

Court Fees Act (VII of 1870), as amended by Madras Act V of 1922, art. 17-A (1)—Suit on mortgage by puisne mortgagee impleading prior mortgagee and claiming priority over the latter—Decree of lower Court declaring liability of property for the mortgage amount and ordering sale but denying priority—Appeal by puisne mortgagee for a declaration that he is entitled to priority—Court-fee of Rs. 15 paid under article 17-A (1)—Sufficiency of.

A, B, C and a number of others were members of a joint Hindu family. X filed a suit on a mortgage executed by A in 1920 impleading Y who was in possession of a portion of the mortgaged property as purchaser at a sale held in a suit on a mortgage executed by C in 1915. Y claimed priority over X claiming that he was entitled to use the mortgage of 1915 as a shield. The lower appellate Court passed a decree in the following terms: "A mortgage decree in X's favour for the amount claimed with costs and subsequent interest is passed. The two-thirds share of A and B in the suit property will be sold and the sale proceeds credited first to X's claim, the balance, if any, being payable to Y. The one-third share of C in the suit property shall be sold and after first crediting the sale proceeds towards the mortgage of 1915, the balance, if any, will be used to discharge X's claim."

Y appealed against this decree and paid a court-fee of Rs. 15 on the memorandum of appeal.

Held that the court-fee paid was sufficient under article 17-A (1) of the Second Schedule of the Court Fees Act of 1870 as amended by Madras Act V of 1922.

* Stamp Register No. 26683 of 1936.

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Premsookh Das v. Shah Gopi Saran(1), *Moti Begam v. Har Prasad*(2) and *Kundan Lal v. Duli Chand*(3) dissented from.

STAMP REGISTER 26683—Appeal sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 71 of 1935 preferred against the decree of the Court of the District Munsif of Palni in Original Suit No. 278 of 1933.

K. V. Ramachandra Ayyar for appellant.

K. S. Champakesa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for Government.

Cur. adv. vult.

ORDER.

The question involved in this reference relates to the amount of court-fee payable on the memorandum of appeal. The appellant is the eleventh defendant in a suit to enforce a mortgage executed on 7th August 1920 in favour of the plaintiff's assignor by the first defendant. The eleventh defendant was impleaded as a party to the suit on the ground that he was in possession of the suit property as an assignee from a purchaser at a sale in execution of a mortgage decree obtained by one Nagappa Chetti in respect of a mortgage, dated 7th August 1915, executed by the third defendant in favour of Nagappa Chetti's father, Venkatachalam Chetti. One of the defences urged by the eleventh defendant was that he was entitled to set up the mortgage of 1915 as a shield, being a mortgage prior in date to the mortgage sued on, and

(1) (1919) 4 P.L.J. 323.

(2) (1912) 18 A.L.J. 81.
(3) (1931) I.L.R. 54 All. 347.

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that the priority claimed by him should be recognized. One of the issues raised in the case was :

"Whether the eleventh defendant is entitled to the priority claimed and is plaintiff obliged to redeem him."

There were other subsidiary questions in the case and one of them was whether the suit mortgage executed by the first defendant was binding on all the members of the family, that is, defendants 2 to 10. A similar question also arose in respect of the plaintiff's mortgage. The learned District Munsif found that both the mortgages were binding on all the members of the family. He also found that the eleventh defendant would be entitled to priority to the extent of Rs. 1,784 in respect of the mortgage set up by him. He accordingly directed sale of the property free of all encumbrances and ordered that the sale proceeds should be applied in the manner stated by him in paragraph 4 of his decree, namely :

"First of all in payment to the eleventh defendant of a sum of Rs. 1,784 in discharge of his prior rights under the mortgage of 1915, and secondly the balance, if any, shall be paid to the plaintiff."

This was modified by the learned Subordinate Judge in appeal. The learned Subordinate Judge recognized priority only in respect of the third defendant's share and held that neither previous consent nor subsequent ratification of the mortgage by defendants 1 and 2 was proved and that it was not executed for a valid and binding joint family purpose. In the view he held he passed the decree thus :

"In the result, the decree passed by the learned District Munsif is set aside and a mortgage decree in plaintiff's favour for the amount claimed with costs and subsequent interest is passed. The two-thirds' share of defendants 1 and 2 in the

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suit property will be sold and the sale proceeds credited first towards the plaintiff's claim, the balance, if any, being payable to eleventh defendant. The one-third interest of the third defendant in the suit property shall be sold and after first crediting the sale proceeds towards the mortgage, Exhibit I, the balance, if any, will be used to discharge the plaintiff's claim."

It is against this decree this second appeal has been preferred.

The appellant has paid a sum of Rs. 15 on the memorandum of appeal. The question is, is the court-fee paid sufficient? Of course this will depend on what in substance is the relief he claims. On the exact point in this case, there is no decision of our High Court. My attention has been invited by the office to two decisions of other High Courts, one of Patna, *Premasukh Das v. Shah Gopi Saran*(1), and the other of Allahabad, *Moti Begam v. Har Prasad*(2). Both those decisions seem to take the view that an *ad valorem* court-fee may have to be paid. During the course of the argument another decision of the Allahabad High Court has been brought to my notice, namely, *Kundan Lal v. Duli Chand*(3). As the matter is of some importance, I directed notice to the Government Pleader and he argues that the view taken by the Allahabad and Patna High Courts is correct and that, in any view, the appellant must be directed to pay either on the amount of his claim or, if it exceeds the value of the property, on the amount of the value of the property. Mr. Ramachandra Ayyar, who appears for the appellant, contended before me that the relief sought is only in the nature of a declaratory relief and the court-fee paid is sufficient.

(1) (1919) 4 P.L.J. 323.

(2) (1912) 16 A.L.J. 81.
(3) (1931) I.L.R. 54 All. 347.

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In the alternative he contends that the relief must be said to be incapable of valuation having regard to the nature of the decree passed by the learned Subordinate Judge and therefore the court-fee paid by him must be held to be sufficient. Under the Civil Procedure Code, where a puisne mortgagee files a suit, he is not obliged to redeem a prior mortgage; he can have a sale subject to the prior mortgage, that is, in cases where he admits the prior mortgage; but where he disputes the prior mortgage either on the ground that it does not subsist or on the ground that his mortgage should take precedence over it, he has to seek a declaration that the alleged prior mortgage is not entitled to priority. In such cases it is clear from the forms of the mortgage decrees framed by the Legislature and found in Appendix D of the First Schedule to the Civil Procedure Code that the Court will have to declare priority which is questioned in the suit. Clause No. 2 of Form No. 9 in Appendix D runs thus :

"It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant 2 or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively"; *vide* also clause No. 2 of Form No. 10.

It will thus be seen that, in cases where the amount is not disputed and where the liability of the mortgaged property is also not disputed and the only question is who is entitled to be paid the sale-proceeds, so far as the prior mortgagee who is a defendant in the case is concerned, the only relief that could be got by the puisne mortgagee in the suit brought by him will be a declaratory one. In this case, the order for sale has been

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passed at the instance of the puisne mortgagee. The other directions necessarily follow from this order for sale by reason of the prior mortgagee being made a party to the suit. Speaking with reference to the mortgages both prior and subsequent to the mortgage sued on, MUKERJI J. observed thus in *Akhilbandhu Guha v. Suradhani Debya Chaudhuranee*(1) :

"The decree, which has been or may be passed in the suit, will, no doubt, be a decree to their advantage . . . But their position in the appeal must be that, as defendants in the plaintiff's suit, they are entitled to have certain rights of theirs protected in the decree which the plaintiff obtains or has obtained. This being the true view to take of the situation, I am unable to see how the dues on the appellants' mortgage or mortgages can be regarded as the value of the subject-matter in dispute, or how the dispute, such as there is in the appeal, may be valued in terms of such dues . . . It should be remembered that it has not been the policy of the law to tax with court-fees *ad valorem* every advantage which a party is seeking for in Courts."

There has already been an order for sale ; there has already been a declaration of liability of the suit property in respect of the mortgage set up by the eleventh defendant ; the only question is whether he is entitled to any priority. All that he is seeking in appeal is to get rid of the declaration made against him and to have a declaration in his favour. Therefore a declaratory relief, would in my opinion be enough and he is entitled to value the relief as one for a declaration and the court-fee therefore paid by him would be sufficient under article 17-A (1) of the Second Schedule of the Madras Court Fees Amending Act. I am unable to agree with the view taken both by the Allahabad and Patna High Courts in this matter.

(1) (1933) I.L.R. 61 Cal. 320, 322.

In *Kundan Lal v. Duli Chand*(1) the reason assigned by KING J. is stated thus :

"The appellants obviously seek to get the decree of the trial Court modified in their favour so as to get the property sold subject to their mortgage for which they claim priority. I think the substance of the relief sought, and not merely its form, must be considered. Their interest in the property is valued at Rs. 1,600 and this must be the value of the subject-matter in dispute in the appeal."

The learned Judge fails to notice that where there is already an order for sale, the prior mortgagee in appeal does not seek any fresh order for sale. The order for sale is already passed at the instance of the plaintiff and the substance of the relief sought by him is only a declaration. Mr. Champakesa Ayyangar relied on *Ramakrishna Reddi v. Kotta Kota Reddi*(2) and the other cases which followed it. In those cases it will be noticed that either the amount of the decree or the liability of the property was in dispute and, in my view, they have no application to the facts of this case. Even if I am not correct in the view I have now taken, having regard to the form of the decree in this case it may be stated that the relief is one incapable of valuation. The learned Subordinate Judge has directed that two-thirds' share in the property will be sold first and after payment to the plaintiff, the eleventh defendant will be paid the balance. How much the two-thirds' share will fetch and what balance will remain payable to the eleventh defendant and whether it would satisfy the entire claim or only a portion of the claim, it is not possible to ascertain. It may be that the balance will be enough to satisfy the eleventh defendant's claim or may not be enough.

(1) (1931) I.L.R. 54 All. 347.

(2) (1906) I.L.R. 30 Mad. 96 (F.B.).

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He can only be called upon to pay the court-fee on the amount of the deficit which he will get as a result of the Subordinate Judge's decree and which is incapable of ascertainment. I think in this view that the court-fee paid is sufficient.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

GADDAM ADEMMA AND ANOTHER (PLAINTIFFS 2 AND 3),
APPELLANTS,

v.

ANAM HANUMA REDDI AND TWELVE OTHERS (DEFENDANTS
1 to 4 AND 6 to 14), RESPONDENTS.*

*Hindu law—Inheritance—Preferential right of—Father's half
sister's son and maternal uncle's son—Conflict between—
Mithakshara law.*

Under the Mithakshara law in the case of a conflict between the father's half sister's son and the maternal uncle's son, the father's half sister's son is the preferential heir to the estate of a Hindu dying intestate.

Principle of the decision in *Jatindranath Ray v. Nagen-
dranath Ray*(1) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Nellore dated 11th August 1930 and passed in Original Suit No. 44 of 1927.

K. Umamaheswaram for P. S. Raghavarama Sastri for appellants.

* Appeal No. 391 of 1931.
(1) (1931) I.L.R. 59 Cal. 576 (P.C.).

K. Bhashyam Ayyangar, Kasturi Seshagiri Rao and V. R. Venugopalan for first respondent.

Other respondents were unrepresented.

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The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—The question raised in this appeal is whether the father's half sister's son or the maternal uncle's son is the preferential heir to the estate of one dying intestate. The learned Subordinate Judge of Nellore was of the opinion that the maternal uncle's son is the preferential heir. It is against this decision that this appeal has been preferred. It seems to us that this matter is concluded by the recent decision of the Privy Council in *Jatindranath Ray v. Nagen-
dranath Ray*(1). In that case, the conflict was between the father's half sister's son and the mother's sister's son and their Lordships held that the father's half sister's son is the preferential heir. The ground of the decision is this. Both are *atma bandhus* and between bandhus of the same class "the spiritual benefit they confer upon the propositus is a ground of preference". This was the principle laid down in *Muttusami v. Muttukumarasami*(2), which was re-affirmed. Their Lordships held that a greater spiritual benefit is conferred upon the propositus by the father's half sister's son than by the mother's sister's son and as a measure of propinquity the spiritual benefit which they respectively confer should be taken in deciding the question of preference. So far as the mother's brother's son and the mother's sister's son are concerned, there is no difference in the application of this principle. Following the

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(1) (1931) I.L.R. 59 Cal. 576 (P.C.)

(2) (1892) I.L.R. 16 Mad. 23.

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said principle we allow this appeal and hold that the father's half sister's son is the preferential heir.

The decree of the lower Court is reversed and the case remanded to the lower Court for disposal of the further issues raised in the case. The appellants are entitled to recover the costs of this appeal, which we fix at Rs. 150, from the respondents. As the appellants have filed the appeal in *forma pauperis* and as the court-fee, if paid, will have to be refunded we make no order as to the court-fee.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

IN RE MYLSWAMI AND ANOTHER (FIRST AND SECOND ACCUSED), PRISONERS.*

Evidence—Foot impressions—Similarity of—Evidence—Admissibility of.

Though the science, if it could be so called, of footprints has not yet progressed very far, evidence of similarity of the impressions of the foot, shod or unshod, is admitted by the Courts and such evidence comes under the head of circumstantial evidence.

Emperor v. Babulal(1) referred to.

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentences of death passed on 17th April 1937 upon the prisoners in Calendar Case No. 135 of 1936 (Retrial).

* Referred Trial No. 60 of 1937 and Criminal Appeal No. 275 of 1937.
(1) (1928) I.L.R. 52 Bom. 223.

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N. Somasundaram for first accused.

K. Krishnamurti for second accused.—The footprint expert came only a fortnight after the occurrence, and he discovered a large number of footprints. The village munsif who inspected the place soon after the occurrence discovered a fewer number of footprints. The evidence in the case shows that a large number of persons had walked over the place. No weight should be given to the so-called expert's evidence. His evidence is inadmissible under section 45 of the Indian Evidence Act as it is not on a point of foreign law, or science or art, or as to identity of handwriting or finger impressions. The words "finger impressions" were added to the section by Act V of 1899. The section does not apply to footprints. The study of foot impressions cannot be called a science. [Gross on Criminal Investigation, page 323, and *Regina v. Britton*(1) were referred to].

R. N. Aingar for Public Prosecutor (*V. L. Ethiraj*) for the Crown.—The examination of footprints would come under the head of "science". In this case the expert has given evidence as to the similarity between the footprints found near the scene of occurrence and those of the second accused. This witness has examined and studied many cases of footprints and his evidence is certainly entitled to great weight. If the other witnesses discovered only a smaller number of footprints it was because they had not the necessary training to look for them. The expert has noted certain very peculiar characteristics in the feet of the second accused and also in the impressions found. His evidence is clearly admissible. *Regina v. Britton*(1) refers only to the impressions of boots of the prisoners. This is a case of impressions of feet. "Footprints are of decisive importance"; Gross on "Criminal Investigation", page 320. The evidence regarding them is admissible generally even apart from section 45 of the Evidence Act.

The JUDGMENT of the Court was delivered by BURN J.—The two prisoners have been convicted and sentenced to death for the murder of a woman, named Unnamalai, which they are said to have committed on the morning of 7th June 1936.

(1) (1858) 1 F. & F. 354; 175 E.R. 761.

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Along with another they were tried by another Sessions Judge in Calendar Case No. 135 of 1936. They were convicted on 4th December 1936, and sentenced to death; the third accused was acquitted. On appeal to this Court, in Referred Trial No. 7 of 1937 the learned Judges, MOCKETT and HORWILL JJ., set aside the convictions of these two accused and ordered that they should be retried largely for the reason that one Rangaswami Goundan who had been examined as a witness in the Court of the Committing Magistrate was not cited at the Sessions Court. This Rangaswami Goundan has now been examined as P.W. 8. He was cross-examined with regard to enmity and he denied all the insinuations made against him by the accused in the cross-examination; and the learned Advocates who have appeared for the accused in this case have not been able to show from the evidence of any other witness that the charges of enmity against Rangaswami Goundan were well-founded or that he had anything to do with the concoction of a false case against them.

The case was of a very simple nature. There was no eye-witness. P.W. 5, a woman, deposed that when she went to the house of Unnamalai to borrow money from her, she saw the second accused come out of the kitchen followed by the first accused, that she saw blood on the clothes of the second accused, and asked him where Unnamalai was. The second accused is alleged to have told her that she was not there and ordered her to go away. She became afraid, and when she was about to go, the second accused stopped her and warned her not to tell anyone saying

"Don't tell anyone that we have cut Unnamalai. We will give you Rs. 25".

The rest of the evidence against both the accused is entirely circumstantial. The house of the first accused was searched the same night but nothing of an incriminating nature was found. On 8th June it is alleged that both these accused separately gave information to the police which led to the discovery of important facts. The second accused is said to have given them information about the disposal of the blood-stained clothes which he was wearing at the time of the murder. A statement, Exhibit C, was recorded, and the second accused took the police to the place where his clothes, M.Os. 7 to 9, were found buried. The evidence of the police and other witnesses is that the clothes were wet when they were taken out and appeared to be stained with blood, because there were certain brown stains upon them. When they were submitted for examination to the Chemical Examiner, Madras, he found blood only on one of the clothes, M.O. 8, and when this was submitted to the Imperial Serologist, Calcutta, the report came back that the stains were too much disintegrated to enable the Imperial Serologist, to express an opinion whether the blood was human blood or not. The first accused is said to have told the police that he had buried the jewels taken from the body of the woman at the time of the murder and that he would go and show them the place where he had buried them. This information was recorded in Exhibit E; and the first accused is said to have led the police to his own backyard and dug out a mud pot (M.O. 10) in which was found a cloth pouch

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(M.O. 16) containing three jewels (M.Os. 13, 14 and 15) which are identified by P.W. 6 as the jewels belonging to his late wife, Unnamalai. Of these, two M.Os. (M.Os. 13 and 15) were found by the Chemical Examiner and the Imperial Serologist to be marked with human blood.

In addition to these, there is the evidence regarding certain footprints observed by the Inspector of Police, P.W. 9, in the room in which the body of the deceased was found. It is to be noted that from about 10 o'clock when the murder must have been committed till about 3-30 p.m. when the village munsif came to the scene, we have no evidence regarding the persons who entered the house. After the village munsif arrived he prevented anyone else from going in; and the Inspector when he noticed the footprints took particular precaution to see that no one should go in to disturb them. He sent a requisition to the footprint expert from Vellore, who came a fortnight later and took impressions of those footprints. He compared them and gave evidence as P.W. 14 regarding the results of his comparisons of the marks on the floor of the room with the impressions taken from the feet of these accused persons. His opinion was quite definite that all footprints found in the room where the woman lay murdered had been made by the feet of the second accused. He pointed out many dissimilarities between the impressions made in the room and the impressions by the first accused's foot. He pointed out several similarities between the impressions made in the room and the second accused's foot. Mr. K. Krishnamurthi for the second accused has contended that the

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evidence of the expert was inadmissible and referred to section 45 of the Indian Evidence Act. He points out that though provision is made for expert evidence regarding finger impressions there is no provision for expert evidence regarding impressions of feet. He also contends that the study of foot-marks is not worthy of the name of science and that therefore the evidence regarding foot-marks cannot be brought under the general description given in section 45. There is some force in this contention. It is quite clear that the science, if it could be so called, of footprints has not yet progressed very far. There is equally no doubt whatever, as was observed in the case of *Emperor v. Babulal*(1), about the fact that

"evidence of similarity of the impressions of the foot, shod or unshod, is admitted by the Courts in India and in Great Britain, and as far as I know, in every other country, though there is no science of such impressions".

The fact is that such evidence comes under the head of circumstantial evidence; *vide* Wills on Circumstantial Evidence, page 285. In a case of this kind it is not the opinion of the expert that is of any importance but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court and from his evidence the Court draws its own conclusions. This is precisely what has been done in the present case. P.W. 14 has explained the grounds of his opinion and these grounds are such as can be appreciated by any

(1) (1928) I.L.R. 52 Bom. 223, 226.

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ordinary person. He has pointed out several points of similarity between the footprints in the room where the woman's body was found and the footprints of which he took impressions from the feet of the second accused. The most important and the most easily verifiable of these are that on the second accused's left foot the little toe is rather farther away from the fourth toe than usual, whereas the second toe is rather unusually close to the big toe. Again there is, as P.W. 14 says, a very rare projection of the heel just below the hollow in both the feet; and finally, there is a very remarkable circumstance, that the left foot of the second accused is $\frac{1}{3}$ inch shorter than his right foot; and P.W. 14 was able to say, from the tracings which he made of the footprints found in the room, that the left foot of the man who had walked in the blood in the room was $\frac{1}{3}$ inch shorter than the right foot. We think that the only possible conclusion that can be drawn from these facts is that the impressions made in the room where the body was found were made by the second accused.

Neither of the accused made any attempt to explain the facts appearing in evidence against them. Both alleged that the case against them was wholly false. They both alleged that P.Ws. 7 (the village munsif), 8 and 15 (karnam) had given false evidence against them on account of enmity. We have already noticed that the learned Advocates for the accused were not able to point to anything in the evidence which could indicate that P.W. 8 had any motive to give false evidence against the accused. The same must be said with regard to the village munsif and the

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karnam. There is nothing to show that they had any motive to bring a false case against the accused or that they in fact took part in anything of the kind. The evidence though circumstantial is conclusive.

There was some contradiction between the evidence of P.W. 5 in the Sessions Court and what she said in the Court of the Committing Magistrate; but these contradictions were not on matters of importance.

We agree with the learned Sessions Judge who was himself in agreement with the majority of the assessors in holding that the only reasonable inference to be drawn from the facts established against the accused is that they jointly murdered the woman, Unnamalai. The sentence of death is the only appropriate sentence in this case and we are not prepared to refrain from confirming that sentence merely on the ground that these accused have been twice tried. The main reason why they have had to undergo the ordeal of a second trial was that they succeeded in persuading the learned Judges who heard their appeal on the former occasion that the absence of Rangaswami Goundan, P.W. 8, from the prosecution witness-box was a matter of importance to them.

We confirm the convictions and sentences of death passed upon both the accused and dismiss the appeal of the first accused.

V.V.C.

INCOME-TAX REFERENCE.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice King.*

1937,
October 22.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

THE ANDHRA INSURANCE COMPANY, LIMITED,
MASULIPATAM, KISTNA DISTRICT, RESPONDENT.*

*Indian Income-tax Act (XI of 1922), sec. 59—Rule 25 of Rules
framed under—"The last preceding valuation" in—
Meaning of.*

The expression "the last preceding valuation" in Rule 25 of the Rules framed under section 59 of the Indian Income-tax Act of 1922 means the last preceding valuation at the time of the return and not the valuation covering the last valuation period terminating before the 1st of April of the year of assessment.

Rule 25 is of a mandatory character and provides the only manner in which the income, profits and gains of life assurance companies can be ascertained and it is not open to the Income-tax Officer to depart from its provisions.

The Laxmi Insurance Co., Ltd. v. The Commissioner of Income-tax(1) approved.

In the matter of the Indian Income-tax Act XI of 1922.

N. Rama Rao for assessee.—Section 59 of the Indian Income-tax Act provides for rules being made with reference to insurance companies. The Central Board of Revenue have made such rules. Rule 25 of those Rules is to be found on page 112 of the Income-tax Manual. The assessee company was incorporated in 1925 and the first actuarial valuation was made in December 1930 and it related to the period ended 31st December 1929, i.e., a period of four years, four months and four days. That valuation was in force until the next

* Original Petition No. 34 of 1937.
(1) (1931) I.L.R. 12 Lah. 757.

valuation which came out in December 1934 and was for the four years ended 31st December 1933. In June 1934 the assessment for 1934-35 was made and the tax paid. Under section 3 of the Act the tax was in respect of the previous year which in the present case was 1933. The last preceding valuation with reference to the income of 1933 was the valuation made in December 1930 for the period ended 31st December 1929. The Income-tax authorities say that they will take the valuation made in the assessment year 1934-35. The answer to the question depends upon the meaning of the words "the last preceding valuation" in Rule 25 of the Income-tax Rules. The return must be made by the 15th of June after the end of the year of account, unless the Income-tax Officer extends the time at the instance of the assessee. In the present case the return was to have been furnished by 15th June 1934. It was in fact furnished on 30th June 1934, i.e., fifteen days after, but the Income-tax Officer accepted it and assessed the assessee company to income-tax on the basis of the return on 30th June 1934. With reference to the assessment for 1934-35, "the last preceding valuation" within the meaning of Rule 25, both with reference to the date on which the return was submitted and to the date on which the assessment was made, was the valuation made in December 1930 for the period ended 31st December 1929. [*The Laxmi Insurance Co., Ltd. v. The Commissioner of Income-tax(1)* was referred to.]

M. Patanjali Sastri for Commissioner of Income-tax.—Once assessment proceedings are started they may be kept alive for any length of time. If in the present case the Income-tax Officer had kept alive the assessment proceedings till after the actuarial valuation of 1934, the assessment could have been made with reference to that valuation.

[The meaning of the words "the last preceding valuation" cannot be changed by a postponement of the date of assessment. The question would even then be what was the last preceding valuation with reference to December 1933.—*VARADACHARIAR J.*]

If the valuation of 1934 had become available before the date on which the return was submitted, the last preceding valuation within the meaning of Rule 25 would be the valuation of 1934.

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THE JUDGMENT of the Court was delivered by LEACH C.J.—The assessee in this case is a life insurance company carrying on business at Masulipatam, having been incorporated in the year 1925. Under the provisions of section 8 of the Indian Life Assurance Companies Act, 1912, a life assurance company is required once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company or by its regulations or bye-laws, to cause an investigation to be made by an actuary into its financial condition, including a valuation of its liabilities. This company decided that the valuation should take place every four years. The first valuation was made in December 1930 and was for the period ended 31st December 1929. The next valuation took place in December 1934 and this was for the four years ended 31st December 1933. Under section 22 of the Indian Income-tax Act, the principal officer of every company shall prepare, and on or before the fifteenth day of June in each year, furnish to the Income-tax Officer a return, in the prescribed form and verified in the prescribed manner, of the total income of the company during the previous year. On 30th June 1934 the secretary of the company furnished the return contemplated by this section. It was fifteen days late, but the Income-tax Officer accepted it and assessed the company to income-tax on the basis of the return. Rule 25 of the Income-tax Rules provides that in the case of life assurance companies incorporated in British India, whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business

shall be the average annual net profits disclosed by the last preceding valuation. This rule was framed under the provisions of section 59 of the Act and has effect as if enacted in the Act.

The return which the secretary furnished to the Income-tax Officer on 30th June 1934 was based on the valuation for the period ended 31st December 1929 and on this basis the income of the company for the account year 1933 was Rs. 8,294. The company paid the amount of the tax; but when the valuation for the four years ended 31st December 1933 was published in December 1934 it was found that the profits had greatly increased. If the assessment had been based on this return the amount of the income would have been Rs. 39,755 instead of Rs. 8,294. When this was discovered by the Income-tax Officer, he issued a notice under section 34 of the Act, intimating his intention to assess the company in respect of the year 1933 on the further sum of Rs. 31,461 (the difference between Rs. 39,755 and Rs. 8,294) on the ground that this was income which had escaped assessment. The company objected and asked the Commissioner of Income-tax to refer the matter to this Court under the provisions of section 66 (2). The Commissioner has accordingly referred the following question :

“ Whether the ‘ last preceding valuation ’ of the surplus of the company for the purposes of the assessment to be made for the year of assessment 1934–35 was in the circumstances of the case that covering the years 1926–29 or that covering the years 1930–33 ? ”

The Income-tax Commissioner in his reference has expressed the opinion that the Income-tax Officer is entitled to reopen the assessment under

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section 34 notwithstanding the wording of Rule 25. He contends that the expression "the last preceding valuation" must be taken to mean the valuation covering the last valuation period terminating before the 1st of April of the year of assessment. This contention ignores the wording of Rule 25. The wording is perfectly clear and says that the income of a life assurance company shall be the average annual net profits disclosed by the last preceding valuation, that is the last preceding valuation at the time of the return. The return must be made by the 15th of June after the end of the year of account, unless the Income-tax Officer extends the time at the instance of the assessee. In this case the last preceding valuation when the return was submitted was the valuation made in December 1930 for the period ended 31st December 1929. As I have said, the words of the rule are perfectly clear and they must be given their plain meaning. Giving them their plain meaning the return made in June 1934 was made on the proper basis.

In these circumstances the Income-tax authorities had no right to serve a notice under section 34 of the Act, as no income had escaped assessment. The return had been made in accordance with the statute and the tax had been paid. In *The Laxmi Insurance Co., Ltd. v. The Commissioner of Income-tax*(1), it was pointed out that Rule 25 is of a mandatory character and provides the only manner in which the income, profits and gains of life assurance companies can be ascertained and that it is not open to an Income-tax Officer to depart from its

(1) (1931) I.L.R. 12 Lah. 757

provisions. With this opinion we are in entire agreement. It follows that the answer to the reference is that the last preceding valuation of the surplus of the company for the purposes of the assessment for the year 1934-35 was that covering the years 1926-29. As the company has succeeded, it will be entitled to its costs which we fix at Rs. 250.

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APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Madhavan Nair.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
BY THE COLLECTOR, WEST GODAVARI (APPELLANT),
PETITIONER,

1937,
October 5.

v.

VINJAMURI KISTNAMACHARYULU (LEGAL REPRESENTATIVE OF DECEASED RESPONDENT), RESPONDENT.*

Indian Limitation Act (IX of 1908), sec. 5—Abatement of appeal—Delay in seeking to set aside—Sufficient cause for excusing—Appellant's ignorance of death of respondent, if and when.

Ignorance of the death of the respondent, in the absence of any negligence or other act or omission for which the appellant can be held responsible, is sufficient cause for excusing the delay in seeking to set aside the abatement of an appeal within the meaning of section 5 of the Indian Limitation Act.

Lakshmi Chand v. Behari Lal(1) and *Rajani Kanta Roy v. Raja Jyoti Prosad Singh Deo*(2) approved.

PETITION praying that in the circumstances stated therein and in the affidavit filed therewith, the

* Civil Miscellaneous Petitions Nos. 2694 and 2695 of 1937.
(1) (1931) I.L.R. 54 All 280. (2) (1922) 27 C.W.N. 710.

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High Court will be pleased to excuse the delay in seeking to set aside and to set aside the abatement of Appeal Suit No. 399 of 1931 on the file of the High Court (Original Suit No. 7 of 1930 on the file of the Court of the Subordinate Judge, Ellore) caused by the death of Vinjamuri Seshavaram, the respondent therein.

Government Pleader (K. S. Krishnaswami Ayyangar) for petitioner.

V. Govindarajachari for respondent.

LEACH C.J. The ORDER of the Court was delivered by LEACH C.J.—This is an application for an order excusing the delay in seeking to have the abatement of Appeal No. 399 of 1931 set aside and for an order setting aside the abatement. The petitioner is the Secretary of State for India in Council, acting through the Collector of West Godavari District. It appears that the respondent died on 18th September 1935, but the learned Government Pleader did not become aware of his death until the 4th May this year, that is, two days before the Court closed for the long vacation. The learned Government Pleader promptly communicated with the Collector, who on the re-opening of the Court on the 15th July filed the present application. The learned Advocate for the respondent does not contend that there was any delay in filing the application after the news of the death had been received, but he does contend that the Court should not set aside the abatement. His argument is that ignorance of the death of the respondent is not sufficient to support the application.

It has been proved to our satisfaction that neither the Collector nor any Government official

concerned with this appeal was aware of the death of the respondent until May of this year, and that being so we consider that the petitioner is entitled to have the abatement set aside under the provisions of Order XXII, rule 9, Civil Procedure Code. It is not incumbent upon an appellant to make periodical inquiries as to whether the respondent is alive. We are in entire agreement with the observations in *Lakshmi Chand v. Behari Lal*(1) where it was said that there was no justification for holding that ignorance of the death, in the absence of any negligence or other act or omission, for which the applicant can be held responsible, was not sufficient cause within the meaning of the Limitation Act. A decision to the same effect was given by the Calcutta High Court in *Rajani Kanta Roy v. Raja Jyoti Prosad Singh Deo*(2).

Here it has not been contended that there has been any negligence or any act or omission on the part of the petitioner which would prevent him from having the benefit of section 5 of the Limitation Act. For these reasons we excuse the delay and set aside the abatement.

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(1) (1931) I.L.R. 54 All. 280.

(2) (1922) 27 C.W.N. 710.

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APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Varadachariar.*

1937,
September 1.

RAHIMAN BIBI SAHEBA BY AGENT SYED YUSUF SAHIB
(PLAINTIFF), APPELLANT,

v.

MAHBOOB BIBI SAHEBA AND NINE OTHERS (DEFENDANTS),
RESPONDENTS. *

*Muhammadian law—Muhammadian marrying his wife's sister
during his wife's lifetime—Child of such marriage—Legiti-
macy of.*

The child of a marriage contracted by a Muhammadian with
his wife's sister while his wife is alive is legitimate.

Tajbi v. Mowla Khan(1) followed. *Aizunnissa Khatoon v.
Karimunnissa Khatoon*(2) not followed.

The distinction between an invalid marriage and a void
marriage in Muhammadian law pointed out.

APPEAL against the decree of the Court of the
City Civil Judge, Madras, in Original Suit No. 169
of 1933.

C. Sarangarajan for appellant.—The question in the appeal
is whether a child of a marriage contracted by a Muhammadian
with his wife's sister when his wife was alive is legitimate. In
Aizunnissa Khatoon v. Karimunnissa Khatoon(2) the Calcutta
High Court held that such a marriage was void but the Bombay
High Court in *Tajbi v. Mowla Khan*(1) held that such a
marriage was only invalid.

[THE CHIEF JUSTICE.—The leading text-book writers who
have dealt with the question within the last one hundred years
have expressed themselves contrary to the view taken by the
Calcutta High Court.]

The majority of them are against the Calcutta view. In the
earlier editions of Wilson's Anglo-Muhammadian Law the Cal-
cutta view was stated to be the correct one though in the fifth

* City Civil Court Appeal No. 52 of 1935.
(1) (1917) I.L.R. 41 Bom. 485. (2) (1895) I.L.R. 23 Cal. 130.

edition the Bombay view is accepted. Ameer Ali and Baillie
are in favour of the Bombay view.

[VARADACHARIAR J.—Is there any Muhammadan law text
which says that the children of such marriage are illegitimate?]

There is no text. The texts deal only with such a marriage
and not with the legitimacy or otherwise of the children born
of such marriage. If the marriage is void, by necessary impli-
cation, the children must be declared to be illegitimate.

[THE CHIEF JUSTICE.—The prohibition against marriage of
sisters is only a temporary prohibition as opposed to the prohibi-
tion against marriage with the mother-in-law which is a
permanent prohibition.]

A. B. Nambiar and *Rafiuddin Ahmed* for respondents.

[THE CHIEF JUSTICE.—We do not want to hear you on the
question of legitimacy.]

[*A. B. Nambiar* made his submissions on the question
of mahar.]

The JUDGMENT of the Court was delivered by
LEACH C.J.—This appeal raises the question
whether a child of a marriage contracted by a
Muhammadian with his wife's sister, the wife
being alive, is legitimate. It also raises questions
with regard to the right of certain parties to
payments on account of mahar.

The suit was filed by the appellant for the
administration of the estate of her deceased
father, Syed Mahmood Sahib, a Sunni Muham-
madian, who died in Madras on 17th July 1930.
There were ten defendants, a widow and the sons
and daughters of the deceased. The first respon-
dent is the widow. The appellant and the third
respondent are the children of the deceased's first
wife, who predeceased him. Respondents 2, 5, 6,
8 and 10 are the sons and daughters of the first
respondent by the deceased. Respondents 4 and
9 are the children of the third wife, who also

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predeceased her husband. The seventh respondent is the son of the fifth wife, who survived the husband but died before the suit was instituted. The first respondent was his fourth wife, and she and the fifth wife were sisters. It is contended by the appellant that the seventh respondent who is the son of the younger sister is illegitimate, his mother having married the deceased while her sister was alive. It is said that the Muhammadan law prohibits a Muhammadan marrying his wife's sister and if he does take her as a wife her children have no share in the inheritance. The seventh defendant denies that he is illegitimate, and, therefore, claims to be entitled to share in the estate of his deceased father. The learned trial Judge held that the marriage was irregular, but that this did not affect the legitimacy of the seventh defendant. With regard to the matter of mahar, the claimants are the first and seventh respondents, the first respondent claiming in her own right and the seventh respondent as his mother's heir. The learned Judge held that they were each entitled to a sum of Rs. 585 by way of mahar. The appellant says that they are entitled to nothing.

The question whether a Muhammadan may marry the wife's sister during the lifetime of his wife has been considered by the Calcutta High Court and by the Bombay High Court and they have arrived at different conclusions. The Calcutta case is that of *Aizunnissa Khatoon v. Karimunnissa Khatoon*(1) and the Bombay case that of *Tajbi v. Mowla Khan*(2). The Calcutta decision stands alone, but the Bombay decision has

(1) (1895) I.L.R. 23 Cal. 130.

(2) (1917) I.L.R. 41 Bom. 485.

the support of all the principal modern works on Muhammadan law. The Calcutta High Court holds that a Muhammadan cannot lawfully marry his wife's sister, and that if he has marital relation with his sister-in-law during his wife's lifetime the children born of the union are illegitimate. This decision is largely based on a passage from the Koran. The Koran does prohibit a man marrying his wife's sister, as it prohibits a man marrying his wife's daughter. The Bombay High Court considers that Muhammadan law recognises a difference between a marriage which is void from the beginning and can never become lawful and a marriage with a person who may later become a lawful wife. In the case of a marriage with a wife's sister the marriage would become lawful on the divorce or death of the wife. This view finds acceptance in the *Fatwa-i-Alamgiri*, which is of undoubted authority. It dates from about the middle of the seventeenth century. BEAMAN J. in *Tajbi v. Mowla Khan*(1) gives it the place in the Muhammadan law which the Institutes of Justinian occupy in Roman Law and points out that it was written when Muhammadanism was at the height of its power in this country.

Modern text books, as I have indicated, are unanimous on the question. In the second edition of Baillie's Digest, the following passage appears at page 157 of Part 1 :

"An invalid marriage has no legal effect before consummation, so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife he

(1) (1917) I.L.R. 41 Bom. 485.

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might lawfully marry the mother. But after consummation it is joined to valid marriages as to its effects, one of which is the establishment of *nusub*, or the child's paternity, as already mentioned."

The editor of the fifth edition of "Wilson's Anglo-Muhammadan Law" accepts the Bombay decision, although Sir Roland Wilson himself favoured the contrary opinion. Ameer Ali states the position as follows (fourth edition, Vol. II, page 326) :

"Thus a man may not marry two sisters or a woman and her niece by the same contract or one after another whilst the previous marriage is subsisting. But if such a marriage is contracted in fact, it is *invalid* (*fasid*) but not void (*batil*), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the second union. Accordingly, although the Judge may separate the parties on the ground of the invalidity of the marriage, if it is consummated the issue would be affiliated to the father, in other words, they would be his legitimate children."

This opinion is emphasised at page 391. In the tenth edition of Mulla's Muhammadan Law (page 179) it is said that the bar of unlawful conjunction renders a marriage irregular, not void, and at page 180 there is express dissent from the Calcutta decision.

In view of this weight of authority we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Muhammadan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate. Of course, where a Muhammadan

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marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular, the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as the seventh respondent is concerned. For these reasons we consider that the decision of the learned trial Judge on the question of the legitimacy of the seventh respondent was correct.

With regard to the question of mahar the position is very unsatisfactory. It is impossible on the evidence to say whether anything is due. The seventh respondent in fact made no claim in his written statement to his mother's mahar ; but he was allowed to raise the question in the course of argument. We consider that, as this question of mahar was not dealt with adequately by the learned Advocates in the Court below, it will be better to send the case back for further evidence on the question whether the first and seventh respondents are entitled to payments on account of mahar and on the question of the amounts. Accordingly the decree of the lower Court will, so far as it affects the matter of mahar, be set aside and the case remanded for retrial on this question. Leave will be granted to the seventh defendant to amend his written statement so as to make it quite clear that he is claiming to have paid out to him the money which he says was due to his mother on account of mahar. As the appeal has succeeded in part and has failed in part, we propose to make no order as to costs.

G.R.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Varadachariar.

1937,
August 24.

MOHAMED HASAN KHALEELI (PETITIONER),
APPELLANT,

v.

P. VARADARAJULU NAIDU AND SIX OTHERS (SECOND
RESPONDENT AND NIL), RESPONDENTS.*

*Costs—Limited liability company—Winding-up of—Petition
for—Withdrawal of, by petitioning creditor—Advertisement
in Form 9 of the Original Side Rules of the High Court—
Order for separate set of costs in favour of supporting
creditors—Validity of—Difference between the Indian and
English law—R. 101—Effect of.*

A petition was presented on the Original Side of the High Court for the winding-up of a limited liability company under the supervision of the Court. In pursuance of rule 27 of the Rules of the Original Side of the High Court under the Indian Companies Act advertisement was made in Form No. 9 calling on creditors or contributories of the said company desirous of opposing the making of an order for the winding-up of the said company to appear at the time of the hearing of the said petition. Six creditors appeared to support and not to oppose the petition. At the hearing of the petition the petitioner did not want to pursue the petition. The trial Judge enquired whether any other creditor was willing to proceed with the petition. None of the creditors who appeared were willing finally to undertake the burden of continuing the petition. The trial Judge dismissed the petition but directed the petitioner to pay the costs of all parties who appeared before him, which meant that the petitioner was required to pay seven sets of costs, including one set to the voluntary liquidator.

Held: (i) The only order for costs which might have been made in the circumstances was an order in favour of the voluntary liquidator, but he did not ask for it.

* Original Side Appeal No. 52 of 1937.

(ii) A creditor appearing in a winding-up petition is not entitled to his costs as a matter of right; to entitle him to them he must show reasonable ground for appearing.

(iii) In view of the specific provision in Form 9 which refers to the appearance of persons who desire to oppose the winding-up order, rule 101 cannot be relied on to make the English rule as to costs applicable in this matter.

Difference between Indian and English law pointed out.
In re Hull and County Bank(1) followed.

APPEAL from the order of GENTLE J. dated 28th April 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 312 of 1936.

K. Krishnaswami Ayyangar for *Md. Asker Ali* for appellant.—The appellant was the petitioner on the Original Side of the High Court. He filed a petition for the winding-up of a limited liability company under the supervision of the Court. Notice was issued in Form No. 9 of the Original Side Rules, page 324, to creditors who were desirous of opposing the making of an order for the winding up of the company. A number of creditors who supported the petition for winding-up appeared. On the day fixed for the hearing of the petition the petitioning creditor wanted to withdraw the petition. The trial Judge enquired whether the supporting creditors were willing to continue the petition. None of them undertook the responsibility. The trial Judge dismissed the petition but gave separate set of costs to each of the supporting creditors. There was no invitation to the supporting creditors to appear. They were not entitled to any costs. In this respect the Indian law differs from the English law. Even under English law, when there is no reasonable ground for appearance, costs would not be allowed; see *In re Hull and County Bank*(1). None of the supporting creditors were willing to continue the petition when opportunity was given which clearly shows that they need not have appeared.

R. Narasimham for first respondent.

W. A. P. Lobo and A. S. M. Nair for second and third respondents.—In the trial Court when opportunity was given to

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(1) (1878) 10 Ch. D. 130.

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the supporting creditors to continue the petition the second respondent took time to consider the position. He came to the conclusion that, without the help of the petitioner who was in possession of important facts which would support the petition, he could not push the petition to a successful issue. Under these circumstances the trial Judge exercised his discretion and gave one set of costs to the second respondent, which could not be set aside in appeal; see *Butler v. Butler*(1), *In re Paper Bottle Company*(2), *In re Criterion Gold Mining Company*(3) and *In re British Electric Street Tramways*(4).

[The CHIEF JUSTICE.—Under the English rule both the creditors who came to oppose as well as creditors who came to support are entitled to costs. In the Indian rule the word “support” is omitted. The law as regards costs is stated clearly by Buckley in his book on the Companies and Limited Partnerships Act at page 344.]

S. S. Rajagopalan for fourth respondent.—Rule 101 of the rules framed by the High Court under the Indian Companies Act makes English rules of procedure applicable to India. So the trial Judge had power to order costs to supporting creditors also. Under the circumstances the order for separate sets of costs was also justified. Your Lordships can fix some reasonable amount.

T. K. Rajagopalan for seventh respondent.

[*K. Krishnaswami Ayyangar* in reply cited *In re Humber Iron Works Co.*(5), *Re: The North Brazilian Sugar Factories Limited*(6) and *Re: Jablochkoff Elec. Light & Power Co., Ltd.*(7) and pointed out the difference in the language in the matter of costs between the English Companies (Consolidation) Act of 1908 and the earlier Acts, and emphasised the fact that the cases quoted on behalf of the respondents were decided under the Acts before 1908.]

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question with regard to costs in a winding-up petition. In November 1936 a resolution was passed for the

(1) (1884) 28 Ch. D. 66.

(3) (1889) 41 Ch. D. 146.

(5) (1866) 2 Eq. 15.

(2) (1888) 40 Ch. D. 52.

(4) [1903] 1 Ch. 725.

(6) (1886) 56 L.T. 229.

(7) (1883) 49 L.T. 566.

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voluntary winding-up of the “Tamil Nadu, Limited”, a company registered under the Indian Companies Act, 1913. The company had been formed for the purpose of publishing a daily newspaper in Tamil in Madras. On 11th December 1936 the appellant filed a petition on the Original Side of this Court asking that an order might be passed for the winding up of the company under the supervision of the Court. This action was taken as the result of a resolution passed at a meeting of creditors held on 2nd December 1936. On 5th December a further application was filed for the appointment of an interim official liquidator. These petitions came before GENTLE J. on 27th April of this year. The learned Advocate appearing for the appellant then informed the Court that his client did not propose to pursue the winding-up petition and he had no interest in it. The learned Judge enquired whether any other creditor would proceed with the petition. I should mention that six creditors had entered appearances and professed to support the petition. Two of them, respondents 2 and 7, asked for time to look into the matter. Time was accordingly granted until next day when the case was again placed in the list. The learned Advocate for the second respondent intimated that his client would like to continue the petition in the place of the petitioner, but later, realising that he was not in a position to prove facts which would justify a supervision order being passed, he informed the Court that he was not in a position to proceed further. The seventh respondent was also not willing to go on with the petition. In his case there was only a small amount due by

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the company. The learned Judge then passed an order dismissing both the petitions; and in respect of the petition for a supervision order, he directed that the petitioner should pay the costs of all parties appearing before him. As there were seven respondents, the voluntary liquidator and six creditors, this meant that the petitioner was required to pay seven sets of costs which would amount, we are told, to a sum of over Rs. 2,000. The petitioner has appealed against this order and contends that the learned Judge was not entitled to pass any order for costs against him.

While the position of the creditors who appeared is on a different basis, it is quite clear that the voluntary liquidator would have been entitled to his costs, because he had successfully opposed the petition. But he had agreed before the case came into Court on 27th April that he would not press for his costs and that there should be an order dismissing the petition without costs. In these circumstances he does not ask for the dismissal of the appeal. In fact, he is quite agreeable to the appeal being allowed. The third respondent in the appeal leaves the matter in the hands of the Court. Respondents 2, 4, 5, 6 and 7 in the appeal strongly oppose the appeal.

The question involves a reference to the provisions of the rules of the Court and consideration of the principles which apply. Dealing first with the rules, Rule 27 of the Rules of the Original Side of this Court under the Companies Act provides that every petition for the winding up of any company by the Court, or subject to the

supervision of the Court, shall, after admission, be advertised fourteen clear days before the hearing, and the advertisement is required to be in the terms of Form No. 9 to be found at page 324 of the Rules. The Form reads as follows:—

“Notice is hereby given that a petition for the winding-up of the abovenamed Company by the (or subject to the supervision of the) High Court of Judicature at Madras was on the _____ day of _____ 19 _____, presented to the High Court of Judicature at Madras, by the said Company (or A.B. of _____, a creditor or contributory of the said Company, or as the case may be); and that the said petition is directed to be heard on the _____ day of _____ 19 _____; and any creditor or contributory of the said Company desirous to oppose the making of an order for the winding-up of the said Company under the above Act, should appear at the time of hearing by himself or his Counsel or Vakils for that purpose; and a copy of the petition will be furnished to any creditor or contributory of the said Company requiring the same, by the undersigned on payment of the regulated charge for the same. *Attorneys or Vakils for the petitioners.*”

It will be observed that this Form only refers to appearance of persons who desire to oppose the winding-up order. It differs materially from the form prescribed by the English rules which allow interested persons to appear to oppose or to support. Rule 101 of this Court states that in cases not provided for by the Rules or by the rules of procedure laid down in the Act, the practice and procedure of the High Court of Justice in England in matters relating to companies shall be followed so far as they are applicable and not inconsistent with the rules and the Act. It is said that by reason of this Rule the English rule can be applied here and that the Court is justified in regarding the notice to appear as an invitation to appear to oppose *or to support*. I am unable to

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accept this contention. It is quite clear from the form of the notice that this Court only intended notice to issue to persons who wished to oppose. The law allows the Court to permit another creditor to take the place of a petitioning creditor who does not wish to proceed with his petition, but this is another matter and does not really affect the point under discussion.

We have here a notice inviting creditors who wished to oppose the application for a winding-up order to appear at the hearing. The creditor-respondents to this appeal appeared in answer to the notice issued, but they appeared to support, not to oppose, the petition. It is said that in these circumstances, the petition having failed, they are not entitled to costs in their favour. They supported a petition which the Court dismissed. We consider that there is great force in this argument. Moreover, none of the creditors who did appear were willing to undertake the burden of the petition. The second respondent did express his willingness at one time to undertake this burden, but he found it too much for him and quickly abandoned the idea. It seems to us that in these circumstances it is not open to him to oppose this appeal, and the same remark applies to the other opposing creditors.

We have been referred to a number of cases decided in England on questions relating to costs in winding-up petitions. It appears to be usual there to allow one set of costs to the successful party and, where the petition is withdrawn, one set even to the supporting creditor or creditors. But it must be remembered that in England supporting creditors are invited to come in. They

are not invited to come in under the rules of this Court. The question of costs must be decided in the light of the facts of the particular case. As a general rule the successful party is entitled to costs in his favour and the unsuccessful party is liable to have an order for costs against him. The opposing respondents in this case are not the successful parties.

A case which has a general application is that of *In re Hull and County Bank*(1), where it was decided that a creditor appearing in a winding-up petition is not entitled to his costs as a matter of right. To entitle him to them he must show reasonable ground for appearing. In giving the judgment in this case JESSEL M.R. observed :—

“ I refused these costs, and I will state my reasons for doing so. I by no means assent to the proposition that creditors appearing on a petition to wind up a company are entitled to their costs as of right. It is usual to give one set of costs when many appear, and when there is a reasonable ground for appearing; but I have said before, and I repeat it, that I will not lay down any such rule as that creditors are entitled to their costs as of right because that would induce solicitors to instruct Counsel simply for the purpose of obtaining costs, and for no other purpose whatever.”

I do not wish to suggest that appearances have been entered in this case for the mere purpose of obtaining costs, but the appearances of the respondent-creditors have not been justified. When they were called upon to adopt the petition, they refused to do so. I will not pause to consider what their motives might have been; it is clear that they have not made out a case for an order for costs in their favour. The only order for costs which might have been made

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in the circumstances was an order in favour of the voluntary liquidator, but he did not ask for it.

The appeal will be allowed but we make no order for costs in the appeal. The appellant did not disclose before the learned trial Judge the reasons why he was not proceeding with the application and his attitude was one which was sufficient to raise suspicion as to his motives. The liquidator will have his costs of the appeal out of the assets of the company.

G.R.

APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Varadachariar.*

1937,
August 12.

D. DOSS (SIXTH RESPONDENT), APPELLANT,

v.

C. P. CONNELL AND ANOTHER, JOINT OFFICIAL LIQUIDATORS,
(APPLICANTS), RESPONDENTS.*

*Indian Companies Act (VII of 1913), sec. 235—Misfeasance
summons—Articles of association—Liability of directors
for wilful neglect or default under—What amounts to—
Section 103—Non-compliance of—Directors commencing
and carrying on business in spite of—Banking business—
Deposits by constituents—Loss of moneys—Damages—
Measure of—Insolvency of a director—Effect of—Section
281—Powers of Court under, if and when to be exercised.*

N, an Advocate, who was an undischarged insolvent, promoted a limited liability company, for the purpose, *inter alia*, of doing all kinds of banking business. He arranged that he should be appointed legal adviser to the company and the "advisory director". There were eight other directors, one of whom was the chairman. The articles of association provided : (i) the business of the company might be commenced as soon as fifty shares, that is, Rs. 2,500, had been subscribed ; (ii) the

chairman should have the power of appointing, promoting, reducing and suspending and removing all officers of the bank (company) subject to the approval of the board of directors and should have the power to fix all remunerations, salaries and wages to be paid by the company. The articles also contained in effect a clause comprising the usual indemnity to directors for anything done by them, except where loss had been incurred as a result of wilful neglect or wilful default on their part. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to N, a sum of Rs. 10,000, of which Rs. 5,000 was to redeem certain of his assets which had vested in the Official Assignee so that he might mortgage the same and a life policy to the company as security for the loan. After the incorporation of the company the agreement was executed and, in due course, N executed the requisite mortgage deed. Before the business was started, advertisements were inserted by N in the local press calling for applications for posts on the staff of the company. N made a number of appointments, the persons appointed furnishing security in the aggregate sum of Rs. 10,720. The company had no right to utilize this amount for its own purposes. N misappropriated Rs. 4,988-7-2 out of the same. The minimum subscription had been subscribed. The directors including N allowed the company to start the business, though the directors had not all paid the requisite proportion of their shares under section 103 of the Indian Companies Act. The certificate permitting the company to commence business was obtained as the result of a false declaration made by N that the conditions of section 103 had been satisfied. As a result of the directors having allowed the company to keep open its doors for business when they were not entitled to do so, the company suffered loss to the extent of Rs. 6,331-9-3. It was found : (i) None of the directors knew until at a late stage that N had utilized a large portion of the deposits towards the sum of Rs. 5,000 which was to be paid to him under the agreement but without utilizing the same for the purposes contemplated in the agreement. (ii) Although some of the directors knew from the inception of the company that N was an undischarged insolvent they had no reason to suspect the integrity of either the chairman or N. (iii) The directors were fully aware that all the directors had not paid the requisite proportion of their respective shares, that the company had

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[VARADACHARIAR J.—In the cases under appeal we have got to assume misconduct and damages. The question is, what is the measure of damages? Your answer that the damages might have resulted even if the company had been properly started will not help you because in your example there is no misconduct and the damages are the result of misfortune and not of misconduct. The fact that the incorporation was wrongly obtained is no answer with respect to contracts of the company with third parties. The company's liability has got to be met by the company. Cannot the shareholders, who have got to contribute, say to the directors that the damages to the company resulted on account of their misconduct in having started and carried on the business improperly?]

In *Indian States Bank, Ltd. v. Sardar Singh*(1) the liability of directors under sections 101 and 103 of the Indian Companies Act is dealt with. No case has arisen before the Courts where the point is specifically dealt with. *Burton v. Bevan*(2) supports the above submission.

A. *Westmorland Wood* for respondents.—The directors should have acted as prudent men of business and as they would have done in conducting their own private affairs; *Leeds Estate, Building and Investment Company v. Shepherd*(3). A director must take reasonable care, which is to be measured by the care which an ordinary man might be expected to take in the same circumstances on his own behalf; see *In re Brazilian Rubber Plantations and Estates, Limited*(4) which is approved by ROMER J. in *In re City Equitable Fire Insurance Co.*(5). This company was a banking company whose stock in trade was cash and securities. Employees in banks are obviously required to furnish security deposits and must be engaged before the commencement of business. Here P. K. Nair, the promoter of the company, was allowed by the directors to have the unfettered handling of moneys which they must have known were coming into his hands. The directors knew that P. K. Nair was an undischarged insolvent. This should have put the directors on their guard. They did not act as reasonable men. They would not have left their own moneys in the hands of an insolvent whom they had no particular reason to

(1) A.I.R. 1934 All. 855.

(3) (1887) 36 Ch. D. 787.

(2) [1908] 2 Ch. 240.

(4) [1911] 1 Ch. 425, 437.

(5) [1925] 1 Ch. 407, 428.

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trust. The attitude of the Legislature with regard to undischarged insolvents is shown by the Companies (Amendment) Act, 1936, which disqualifies an undischarged insolvent from acting as a director. The indifference of the directors to their duties in this case is shown by the circumstance that they signed a memorandum authorizing the promoter to collect money on behalf of the company even after they had discovered his misappropriations. The directors are liable for allowing the company to start and to continue business in contravention of section 103 of the Indian Companies Act and the measure of the loss is the aggregate loss incurred through commencing and continuing the business; see *Indian States Bank, Ltd. v. Sardar Singh*(1).

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal and Appeals Nos. 27 of 1937 and 28 of 1937 arise out of a misfeasance summons taken out by the Official Liquidators of the General Banking Corporation, Limited, against the directors of that company. The appeals have been heard together and it will be convenient to deal with them in one judgment.

The company was registered on 11th May 1933 for the purpose, *inter alia*, of doing all kinds of banking business. The promoter was one P. K. Nair, a Barrister-at-law, who was at the time and has since remained an undischarged insolvent. Nair, who was the ninth respondent in the proceedings before the learned trial Judge, arranged that he should be appointed legal adviser to the company and the "advisory director". A prospectus was prepared, but fortunately there was no general application made to the public to subscribe shares. There were eight other directors, who were respondents 1 to 8. Two of them, respondents 3 and 5 (B. Gulabchand Sowcar and M. L. Ranganayakulu) were

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not served and they took no part in the proceedings. The fourth respondent, A. Madhava Rao, who was the chairman of the company, and Nair absconded before the proceedings commenced. The Official Liquidators sought to make all the respondents, except respondents 3 and 5, liable under section 235 of the Indian Companies Act, 1913, for (i) a sum of Rs. 4,988-7-2 which had been misappropriated by Nair and (ii) a sum of Rs. 6,331-9-3, representing liabilities incurred by the company from the date it started business until the date it closed its doors. The certificate permitting business to be started was issued on 4th September 1933 and business was actually commenced on the 7th of that month. The bank's doors were closed on 16th February 1934; a petition for winding up was presented on 5th March of that year and on 6th April 1934 a compulsory winding-up order was passed.

GENTLE J., before whom the case came, held that respondents 1, 2 and 4 (Rao Bahadur M. C. Rajah, V. Venkateswara Sastrulu and A. Madhava Rao) were each liable to pay the sum of Rs. 4,988-7-2 claimed as the first item, and respondents 2, 4 and 6 (the sixth respondent being D. Doss) were each responsible for the payment of the sum of Rs. 6,331-9-3, the second item claimed. He also held that, in respect of the sum of Rs. 6,331-9-3, the first respondent was liable to pay Rs. 2,833-9-9, and the seventh respondent Rs. 5,408, these sums being calculated in accordance with the dates on which they resigned from the board of directors. Appeal No. 26 is the appeal of the sixth respondent in respect of the sum of Rs. 6,331-9-3; Appeal No. 27 is by the

seventh respondent in respect of the sum of Rs. 5,408; and Appeal No. 28 embraces the appeals of the first and second respondents in respect of the sum of Rs. 4,988-7-2, that of the first respondent in respect of the sum of Rs. 2,833-9-9 and that of the second respondent in respect of the sum of Rs. 6,331-9-3. The fourth respondent has not appealed and the order of the learned Judge has become final as against him.

The nominal capital of the company was Rs. 1,00,000 divided into 2000 shares of Rs. 50 each. Of the Rs. 50 payable on each share, Rs. 10 was payable on application, Rs. 15 on allotment and the balance in five equal instalments. The articles of association provided that the business of the company might be commenced as soon as fifty shares, that is, Rs. 2,500, had been subscribed. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to Nair a sum of Rs. 10,000 on the security of his interest in the assets of the Indian Law Times, Limited, and a life policy of Rs. 10,000. The Indian Law Times, Limited, had been acquired by Nair and his insolvency arose in connection with this business. The arrangement was that out of the loan of Rs. 10,000, Rs. 5,000 should be paid to Nair for the purpose of enabling him to redeem the assets of the Indian Law Times, Limited, from the hands of the Official Assignee. After the incorporation of the company the agreement was executed and, in due course, Nair executed the requisite mortgage deed. Although business was not started until 7th September 1933, advertisements were inserted by Nair in the local press on 21st June and 15th July 1933, calling for applications for posts on the

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staff of the company. It was intimated that the successful candidates would be required to deposit security for the proper performance of their duties. Applications were received in the course of July and August and a number of appointments were made, the persons appointed furnishing security in the aggregate sum of Rs. 10,720. I should mention that article 63 of the articles of association provided that the chairman should have the power of appointing, promoting, reducing, suspending and removing all officers of the bank, subject to the approval of the board of directors, and should have the power to fix all remunerations, salaries, and wages to be paid by the company. Subscriptions were received for only sixty-five shares. The subscriptions by the respondents were as follows :—

Respondent No.	No. of shares.
1	5
2	5
3	20
4	10
5	5
6	5
7	5
8	5

Respondents 1, 2, 4 and 6 paid nothing in respect of their shares. The third respondent paid Rs. 250 on account of the Rs. 1,000 owed by him in respect of his 20 shares, and the seventh respondent paid Rs. 30 on account of the Rs. 250 owed by him in respect of his five shares. Respondents 5 and 8 appear to have paid for their shares in full. The actual capital which the company had when it started business was Rs. 780.

The first item of the claim, viz., the sum of Rs. 4,988-7-2, represents security deposits provided

by the employees which Nair put into his own pocket. The company had no right to utilise these monies for its own purposes and the fact that Nair misappropriated them is common ground. The learned Judge held that respondents 1, 2 and 4 were responsible for this sum, because they had not used reasonable care in carrying out their duties. He considered that it was incumbent on them to see that the company's monies were in a proper state of investment and that Nair being an undischarged insolvent should not have been allowed to take charge of the security deposits of the employees. The learned Judge held as a fact that the second and fourth respondents had knowledge of Nair's insolvency, but he was not satisfied that the first respondent had such knowledge. He, however, held that they were all liable as they took no steps to see that a responsible person was attending to the company's finances. They had all failed to carry out their duties, and were guilty of the grossest negligence. The position with regard to this sum of Rs. 4,988-7-2 is altogether different from the position with regard to the sum of Rs. 6,331-9-3 which I will deal with separately.

With regard to the first sum, the learned Advocate for respondents 1 and 2 (appellants here) contends that the learned trial Judge has misconceived the law with regard to the duties of directors. He says that on the authorities it must be shown that the directors had knowledge of the facts and that they acted wilfully despite their knowledge. Before passing to the authorities I should refer to article 95 of the articles of association. This article has been very badly

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drafted, but it is intended to comprise the usual indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, and it is accepted by both sides that it has this effect. The duties of directors and what is meant by wilful negligence were dealt with at length by ROMER J. in the case of *In re City Equitable Fire Insurance Co.*(1). The learned Judge who discussed the authorities there pointed out that, in order to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained, a director must, of course, act honestly; and he must also exercise some degree of both skill and diligence. The learned Judge, however, pointed out that (i) a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; (ii) he is not bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature to be performed at periodical meetings; and (iii) in respect of all duties that, having regard to the exigencies of business and the articles of

(1) [1925] 1 Ch. 407.

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association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Dealing with the question of wilful negligence, the learned Judge observed at page 434 of the report:

"An act or an omission to do an act is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

This view was affirmed by the Court of Appeal consisting of POLLOCK M.R., WARRINGTON L.J. and SARGANT L.J.

With regard to the question whether a director is justified in trusting the officials of the company, I would also refer to the observations of LINDLEY M.R. in the case of *In re National Bank of Wales, Limited*(1):

"Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men."

This case was taken to the House of Lords, [*Dovey v. Cory*(2)]. Lord DAVEY there said at page 492:

"I think the respondent was bound to give his attention to and exercise his judgment as a man of business

(1) [1899] 2 Ch. 629, 673.

(2) [1901] A.C. 477.

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on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir GEORGE JESSEL in *Hallmark's case*(1), and by CHITTY J. in *In re Denham & Co.*(2) that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

Now what is the position here? As I have pointed out, the matter of the appointment of the staff was in the hands of the chairman. It is not suggested that respondents 1 and 2 had any reason whatsoever to suspect the integrity of the chairman. It is also not suggested, apart from his insolvency, that they had any reason to suspect the integrity of Nair. It is true that Nair was an undischarged insolvent, but insolvency does not necessarily mean that a man is a dishonest man. There is here an entire absence of anything which would point the finger of suspicion to either the chairman or to Nair in the matter of these appointments. There was certainly no reason for any of the directors to suspect that Nair would utilise the security deposits for his own purposes, and there is no reason to suspect that the chairman knew that he was so doing. It is abundantly clear from the minutes that, when it was discovered that Nair had utilised these security deposits for his own purposes, the matter was

immediately taken up by the directors and he was called upon to repay. Nair appears to have utilised Rs. 4,500 of the deposits towards the Rs. 5,000 which was to be paid to him under the mortgage for the purposes of redeeming the assets of the Indian Law Times, Limited, but instead of redeeming those assets he kept the money. But nobody knew about this until afterwards. The authorities show that, where there is an indemnity clause of the kind we have here, not only must a director be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter. ROMER J. at page 468 of the report of the *City Equitable Fire Insurance Company's case*(1) emphasised this. It seems to us that respondents 1 and 2 were justified in trusting the chairman and Nair to deal properly with the employees and therefore it cannot be said that they were guilty of wilful negligence in so doing. In these circumstances we consider that the appeal so far as it relates to the sum of Rs. 4,988-7-2 must be allowed.

But entirely different considerations arise with regard to the sum of Rs. 6,331-9-3. In this connection it is necessary to refer to section 103 of the Indian Companies Act. This section provides that a company shall not commence any business or exercise any borrowing powers unless (a) the shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him

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(1) (1878) 9 Ch. D. 329.

(2) (1883) 25 Ch. D. 752.

(1) [1925] 1 Ch. 407.

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and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting public to subscribe for its shares, on the shares payable in cash; and (c) there has been filed with the Registrar a duly verified declaration by the secretary or one of the directors, in the prescribed form, that these conditions have been complied with. In this case the minimum subscription had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate permitting the company to commence business had been obtained as the result of a false declaration made by Nair. The learned Judge found that all the respondents knew of the obtaining of this certificate and that they were fully aware that the company had started business on 7th September 1933. They therefore all wilfully permitted the company to carry on business on the strength of a certificate obtained by a false declaration. We have no doubt that respondents 2, 6 and 7 had knowledge of the obtaining of the certificate and of the fact that business commenced on 7th September 1933. With regard to the first respondent it is said that he was actually in Madras only on 26th, 27th and 28th of July and between 13th and 18th of August. But it is clear on his own evidence that he returned to Madras on 28th September. We have no doubt that he was fully aware by that date, if not before, that the certificate had been obtained and that business was being carried on. We are also satisfied that

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these four respondents were fully aware that the directors had not paid what was due in respect of their respective shares and that they knew that the company had no right to commence business. In any event they must be deemed to know the law. In *Burton v. Bevan*(1), which was also a case of misfeasance, NEVILLE J. remarked:

"I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, did he know the facts which made the act complained of a contravention of the statute?"

In the present case the learned trial Judge has held that they did know, and we are in entire agreement with him. This means that the directors allowed this company to open its doors and keep them open for months knowing full well that section 103 had not been complied with, that the company had no capital with which to carry on business, and that deposits made by customers in current and other accounts were being utilised by the management for the payment of wages and current expenses without any likelihood of the company being able to pay back such monies. In other words, they knew that the bank was utilising its customers' monies dishonestly. As the result of the company having obtained by means of a false declaration a certificate allowing it to carry on business, and as the result of the respondents having allowed the company to keep open its doors, the company has suffered loss to the extent of Rs. 6,331-9-3. We are of opinion that respondents 1, 2, 6 and 7 have been guilty of

(1) [1908] 2 Ch. 240.

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wilful negligence and that they are liable to make repayment under section 235 of the Indian Companies Act. We therefore agree with the finding of the learned trial Judge on the second part of the case.

We have been asked to relieve these respondents from the consequences of their wilful negligence under the provisions of section 281 of the Indian Companies Act. That section provides that if, in a proceeding for negligence, default, breach of duty or breach of trust, it appears to the Court hearing the case that the person may be liable but has acted honestly and reasonably and ought fairly to be excused, the Court may relieve him wholly or in part from his liability. This power to relieve is placed in the hands of the Court when it is convinced that a person has acted honestly and reasonably. In this case, even if it be said that these respondents acted honestly, it cannot be said that they acted reasonably, and we are unable to grant them any relief under this section. The order of the learned Judge against respondents 1, 2, 6 and 7 in respect of the second item of the claim will therefore stand. As the appellants have succeeded in part and failed in part, we do not propose to make any order as to costs. The liquidators will have their costs out of the assets of the company.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Abdur Rahman.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
PETITIONER,

1937,
October 15.

v.

Rm. P. Rm. M. SUBRAMANIAN CHETTIAR (PLAINTIFF-
APPELLANT), RESPONDENT.*

Court Fees Act (VII of 1870), sec. 12—Deficit court-fee—Power of appellate Court to levy—Part of suit—Appeal confined to—Deficit court-fee in respect of entire subject-matter of suit—Power to levy.

Where an appeal is confined to a part of the suit, that part of the suit alone as is comprised in the appeal is before the appellate Court. Hence, under section 12 of the Court Fees Act, the appellate Court has jurisdiction to levy the deficit court-fee only in respect of that part of the suit. It has no jurisdiction to levy the deficit court-fee in respect of the entire subject-matter of the suit.

Kerala Varma v. Chadayan Kutti(1) followed.

Radharanee v. Kshetra Mohan(2) explained and distinguished.

PETITION praying that in the circumstances stated therein the High Court will be pleased to issue an order calling upon the plaintiff to pay the deficit court-fee in Original Suit No. 47 of 1929 on the file of the Court of the Subordinate Judge of Tinnevely and in Appeal No. 506 of 1931 preferred to the High Court against the decree in the said Original Suit No. 47 of 1929 on the file of the Court of the Subordinate Judge of Tinnevely,

* Civil Miscellaneous Petition No. 3246 of 1934.

(1) (1891) I.L.R. 15 Mad. 181.

(2) (1935) 40 C.W.N. 406.

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and that in default thereof action should be taken under section 12 (ii) of the Court Fees Act.

K. S. Champakesa Ayyangar for Government Pleader (K. S. Krishnaswami Ayyangar) for petitioner.

N. Srinivasa Ayyangar for respondent.

Cur. adv. vult.

VENKATASUBBA
RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—In the appeal that we have just disposed of, a question of court-fee has been raised on behalf of the Government under section 12 (ii) of the Court Fees Act. The suit is in effect one for partition and possession brought by the plaintiff against his co-sharers. He claimed in the plaint two separate shares, each of one-eighth, on the ground that he purchased them from two different co-owners. He fixed the total value of the entire one-fourth share at Rs. 14,000 and paid in respect of the relief of “partition and separate possession” of that share, Rs. 100 as court-fee under Schedule 11, article 17-B (Madras Amendment) of the Court Fees Act.

It must be mentioned that previous to the suit, he had applied to the Collector for separate registration, which was refused. He therefore prayed for a declaration that he was entitled to get himself registered as a landholder to the extent of the one-fourth share. In respect of this relief he paid a court-fee of Rs. 100 under Schedule 11, article 17-A (Madras Amendment).

Thus, the plaintiff paid on his plaint in respect of these two reliefs Rs. 200 as the court-fee. Here on the memorandum of appeal also, he paid a similar amount.

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The appeal, as will be evident from what has been stated in the judgment just delivered, deals with the one-eighth share of the seventh defendant alone. The question has been raised whether under the terms of section 12, the plaintiff can be called on to pay the deficit court-fee payable on his plaint (in the lower Court) in respect of the other one-eighth share.

The relevant portion of the section reads thus :

“Whenever any such suit comes before a Court of appeal, reference, or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue. . . .”

There are three possible positions :

(i) Notwithstanding that the appeal is confined to a part of the suit, it may be contended that the whole suit has come before the Court of appeal. Hence the appellate Court has jurisdiction to levy the deficit court-fee in respect of the entire subject-matter of the suit.

(ii) That part of the suit alone as is comprised in the appeal (it may be contended) is before the appellate Court. In that case deficit court-fee only in respect of that part of the suit can be levied.

(iii) Only a part of the suit being comprised in the appeal, the suit as such is not before the appellate Court. Therefore the section has no application at all.

On this point there are two reported decisions. In *Kerala Varma v. Chadayan Kutti*(1) the facts were : the suit related to three parcels of land but the defendants' appeal was in respect of only one of them. The suit was valued at Rs. 480 odd. The

(1) (1891) I.L.R. 15 Mad. 181.

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appellate Court held that it ought to have been valued at about Rs. 1,100. The deficit court-fee not having been paid, an order was made, "original suit rejected". The learned Judges (WILKINSON and SHEPHARD JJ.) held that the District Judge's order was irregular, on the ground that

"he had no jurisdiction over the whole subject-matter of the suit, the appeal by the fourth defendant relating to one item only".

The judgment is brief, but the decision is perfectly clear. In other words, of the three possible views mentioned above, it was the second view that prevailed. It is a ruling of a Bench of our Court, which does not appear to have ever been questioned and there is no reason why we should now depart from it.

Radharanee v. Kshetra Mohan(1) is the second of the two cases referred to above. There, the suit related to four mortgages and the lower Court accepted Rs. 2,775 to be the correct court-fee payable on the plaint. The defendants appealed in regard to a part of the suit claim, namely, the amount claimed on the basis of the fourth mortgage bond alone. The appellate Court held that the proper court-fee payable in the Court below was Rs. 6,000 odd. The question arose, could the appellate Court make an order for the payment of this entire amount? The answer was given in the affirmative. It will be seen that the decision is at variance with what was held in *Kerala Varma v. Chadayan Kutti*(2). But from the judgment, which in this case also is very brief, it would appear that the argument that

was put forward and negatived was that indicated in position No. (iii) above. It follows therefrom that position No. (ii) did not fall to be considered in that case, i.e., the position accepted in the Madras case; nor was that case referred to or cited.

The section is not happily worded, but we think that the view taken in *Kerala Varma v. Chadayan Kutti*(1) is the most reasonable.

The question then remains, what was the court-fee payable on the plaint in respect of the seventh defendant's one-eighth share? There is a distinct averment in the plaint that the first defendant is in possession of the plaintiff's share—which means that the plaintiff is out of possession. The prayer in the suit, which is in accordance with this allegation, is both for partition and separate possession. Where the plaintiff is in possession, actual or constructive, and merely seeks to change the form of his enjoyment by obtaining a divided, in the place of an undivided, share—in such a case there is a conflict of judicial opinion as to the appropriate provision applicable. But where, as here, the plaintiff has been excluded, upon his allegation, from possession, there can be no doubt whatsoever that the court-fee payable is *ad valorem* under section 7(v).

It is for the Government to show that the court-fee of Rs. 100 (paid in the lower Court in respect of this relief) is insufficient. It was on the assumption, that court-fee was payable on the *market-value* of the one-eighth share (i.e., Rs. 7,000), that the case was argued on behalf of

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the Government. But the suit property is a mittha, which, it is not disputed, is an "estate", and the value of the land is to be deemed to be, under section 7 (v) (a), twenty times the annual revenue payable. It has not been shown what the annual revenue is; in other words, there is nothing to show that twenty times the annual revenue amounts to a figure in excess of the sum on which Rs. 100 (the amount actually paid) would be the proper court-fee. So much for the plaint in the Court below. The same remark would apply to the court-fee paid on the memorandum of appeal.

Finally, one word as regards the contention in respect of the relief of declaration. The value of the seventh defendant's share (which alone has come before the appellate Court) is less than Rs. 10,000 and therefore the court-fee payable on the plaint under Schedule 11, article 17-A (1) (Madras Amendment), is Rs. 100 and not Rs. 500, and that sum has been paid. It is unnecessary, in this view, to consider the other question raised, namely, whether the prayer as to declaration was superfluous and therefore no court-fee was payable in respect of that relief; *Kattiya Pillai v. Ramaswamia Pillai*(1).

In the result, we must hold that the Government's contention has not been made out.

A.S.V.

(1) (1929) 56 M.L.J. 394.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

NYAPATI NARAYANA RAO AND TWO OTHERS (DEFENDANTS),
APPELLANTS,

1937,
October 7.

v.

MUDHAVALAPU PURUSHOTHAMA RAO (PLAINTIFF),
RESPONDENT.*

Hindu Law—Partition—Severance in status—Communication to other co-parceners of intention to become divided—Severance in status by—Receipt of communication by them condition if.

S and his son were members of a joint Hindu family. On 3rd August 1926 S sent to his son a registered notice of his intention to become divided from him. On 4th August 1926 S executed a will disposing of his share in the joint family property in favour of a stranger and died on 5th August 1926. The notice was in fact received by the son on 9th August 1926, though S would have been justified in expecting that in the ordinary course the notice would be delivered to his son on the 4th or at least on the 5th. It was contended that the division in status arose only on the 9th August when the son received the notice and that as S had died on the 5th and the estate had passed by survivorship to the son on that date the receipt of the notice on the 9th could not divest the son of the estate so vested in him and the will was therefore not valid.

Held that the issue of the notice was, so far as the testator was concerned, sufficient to prevent the operation of the principle of survivorship and that the will was valid.

Though the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, none of them lays down that the severance in status does not take place till after such communication is received by the other coparceners. The reference to "communication" in the various cases is not to be interpreted as

* Appeal No. 114 of 1932.

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implying that the severance does not arise until notice has been actually received by the addressee or addressees.

Rama Ayyar v. Meenakshi Ammal(1) referred to.

Quaere as to what the legal position would be in a case where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee before the testator's death.

APPEAL against the preliminary decree of the Court of the Subordinate Judge of Guntur dated 28th March 1931 and the final decree of the said Court dated 2nd October 1931 and made in Original Suit No. 63 of 1928.

V. Subrahmanyam for *Vedantam Satyanarayana* for appellants.

N. Rama Rao for respondent.

VARADACHARIAR J.—The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The question for decision in this case is whether the will (Exhibit H) said to have been executed by one Seshagiri Rao on 4th August 1926 is genuine and valid.

[His Lordship considered the evidence in, and the probabilities of, the case and held that Exhibit H was executed by the deceased Seshagiri Rao when he was in a sound disposing state of mind and proceeded :—]

As the deceased was a member of an undivided Hindu family, the question of his right to make a will disposing of his share in the joint family property has next to be considered. To enable him to do so, it is alleged by the plaintiff that he sent a registered notice, Exhibit J, on 3rd August 1926. Having regard to what we have already stated as to the advice that the deceased had been given on this matter, it is not by any means

unlikely that this step would have been taken. The preparation of the draft for Exhibit J is spoken to by P.W. 10, a witness whom the trial Judge regards as quite respectable; and the writing and execution of Exhibit J is spoken to by P.W. 4 whom the learned Judge has unhesitatingly believed. We therefore see no reason to doubt the genuineness of Exhibit J nor the fact of its having been sent with the knowledge of the deceased. Exhibit J is a postcard and the postal seal shows that it was posted at Bezvada on 3rd August 1926. In the ordinary course it would have been delivered to the first defendant (one of the undivided sons of the deceased) at Guntur on the 4th, but it so happened for reasons to which we shall presently refer that it was not actually received by the first defendant till the 9th. An argument has accordingly been addressed to us as to whether the mere posting of Exhibit J on the 3rd August was sufficient to validate the will executed on the 4th when in fact the deceased died on the 5th before Exhibit J had been received by the first defendant. To obviate such an argument it was suggested on behalf of the plaintiff (the other son of the deceased) that the first defendant must have become aware of the contents of Exhibit J even on the 4th August and that he purposely evaded receiving it. We are not satisfied that there is sufficient proof of this or even some justification for the suggestion. Seeing that this suggestion had been made or might be made, the first defendant applied to the postal department for an exact statement of the reasons for the delay in the delivery and Exhibit III gives the material information. The first defendant resides in one

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postal division of Guntur whereas the Court is situate in another postal division. The result was that by the time that this postcard was taken to the first defendant's residence on the 4th, he had left for the Court and, on non-delivery at home, it was transferred for delivery at the other division but when it was taken to the Court on the 5th, the first defendant is said to have been absent from the Court. On the 6th and 7th he was admittedly in Bezwada after hearing of his father's death and as the 8th was a Sunday the registered postcard was delivered to him only on the 9th.

On the above facts it has been argued on behalf of the appellants that as communication to the other coparceners is necessary before a member of a joint Hindu family can become divided by a declaration of his intention to become so divided, it must be held in this case that the division in status arose only on the 9th August when the first defendant received Exhibit J and, as the testator had died on the 5th August, the testament cannot take effect so far as the joint family property is concerned. We are unable to accede to this contention. It is true that the authorities lay down generally that the *communication* of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners. The anomalous results following from any such view can easily be shown. It would be unfortunate indeed if the validity of a will should depend upon the accident as to whether a postman was able to find an addressee

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on a particular date or at a particular place or not; and it will sometimes be a very difficult task for the Court to decide how far the addressee had with some knowledge of what is coming evaded receipt of the notice. An illustration will forcibly demonstrate the anomalous position. If a person should have a number of coparceners living in a number of places far remote from one another what is to be the *date* of division of status when notice had been sent by one of the coparceners to those various other coparceners? It certainly cannot be that he will become divided from the family on different dates; and here again the uncertainty that may arise from the delay in delivery due to avoidable or unavoidable causes is a fact to be taken into account. It may be that if the law is authoritatively settled, it is not open to us to refuse to give effect to it merely on the ground that it may lead to anomalous consequences; but when the law has not been so stated in any decision of authority and such a view is not necessitated or justified by the reason of the rule, we see no reason to interpret the reference to "communication" in the various cases as implying that the severance does not arise until notice has actually been received by the addressee or addressees.

The only reported decision in which the question of the date of severance was discussed is a judgment of MADHAVAN NAIR J. in *Rama Ayyar v. Meenakshi Ammal*(1). So far as it goes, it is an authority against the appellants' contention, because the learned Judge held that even if it should be assumed that the receipt of the notice

(1) (1930) 33 L.W. 384.

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by the other coparceners is material, the severance of status relates back to the date when the communication was sent. As pointed out by the learned Judge, the principle emphatically stated by the Privy Council that the other coparceners have no choice or option in the matter clearly indicates that the date of the receipt of the notice by them cannot be material. This decision of MADHAVAN NAIR J. was sought to be distinguished by the appellants' learned Counsel on the ground that in that case the testator lived till after the date of the service of the notice. In view of the basis of the decision, we do not see how that can make any difference. It was argued that if on the 5th the estate passed by survivorship to the first defendant, the receipt of the notice on the 9th cannot divest the first defendant of the estate so vested in him. The answer is that the issue of the notice is, so far as the testator is concerned, sufficient to prevent the operation of the principle of survivorship. He was certainly justified in expecting that in the ordinary course his notice would have been delivered to the first defendant on the 4th or at least on the 5th. It is unnecessary for us to say what the legal result would be in a case where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee before the testator's death. It may be possible to argue that this is merely a device to defeat the law, but no such suggestion can be made in the circumstances of this case. The appeal fails and is dismissed with costs.

A.B.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

SRI JAGANNADHA RAJAMONI RAJ DEO (MINOR) BY
GUARDIAN, THE SUB-COLLECTOR, CHICACOLE (SECOND
RESPONDENT), APPELLANT,

1937,
July 26.

v.

V. RAMACHANDRA RAO (PETITIONER—DECREE-HOLDER),
RESPONDENT.*

Madras Court of Wards Act (I of 1902), sec. 45—Notification under—"Decree capable of execution by sale of immovable property"—Meaning of—Decree for money if a—Decree-holder not applying for attachment and sale of immovable property.

Under section 45 of the Madras Court of Wards Act the Local Government issued a notification declaring that "the execution of decrees passed by the Civil Court which are capable of execution by sale of any immovable property of the said ward . . . shall be transferred to the Collector of the Vizagapatam district".

Held that the description "decrees capable of execution by sale of any immovable property of the ward" in the said notification was wide enough to cover an ordinary decree for the payment of money even though the decree-holder had not in fact applied for attachment and sale of immovable properties in execution but had only applied for attachment of cash in the sub-treasury.

A decree for the payment of money can at any time be executed by attachment and sale of the immovable properties of the judgment-debtor and its character is not varied from time to time in accordance with the method adopted by the decree-holder for enforcing it.

APPEAL against the order of the Court of the Subordinate Judge of Chicacole, dated 9th September 1936 and made in Execution Petition

* Appeal Against Order No. 424 of 1936.

RAJAMONI RAJ
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v.
RAMACHANDRA
RAO.

No. 29 of 1936 in Original Suit No. 57 of 1931 on the file of the Sub-Court, Berhampur.

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

B. Jagannadha Das for respondent.

JUDGMENT.

BURN J.

BURN J.—This appeal is preferred by the Court of Wards from the order of the learned Subordinate Judge of Chicacole passed in Execution Petition No. 29 of 1936 in Original Suit No. 57 of 1931. The respondent holds a decree against the son and the adopted son of the late zamindar of Mandassa directing them to pay the plaintiff from out of the properties of the Mandassa estate in their hands Rs. 7,966-10-9 with interest thereon at six per cent per annum from 7th November 1931 till payment. The decree-holder prays for attachment of the amount of Rs. 15,000 belonging to the Mandassa estate in the possession of the Sub-treasury of Ichapur under Order XXI, rule 52, Civil Procedure Code. The Sub-Collector of Chicacole who has taken over the management of the estate takes exception on the ground that under section 45 of the Madras Court of Wards Act the Local Government has declared that

“the execution of decrees passed by the Civil Court which are capable of execution by sale of any immovable property of the said ward . . . shall be transferred to the Collector of the Vizagapatam district”.

As the learned Subordinate Judge observes the question for consideration is what is the meaning of the expression “decrees capable of execution by the sale of any immovable property of the ward”? The learned Advocate-General contends that this description is wide enough to

cover an ordinary decree for the payment of money such as this one, since a decree for the payment of money can at any time be executed by attachment and sale of the immovable properties of the judgment-debtor. The contention raised for the decree-holder, which is supported by Mr. Jagannadha Das in this Court, is that the expression “capable of execution by the sale of immovable property” must be understood with reference to the execution proceedings that have actually been taken. The suggestion is that since the decree-holder has not in fact applied for attachment and sale of immovable properties, therefore the decree is not one which is capable of execution by the sale of immovable property. The learned Subordinate Judge has accepted this argument but in my opinion he has been misled in so doing. The learned Subordinate Judge says that

“the decree-holder’s capacity to sell the property is co-existent with his desire to sell the same”.

This, in my opinion, displays some confusion of thought. It is not correct to say that the decree-holder’s capacity is co-existent with or in any way dependent upon his desires. He may be perfectly capable of selling the property but may not wish to do so. In fact, that was the state of mind in which he was when this execution petition was lodged. No one could allege that the decree-holder had not the capacity to bring the judgment-debtor’s immovable property to sale. He was fully clothed with that capacity by the provisions of the Civil Procedure Code but he had no desire to sell the immovable property. What he preferred to do was to attach the

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cash in the sub-treasury. The learned Subordinate Judge appears to have confused the question of the description of the decree with the method which the decree-holder may adopt to execute his decree. The expression "decree capable of execution by sale of immovable property" appears to me to be intelligible and clear and I am not prepared to restrict it in the way suggested by Mr. Jagannadha Das. In my opinion it would be wrong to hold that this description only applies to decrees in which applications have already been made for attachment and sale of immovable property. I think that the character of the decree is not in any way altered from time to time by the procedure which the decree-holder may adopt in execution of it. It is commonplace to say that an ordinary money decree may be executed by attachment and sale of movable or immovable property or by arrest and detention or by the appointment of a receiver. All these remedies may be adopted in succession; but it would be wrong to say that the character of the decree was varied from time to time in accordance with the method adopted by the decree-holder for enforcing it.

Mr. Jagannadha Das is prepared to argue that if this wide meaning is allowed to the expression "capable of execution by the sale of immovable property", almost any kind of decree may be brought within it. I am not prepared to enter upon a discussion of whether it would be feasible, e.g., to bring a decree for restitution of conjugal rights within this or not. I am quite clear that this decree which is for the payment of money is one which is capable of execution by sale of

immovable property of the ward and therefore, disagreeing with the learned Subordinate Judge, I hold that it is a decree which in pursuance of the notification of the Government, G.O. Ms. No. 1236, Revenue, dated 7th June 1936, must be transferred for execution to the Collector of the Vizagapatam district.

For these reasons I think the appeal should be allowed and the order of the learned Subordinate Judge set aside. The respondent-decree-holder will pay the costs of the appellant.

LAKSHMANA RAO J.—I agree and would only add that the nature or character of a decree does not depend upon or vary with the mode of execution adopted by the decree-holder. The decree in this case is undoubtedly capable of execution by sale of immovable property of the ward and section 68 of the Code of Civil Procedure has no bearing. The language too is different and it is not permissible to construe section 45 of the Court of Wards Act with reference to the terms of section 68 of the Code of Civil Procedure which provides for transfer of the execution of decrees against immovable property in any local area to the Collector.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

1937,
August 6.

MUTHU RAMA REDDI (THIRD RESPONDENT), APPELLANT,

v.

MOTILAL DAGA TRADING UNDER THE NAME AND STYLE OF
SAIT BALAKISANDAS MOTILAL AND TWO OTHERS
(PETITIONER AND RESPONDENTS 1 AND 2), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182, expl. II—"Proper Court"—Transmission of decree to another Court for execution—Non-return of copy of decree by transferee Court—Application to Court which passed decree for transmission thereof to a third Court—Application to "proper Court", if—Code of Civil Procedure (Act V of 1908), O. XXI, r. 26, and ss. 42 and 46—Effect of—Art. 182, cl. 5, of Limitation Act—"Final order"—Order returning execution application for amendment, if an—Application not re-presented.

A decree passed by Sub-Court C was transmitted to the District Munsifs of K and R for simultaneous execution against some of the defendants. On 20th January 1930 an application was filed in Sub-Court C for transmission of the decree to Sub-Court V for execution against the same defendants. Though it was alleged in that application that the decree copies transmitted to the District Munsifs of K and R had been returned, in fact only the decree copy sent to the District Munsif of K had been returned. The application was defective in other respects as well and was returned for amendment on several occasions, the last of them being by an order dated 9th October 1930, and it was not re-presented thereafter. On an application filed on 27th September 1932 for transmission of the decree to the District Court of South Arcot for execution against the appellant, the other defendant in the suit,

held that the application of 20th January 1930 was made to the "proper Court" within the meaning of explanation II to article 182 of the Indian Limitation Act but that the order thereon dated 9th October 1930 was not a "final order"

* Appeal Against Order No. 325 of 1934.

within the meaning of article 182, clause 5, of the said Act, RAMA REDDI and that the application of 27th September 1932 was therefore MOTILAL DAGA, barred by limitation as against the appellant.

Sub-Court C, the Court which passed the decree, retained control of the execution proceedings and was therefore competent to transfer the decree to Sub-Court V for execution.

Mahadum Beg Sahib v. Md. Meera Sahib(1) approved.

Chidambara Nadar v. Rama Nadar(2) followed as regards the meaning of the expression "final order".

APPEAL against the order of the Court of the Subordinate Judge of Cocanada dated 5th July 1934 and made in Execution Application No. 958 of 1932 in Original Suit No. 72 of 1922.

When the appeal originally came on for hearing the Court made the following Order:—

Mr. Bhashyam points out that in his counter dated 22nd September 1933 he raised the objection in paragraph 5 that the execution application dated 20th January 1930 was not made to a "proper Court". The basis of this is that in 1927 two applications were made to the Subordinate Judge's Court for transmission of the decree for execution to the District Munsif's Court, Kovvur, and simultaneously to the District Munsif's Court, Rajahmundry. The appellant's contention is that the decrees sent to those Courts on 20th January 1927 had not been returned to the Subordinate Judge's Court, Cocanada, when the application dated 20th January 1930 was made. This question, Mr. Bhashyam says, was in fact argued before the learned Subordinate Judge but there is no finding on it and no reference to it in the learned Subordinate Judge's order. Without a finding on the point of fact we cannot discuss the question of law which arises. We think it necessary that

(1) A.I.R. 1928 Mad. 493.

(2) I.L.R. [1937] Mad. 616 (F.B.).

RAMA REDDI
MOTILAL DAGA. this point should be decided by the lower Court. We therefore call on the learned Subordinate Judge to submit within six weeks from the date of receipt of this order a finding on the question whether the decrees transmitted to the Courts of the District Munsif of Kovvur and the District Munsif of Rajahmundry had been returned to the Subordinate Judge's Court of Cocanada on 20th January 1930.

The learned Subordinate Judge may take any evidence that is available. Seven days' time is allowed for the parties to file their objections to the said finding after notice of receipt of the same shall have been posted upon the notice board of the High Court.

[In pursuance of the above order, the Subordinate Judge of Cocanada submitted a finding to the effect that the decree copy transmitted to the District Munsif's Court, Kovvur, was received back in the Court of the Subordinate Judge of Cocanada on 29th July 1927 and that the decree copy transmitted to the District Munsif's Court, Rajahmundry, was received back in the said Subordinate Judge's Court on 8th November 1930.]

The appeal came on for final hearing after the return of the above finding.

K. Bhashyam Ayyangar for the Advocate-General (*Sir A. Krishnaswami Ayyar*) and *A. Satyanarayana* for appellant.

V. V. Srinivasa Ayyangar for *K. Subrahman-
yam* for first respondent.

Respondents two and three were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by **RAMA REDDI**
LAKSHMANA RAO J.—This appeal arises out of an application for transmission of the decree in Original Suit No. 72 of 1922 on the file of the Subordinate Judge of Cocanada for execution to the District Court of South Arcot, and the questions for determination are: (i) whether the application is barred by limitation against the appellant (third defendant) and (ii) whether the decree is executable against him.

The first respondent is the decree-holder and the suit was for recovery of Rs. 28,374-11-9 due under two promissory notes executed by the appellant and respondents 2 and 3. The appellant pleaded that he was a surety and the suit was decreed on 19th February 1923 as follows:

"It is ordered and decreed that the plaintiff (first respondent) do proceed against defendants 1 and 2 (respondents 2 and 3) in the first instance and against the third defendant (appellant) in case the amount cannot be realised from defendants 1 and 2 and do recover Rs. 25,777-4-9 with further interest and proportionate costs."

A sum of Rs. 3,652-4-1 was realised by 1926 by executing the decree against respondents 2 and 3, and two applications were filed by the decree-holder on 18th January 1927 for transmission of the decree to the District Munsifs of Kovvur and Rajahmundry for simultaneous execution against respondents 2 and 3. The applications were ordered on 20th January 1927 and decree copies were transmitted to the District Munsifs of Kovvur and Rajahmundry. No steps were however taken at Kovvur or Rajahmundry and an application for transmission of the decree to the Sub-Court of Vizagapatam for execution

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against respondents 2 and 3 was filed in the Sub-Court of Cocanada on 20th January 1930 (18th and 19th January being holidays). It was alleged in the petition that the decree copies transmitted to the District Munsifs of Kovvur and Rajahmundry had been returned, though in fact only the decree copy sent to the District Munsif of Kovvur had been returned, and the application was defective in other respects as well. So it was returned on 23rd January 1930 for amendment, and the decree-holder applied for and obtained time for that purpose on several occasions. The application was returned for the last time on 9th October 1930 and it was not re-presented thereafter. The application out of which this appeal arises was filed on 27th September 1932 for transmission of the decree to the District Court of South Arcot for execution against the appellant and respondents 2 and 3, and the latter did not appear. It was not alleged in the application, that the decree amount cannot be realised from respondents 2 and 3, and the appellant pleaded that the decree cannot be executed against him until then. Even otherwise he contended that the application of 20th January 1930 was not made to the proper Court and cannot save limitation, but the Subordinate Judge overruled the plea of limitation on the ground that the present application was filed within three years of the prior application. The contention that the prior application was not made to the proper Court and cannot save limitation was not considered, and, though evidence was not led and there is nothing on record to show that the decree amount cannot be realised from respondents 2 and 3, the Subordinate Judge

negatived the other plea on the ground that the decree does not say that the decree-holder should exhaust the properties of respondents 2 and 3 before proceeding against the appellant, and that the time for executing the decree against the appellant had arisen in 1932 when the decree-holder was obliged to take out execution against him.

Hence this appeal ; and it was argued first, that assuming the decree to be executable against the appellant, the application of 20th January 1930 cannot prevent time from running and the present application was barred by limitation against him. Article 182, clause 5, of the Limitation Act, which was relied upon by the decree-holder, allows three years from the date of the final order 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, and it was contended on behalf of the appellant that the application of 20th January 1930 was not even made to the proper Court within the meaning of that clause. "Proper Court", according to explanation II to article 182, means the Court whose duty it is to execute the decree, and it was urged that, once the decree is transmitted to another Court for execution, that Court alone can execute it and the Court which passed the decree is not competent to entertain an application for transmission or execution until the decree is returned to it with a certificate of non-satisfaction. This contention was not dealt with by the Subordinate Judge though it was pressed before him and a finding had to be called for as to whether the decree copies transmitted to the District Munsifs

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of Kovvur and Rajahmundry had been returned to the Subordinate Judge of Cocanada by 20th January 1930. It is now agreed that, as found by the Subordinate Judge, only the decree copy sent to the District Munsif of Kovvur had been returned, and the question is whether by reason of the non-return of the decree copy by the other Court, the Sub-Court of Cocanada was not competent to entertain an application for transmission of the decree to the District Court of South Arcot. This question was decided in *Mahadum Beg Sahib v. Md. Meera Saheb*(1), in which all the previous decisions were considered and we see no reason to dissent from the view taken therein that in such cases the Court which passed the decree is competent to transfer the decree to a third Court for execution. To the same effect are the decisions in *K. K. Deb v. N. L. Chowdhury*(2) and *Kanti Narain v. Madan Gopal*(3) and an examination of the relevant provisions of the Code of Civil Procedure leads to the same result. There is nothing in the Code to prevent simultaneous execution of a decree in more than one Court, though it is a matter for the discretion of the Court to permit or refuse concurrent execution; and it is clear from the provisions of Order XXI, rule 26, which requires the transferee Court to stay execution to enable the judgment-debtor to apply to the Court which passed the decree for an order to stay execution or for any other order relating to the decree or execution which might have been made by such Court if execution had

(1) A.I.R. 1928 Mad. 493.

(2) (1927) I.L.R. 5 Ran. 397.

(3) A.I.R. 1935 Lah. 465 (F.B.).

been issued thereby or if an application for execution had been made thereto, that the Court which passed the decree retains control of the execution proceedings. Section 46 which relates to precepts points to the same conclusion and the power to order simultaneous execution or send the decree to another Court for execution is vested in the Court which passed the decree. Section 42 does not empower the transferee Court to order simultaneous execution or send the decree to another Court for execution and, as pointed out in *Mahadum Beg Sahib v. Md. Meera Saheb*(1) and *Subba Rao v. Ankamma*(2), the decision of the Privy Council in *Maharajah of Bobbili v. Narasaraaju Bahadur* (3) does not touch this question. The question there was whether an application would lie to the District Court of Vizagapatam for sale of property attached by the District Munsif of Parvathipur, and, as observed already, it is for the Court which passed the decree to decide whether in the circumstances of any case simultaneous execution against different properties in different Courts should be ordered or the proceedings should be withdrawn from one Court and transferred to another Court. An application for either relief would therefore lie only to the Court which passed the decree and it would be the proper Court within the meaning of explanation II to article 182. The Sub-Court of Cocanada was thus the proper Court and the application of 20th January 1930 was an application to take some step in aid of execution. But what is material under the amended article 182, clause 5, is the date of

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(1) A.I.R. 1928 Mad. 493.

(2) (1932) 63 M.L.J. 788.

(3) (1916) I.L.R. 39 Mad. 640 (P.C.).

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the final order on the application and not the date of the application, and it remains to consider whether the order of 9th October 1930 granting further time for remedying the defects is such an order. The order need not in our opinion be an order on the merits or a judicial determination of the matter involved in the application but, as pointed out in *Chidambara Nadar v. Rama Nadar*(i) in which the previous decisions were considered, the words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned. It cannot mean the "last order" in point of time, irrespective of whether it terminates the proceeding so far as the Court is concerned, and the order of 9th October 1930 merely granted further time for remedying the defects. It did not terminate the proceeding and the application was not re-presented. There was thus no final order within the meaning of article 182, clause 5, and it follows that the application is barred by limitation as against the appellant.

As regards the second question, the decree provides that the appellant should be proceeded against only in case the amount cannot be realised from respondents 2 and 3 and it was not alleged in the application for transmission that the amount cannot be realised from respondents 2 and 3. No evidence was led about it nor is there anything on record to show that the amount cannot be realised from respondents 2 and 3. The assumption of the Subordinate Judge that the decree-holder must have been obliged to apply for execution against the appellant in 1932 is unwarranted,

(1) I.L.R. [1937] Mad. 616 (F.B.).

and it follows that the appellant cannot be proceeded against.

In the result the appeal is allowed and the application will stand dismissed against the appellant with costs throughout. The Advocate's fee is in the circumstances of the case fixed at Rs. 250.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

MINOR S. VENKATASUBRAMANIA SARMA *alias*
RATNAM BY GUARDIAN SUBRAMANIA SARMA (RESPONDENT—
JUDGMENT-DEBTOR), APPELLANT,

1937,
September 23.

v.

THE UNITED PLANTERS' ASSOCIATION OF SOUTH
INDIA INCORPORATED HAVING ITS REGISTERED OFFICE AT
GLENVIEW, COONOOB, THE NILGIRIS (PETITIONER—
DECREE-HOLDER), RESPONDENT.*

Married Women's Property Act (III of 1874), sec. 6—"Policy of insurance" in—Meaning of—Trust to arise under that section—Condition.

The expression "policy of insurance" in section 6 of the Married Women's Property Act must be taken in the ordinary meaning of those words and cannot be taken as including the proposal filled in by the insurer and the prospectus issued by the company.

For a trust to arise under section 6 of the Married Women's Property Act it must appear on the face of the policy that the policy was effected for the benefit of the insurer's wife, or wife and children, or any of them.

Where the only words which were found in the column of the policy "To whom payable" were: "The proposer's

* Appeals Against Orders Nos. 16 and 56 of 1936.

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assigns or his proving executors or administrators or other legal representatives who shall take out representation from any British Court to his estate or limited to the moneys payable under this policy",

held that there was nothing on the face of the policy to indicate that the policy was effected for the benefit of the insurer's wife, or wife and children, or any of them.

Krishnamurthy v. Anjappa(1) approved. *Abhiramavalli v. Official Trustee, Madras*(2) considered.

APPEALS against the order of the Court of the Subordinate Judge of Coimbatore dated 26th August 1935 and made in Execution Petition Register No. 349 of 1935 in Original Suit No. 261 of 1934.

D. Ramaswami Ayyangar and *T. P. Kannabiran* for appellant.

S. Srinivasa Ayyar for respondent.

BURN J. The JUDGMENT of the Court was delivered by BURN J.—These two appeals are preferred against the order of the learned Subordinate Judge of Coimbatore passed on Execution Petition Register No. 349 of 1935 in Original Suit No. 261 of 1934. Original Suit No. 261 was a suit filed by the United Planters' Association of South India against a minor, S. Venkatasubramania Sarma, by his guardian. The suit was based upon the allegation that the father of the minor, Sundareswara Sarma, who had been employed as an accountant by the Association, had misappropriated Rs. 7,500 of the Association's money. A decree was passed in favour of the Association against the separate assets of the deceased Sundareswara Sarma, if any, in the hands of the

minor defendant. The Association got an attachment before judgment of three sums, viz., (i) a sum of about Rs. 500 representing the contributions of Sundareswara Sarma to the Association's Provident Fund; (ii) an insurance policy for Rs. 1,000; and (iii) an insurance policy for Rs. 4,000. Both the policies were issued by the Oriental Government Security Life Assurance Company Limited and copies of the policies were filed as Exhibits I and II. The learned Subordinate Judge held that the amount of Rs. 500 representing Sundareswara Sarma's contributions to the Provident Fund could not be proceeded against and he came to the same decision with regard to the amount of Rs. 4,000 due under Policy No. 353009, but he held that the amount of Rs. 1,000 covered by Policy No. 123164 could be proceeded against. The learned Subordinate Judge said in his judgment that it had been fairly conceded on behalf of the defendant that the sum of Rs. 1,000 could be proceeded against. Mr. Ramaswami Ayyangar, who appears for the appellant in Appeal Against Order No. 16, says that the guardian of the minor defendant did not give the Vakil in the lower Court any authority to make any such concession. We must take the learned Judge's observation as representing the fact that the Vakil, whether with or without authority, did make that concession, but it is not necessary to embark upon a discussion of whether the Vakil had authority to make such a concession since we propose to consider that appeal also on its merits. Appeal No. 56 is filed by the Association from the decision of the learned Judge holding that the decree-holder was not entitled to proceed against the

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(2) (1931) I.L.R. 55 Mad. 171.

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amount of the policy for Rs. 4,000 and the amount in the Provident Fund.

With regard to the amount in the Provident Fund, we agree with the learned Subordinate Judge. An attempt was made to argue that the deceased Sundareswara Sarma had been dismissed from the Association's service before he died. The learned Subordinate Judge refused to allow that point to be raised before him. He said that if this were the fact, it ought to have been stated when the decree-holder first sought to attach the property. He says in paragraph 7 that it transpired at the trial that the deceased died while he was still in the service of the Association. This we are told is incorrect, but we note that the judgment in the suit itself begins with a recital that the Association sued to recover a certain sum of money from the son of Sundareswara Sarma "who was employed under the Association as an accountant from 1927-28 till his death in 1934". We therefore follow the learned Subordinate Judge in declining to allow it to be argued on behalf of the Association that Sundareswara Sarma was dismissed before he died. This being so, we are of opinion that the rules of the Provident Fund are such that Sundareswara Sarma's contributions to the Provident Fund are not liable to attachment to defray his debts any more than the contributions of the Association itself. In fact, if it be taken that Sundareswara Sarma died in service, it is not really possible to maintain that his contributions were liable to attachment.

The real contest is with regard to the two policies of insurance. We are of opinion that there is no difference between the two. Both of

them are liable for the debts of Sundareswara Sarma, or neither. The learned Subordinate Judge seems to have been influenced by the concession already referred to when he held that the policy for Rs. 1,000 could be proceeded against. With regard to the policy for Rs. 4,000, he has referred to a pamphlet Exhibit III issued by the Oriental Government Security Life Assurance Company Limited. In that pamphlet the policy in the form Exhibit II is advertised as providing the most practical form of protection obtainable for the wife and family of the assured. The policy is called a perfect protection policy. The learned Subordinate Judge after reading the provisions comes to the conclusion that the policy

"is more or less on a line with Life Assurance Policies covered by the Married Women's Property Act and that the policy is covered by the ruling in *Abhiramavalli v. Official Trustee, Madras*(1)."

Section 6 of the Married Women's Property Act is quite definite. It runs as follows :

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

If the amounts of these policies are to be saved for the minor defendant in this case, it must be because they come strictly within the terms of section 6 of the Married Women's Property Act. It will not do to say, as the learned Subordinate Judge says, that these policies are "more or less on

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a line with Life Assurance Policies covered by the Married Women's Property Act".

Now it cannot be disputed that on the face of these policies themselves there is no expression that they are for the benefit of the wife or of the wife and children of the insurer. Mr. Ramaswami Ayyangar, for the appellant in Appeal Against Order No. 16, realising this wishes to contend that the policy does not mean merely the policy as issued by the company but must be taken as including the proposal filled in by the insurer and also, if necessary, any prospectus issued by the company. He relies upon the decision in *Oriental Government Security Life Assurance Company, Limited v. Narasimha Chari*(1). We are of opinion that this case has no bearing upon section 6 of the Married Women's Property Act. Although for certain purposes in cases of dispute between the insurer and the insured it may be necessary to look into the proposal or the prospectus or even, as stated in *Oriental Government Security Life Assurance Company, Limited v. Narasimha Chari*(1), to construe the prospectus as though it were part of the policy, we think the terms of section 6 of the Married Women's Property Act are clear and unambiguous and that the expression "policy of insurance" in that section is to be taken in the ordinary meaning of those words. The provision was passed in order to create a trust in favour of a wife or wife and children. For this purpose it is enacted that the policy which is to create such a trust must be "expressed on the face of it" to be for the benefit of the insurer's wife or wife and children. This we think is clearly intended as

(1) (1901) I.L.R. 25 Mad. 183.

inter alia a measure of protection for persons who might be induced to take an assignment of the policy. If there is an expression on the face of the policy that the policy is for the benefit of the insurer's wife or wife and children, the prospective assignee will be put on his guard. This would certainly not be the case if the term "policy of insurance" were interpreted to mean the proposal as well as the company's prospectus. This view is supported by the decision of VENKATASUBBA RAO J. in *Krishnamurthy v. Anjayya*(1). In that case, the amount of the policy was expressed to be payable "to the person or persons legally entitled thereto". In the present case, in the column "To whom payable" in Exhibit II we find the words :

"The proposer's assigns or his proving executors or administrators or other legal representatives who shall take out representation from any British Court to his estate or limited to the moneys payable under this Policy".

There is nothing on the face of either of these policies to indicate that the policies were effected for the benefit of the insurer's wife, or wife and children, or any of them. Mr. Ramaswami Ayyangar wishes us to admit in evidence copies of the proposals made by the insurer in pursuance of which these policies were issued. We are refusing to admit those copies since we find that the requirements of Order XLI, rule 27, Civil Procedure Code, are not fulfilled. There is no allegation that they were shut out by the lower Court and we do not find them necessary in order to enable us to pronounce judgment. We think it is right to say, as VENKATASUBBA RAO J. said

(1) (1936) 71 M.L.J. 39.

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in the case already referred to, that under section 6 of the Married Women's Property Act

"for a trust to arise it must appear on the face of the document that the policy was effected for the benefit of the wife, or the wife and children, or any of them".

We have been referred to the case of *Abhiramavalli v. Official Trustee, Madras*(1) in which MADHAVAN NAIR J. construed in favour of the wife a life insurance policy in which it appeared that the amount was payable "to the assured or his wife if he predeceases her". Since those words did appear on the face of the policy in that case we do not think that it is necessary to discuss the judgment of MADHAVAN NAIR J., but we are quite clear that we are not prepared to go even further than he went. It would be necessary to go a great deal further in this case in order to accept the contentions of Mr. Ramaswami Ayyangar, because neither of the policies in this case mentions the wife or the children of the insurer.

It follows that Appeal Against Order No. 16 of 1936 is dismissed with costs and Appeal Against Order No. 56 of 1936 is allowed with regard to the amount of the Policy No. 353009 and dismissed with regard to the amount of the Provident Fund. The appellant and the respondent in Appeal Against Order No. 56 of 1936 will pay and receive costs proportionate to their success.

Solicitors for respondent :—*King & Partridge.*
A.S.V.

(1) (1931) I L.R. 55 Mad. 171.

APPELLATE CRIMINAL.

Before Mr. Justice King.

IN RE MALAI AND TWO OTHERS (ACCUSED IN CALENDAR CASE
No. 95 of 1937, ON THE FILE OF THE COURT OF THE TOWN
SUB-MAGISTRATE OF TRICHINOPOLY).*

1937,
August 18.

Code of Criminal Procedure (Act V of 1898), ss. 242 and 252—Summons issued for an offence under sec. 426, Indian Penal Code, triable only according to procedure applicable to summons cases—Accused appeared—Magistrate informing them that other offences were disclosed by the complaint—Procedure applicable to warrant cases followed—Legality of.

A Magistrate issued summonses to the accused for an offence under section 426, Indian Penal Code, only; and when the accused were brought before him he did not apply section 242, Criminal Procedure Code (i.e., procedure applicable to summons cases) but informed them then and there that on reconsideration he held that other offences triable under the procedure applicable to warrant cases also were disclosed by the complaint, and proceeded to apply section 252, Criminal Procedure Code.

Held, the procedure adopted by the Magistrate was legal.

Rajaratnam Pillai, In re(1) explained and distinguished.

Emperor v. Chinna Kaliappa Gounden(2) and *Ponnuswami Goundan, In re*(3) referred to.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Trichinopoly in his letter No. C.R.C. No. 2 of 1937, dated 6th May 1937.

A complaint was filed before the Second Class Town Magistrate, Trichinopoly, against the three accused in Calendar Case No. 95 of 1937 mentioning sections 452, 426, 506, 500 and 109, Indian

* Criminal Revision Case No. 333 of 1937 (Case Referred No. 24 of 1937).

(1) (1936) I.L.R. 59 Mad. 442. (2) (1905) I.L.R. 29 Mad. 126 (F.B.).

(3) (1931) I.L.R. 55 Mad. 622 (F.B.).

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Penal Code, as the offences alleged to have been committed by them. Though the offence under section 500, Indian Penal Code, is one cognizable by a First Class Magistrate only, the Town Second Class Magistrate, instead of returning the complaint under section 201, Criminal Procedure Code, for presentation to the proper Court, received the same, recorded a sworn statement of the complainant under section 200, Criminal Procedure Code, and on a consideration of the complaint and the sworn statement, thought fit to take cognizance of the case for the offence of mischief alone, punishable under section 426, Indian Penal Code, and triable only under the procedure applicable to summons cases. Accordingly, he issued summons in respect of that offence only. But when the accused appeared, instead of examining them in respect of the offence under section 426, Indian Penal Code, and following the procedure applicable to summons cases, the Magistrate on reconsideration, apparently holding that the complaint disclosed also offences triable by the procedure applicable to warrant cases, adopted that procedure. He examined the prosecution witnesses. They were not cross-examined as the pleader for the accused was absent and the accused did not themselves cross-examine them. The accused were then examined generally under section 342, Criminal Procedure Code. Ultimately the Magistrate framed charges against the accused, not only for an offence under section 426, Indian Penal Code, but also for offences under sections 452, 504 and 506, Indian Penal Code.

When the case was posted for re-cross-examining the prosecution witnesses, objection was taken

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by the accused that the procedure adopted by the Magistrate was illegal. On the strength of the decision in *Rajaratnam Pillai, In re*(1), it was contended that the Magistrate having taken cognizance of a summons case, he should adopt the procedure applicable to summons cases and not the procedure applicable to warrant cases. The Magistrate disallowed the objection. The accused then moved the District Magistrate, Trichinopoly, who under section 438, Criminal Procedure Code, reported the case to the High Court for orders.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

This reference is made on the assumption that the facts are governed by a decision of my own reported as *Rajaratnam Pillai, In re*(1). The facts are obviously distinguishable. In *Rajaratnam Pillai, In re*(1), I had to deal with a case in which the Magistrate had not only taken cognizance of an offence triable only under Chapter XX of the Code of Criminal Procedure but had actually applied sections 242 and 244 and taken evidence. In the present case, though the Magistrate had issued summonses to the accused for an offence under section 426, Indian Penal Code, only, he did not apply section 242, Criminal Procedure Code, when the accused were brought before him, but informed them then and there that on reconsideration he held that other offences also were disclosed by the complaint, and proceeded from that moment to apply section 252, Criminal Procedure Code.

It is no doubt stated with some lack of precision in *Rajaratnam Pillai, In re*(1) that when

(1) (1936) I.L.R. 59 Mad. 442.

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"once a Magistrate has taken cognizance of an offence which is triable only according to the procedure applicable to summons cases, etc.," but the argument is clear that I was concerned solely with Chapter XX and the provisions of section 246. A situation such as has now arisen was not then contemplated and was obviously not being considered. I accordingly hold that the decision in *Rajaratnam Pillai, In re*(1) does not and cannot apply to the facts of this case.

That a Magistrate has power to change his mind in regard to the exact offences which a complaint discloses before he begins to enquire into the case cannot be denied on general principles, and even if it be argued that in the present case he has impliedly dismissed a complaint under other sections of the Penal Code than section 426, he still has power to re-entertain a complaint on the same facts without the need of any action by any superior Court [vide *Emperor v. Chinna Kaliappa Gounden*(2) and *Ponnuswami Goundan, In re*(3).]

In the result, I am unable to accept the learned Magistrate's reference and must decline to interfere.

V.V.C.

(1) (1936) I.L.R. 59 Mad. 442.

(2) (1905) I.L.R. 29 Mad. 126 (F.B.). (3) (1931) I.L.R. 55 Mad. 622 (F.B.).

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APPELLATE CRIMINAL.

Before Mr. Justice Newsam.

IN RE UNNA MUHAMMAD SAHIB (FIFTH ACCUSED),
PETITIONER.*1937,
September 24.*Madras Gaming Act (III of 1930), sec. 12—"Place"—
Meaning of.*

The real offence dealt with in section 12 of the Madras Gaming Act (III of 1930) is obstruction or annoyance to wayfarers and pedestrians. The word "place" occurring in that section means from its context a place akin to a street or thoroughfare, used regularly and necessarily by people going from one place to another.

Held, accordingly, that playing cards for money in a tank-bed at 3-30 p.m. by the petitioner and others did not amount to an offence.

Emperor v. Hussein(1) relied upon.

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 Ranipet, dated 3rd November 1936 and passed in Criminal Appeal No. 53 of 1936 preferred against the judgment of the Court of the Bench of Magistrates of Wandiwash, dated 21st October 1936 and passed in Bench Case No. 75 of 1936.

V. T. Rangaswami Ayyangar and K. Ramaswami Ayyangar for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

Gambling is not a criminal offence in itself. Gambling in a public street, place or thoroughfare is an offence. The facts are that petitioner

* Criminal Revision Case No. 108 of 1937 and Criminal Revision
Petition No. 100 of 1937.

(1) (1905) I.L.R. 30 Bom. 348.

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(fourth appellant and fifth accused in the case) and others were caught playing cards for money in a tank-bed at 3-30 p.m. I do not think that this amounts to an offence. I agree with the conclusion in *Emperor v. Hussein*(1) that it is not an offence to gamble in every public place. The word "place" in section 12 of the Madras Gaming Act means from its context a place akin to a street or thoroughfare, used regularly and necessarily by people going from one place to another. The real offence dealt with in section 12 is obstruction or annoyance to wayfarers and pedestrians.

I allow this petition and set aside the conviction and sentence on the petitioner.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

1937,
April 8.

IN RE KAMSALA MUNEYYA AND ANOTHER (FIRST AND SECOND ACCUSED), PRISONERS.*

Criminal Rules of Practice—Rule 85 of—Confession—Voluntary, if—Omission of Magistrate to ask accused whether he was aware that it was not intended to make him an approver—Effect of—Retracted confession—Use of, against co-accused—Considerable circumstantial evidence connecting accused with crime—Existence of—Effect of.

The object of putting the questions set out in Rule 85 of the Criminal Rules of Practice is to enable the Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not

brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked.

In every case it is a question of fact whether the Court is satisfied whether the statement made was a voluntary one. There may be cases where the omission to ask the accused whether he was aware that it was not intended to make him an approver might, taken with other circumstances of the case, make the Court strongly suspicious that the confession was not voluntarily made. But there may be other cases in which such an omission might not lead to that conclusion.

Held that in the circumstances of the case the omission of the Magistrate to ask the accused whether he was aware that it was not intended to make him an approver did not render the confession other than voluntary.

Held further that the mere fact that some police officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate was no proof that he was forced to make it.

A retracted confession is of little value against a co-accused and the fullest corroboration is necessary—far more than would be demanded for the sworn testimony of an accomplice on oath. But when there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind as to the guilt of the accused.

TRIAL referred by the Court of Session of the Cuddapah Division for confirmation of the sentences of death passed upon the prisoners in Calendar Case No. 23 of 1936 on 23rd November 1936 and appeals by the prisoners against the said sentences.

The two accused were convicted of the murder of Pedda Konda Reddi, a member of the Cuddapah District Board, at about 7 p.m. on 11th October 1935 at a spot just east of Cuddapah town and within a short distance of the Kondayapalli Kunta, the Government Hospital, the High School and the Cuddapah-Rachinnayapalli Road.

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(1) (1905) I.L.R. 30 Bom. 348.

* Referred Trial No. 149 of 1936 and Criminal Appeals Nos. 670 and 671 of 1936.

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P.W. 2 met the deceased at the house of Narasimhareddi, a District Board member, and at about 6 p.m. they both left for Pakirpalli, the village of the deceased, about one and a half miles from Cuddapah. On their way, as they were approaching the spot where the tank bund meets the foot-path, they met two men, one of whom was dressed in the ordinary garb of a Hindu and the other in the tarbush and pyjamas of a Muhammadan. P.W. 2 was then about four yards behind the deceased. Just as these two men passed Pedda Konda Reddi, they turned and attacked him with bill-hooks and hacked him mercilessly to death. The witness remonstrated, but the man in Muhammadan costume advanced to attack him. He pleaded for his life and when the man in Muhammadan dress returned to give some final blows to the deceased, the witness ran away. Some voices from a well near by in the bed of the tank incited the assailants to attack this witness also, but he ran in the direction of the town and, before his pursuers could catch him, others called out enquiring what had happened; and so his pursuers turned back before he actually reached the town. Panic-stricken, the witness ran towards the hospital and gave out his story to P.Ws. 3 and 4. Soon afterwards he made a formal complaint, Exhibit B, to the police. Two days later, this witness was examined under section 164, Criminal Procedure Code, by the Sub-Magistrate to whom he gave a very detailed statement (Exhibit C) of what had occurred. In Exhibits B and C he said that he could identify the two persons who attacked the deceased and threatened him. Search was made for the first accused and he was

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eventually arrested on the 21st at the village of Rajampet. An identification parade was held on the 22nd at which P.W. 2 pointed out that accused as the man who was wearing Muhammadan costume and had participated in the murder. A search was then made for the second accused. He was arrested on the 24th in a field on the outskirts of Cuddapah and produced before the Sub-Inspector, P.W. 30. The second accused was at once questioned, and he gave certain information regarding the whereabouts of the clothes worn by the first accused at the time of committing the murder. Panchayatdars were secured and the party proceeded to the tank, where the second accused pointed out the place where these articles had been thrown. A search was made there and two bill-hooks and a tarbush were recovered.

K. S. Jayarama Ayyar for *G. Gopalaswami* for first accused.

V. L. Ethiraj for *V. Sankaran* for second accused.

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

Cur. adv. vult.

The JUDGMENT of the Court was delivered by HORWILL J.—

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[His Lordship after dealing with the facts of the case summarised above proceeded:—]

As the second accused was willing to make a confession, the Sub-Inspector wrote to the Sub-Magistrate and asked him to make arrangements for the confessional statement of the second accused to be recorded, either by himself or by the Sub-Magistrate of Kamalapuram. The second

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accused having in the meanwhile been transferred to his jurisdiction, the Sub-Magistrate of Kamalapuram was ordered to take the confessional statement and he had the second accused brought before him on the 28th. He then informed the second accused that he had received a requisition from the police to record his confessional statement and warned him that he was not bound to make a confession and that, if he did so, any statement that he made might be used in evidence against him. He then sent him back to the sub-jail, telling him that he should think over the matter and that his statement would be recorded on the 30th. On the 30th the second accused was again brought before the Sub-Magistrate and a number of questions were put to him. When the Sub-Magistrate was satisfied that the second accused was prepared to make a confessional statement he recorded it. The second accused made a very detailed statement of the deliberations which led him to take part in the murder. He stated that two persons, who were prominent members of the party in the District Board opposed to the deceased, asked him to give his assistance to the first accused and promised to reward him with a sum of Rs. 100, that after considerable hesitation the temptation to earn Rs. 100 so easily became too much for him and he agreed, and that he and the first accused primed themselves with arrack and came back to the theatre, where final arrangements for the commission of the murder were made. The accused were then promised Rs. 200 each. This incitement began about twenty days before the actual murder was committed, the meeting at the theatre being a day or two

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before the murder. At about 3 p.m. on the day of the offence they met at the theatre, and the first accused arranged that the second accused should wait in the choultry while he, the first accused, made final enquiries as to the movements of the victim. At about 6 p.m. the first accused returned with arrack and bill-hooks and with the garb of a Muhammadan for himself. They waited there until they received a signal from the tank bund, the signal being the waving of a cloth. They then proceeded to the well referred to above, as situate in the tank bund, and there waited until the deceased and P.W. 2 came along the path. The first accused accosted the deceased saying, "You have succeeded in remaining alive until now" and struck the deceased with a bill-hook on his face and neck. The second accused also gave a blow with a bill-hook. After the deceased fell down the second accused stabbed the deceased twice on the chest with a dagger, while the first accused cut the throat of the deceased and hacked his face. They ran away along the tank bund, throwing the bill-hooks, the hat, and the pyjamas into the tank. The dagger, the second accused took and kept in his house.

This confession is the most important evidence in the case and has been attacked principally on two grounds : (i) that it was not a voluntary confession and (ii) that in any case it is not true. With regard to the first argument the principal point made is that the Sub-Magistrate, P.W. 25, did not ask the second accused whether he was aware that it was not intended to take him as an approver. This is unfortunately true and the Sub-Magistrate's excuse is that he did not know the Telugu word

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for approver. This does not seem to be either a true or a proper explanation. Obviously, the Sub-Magistrate had forgotten to ask the question. There is no single word in Telugu for approver and if there were, the word would probably be so technical that the second accused, who is a cooly, would not have understood it. It would have been easy enough for the Sub-Magistrate, if he had really remembered that that question should have been asked, to have conveyed to the accused the purport of the question laid down in the Criminal Rules of Practice. However, the question is whether the omission to ask this question invalidates the confession. The object of putting the questions set out in Rule 85 of the Criminal Rules of Practice is to enable the Sub-Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked. There is no evidence that there was ever any intention to take the second accused as an approver. P.W. 30, the Sub-Inspector in charge of this case, states, on the contrary, that no attempt was made to take this accused as an approver while he had anything to do with the case. It has already been mentioned that on the 28th, two days before the confession was recorded, the Sub-Magistrate warned the accused that if he made a statement it would be used in evidence against him and advised him to think over the matter before making his confession. On the 30th, P.W. 25 first ascertained from the second

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accused how long he had been in police custody, when the police first questioned him, and how many times the police had questioned him about this case. He was then asked if he had been forced to make a confession, to which he replied that he was making it of his own free will. In answer to a question, the second accused also stated that he knew that the statement would be used in evidence against him and he assured the Sub-Magistrate that during the five days that he had been in the sub-jail nobody had asked him to make any statement and that he was making the statement of his own free will and not on account of any fear that he would be beaten. The Sub-Magistrate then gave his reasons for believing that the statement was a voluntary one and asked the accused to state what he knew about the murder. After the confession had been recorded he appended the usual certificate that the second accused was told that he was not bound to make a confession, that if he did so it would be used against him, and that he believed the statement of the accused to be a voluntary one. In his evidence he states that he told the accused that he need have no hope that he would escape by making such a statement and indicated to him that he would be hanged as a result of making the statement. The questions put by the Sub-Magistrate make it quite clear to us that he did explain carefully to the accused that, far from his confession having the effect of getting him off, it would get him hanged; and if the accused knew this he also knew that being taken as an approver would not help him. We have been referred to the cases

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There remains for consideration the effect of the confessional statement of the second accused against the first accused. It is contended that the value of this piece of evidence is so little that it should not be taken into consideration at all ; but if that were so, section 30 of the Indian Evidence Act would have no practical application whatever. Confessional statements are invariably retracted as soon as the accused is represented, which in this particular case was very soon after the confession was made. The strongest case quoted on behalf of the accused is *Sher Muhammad v. Emperor*(1) where it is said :

"The rule is now firmly established that ordinarily it is improper to use the retracted confession of an accused person against his co-accused."

The whole legal aspect of the case is summed up in this terse statement, the rest of the judgment discussing the facts of that particular case. The learned Judges do not say how that rule has been firmly established and what tribunals have laid down that rule. In *Giddigadu v. Emperor*(2) there was no evidence at all except the confession of the co-accused. Under such circumstances no co-accused could of course be convicted ; for section 30 says only that the confession *may be taken into account*, which pre-supposes the existence of other evidence. *In re Periyaswami Moopan*(3) has no application to the point now under consideration, for the question there was whether the confession of an offence other than that for which the accused was tried could be considered against the co-accused. In *Yasin v. King-Emperor*(4) it is

(1) (1927) 104 I.C. 630.
(3) (1930) I.L.R. 54 Mad. 75.

(2) (1909) I.L.R. 33 Mad. 46.
(4) (1901) I.L.R. 28 Cal. 689. 14

pointed out that a retracted confession is of little value against a co-accused and the fullest corroboration is necessary—far more than would be demanded for the sworn testimony of an accomplice on oath. With this statement we of course agree. Obviously, a retracted confession has little evidentiary value against a co-accused when compared with the evidence of an accomplice given on oath, which can be tested by cross-examination ; but when, as in the present case, there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind whether, in spite of the fact that the accused has been identified, that he was seen both before and after the offence under suspicious circumstances, yet by some chance he may not have taken part in the murder. If we doubted the other evidence, which we do not, the confessional statement of the second accused would assure us that we were not mistaken in accepting the identification of the first accused by P.W. 2, that the first accused not merely stood in Muslim dress a few yards away from the path when seen by P.W. 3, but that he soon afterwards took part in the murder ; and that when P.Ws. 5 and 6 say that they met the accused coming from Nabikote just after the murder was committed they were speaking the truth.

[In conclusion, his Lordship found that the accused were guilty of a shocking and cold-blooded murder and confirmed the convictions and sentences on both the accused.]

V.V.C.

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PRIVY COUNCIL.

J.C.*
1937.
December 3

THE MERCANTILE BANK OF INDIA, LTD., APPELLANTS,

v.

THE CENTRAL BANK OF INDIA, LTD., RESPONDENTS.
[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Estoppel—Pledge—Second pledge—Sale by second pledgee—
Action for conversion by first pledgee against second—
Essentials to establish estoppel against first pledgee.*

A merchant pledged railway receipts with the Central Bank and obtained an advance from them. The Central Bank, following their usual practice, re-delivered the railway receipts to the merchant for the purpose of clearing the goods and storing them in the Central Bank's go-down without any indication in the receipts to show that the Central Bank had had possession of them. The merchant fraudulently pledged the receipts a second time with the Mercantile Bank and obtained an advance from them. The Mercantile Bank obtained the goods and sold them for value to an innocent purchaser. In an action by the Central Bank against the Mercantile Bank for conversion,

held, that the Central Bank were not estopped from setting up a prior title as pledgees against the Mercantile Bank by reason of the subsequent pledge by the merchant to the Mercantile Bank.

To maintain estoppel it is essential to show neglect of a duty which a person owes to the public or to an individual. In this case the Central Bank were under no duty to the Mercantile Bank to deal with the railway receipts in any other way than they did.

Official Assignee, Madras v. Mercantile Bank of India(1), *Lickbarrow v. Mason*(2), *Commonwealth Trust v. Akotey*(3), *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*(4), *Farquharson*

* Present: LORD WRIGHT, SIR GEORGE LOWNDES AND
SIR GEORGE RANKIN.

(1) [1935] A.C. 53; (1934) I.L.R. 58 Mad. 181.

(2) (1787) 2 T.R. 63, 70; 100 E.R. 35.

(3) [1926] A.C. 72.

(4) [1926] A.C. 670, 698.

Brothers & Co. v. King & Co.(1), *London Joint Stock Bank v. Macmillan and Arthur*(2), *Swinn v. The North British Australasian Co.*(3), *Johnson v. Credit Lyonnais Co.*(4), *Scholfield v. Earl of Londesborough*(5), *Slingsby v. District Bank, Ltd.*(6), *Henderson & Co. v. Williams*(7), *Fuller v. Glyn, Mills, Currie & Co.*(8), *London Joint Stock Bank v. Simmons*(9) and *Sarat Chunder Dey v. Gopal Chunder Laha*(10), referred to.

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

A. T. Miller K.C. and Harvey for appellants.—The documents contained, on their face, a representation that the holder was the owner. The plaintiffs were, therefore, by their conduct in handing over the documents to C.K.N., without anything to indicate the pledge to them, estopped from denying C.K.N.'s rights to the goods covered—*Official Assignee, Madras v. Mercantile Bank of India*(11). The railway receipt is a document of title. The Central Bank must have known that C.K.N., having the documents, could deal with them or the goods as his own and they were, therefore, guilty of negligence in handing over the documents, as they did, without anything to indicate the pledge to them.

The primary matter in estoppel is not a question of duty, but of representation. In the High Court no careful consideration was given to the receipts. The receipts show by their conditions that C.K.N. is the only person entitled to obtain delivery. The possible effect of entrusting a person with such documents should be considered.

[Reference was made to *Boyson v. Coles*(12), *Dyer v. Pearson*(13), *Cole v. North Western Bank*(14), *Pease v. Gloaher*(15), *Henderson & Co. v. Williams*(7), *Johnson v. Credit Lyonnais Co.*(4), *Colonial Bank v. Cady and Williams*(16),

(1) [1902] A.C. 325, 342.

(2) [1918] A.C. 777.

(3) (1863) 2 H. & C. 175, 182; 159 E.R. 73.

(4) (1877) 3 C.P.D. 32.

(5) [1896] A.C. 514.

(6) [1932] 1 K.B. 544.

(7) [1895] 1 Q.B. 521.

(8) [1914] 2 K.B. 168.

(9) [1892] A.C. 201, 213.

(10) (1892) L.R. 19 I.A. 203, 215; I.L.R. 20 Cal. 296.

(11) [1935] A.C. 53; (1934) I.L.R. 58 Mad. 181.

(12) (1817) 6 M. & S. 14; 105 E.R. 1148.

(13) (1824) 3 B. & C. 38; 107 E.R. 648.

(14) (1875) 10 C.P. 354, 364, 372.

(15) (1866) 1 P.C. 219, 229.

(16) (1890) 15 App. Cas. 267.

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Fuller v. Glyn, Mills, Currie & Co.(1) and *London Joint Stock Bank v. Simmons*(2)]. The whole of the circumstances must be taken into account, including the character of the person to whom the document is given—here it was a merchant. [*Commonwealth Trust v. Akotey*(3), *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*(4), *Farquharson Brothers & Co. v. King & Co.*(5) and *Sarat Chunder Dey v. Gopal Chunder Laha*(6), and the Indian Evidence Act, section 115, were referred to]. The documents handed over in the circumstances here conveyed the clear representation to whomsoever they might be produced that C.K.N. as owner had full and unfettered power of disposition. The Central Bank intended C.K.N. to use the documents and, by means of the representation they contained, to get delivery of the goods. C.K.N. producing the documents to the third party, conveyed the Central Bank's representation and the third party, the Mercantile Bank, acted upon it and advanced money. The Central Bank is thereby precluded from alleging that C.K.N. had no disposing power over the property and cannot set up their title.

Sir Stafford Cripps K.C. and *Wallach* for respondents.—The purpose for which the Central Bank handed over the documents to C.K.N. was to get delivery of the goods. There is no case of estoppel here. The Indian Contract Act, sections 172 to 181, deals with the whole matter of pledges. Section 178, as it then was, puts the duty on the second pawnee, here the Mercantile Bank, to satisfy itself that the pawnor had a good title. One cannot use an estoppel to negative a statute. Assuming estoppel arises, it is necessary to see exactly how it is raised. It is said the plaintiff Bank did not stamp the documents and is, therefore, estopped from setting up its title. The complaint is that the railway receipts had nothing on them to show the Central Bank's title. It was admitted that it was the common practice to hand over receipts to the consignee to get delivery of the goods. The case, therefore, of arming some one with the indicia of title falls to the ground. The Mercantile Bank's case is based on the failure of the Central Bank to put a rubber stamp on the

(1) [1914] 2 K.B. 168.

(2) [1892] A.C. 201, 213.

(3) [1926] A.C. 72.

(4) [1926] A.C. 670.

(5) [1902] A.C. 325.

(6) (1892) L.R. 19 I.A. 203; 1 L.R. 20 Cal. 296.

documents. Estoppel from failure to do something arises only where there is a duty to do that thing. This duty can arise from contract, by operation of statute or from acknowledged practice of trade. [*Lloyds Bank Ltd. v. Bank of America National Trust and Saving Association*(1) referred to.] The rubber stamp would have no legal effect. It would show the document passed through the Bank, but not for what purpose. There is no estoppel unless it is proved that there was a duty on the person, a duty either as an individual or as a member of a company, to do the thing complained of. Here it is alleged that it was the duty of the Central Bank to put a rubber stamp on the railway receipts. It is submitted that there was no such duty and the defendants have entirely failed to establish such duty. The second proviso to section 178, as it then stood, means that where the goods or documents have been obtained from the lawful owner by a fraud or an offence, the person who is in possession of the goods or documents of title cannot make a valid pledge of them.

Cases which deal with share certificates and transfers are distinguishable from cases of documents dealing with goods or documents of title equivalent to goods. [Reference was made to *Reeves v. Capper*(2), *Farquharson Brothers & Co. v. King & Co.*(3), *London Joint Stock Bank v. Macmillan and Arthur*(4), *Cole v. North Western Bank*(5), *Henderson & Co. v. Williams*(6), *Colonial Bank v. Cady and Williams*(7), *Heap v. Motorists' Advisory Agency Ltd.*(8), *Weiner v. Gill*(9) and *Fine Art Society v. Union Bank of London*(10)].

Cole v. North Western Bank(5) was a case in which goods were received by a person as warehouseman or broker. It was held that they were received by him as warehouseman and could not be transferred. *Heap v. Motorists' Advisory Agency, Ltd.*(8) states the law as to estoppel.

A. T. Miller K.C. in reply.—Section 178 of the Contract Act was read by the respondents to demonstrate that estoppel

(1) (1937) 53 Times L.R. 840.

(2) (1838) 5 Bing. (N.C.) 136; 132 E.R. 1057.

(3) [1902] A.C. 325.

(4) [1918] A.C. 777, 836.

(5) (1875) 10 C.P. 354.

(6) [1895] 1 Q.B. 521, 535.

(7) (1890) 15 App. Cas. 267.

(8) [1923] I.K.B. 577.

(9) [1905] 2 K.B. 172.

(10) (1886) 17 Q.B.D. 705.

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does not arise. It is submitted that it is wrong to say that the second pawnee cannot raise the plea of estoppel. Possession of documents of title may enable a person to make a valid pledge, but if the second proviso operates he cannot make a valid pledge. The section does not deal with estoppel. It deals only with the circumstances in which the legal right of the pawnee may arise. It is irrelevant here. It neither helps nor injures the argument for the appellant. The action was brought for conversion. The plaintiffs' title was directly in issue. The title was admitted. But in conversion, the defendants' case was, "though you have a title you cannot be heard to urge your title in the circumstances".

The Contract Act cannot preclude the plea of estoppel. It is said that the plea here is entirely based on omission to place a rubber stamp on the documents. It is not an omission that is complained of, but an action in handing C.K.N. a document which he could use as his own. Cases on duty do not apply. It is said that it was the practice of the Central Bank to do what they did, but what bearing has that on estoppel? They did an act which put C.K.N. in a position unequivocally to hold himself out as owner. It is no answer to say that was the practice. It does not affect the position in law. I challenge the statement that it was the practice. The practice referred to was the practice of handing over the documents to collect the goods. That does not touch the question of the rubber stamp.

LORD WRIGHT. The JUDGMENT of the Judicial Committee was delivered by Lord WRIGHT.—The appellants and the respondents are limited companies carrying on the business of bankers in Madras. The appeal is against the judgment of the appellate Court of Madras who have held the appellants liable to the respondents for the conversion of their property. The question arises out of a series of frauds committed by a firm of merchants named C. K. Narayana Iyer & Sons, who will be referred to hereinafter as "the merchants". They were a firm who, until the frauds became disclosed, had enjoyed the highest standing and repute in

Madras where they carried on a large business as buyers and exporters of groundnuts. Their practice was to purchase the groundnuts from the up-country growers and have them despatched by rail to Madras. The railway companies and the Madras Port Trust, which had its own railway system within the Port, had a working arrangement between them under which the Trust took over the consignment of nuts on their arrival at the Port and lodged them in the first instance in their go-downs. The groundnuts were covered in respect of each consignment or wagon load by a document called a "railway receipt", which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in question in these proceedings the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination should be evidence of complete delivery. They also provided that if the consignee did not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wished it to be made.

Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts; the practice was

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that the merchant should deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their own go-down keeper so as to enable him to obtain possession of the goods. What was in practice then done was for the bank's go-down keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants, but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's go-down. The character and effect of this course of business was discussed by the Board in the case of the *Official Assignee, Madras v. Mercantile Bank of India*(1). It was there held that the railway receipt was a document of title within the meaning of section 178 of the Indian Contract Act, 1872, and that a pledge of the railway receipt operated under that section, which was in force at material times but has since been repealed, as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the bank's go-down. It was said by the Board that such a

procedure was in the usual course of business and was obviously either necessary or at least convenient for the conduct of the business.

The railway receipts concerned in this case were thirty-five in number. The merchants, in accordance with the practice and for the purpose described above, were given by the respondents the receipts and then fraudulently obtained a second advance from the appellants. It was found that in January and February, 1929, the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway receipts from either the appellants or the respondents, as the case might be, they repledged them with the other bank, that is to say, if the railway receipts had been pledged in the first instance with the appellants they took them to the respondents and obtained advances on them as if they had not been already pledged, and conversely, if they had been first pledged with the respondents they took them to the appellants and obtained advances from them. There was, however, one difference between the two banks, in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge. That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations. The addition of the stamp had no effect in law and was not, it seems, generally adopted by banks, but it would naturally, according to the evidence, put the other bank on enquiry. The merchants, however, were not unequal to dealing with this complication. They followed the

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(1) [1935] A.C. 53; (1934) I.L.R. 58 Mad. 181.

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simple process of obtaining delivery of the goods if the railway receipts bore the bank's stamp and thereupon pledging the goods themselves with the other bank. It was rightly not contested that such a pledge of the actual goods was invalid. In due course the frauds became known and the merchants were declared insolvent. Thereupon the respondents brought against the appellants an action for conversion out of which the present appeal arises. It was found by the trial Judge, and is not now contested, that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts, did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants. This followed from section 178 of the Indian Contract Act, 1872, as interpreted in the *Official Assignee, Madras v. Mercantile Bank of India*(1). This section, in force at material times, though since repealed, is in the following terms:—

“S. 178. A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents; Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.”

It has been found in the Courts below that the merchants obtained the documents or goods by means of an offence or fraud within the meaning of the section, because the true inference from the

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facts was that they obtained the documents with no intention of fulfilling their duty as mandatories but with the dishonest intention of perpetrating the frauds which they actually committed. The correctness of that ruling was not challenged before the Board. The appellants, however, claimed that they were entitled to succeed in the action on the ground which is set out in their amended defence in the following paragraph:—

“The plaintiff bank having placed C.K.N. & Sons in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein or that C.K.N. & Sons were not the owners thereof, enabled C.K.N. & Sons to hold themselves out as the owners thereof and thereby to pledge the said railway receipts for value with the defendant bank, who acted in good faith, and the plaintiff bank is therefore estopped from setting up its title against that of the defendant bank to the relative goods or their value.”

It has been this plea which has been the subject of debate in the present appeal. Both Courts below have decided against it. It is admitted that the respondents made the advances completely *bona fide*; they only did what they had done for some time previously without any misadventure. They had regularly had dealings with the merchants over a prolonged period. The merchants were a firm of the highest standing and reputation of whose rectitude and solvency there had been no question or suspicion. In delivering the railway receipts to the merchants the respondents followed a practice which had long been consistently followed both by the appellants and the respondents. No authority had been given to the merchants to deal with the goods otherwise than by handling them for the

(1) [1935] A.C. 53; (1934) I.L.R. 58 Mad. 181.

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limited purpose which has been stated. On these facts it would *prima facie* seem impossible to say that the respondents made any representation to the appellants that the merchants had authority or were entitled to obtain an advance on the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to anyone else. All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed by both the appellants and the respondents. It would seem, accordingly, that they were entitled to rely on the rule of law that no one could transfer a better title than he possessed, save in the exceptional cases not here material, such as sales in the market overt or where there has been a transfer of property avoidable on the ground of fraud but not yet avoided or where the special provisions of the Factors Acts apply.

It has, however, been strenuously contended on behalf of the appellants that the circumstances here raise what is called an estoppel and that the respondents are precluded by their conduct from denying as against the appellants that the merchants had the right, which they pretended to have, of pledging the goods as owners, the *bona fides* of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been described as a mere rule of evidence, it may have the effect of creating

substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by ASHHURST J. in *Lickbarrow v. Mason*(1) that

“wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it”.

The decision of the Board in the *Commonwealth Trust v. Akotey*(2) was cited as one in which it was said that the case was a plain case for the application of that principle. The facts were that a grower of cocoa in the Gold Coast Colony had consigned by railway cocoa to a merchant at the port in the expectation of his buying the cocoa. The merchant, instead of concluding the purchase, purported to sell the cocoa as for himself to a third party, the appellants, who purchased in good faith and paid the full price to the merchant as seller. In an action for conversion brought by the grower, the Full Court of the Gold Coast held that no property had passed because the merchant had no title. That judgment was reversed by this Board, who said:

“To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent

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(1) 1787) 2 T.R. 63, 70; 100 E.R. 35.

(2) [1926] A.C. 72.

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title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason*(1)."

What is there stated, it may be, would cover this case if it is applied without qualification. But in their Lordships' judgment it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report, which would justify the decision; but on the face of it their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord SUMNER who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case of *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*(2), said:

"There was no duty between Jones, Ltd., and Waring & Gillow, Ltd., and, without that, the wide proposition of ASHHURST J. in *Lickbarrow v. Mason*(1) would not apply [see observations of Lord MAONAGHTEN and Lord LINDLEY in *Farquharson Brothers & Co. v. King & Co.*(3), and of Lord PARMOOR in *London Joint Stock Bank v. Macmillan and Arthur*(4), which were apparently overlooked in *Commonwealth Trust v. Akotey*(5)]."

Lord SUMNER thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord PARMOOR's speech in the *London Joint Stock Bank v. Macmillan and Arthur*(4) pointed out that the rule expressed by ASHHURST J. was too wide and said that the accurate rule was stated by BLACKBURN J. in

(1) (1787) 2 T.R. 63; 100 E.R. 35.
(2) [1926] A.C. 670.
(3) [1902] A.C. 325.
(4) [1918] A.C. 777.
(5) [1926] A.C. 72.

Swan v. The North British Australasian Co.(1). There BLACKBURN J., referring to the judgment in the Court below of WILDE B., said:

"He omits to qualify it [the rule he has stated] by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

To the same effect in *Farquharson Brothers & Co. v. King & Co.*(2) Lord LINDLEY said:

"It is, of course, true that by employing Capon [the fraudulent clerk] and trusting him as they did the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach."

Lord LINDLEY then pointed out that the dictum of ASHHURST J. is too wide. This has been pointed out by other Judges. It was indeed not necessary to the decision of the case which was before ASHHURST J. The case of *Commonwealth Trust v. Akotey*(3) is also inconsistent with the case of *Johnson v. Credit Lyonnais Co.*(4), where it was held that the conduct of the plaintiff, in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who, in good faith, made

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(1) (1853) 2 H. & C. 175; 159 E.R. 73.
(2) [1902] A.C. 325.
(3) [1926] A.C. 72.
(4) (1877) 3 C.P.D. 32.

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advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. In one sense the plaintiff by leaving the indicia of title in the vendor's hands had enabled him to defraud the defendants, but it was held by the Court of Appeal that, in the words of COCKBURN C.J., :

"The case for the plaintiff rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been."

The Chief Justice adds that if it were held that in such a case there was an estoppel, the Factors Acts, which give a limited protection in certain cases to the unauthorized sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite.

Mr. Miller, however, argued that the necessity of a duty to constitute an estoppel only applied to an estoppel based on conduct or negligence, whereas an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation

by the respondents to any person to whom the merchants might produce them that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation when presented by the merchants to the respondents that the merchants were invested with full disposing power. No authority was cited which in their Lordships' judgment would justify any such wide proposition. It is not, indeed, true to say without qualification that people are not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. The *London Joint Stock Bank v. Macmillan and Arthur*(1) is a case in which the bank's customer was held liable because he had facilitated the fraudulent alteration of a cheque by so drawing the cheque as to leave a space which the forger could fill up and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer and was distinguished on that ground from *Scholfield v. Earl of Londesborough*(2), where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of

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(1) [1918] A.C. 777.

(2) [1896] A.C. 514.

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such proof that the case of *Slingsby v. District Bank, Ltd.*(1) was distinguished from the *Macmillan* case (2). In the present case, not only was there an absence both of any duty or of anything amounting to a neglect of usual precautions, but there was, in their Lordships' judgment, no ground for finding any representation. There was no reason for the respondents to think that they were representing to anybody that the merchants had any title to dispose of the goods. The railway receipts were not dangerous things ; there was no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established. There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was *Henderson & Co. v. Williams*(3), which was relied on by Mr. Miller. There was in that case an actual transfer of goods lying in a warehouse to the order of Fletcher, a transfer made on the express instructions of the owner of the goods who was induced to do so by Fletcher's fraud : Fletcher then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods to Fletcher's order. That was held to be a case where both the warehouseman and the owner were estopped from denying the rights of the purchaser. The warehouseman had in fact attorned to the purchaser and it was also held that there had been a holding out by the true owner of the goods that

(1) [1932] 1 K.B. 544.

(3) [1895] 1 Q.B. 521.

(2) [1918] A.C. 777.

Fletcher was capable of giving a good title. That was a very different case from the present.

A similar principle of holding out has been applied in the cases where a share certificate with a transfer in blank has been placed in the hands of a stockbroker or one in a similar position, and where it has been held that there was a representation which constituted an estoppel. Such a case is illustrated by *Fuller v. Glyn, Mills, Currie & Co.* (1), where the plaintiff had left share certificates in the hands of stockbrokers; the certificates were in the name of a person from whom the plaintiffs had bought the shares and bore upon them an endorsed form of transfer executed by the seller. The stockbrokers used the certificates in order to obtain an advance for themselves. On their bankruptcy the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it and, if produced to a third person, calculated to convey to that third person that such an authority existed. On the facts of such a case there was in addition to the form of the document, the character of the person in whose hands it was. As was said in the *London Joint Stock Bank v. Simmons*(2) by Lord WATSON :

"Brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers"

and accordingly it was reasonable assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such

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(1) [1914] 2 K.B. 168.

(2) [1892] A.C. 201, 213.

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cases further or express any opinion about them because the material circumstances were not present here. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been. It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them for his own purposes. Such cases are quite different.

Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railway receipts in regard to the transactions in question; it is true that at a later date the respondents did stamp the railway receipt and that the appellants in practice did so throughout, but it is clear, in their Lordships' judgment, that that would have made no difference to the course adopted by the merchants. If the stamp had the

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effect of putting the bank on enquiry, the merchants would not adopt the method of seeking to obtain a second advance on the documents, but would have taken delivery under the receipt of the actual goods and pledged them, or if they did seek to obtain a second advance on the documents and had been asked by the bank to explain why the railway receipt was stamped, might have said that they had pledged the documents and redeemed that pledge. Having regard to the position which they held, that explanation would, presumably, have been accepted. There is, however, a more general answer to any argument based upon the respondents' failure to stamp. It is not suggested that it was a usual practice, so that failure to adopt it could be charged against the respondents; but even if it were, it would still be of no avail to the appellants, because there was no duty as between the appellants and the respondents to adopt any such practice. As already pointed out, the existence of a duty is essential, and this is peculiarly so in the case of an omission. This is so even if the case were put on representation or holding out. The duty may be, in the words of BLACKBURN J., "to the general public of whom the person is one". There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. In their Lordships'

MERCANTILE BANK OF INDIA LTD. judgment the appellants fail to establish these conditions.

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CENTRAL BANK OF INDIA, LTD. Section 115 of the Indian Evidence Act does not call for particular discussion here. It is conceded that the law it enacts is the same as the English law [see *Sarat Chunder Dey v. Gopal Chunder Laha*(1)].

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *E. F. Turner & Sons.*

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

C.S.S.

(1) (1892) 19 I.A. 203, 215; I.L.R. 20 Cal. 296.

APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.*

KOTTA VENKATARAJU GARU (SIXTH DEFENDANT),
APPELLANT,

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December 8

v.

SRI RAJA SAHIB MAHARBAN DOSTAN SRI RAJA
RAVU KUMARA MAHIPATHI SURYA RAO
BAHADUR GARU, SIRDAR, RAJAHMUNDY SIRCAR AND
MAHARAJA OF PITHAPURAM AND FIVE OTHERS
(PLAINTIFF AND DEFENDANTS 1 TO 5), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), ss. 3 (11), 24, 30 and
77—Water of landholder taken by ryot without landholder's
permission for raising wet crops on dry lands—Money being
charge for—Suit by landholder under sec. 77 of the Act to
recover—Suit for rent if—Maintainability of—Failure of
landholder to take advantage of sec. 30 of Act—Suit for
enhanced rent within meaning of sec. 24 of the Act, if—
Provision in patta precluding landholder from claiming
such charge—Provision not amounting to.*

A landholder filed a suit before the Deputy Collector under section 77 of the Madras Estates Land Act to recover from ryots holding lands under him a certain sum of money for water taken by them from his tank without his permission for the purpose of raising wet crops on dry lands in three faslis.

Held by the Full Bench: (i) The suit being a suit under section 77 of the Madras Estates Land Act and being for the recovery of the value of water taken without permission, it must be treated as a suit for rent and not as a suit in tort. Being a suit for rent within the meaning of the Act it could only be instituted before the Collector.

Rent, as defined in section 3 (11) of the Madras Estates Land Act, includes money payable for water taken without permission.

* Second Appeal No. 848 of 1932.

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(ii) The suit was not for enhanced rent within the meaning of section 24 of the Madras Estates Land Act and the plaintiff's omission to take advantage of section 30 of that Act before instituting the suit was no bar to its maintainability.

An extra charge for taking the landholder's water is "rent" within the meaning of section 3 (11) of the Act and does not amount to an enhancement of rent.

There were no circumstances which would permit of an application under section 30 of the Act. The plaintiff was not attempting to recover a higher rent because of any improvement effected by him or at his expense. He could not therefore have applied under sub-section (ii) of section 30 for enhancement of rent.

(iii) The provision in the patta, "I (landholder) should on no account enhance the cist at any time on the said kama-tham (holding)", did not preclude the landholder from requiring his tenants to pay for water taken without his permission.

When the patta was drawn up it was never contemplated that the tenants would take water from the landholder's tank without his permission.

SECOND Appeal against the decree of the District Court of East Godavari at Rajahmundry in Appeal Suit No. 81 of 1930 preferred against the decree of the Court of the Deputy Collector of Cocanada in Land Suit No. 2 of 1930.

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

ORDER OF REFERENCE TO A BENCH:—

This second appeal arises out of an action by a landlord to recover rent from a ryot holding a certain land under him. Two points have been argued by Mr. Suryanarayana in this second appeal. One is based on the construction of the patta under which the tenant holds and the second is based on section 30 of the Madras Estates Land Act.

In regard to the first point, the contention is put thus: The land is held on what is known as Nimebadi tenure and under clause 4 of the patta the landlord is not entitled to claim any extra sum in addition to what is provided therein.

The claim is made by way of a charge for water for raising wet crops on dry lands in addition to the dry rate mentioned in the patta for three faslis. What is known as "Nimebadi land" is defined in Exhibit III thus: "The expression 'Nimebadi' as used and understood by the raja and the ryots of the Pithapuram estate connotes lands granted on favourable rent which is lower than the lawful rate previously payable on them or upon lands of similar description and with similar advantage in the neighbourhood." Therefore clause 4 in the patta only means that so long as the tenant raises dry crops on the land, the landlord is not entitled to charge any extra rent on any account whatever. But once the tenant raises wet crops on the dry land, clause 4 would not apply.

The second contention raises a question of some importance: Where in a particular year the tenant raises wet crops on dry land with the use of the landlord's water and the landlord claims water rate for the use of such water in addition to the dry rate, can this extra claim be construed as an enhancement of rent so as to attract the provisions of section 30 of the Madras Estates Land Act? In *Venkatachalam Chetty v. Aiyamperumal Tevan*(1) their Lordships, PHILLIPS and KUMARASWAMI SASTRI JJ., were inclined to hold that it would not amount to an enhancement of rent—*vide* the observations at pages 706 and 707. In a recent decision in *Sundaram Pillai v. Karuppayee Ammal*(2) VENKATASUBBA RAO J. doubts the correctness of this decision at page 31, where referring to it he observes thus:

"I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of section 30, does not amount to an enhancement."

On the other hand, RAMESAN J. does not seem to dissent from this decision; in fact, he rather approves of it. At page 15 the learned Judge remarks thus:

"It was there held [referring to the decision in *Venkatachalam Chetty v. Aiyamperumal Tevan*(1)] that a charge for taking water belonging to the landlord is 'rent' and it is not enhancement of rent even if not consolidated with the rent proper. I agree with this proposition."

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

(2) (1935) I.L.R. 59 Mad. 5.

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PITHAPURAM. I may in this connection refer to the observations of the learned Chief Justice in *Rajah of Visianagaram v. Narayana-swami Naidu*(1).

I think it is desirable that this question should be considered by a Bench and I accordingly refer the case for disposal by a Bench. I have not considered the other questions which may arise on the decision of this question and the same will also be dealt with by the Bench.

The appeal was directed to be posted before a Full Bench.

ON THE REFERENCE—

V. Suryanarayana for appellant.—The first contention of the appellant is that if the suit claim is treated as a claim for rent, it amounts to an enhancement of rent within section 30 of the Madras Estates Land Act and enhancement can be claimed only through the machinery of that section and the present suit is not maintainable. The second contention is that if the suit is not one for rent, the Revenue Court has no jurisdiction to entertain the suit. The third contention is that on the proper construction of the patta in the case the plaintiff (landholder) cannot claim increased rent on any account. Section 3 (11) of the Madras Estates Land Act does not provide for the mode of enforcing the landholder's right to additional rent in such a case as the present.

[VARADACHARIAR J.—Do you contend that section 30 provides for a mode in such a case as the present ?]

No; but that only shows that such a claim as the present cannot be enforced in a Revenue Court and that the landholder must have recourse to the Civil Court. Section 3 (4) of the Act defines improvement referred to in section 30. Only certain suits can be brought in the Revenue Court under the Estates Land Act. The presumption is that the Civil Court has jurisdiction to entertain suits unless its jurisdiction is expressly taken away. It is only if a suit is a suit for rent that it can be brought in the Revenue Court. A suit to recover an amount which is not rent cannot be brought in the Revenue Court.

[The CHIEF JUSTICE referred to section 3 (11) of the Act as showing that a charge for water unlawfully taken by the ryot is part of rent.]

But section 3 (11) does not provide for the mode of recovering that charge.

(1) (1935) 70 M.L.J. 494, 496, 497.

[You admit it cannot be recovered under section 30.—VENKATARAJU
VARADACHARIAR J.]

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It can be recovered under section 30 (ii). Section 30 is not confined to cases of permanent improvements. Even in cases where the improvement is only for a period the question of enhancement will arise. As to the meaning of "enhancement" see *Battina Appanna v. Raja Yarlagadda*(1). That case is distinguishable on the facts because in it the rent fixed was not sought to be altered. The excess amount sought to be collected by the landholder was the amount which the ryot had formerly paid to the Government and which the Government had collected from the landholder. *Venkatachalam Chetty v. Aiyamperumal Tevan*(2) would appear to be against the appellant's contention. In that case, however, water was taken with the consent of the landholder. There was therefore a contract in that case.

[So far as the question of enhancement is concerned, it does not matter whether there was a contract or not, because section 24 excludes even cases of contract.—VARADACHARIAR J.]

Even if the additional amount claimed in the present case can be said to be rent and the landholder can enforce the claim and *Venkatachalam Chetty v. Aiyamperumal Tevan*(2) is right to that extent, the learned Judges do not discuss the question of the mode of enforcing that right. [*Thayammal v. Muttia*(3) was referred to.]

[In that case it was argued that the additional charge was not an enhancement and that argument was accepted.—THE CHIEF JUSTICE.]

That case is no doubt against the appellant. *Narasimha v. Ramasami*(4) is in his favour. The case was one of a temporary enhancement for one year.

[In that case, the ryot had not taken the landholder's water at all. He had taken only Government's water and had to pay cesses to Government. All the landholder did was to improve minor supply channels.—VARADACHARIAR J.]

[*Desikachariar v. Rangaswami Pillai*(5) was referred to.]

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

(2) (1919) I.L.R. 43 Mad. 702, 706-7.

(3) (1887) I.L.R. 10 Mad. 282.

(4) (1890) I.L.R. 14 Mad. 44.

(5) (1932) I.L.R. 56 Mad. 300.

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In *Sundaram Pillai v. Karuppayee Ammal*(1) RAMESAM J. refers to permanent improvement at page 18. The question of permanency is, it is submitted, entirely irrelevant.

[Improvement itself implies some sort of permanency.—VARADACHARIAR J.]

The judgment of VENKATASUBBA RAO J. in *Sundaram Pillai v. Karuppayee Ammal*(1) helps the appellant in the following ways:—(a) it states that *Venkatachalam Chetty v. Aiyampurumal Tevan*(2) is wrong; (b) it treats the observation in *Battina Appanna v. Raja Yarlagaadda*(3) which is against the appellant as *obiter*; and (c) it states that though the additional charge is included in the definition of rent in section 3 (11) of the Act, the Act does not provide any mode for its recovery unless there can be said to have been an improvement. [Appalanarasiah Chetty v. Chittavadu(4) and Rajah of Vizianagaram v. Narayanaswami Naidu(5) were referred to.] If the amount claimed is an addition to the basic rent it would amount to an enhancement and the procedure for its recovery would be that prescribed by section 30 and the present suit is not sustainable. The present suit cannot be said to be under section 77 of the Act because that section applies only to rent fixed by contract between the parties. It cannot apply to a suit for the recovery of an amount claimed over and above the basic rent. [Doraiswami Gurukkal v. Subramania Gurukkal(6) was referred to.] Rent can only arise where there is a contract express or implied. In the present case, the contract between the parties provides against enhancement on any account. Therefore the additional charge cannot be said to be rent. *Doraiswami Gurukkal v. Subramania Gurukkal*(6), though it is against the appellant on the facts, is authority for the position that where the amount claimed is over and above what is stipulated in the patta, the case is one of enhancement. JACKSON J. says in that case that even a temporary addition to rent amounts to enhancement. [Venkatayya v. Kistappa(7) was referred to.] “Without permission” in section 3 (11) does not necessarily mean that there is no contract express or implied. As to the meaning of the expression “payable by the ryot as such”, see *Basudeva Doss v. Raja Harischand*

(1) (1935) I.L.R. 59 Mad. 5.

(2) (1919) I.L.R. 42 Mad. 702, 706-7.

(3) (1917) 33 M.L.J. 355

(4) (1934) 67 M.L.J. 199, 200.

(5) (1935) 70 M.L.J. 494, 496, 497.

(6) (1927) I.L.R. 51 Mad. 266, 285-86, 287 (F.B.).

(7) A.I.R. 1928 Mad. 840.

Jagaddeva Garu(1). For an amount to form rent it must be specified in the contract between the parties, i.e., the patta.

K. Subramaniam for the Advocate-General (Sir A. Krishna-swami Ayyar) for first respondent was not called upon.

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JUDGMENT.

LEACH O.J.—This appeal arises out of a suit filed before the Deputy Collector, Cocanada, under section 77 of the Madras Estates Land Act, 1908, by the Maharaja of Pithapuram, to recover from the appellant and five other tenants an aggregate sum of Rs. 11-1-4 for water taken by them without permission from his tank for the purpose of raising wet crops on dry lands in Faslis 1336, 1337 and 1338. Paragraph 5 of the plaint, which is in Telugu, has been translated as follows:

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“The defendants have no right whatever to use the said water for the jirayati dry lands in the aforesaid manner. As the defendants used the said water unjustly the amount of Rs. 9-15-7 as per particulars hereunder towards tirva and cesses thereon with interest (was due) and in spite of several demands by the plaintiff's officials, both oral and written, the defendants did not pay as mentioned above.”

The difference between this sum of Rs. 9-15-7 and Rs. 11-1-4 represents the claim for interest. The main lines of defence were: (i) the Revenue Court had no jurisdiction to entertain the suit as it was a suit in tort; (ii) even if it could be treated as a suit for rent it could not be maintained as it amounted to a claim for enhanced rent contrary to the provisions of the Act; and (iii) the terms of the patta precluded the plaintiff seeking extra rent. The appellant denied that the water belonged to the plaintiff and alleged that he had used it for only one fasli (1338) and then

(1) (1935) I.L.R. 59 Mad. 408.

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not on dry lands. The Deputy Collector dismissed the suit holding that the water belonged to the defendants and that the terms of the patta precluded the plaintiff from claiming any enhanced rent. An appeal followed to the District Judge of East Godavari, who held that the tank did belong to the plaintiff and that water had been used for the three faslis mentioned in the plaint on dry lands belonging to the defendants. With regard to the pleas that the Revenue Court had no jurisdiction and that the suit as framed was bad, he held that the Revenue Court had jurisdiction and that the plaintiff was entitled to recover. He disallowed the claim that the terms of the patta precluded any enhancement of rent. The findings of fact of the District Judge are conclusive and, therefore, before us the appeal has been confined to the three main questions. The appellant was the sixth defendant and he alone has appealed.

With regard to the contention that the suit is in reality a suit to recover damages for tort, it should be borne in mind that it was instituted under the provisions of section 77 of the Act which relates only to the recovery of arrears of rent. Section 3 (11) defines "rent" as meaning whatever is lawfully payable in money or in kind or in both to a landholder by a ryot for the use or occupation of land for the purpose of agriculture and includes whatever is lawfully payable on account of water supplied by the landholder or taken without his permission for cultivation of land where the charge for water has not been consolidated with the charge for the use or occupation of the land. Therefore rent includes what is payable for water taken without permission. The suit being a suit

under section 77 and being for the recovery of the value of water taken without permission, we consider that it must be treated as a suit for rent and not a suit in tort. The word "unjustly" was introduced obviously as meaning without right.

The answer to the question whether the suit is maintainable depends on the meaning to be given to the word "enhanced" in section 24 of the Act which says :

"The rent of a ryot shall not be enhanced except as provided by this Act."

The appellant says that it is a suit for enhancement of rent and as the rent has not been enhanced in accordance with the provisions of the Act it cannot be maintained. The provisions of the statute which permit of enhancement are confined to section 30 and to Chapter XI which relates to the resettlement of rents. Section 30 permits applications to be made by landholders for enhancement of rents in special circumstances. There are four grounds on which a landholder can apply under this section. Under sub-section (i) the landholder may apply to the Collector to enhance the rent on the ground that during the currency of the existing rent there has been a rise in the average local prices of staple food crops in the taluk or zamindari division. Sub-section (ii) gives him the right of applying when during the currency of the existing rent the productive powers of the land have been increased by an improvement effected by him or at his expense. Sub-section (iii) permits him to apply when a work of irrigation or other improvement has been executed at the expense of Government, and he has been lawfully required to pay in respect of the

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holding an additional revenue or rate to Government in consequence. Sub-section (iv) allows him to apply when the productive powers of the land have been increased by fluvial action.

The learned Advocate for the appellant has argued that the plaintiff could have applied under sub-section (ii) of section 30 for enhancement of rent, and if he had done so and obtained an order increasing the rent in respect of the three years, the suit would have been in order, but as he has not secured an enhancement under this section, the suit does not lie. This, however, is not a case of a landlord attempting to recover a higher rent because of any improvement effected by him or at his expense. Section 3 (4) defines "improvement" as meaning, with reference to a ryot's holding, any work which materially adds to the value of the holding, which is suitable to the holding, and consistent with its character, and which, if not executed on the holding, is either executed directly for its benefit or after execution is made directly beneficial to it. Here the landlord did not construct the tank for the benefit of the defendants or for the improvement of their lands. The water in the tank was intended for other tenants and his claim was that the defendant-tenants had taken the water without his permission. In other words, they had taken advantage behind his back of a work which was intended for other people. It is, therefore, not open to the appellant to say that the plaintiff ought to have taken advantage of section 30 before instituting the suit. There were no circumstances which would permit of an application under section 30.

Before referring to the authorities on the question of what is enhancement, I might point out that section 189 of the Act defines the jurisdiction of the Collector. The details of the suits and applications which a Collector shall hear and determine are set out in Parts A and B of the schedule. Item 3 in Part A is a suit by a landholder to recover arrears of rent. The second clause of section 189 states that no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which a suit or application might be brought or made in the Revenue Court. Therefore, this being a suit for rent within the meaning of the Act, it could only be instituted before the Collector.

The meaning of the word "enhanced" has been the subject of much discussion in this Court. The discussion started when the Rent Recovery Act, 1865, was in force and has been continued since that Act was replaced by the Madras Estates Land Act. The earliest case to which we have been referred is that of *Thayammal v. Muttia*(1), where the question was whether the landlord had a right to charge water-cess when a wet crop was cultivated on dry land or when a second wet crop was cultivated on wet land. It was not denied there that water for these purposes had been taken from the proprietor's tank, and it was held that the landlord was entitled to call upon the tenant to pay for the extra water and that this did not constitute an increase in rent. In that case, there was no discussion in the judgment on the meaning of "enhancement", but the matter

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

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A Full Bench of this Court consisting of RAMESAM, WALLACE and JACKSON JJ. considered the question in *Doraiswami Gurukkal v. Subramania Gurukkal*(3). In this case, a ryot had used for the purpose of cultivating his land water from a tank belonging to Government, and Government required the landlord to pay for the water taken by the ryot. The landlord then sought to recover from the ryot what he had been compelled to pay to Government, and the question was whether this was a claim for enhancement of rent within the meaning of section 24. The reference to the Full Bench was made by SRINIVASA AYYANGAR and CURGENVEN JJ. and I will quote a passage from the judgment of SRINIVASA AYYANGAR J. which shows in precise terms what is meant by the expression "enhancement of rent":

"The expression 'enhancement of rent' in ordinary English parlance may apply to two different things; firstly, to any increase in the amount payable by the tenant to the landlord in relation to the holding and secondly, to a larger amount being required to be paid by the tenant to the landlord in respect of the very things that a tenant has been previously enjoying and without any further advantages. Logically

speaking, it is only the latter that can be regarded as constituting a real enhancement of rent. If in the place of half a dozen rooms in a flat the tenant comes to occupy two more rooms and the rent is proportionately increased, it cannot, properly speaking, be called an enhancement of rent; similarly, if the rent of the tenant should be increased, let us say, for electric lights installed in the house by the landlord."

In deciding the reference RAMESAM and WALLACE JJ. held that the claim was not a claim for enhancement within the meaning of the section. JACKSON J. dissented and in doing so expressed the opinion that the enhancement might vary from year to year. This would, however, conflict with the scheme and the provisions of the Act. There can only be an enhancement under section 30 or under Chapter XI. Section 30, as I have pointed out, deals with special circumstances under which a landlord may apply, but when he applies and the application is granted, the order of the Collector fixes the rent which is to be paid by the tenant in the future, and he will be liable to pay it until it is altered either by a fresh application under section 30 or as the result of a resettlement of rents under Chapter XI.

A case on which the appellant has placed reliance is that of *Sundaram Pillai v. Karuppayee Ammal*(1) which was decided by RAMESAM and VENKATASUBBA RAO JJ. There, VENKATASUBBA RAO J. said (page 31):

"I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of section 30, does not amount to an enhancement." and he discussed this question at considerable length. The appeal, however, did not call for a decision of the question because the evidence

(1) (1901) 12 M.L.J. 22.

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

(3) (1927) I.L.R. 51 Mad. 266 (F.B.)

(1) (1935) I.L.R. 59 Mad. 5.

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showed that the water was Government water, and consequently the tenant could not be required to pay any increased rent. Therefore, the remarks of the learned Judge on this question must be regarded as *obiter dicta*. RAMESAM J. accepted the view which found favour in *Venkatachalam Chetty v. Aiyamperumal Tevan*(1) and with great respect for all that was said by VENKATASUBBA RAO J. we consider this view to be right.

The question is whether the word "enhanced" is to be given its dictionary meaning or whether it is to be given a special meaning so far as section 24 is concerned. This difficulty could have been avoided by more careful drafting but we have got to consider the Act as it is. In our opinion section 24 must be read in conjunction with section 30 and Chapter XI. They contain the only provisions for enhancement of rent. Section 3 (11) in effect says that money payable for water taken without permission shall be deemed to be rent. Therefore it can be recovered as such and the authorities show that if such water is charged for it does not amount to an enhancement of the rent within the meaning of the statute. The claim being one for rent within the meaning of section 3 (11), the Civil Court was closed to the plaintiff and the claim could only be enforced by proceedings instituted under section 77. We hold that the suit was properly instituted and that the fact that the plaintiff sought to recover something extra for water taken by his tenants

during the three years mentioned in the plaint does not mean that he was suing for enhanced rent within the meaning of section 24.

The argument that the terms of the patta precluded the plaintiff from instituting the suit must also be rejected. It is true that paragraph 4 of the patta states :

"It is settled that you should on no account demand a reduction or remission of cist either on account of excess inam or want of rain or for any other reason and that I should on no account enhance the cist at any time on the said Kamatham (holding)."—

but when the patta was drawn up it was never contemplated that the tenants would take water from the landlord's tank without his permission. The fact that the parties did not contemplate an increase in rent in the ordinary way does not preclude the landlord from requiring his tenants to pay for something taken without his permission. The tenants took the water behind the back of their landlord and must pay for it. The law says that it may be recovered as rent and that is what the plaintiff sought to do in the suit out of which this appeal arises.

It follows that we consider that the decision of the learned District Judge is correct and that the plaintiff is entitled to hold the decree granted to him. It has, however, been brought to our notice that the appellant was in fact a tenant for only one fasli (1338), and he will be only liable personally in respect of that year. The rent for three years will of course be a charge on the land. The decree will be modified to this extent. The appeal having failed the respondent is entitled to his costs.

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VARADACHARIAR J.—I agree. I only wish to add a few words in respect of an observation in *Battina Appanna v. Raja Yarlagadda*(1), which has given rise to some criticism in later cases. The principle was there enunciated that where new circumstances have come into existence which require new adjustment there is no question of enhancement. If I may say so with due respect to the learned Judges, there was no difficulty in applying this principle to the facts of the case then before them, but the generality of the language used in the observation gives room for criticism. As has been pointed out in later decisions, the case contemplated in section 30 (ii) may well be held to fall within the general language employed by the learned Judges. The same difficulty arises with reference to the passage in the referring judgment of SRINIVASA AYYANGAR J. quoted by my Lord in the judgment just delivered. It therefore appears to me that the term “enhancement” as used in the Madras Estates Land Act should not be understood either in its etymological sense or even in the sense explained in *Battina Appanna v. Raja Yarlagadda*(1), but in the light of the history of the decisions bearing upon the point in this Presidency. As shown in the judgment just delivered, it was well settled under the Rent Recovery Act of 1865 that the landlord was entitled to claim extra payment when a tenant used the landlord’s water for raising a wet crop on dry land or a second crop on a single crop wet land. As a matter of procedure, it had also been recognised

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

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that a claim of this kind would not amount to an enhancement which required the sanction of the Collector under the old Act. When Act 1 of 1908 was enacted, the Legislature seems to have accepted this view of the law both as to the right of the landlord as well as to the necessity for the Collector’s sanction. It is only in respect of advantages which might be said to have brought about a new *state* of things that proceedings under section 30 were contemplated and not for temporary advantages which at his option the tenant might have enjoyed by the use of the landlord’s water in a manner which he had no right to do. The combined result was achieved by carrying the substance of the proviso to section 11 of the old Act into section 30 and by embodying the effect of the previous case law in the definition of “rent” in section 3 (11) of the Act. The very way in which the definition is framed clearly implies that *prima facie* such a payment will not be included in the conception of rent, but, for the purpose of facilitating the recovery of the same by the landlord, and also with a view to encourage such user instead of regarding it as an illegal or prohibited act, the Legislature preferred to embody the effect of the case law by giving an extended definition to the term “rent” in the new Act. It is true that, as pointed out by VENKATASUBBA RAO J. in *Sundaram Pillai v. Karuppayee Ammal*(1), the extension of the definition will not of itself give a right to the zamindar to impose a charge but the zamindar was assumed to have the right as declared in the older cases and the definition was so framed only

(1) (1935) I.L.R. 59 Mad. 5.

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to indicate the manner in which the zamindar was entitled to recover it. The distinction between payment for temporary advantages of this kind and payment of an enhanced rent in the real sense contemplated in the Act is clearly brought out, if I may say so, in the judgment in *Rajah of Vizianagaram v. Narayanaswami Naidu*(1). In the former case, the basic rent remains the same and the tenant is entitled at his option to take the water or not; in the latter case, the basic rent itself is raised and the tenant will continue to be liable to pay the higher rate of rent whether he cultivates the land or not and whether he takes the water or not, unless he takes steps in the manner provided for in section 32(3) to get the rent reduced.

I wish to add a word about another point raised by Mr. Suryanarayana, namely, that the zamindar will be entitled, even under the older decisions, to claim payment when water is taken from his tank *only* if there is a contract express or implied between the parties providing for such payment. It is no doubt true that in many cases there used to be a clause to this effect in the pattas, providing for the contingency of the tenant taking water from the landlord's tank for raising wet crop on dry land or a second crop on a single crop wet land; but I cannot accede to the contention that the zamindar's right is limited to such cases. The appellant's argument is no doubt supported to some extent by the observations of SRINIVASA AYYANGAR J. in *Venkatayya v. Kistappa*(2), but it is not easy to reconcile them with

(1) (1935) 70 M.L.J. 494, 497.

(2) A.I.R. 1928 Mad. 340.

the express provision in the Act which contemplates a payment for the use of such water even when it is taken without the landlord's permission. It does not seem to me right to assume that the Legislature contemplates only a contractual right. Cases which may even be regarded as claims for damages on the ground of unlawful use of water are equally within the terms of the section; the Legislature preferred that even such claims should be treated as claims for "rent" instead of as claims for damages, it being to the interest both of the landlord and of the tenant that such user should not be prohibited as tortious; (cf. section 45 of the Act of 1908 as to "rent" being payable even by a trespasser).

MOCKETT J.—I agree.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Pandrang Row.

IN THE MATTER OF A PLEADER, RAJAM. *

1937,
November 30.

Legal Practitioners Act (XVIII of 1879), sec. 13 (b)—Suit brought by a lady against her son—Appearance of a pleader for her—Decree passed in her favour—Pleader obtaining an assignment of the decree—Rule 16 of the rules framed under the Legal Practitioners Act—Contravention of—Executing the decree for a sum in excess of what the pleader knew was due under it—Professional misconduct, if.

Where a pleader, who had appeared for a lady in a suit brought by her against her son, obtained an assignment from her of the decree which was passed in her favour in that suit

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held, that the pleader was guilty of grave professional misconduct.

The execution of the decree for a sum in excess of what the pleader knew was really due under it and the recovery of that sum in execution in itself amounted to unprofessional conduct. When it was coupled with the fact that he executed the decree which he himself had bought in direct contravention of rule 16 of the rules framed under the Legal Practitioners Act, the offence became much more serious.

NOTICE under section 13 (b) of the Legal Practitioners Act dated 30th October 1937 having been issued to a Pleader, Rajam, calling upon the said pleader to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty.

The Advocate-General (Sir A. Krishnaswami Ayyar) and N. Rajagopala Ayyangar for the Crown.—There was litigation between the petitioner and his mother Kondamma. The son filed Original Suit No. 657 of 1919 on the file of the District Munsif's Court, Rajam, against his mother for rendition of accounts during his minority and the suit was decreed. The mother filed Original Suit No. 834 of 1924 on the file of the District Munsif's Court, Rajam, against her son for maintenance and it was decreed. The respondent (pleader) appeared for her in the maintenance suit in 1924 and 1925. A first appeal and a second appeal were filed against the maintenance decree but they were dismissed. The suit was filed in *forma pauperis* and the High Court directed that half the court-fee should be paid by the son and the other half by the mother. The son paid his share but the mother did not do so. So the Government attached and executed the maintenance decree and Execution Petition No. 146 of 1933 was filed by the Government Pleader. On 14th December 1932, the son filed Execution Petition No. 189 of 1933 in Original Suit No. 657 of 1919 and obtained permission from the Court to enter satisfaction in both the decrees by way of set-off. In this proceeding, the respondent appeared for the son. Later, the mother filed Execution Petition No. 245 of 1934 in Original Suit No. 834 of 1924

against her son and engaged Mr. P. Umamaheswara Rao as her Vakil. During his absence at the request of his clerk, the respondent appeared for the Vakil and he filed a memorandum of account, Exhibit C-3, showing the amount due to Kondamma which was not correct. Thus the respondent appeared for two clients who had conflicting interests. After appearing for them, he bought from Kondamma (his client) her maintenance decree which had to be executed against her son (also his client) in the Court of the District Munsif, Rajam, where he was practising. This is in contravention of rule 16 framed by this High Court under the Legal Practitioners Act. It is also opposed to the principle underlying section 136 of the Transfer of Property Act. That section of course refers only to actionable claims and not to decrees, but the principle underlying it applies to transfer of decrees also. Exhibit XIII is the transfer deed by which the respondent bought the decree. It shows that Rs. 376-10-0 was due by the son to the mother. In truth what was really due was the above amount less Rs. 169-4-8. The respondent ought to have known of it as he appeared for the son in the previous execution proceedings. After buying the decree, the respondent relentlessly executed it for the amount mentioned in the decree against the son. The petitioner's properties were brought to sale and they were actually sold. The petitioner then deposited the entire sale amount and the sale was set aside. Thus the petitioner paid and the respondent collected Rs. 169-4-8 in excess of the amount really due under the maintenance decree. The respondent is guilty of fraudulent or grossly improper professional misconduct.

B. Jagannadha Doss for respondent.—The suit by the mother and the suit by the son are two different proceedings. Though the respondent appeared for the mother in her maintenance suit, there is nothing to prevent him from appearing for the son in the execution proceedings of his accounts suit.

[THE CHIEF JUSTICE.—Perhaps it would have been good taste not to have done that, but it is not professional misconduct. What do you say about the second charge?]

The taking of the transfer by the respondent from Kondamma is no doubt improper and offends against the rules framed by the High Court. But there is no wilful violation of the rules and there is no dishonest intention in violating them. It was only an honest and *bona fide* mistake. The respondent was ignorant

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of the rules framed by the High Court. Even the Court did not notice them. Neither the pleader for the opposite side nor the District Munsif objected to the transfer at the time of the execution proceedings. The transfer was taken openly and in the respondent's own name. There was no secrecy about it. He paid full consideration for it and he did not recover more than what he paid. Apart from the breach of the rule, there is no moral delinquency in the taking of the transfer. The breach of the rule does not entail punishment unless it is wilful or there is a dishonest intention in violating the rules. [*Shiva Narain Jafa v. Judges of the High Court of Judicature at Allahabad*(1) and *Nagendrabala Dasi v. Dinanath Mahish*(2) referred to.] After taking the transfer of the decree, the respondent executed it for the amount mentioned in the decree. [The Counsel after referring to the various adjustments made by way of set off in the two decrees proceeded :—] No doubt the amount shown as outstanding in the transfer deed is not correct. The calculation on which the amount in the decree was arrived at is based on a memorandum of accounts, Exhibit C-3, filed jointly by the petitioner's pleader and Kondamma's pleader in Execution Petition No. 245 of 1934. Owing to the absence of Kondamma's Vakil, the respondent appeared for him then. As there was some dispute with regard to the amount due under the decree, the Court asked both the pleaders to look into the suit register and file a joint memorandum. The suit register did not contain proper entries. That mistake entered into Exhibit C-3 and that again crept into the transfer deed. The respondent though he appeared for the petitioner in the previous execution proceedings did not remember to what extent the maintenance decree was satisfied.

[VARADACHARIAR J.—There is Exhibit B, the letter, written on the note paper of the pleader and written by the son-in-law of his clerk, which shows that the pleader knew to what extent the decree was satisfied.]

Exhibit B is a forgery. Assuming it to be genuine for the purposes of the argument, he did not remember its contents.

[THE CHIEF JUSTICE.—Your client ought to have known what was really due under the decree at least when he took the transfer.]

(1) (1936) I.L.R. 58 All. 307 (P.C.). (2) (1923) I.L.R. 51 Cal. 299 (P.C.).

He could not know, as the records in the case were taken away from him. He executed the decree for the amount mentioned in the deed of transfer. He came to know of the mistake only when the District Munsif made the report in these proceedings.

[THE CHIEF JUSTICE.—Having got more money, has your client paid back the excess amount to the petitioner?]

No. He is willing to pay it. As the petitioner was asking for more money than was due to him the respondent did not pay. The respondent never intended to commit a criminal breach of trust against the petitioner or a fraud on the Court.

Kasturi Seshagiri Rao for complainant.—An excess amount has been collected from my client in execution proceedings by the pleader. The right to receive it may or may not exist. So he should be directed to pay to my client without driving him to a Court of law.

The JUDGMENT of the Court was delivered by LEACH C.J.—We are called upon to consider the report of the District Judge of Vizagapatam on charges of professional misconduct made against a pleader (respondent) practising in the District Munsif's Court at Rajam. The petitioner is the son of one Mantripragada Kondamma, and in Original Suit No. 657 of 1919 of the Court of the District Munsif of Rajam he sued his mother for an account of the management of his estate during his minority, and on 15th December 1920 obtained a money decree against her. In Original Suit No. 834 of 1924 of the same Court, the mother sued the son for the recovery of maintenance due to her and for future maintenance. The suit was decreed, but the petitioner appealed first to the District Court and then to the High Court. The appeals were dismissed. Kondamma had sued in *forma pauperis* and in dismissing the second appeal this Court directed that half the court-fee should be paid by her and half by her son. The petitioner paid his

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half of the court-fee, but his mother failed to pay her half and Government attached the decree which she had obtained against her son. The respondent acted for the mother in the suit against the son and was in fact her legal adviser during the years 1924 and 1925. In 1925 he agreed to act for the son, and on 14th December 1932 he filed an application in execution proceedings arising out of the decree obtained by the son against the mother in Original Suit No. 657 of 1919. This application was filed the day before the twelve years' period of limitation expired.

The fact that the respondent was acting for the son against the mother did not prevent him from acting for the mother against the son in matters connected with her suit for maintenance. On 18th January 1935 he filed in Original Suit No. 834 of 1924 a memorandum which purported to show what payments had been made by the son towards the decree obtained by the mother. The payments mentioned in the memorandum were Rs. 373-5-0 on 28th June 1928 ; Rs. 83-12-0 on 20th August 1928 ; Rs. 469-13-6 on 21st December 1932 ; and Rs. 94-1-2 on 1st November 1933. The memorandum concluded with a statement to the effect that after giving credit for these payments the amount due to the decree-holder, that is, to the mother, was Rs. 282-9-8. This was not correct because the figure Rs. 469-13-6 against the date 21st December 1932 should have been Rs. 639-2-2. In other words there was an under-statement of the position by Rs. 169-4-8. There was not due by the son the sum of Rs. 282-9-8 but only the sum of Rs. 113-5-0.

On 21st July 1935 the respondent bought the mother's decree against her son. The deed of transfer is Exhibit XIII. It stated that there was due Rs. 376-10-0 by the son to the mother under her decree and the decree was transferred to the respondent for this amount. Having got the mother's decree transferred to him, the respondent then proceeded to execute it against the son. He attached a house belonging to the son and bought the property at the Court auction. The sale, however, was set aside on the son paying into the Court the amount due under the decree. In the execution proceedings the respondent did not make the adjustment in respect of the Rs. 169-4-8, but treated it as being owing by the petitioner, which, of course, was not the case.

As a result of these execution proceedings the petitioner preferred the complaint in respect of which the charges were framed by the District Munsif of Rajam. There were two charges which may be summarised as follows :—(i) The respondent had been guilty of professional misconduct in acting for the petitioner when he had acted for the petitioner's mother against the petitioner. (ii) He had with dishonest intent obtained an assignment of the mother's decree and in executing it had suppressed payments made in reduction, thereby committing a breach of trust against the petitioner and a fraud on the Court. The District Munsif held that the charges had not been proved and consequently found for the respondent. The record and the report of the District Munsif were then submitted to the District Judge who made his own report thereon. The District Judge

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considered that the respondent had been guilty of unprofessional conduct in acting for the son in the circumstances of the case and that he had also been guilty of unprofessional conduct in purchasing the mother's decree and executing it for a sum in excess of what was due. These are the findings which we have to consider.

We consider that the respondent was not guilty of professional misconduct in filing the petition in execution of the petitioner's decree. The petitioner's suit had nothing to do with the mother's suit. It would have shown a spirit more in keeping with the traditions of the profession if the respondent had not acted for the petitioner, but we cannot say that there was anything professionally wrong in so doing. There was no necessity for him to obtain the consent of the petitioner's mother, and there was no likelihood of having to make use of anything obtained by him when acting for the mother.

The second charge, however, stands on an entirely different footing. Rule 16 of the rules of this Court framed under the Legal Practitioners Act, 1879, states that practitioners of Courts subordinate to the High Court are strictly prohibited from purchasing from their clients or from any other person, any interest in any decree passed by the Court in which they practise. The rules were published on 10th December 1934, but as long ago as 9th June 1870 the High Court had issued a circular to the same effect. Section 136 of the Transfer of Property Act prohibits legal practitioners from purchasing or trafficking in any actionable claim and states that no Court of justice shall enforce at the instance of the legal

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practitioner any such actionable claim. A decree does not come within the category of actionable claims, but the principle involved is the same. The respondent, therefore, knew or must be deemed to have known that he was acting contrary to the directions of this Court when he purchased the mother's decree against her son. The learned District Judge expresses the opinion that a Vakil with sound professional ideas would have revolted instinctively at the idea of taking such a transfer, and I am in agreement with this statement. Not only did the respondent purchase this decree from Kondamma, but he executed it knowing that there was a mistake in the suit register, and that he was not entitled to the sum of Rs. 376-10-0, but that sum less Rs. 169-4-8. That he knew the true position is shown by Exhibit B, a letter written on 11th October 1933 at the instance of the respondent to the petitioner. In this letter he specifically refers to the sum of Rs. 639-2-2 which was the amount which should have been recorded on 18th January 1935, instead of the sum of Rs. 469-13-6. In this letter it is stated: "If you pay the said amount (Rs. 123-9-9) accordingly, your decree in full, as well as Rs. 762-11-11 due by you to her up to date, will be satisfied." This shows that he knew the exact position on 11th October 1933 and that the petitioner had only to pay Rs. 123-9-9 to clear off his liability under the mother's decree at that date. That sum of Rs. 123-9-9 was admittedly paid on 30th October 1933.

The respondent has denied the genuineness of Exhibit B, and it has been suggested in the course of the arguments that it was forged for the

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purposes of these proceedings. The respondent denied all knowledge of the document, but he called his clerk who said that it was in the handwriting of his (the clerk's) son-in-law. The son-in-law was then called and he admitted having written the letter and said that he did so on the instructions of the petitioner. If the petitioner were wishing to forge a letter for the purposes of these proceedings (which would in itself be an extraordinary thing to do), I do not consider that he would cause a letter of the nature of Exhibit B to be fabricated. Moreover, Exhibit B sets out in great detail information which could only have been in the possession of the respondent or of his clerk. The letter is a very lengthy one and was written for the purpose of obtaining payment of fees due by the petitioner to the respondent. It was referred to in the complaint itself and I consider that the suggestion that the petitioner induced the son-in-law of the respondent's clerk to fabricate it is too grotesque for serious consideration. We have no hesitation in regarding Exhibit B as a genuine document, which means that the respondent instituted execution proceedings against his own client with full knowledge of the real position and obtained from him a larger sum than was in fact due by him. This in itself amounts to unprofessional conduct. But when it is coupled with the fact that he was executing the decree which he himself had bought in direct contravention of the rules framed by this Court under the Legal Practitioners Act, the offence grows in seriousness. The respondent is guilty of grave professional misconduct, and we are unable to accept the

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recommendation of the District Judge that he should be suspended merely for a period of one month and twenty-two days, the period during which he was actually prevented from practising by the administrative orders of this Court. We consider that the offence is one which should be punished by suspension from practice for a much longer period than this and we direct that the respondent be suspended from practice from now until the end of the next summer vacation of the District Munsif's Court of Rajam. We also direct that the respondent should pay to the petitioner the sum of Rs. 180, representing the amount of Rs. 169-4-8 which he recovered from the petitioner in excess of the true amount and interest thereon. The respondent's sanad will not in any event be issued to him until he has paid this amount.

V.V.C.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and
Mr. Justice Varadachariar.

ANANTHACHARI AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

KRISHNASWAMI alias VENKATAKRISHNA
BHATTACHARIAR (SECOND DEFENDANT), RESPONDENT.*

Hindu law—Partition deed—Joint family composed of an adopted son and a natural-born son and his son—Adopted son acted as manager—Existence of ancestral property—Insufficiency of ancestral property for meeting family necessity and for paying off family debts—Adopted son by his exertions discharging family debts and buying new properties—Partition between adopted son on the one hand and the natural-born son and his son on the other—Adopted son given one half of the joint family properties instead of one-fifth in view of his services to the family—Validity of.

S (adopted son of M), G (posthumous son of M), A (G's minor son) and M.V (G's wife) formed members of a joint Hindu family. By a registered deed of partition the family estate was divided equally between S and G (representing his branch) notwithstanding that S being an adopted son was only entitled in law to a one-fifth share. No question with regard to the validity of the transaction was raised during G's lifetime. Two more sons were born to G after partition. After G's death, M.V., as next friend of her minor sons, filed a suit to recover from S the difference between the share he received and the one-fifth share allowed by law.

It was found: (i) At the time of M's death the joint family income was not sufficient to provide for the maintenance of the joint family, the upkeep of the family property and the discharge of the family debts; (ii) At all material times S had independent sources of income out of which the family debts were all paid

off, improvements were made to the ancestral house, a second house was built and three small plots of land were purchased, and the recitals in the deed of partition, that most of the joint family properties were acquired and improved by S alone, were substantially proved; (iii) The case raised in the arguments on behalf of G's sons, that S must be deemed to have blended his self-acquisitions with the joint family property so as to impress the whole of the properties covered by the deed of partition with the character of joint family properties, was not distinctly raised in the pleadings and there was nothing in the evidence to support the same so far as the house in the village was concerned.

Held: Under the circumstances the deed of partition should be upheld.

Per THE CHIEF JUSTICE.—As S had rendered services of real value to G, the deed of partition could be supported. G had by the said deed in effect conveyed his share in the family property to S in consequence of these services and as A had received his individual share (two-fifths) in the family estate in full, the Court exercising jurisdiction in equity should not allow A to repudiate the transaction. The other sons of G were not born at the time and standing alone had no right to challenge the transaction.

Natesa Iyer v. Rathai Ammal (1) followed. *Venkata Row v. Tuljaram Row* (2) distinguished.

Per VARADACHARIAR J.—(i) When a minor coparcener in a joint family (or a reversioner) is sought to be bound by transactions entered into by an undivided father (or a widow) as a family settlement, it is not enough merely to prove that it was intended to secure peace and harmony in the family or the preservation of its property and that it was not tainted by fraud or similar vitiating circumstances; but it should also be a *bona fide* compromise of a disputed claim. The partition as such could not be upheld as a family arrangement. (ii) Though it is difficult to read into the partition deed an intention on the part of G to relinquish or transfer his share as such, the law can split the transaction and on grounds of equity hold that S is entitled to stand in the shoes of G and claim the share which G could have got if a partition between G and his

(1) (1908) 19 M.L.J. 62.

(2) (1921) I.L.R. 45 Mad. 298 (P.C.).

* Original Side Appeal No. 21 of 1936.

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Ramkishore Kedarnath v. Jainarayan Ramrachhpal(1) followed.

APPEAL from the judgment of LAKSHMANA RAO J. dated 12th February 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 296 of 1931.

K. Rajah Ayyar and *K. E. Rajagopalachari* for appellants.—Exhibit I is the deed of partition in question. On the date of the partition the joint family was composed of an adopted son, whose legal representative is the respondent herein, and a natural-born son and his son (the first appellant) who was then a minor. The joint family had large properties. It was a partition of the two branches. In law the adopted son would be entitled to a one-fifth share and the first appellant and his father to a four-fifths share. Contrary to law the deed purported to give one half to the adopted son and the other half to the first appellant and his father. The first appellant was a minor. The considerations mentioned in Exhibit I do not in law warrant a half share being given to the adopted son. He was the manager of the joint family. His position as such enabled him to get a large income. He threw that income into the hotchpot. Everything had become blended and became joint family property. The whole of the income of the joint family was utilized by him for meeting the family expenses and for paying off the family debts. The first appellant was a minor on the date of the partition. Under those circumstances the giving of a half share to the adopted son is contrary to the decisions in the following cases; *Ganesh Row v. Tulja Ram Row*(2), *Venkata Row v. Tuljaram Row*(3) and *Venkata Row v. Tuljaram Row*(4). The deed of partition could not be supported as a family settlement because no claim was made by the adopted son for a half share and there was no dispute; see *Ramkishore Kedarnath v. Jainarayan*

(1) (1913) I.L.R. 40 Cal. 966 (P.C.). (2) (1913) 26 M.L.J. 460.
(3) 1917 M.W.N. 30. (4) (1921) I.L.R. 45 Mad. 298 (P.C.).

Ramrachhpal(1). The deed could not be construed as a relinquishment in favour of the adopted son by the appellant's father of three-tenths out of his two-fifths share in order to make the adopted son's legitimate share, namely, one-fifth, into a half share; see *Venkata Row v. Tuljaram Row*(2) and *Veeranna v. Seetanna*(3).

K. S. Krishnaswami Ayyangar and *C. Narasimhachari* for respondent.—There is no doubt that the adopted son earned a large income on his own initiative without the help of the family property. Out of that income he paid off a large portion of the family debts. He purchased large properties out of that income. In the partition the natural-born son represented his branch. In view of the services rendered by the adopted son he was given a half share in the partition. The deed of partition could be supported as a family arrangement; see *Ramdas v. Chabildas*(4), *Anantanarayana Iyer v. Savithri Ammal*(5) and *Yechuri Ramamurthi v. Yechuri Ramamma*(6). Moreover it is open to a coparcener to relinquish his share or a portion of the same to another coparcener even without any consideration; see *Peddayya v. Ramalingam*(7) and *Thangavelu Pillai v. Doraisami Pillai*(8). Exhibit I could be construed as a partition arrangement and a relinquishment by one coparcener of a portion of his share in favour of another coparcener. After the partition the adopted son began to enjoy his half share and the natural-born son and his son (first appellant) began to enjoy the other half. The transfer had become completed. As such the equitable principle underlying *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(1), *Veeranna v. Seetanna*(3) and *Natesa Iyer v. Rathai Ammal*(9) could be invoked for upholding the equal division.

K. Rajah Ayyar replied.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.—The appellants are the sons of one Gopala Bhattachariar who died in the year 1931. LEACH C.J.

(1) (1913) I.L.R. 40 Cal. 966 (P.C.). (2) (1921) I.L.R. 45 Mad. 298 (P.C.).
(3) (1929) 59 M.L.J. 139. (4) (1910) 12 Bom. L.R. 621.
(5) (1911) I.L.R. 36 Mad. 151. (6) (1915) 30 M.L.J. 308.
(7) (1888) I.L.R. 11 Mad. 406. (8) (1914) 27 M.L.J. 272.
(9) (1908) 19 M.L.J. 62.

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Gopala, who was the son of one Manavala Ayyangar, was born after his father's death which took place in 1888. Three years before he died Manavala adopted Srinivasa Bhattachariar, the first defendant in the suit out of which this appeal arises. Srinivasa died during the pendency of the suit and he is now represented by the respondent. Srinivasa and Gopala remained joint until 1923 when a partition of the family estate was effected. At this time Gopala had one son, the first appellant, then a boy of five years of age. By the deed of partition which was dated 30th March 1923 the family estate was divided equally between Srinivasa and Gopala, notwithstanding that Srinivasa being an adopted son was only entitled in law to a one-fifth share. No question with regard to the validity of the transaction was raised during Gopala's lifetime, but in the month after his death the suit was launched by the widow as the next friend of the appellants who were then all minors. The first appellant has since come of age. The appellants contend that they are entitled to recover from the estate of Srinivasa the difference between the share he received and the one-fifth share allowed by law. The suit was tried by LAKSHMANA RAO J. who decided that in the circumstances of the case Gopala was justified in giving a moiety of the estate to Srinivasa on partition.

At the time of Manavala's death the estate consisted of about eighty acres of land. He was financially involved and it was necessary to sell a portion of the land to relieve pressure by a creditor. In a good year the income from the lands did not amount to more than Rs. 1,300 and the

only other source of income which the family had was a half share in the *chinna murai* of the Sri Parthasarathi Swami temple, Madras. The income from this half share of the *chinna murai* did not amount to more than Rs. 40 per mensem and in all probability to much less; but whatever the exact figure was it is clear that the joint income was not sufficient to provide for the maintenance of the family, the upkeep of the family properties and the discharge of the family debts.

On 3rd March 1903 the owners of the *peria murai* gave Srinivasa a power of attorney authorising him to supervise the collections in the temple to which they were entitled with power to appoint others to assist him in his work. For these services he was to be paid Rs. 10 per mensem. Srinivasa himself took an active part in collecting monetary offerings from worshippers and it is common ground that he was entitled to retain a percentage of the amounts actually collected by him. His earnings in this respect are said to have amounted to about Rs. 40 per mensem, in addition to the Rs. 10 mentioned in the power of attorney. But it is a legitimate inference from the proved facts in this case that his personal income was not limited to this Rs. 50 per mensem and he must have received much more by way of gifts from wealthy people interested in the temple. Srinivasa held this power of attorney for twenty years and it is very significant that twelve months after he obtained it borrowings on behalf of the family ceased. The significance does not stop there. During the period for which Srinivasa held this power of attorney the family debts were all paid off,

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improvements were made to the ancestral house, a second house was built and three small plots of land were purchased. This could only have been done out of monies which Srinivasa acquired as the result of the position which he held as the agent of the owners of the *peria murai*, and this is, in effect, acknowledged in the deed of partition itself. It cannot be gainsaid that the family income alone was insufficient to do all this and Gopala who was a minor up to 1906 had no separate income of his own, apart from what he earned as a gumastah under Srinivasa, which could not have amounted to much. The position, therefore, was that Gopala had to thank Srinivasa for removing the oppression of debt and reviving the prosperity of the family. In these circumstances it is not surprising, when it was decided to put an end to the joint family status and partition the family estate, that Gopala agreed to Srinivasa having a half share instead of one-fifth. The recitals in the deed of partition show that Gopala realised how much he owed to Srinivasa. These recitals read as follows :—

“Whereas both of us were living hitherto in one joint family, and whereas, in view of certain inconveniences, it is now deemed fit to effect a partition and live separately, and whereas the movable and immovable properties belonging to us in common and mentioned hereunder belonging to us both as our ancestral property and self-acquired property, which are in our possession and enjoyment, are most of them acquired and improved to a great extent by Srinivasa Ayyangar alone the adopted son amongst us, under the patronage of great men, . . .”

The reference to the patronage of great men has been interpreted as meaning that as the result of coming into contact with wealthy

worshippers Srinivasa received substantial gratuities, and no alternative interpretation has been suggested.

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The learned trial Judge had no reason to doubt the truth of the recitals and on the basis that Srinivasa had discharged the family debts held the partition deed to be valid. The learned Advocate for the appellants challenges the correctness of this decision. He says that, because Srinivasa threw into the common fund his own individual income, thereby providing monies for the discharge of the family debts and the improvement of the estate, he could have no claim in law to a greater share than one-fifth on partition. He had blended his own monies with those of the family. There is certainly no evidence to show when the debts were paid off and there is no evidence that Srinivasa ever made a claim to be repaid any monies spent by him for the benefit of the family, or any evidence that he had ever made any stipulation for repayment. Therefore, if the case rested here there would be much to be said for the argument of the learned Advocate for the appellants. The defendants in their written statement supported the partition deed on the ground that Srinivasa had done much for Gopala, and that therefore Gopala was entitled to do what he did. Before us it was also supported on the ground that it was in the nature of a family arrangement, but unfortunately for this argument there is no evidence that it was entered into in order to settle a family dispute or to avoid the expense or delay of litigation, or that there was, in fact, any real necessity for giving Srinivasa a larger share. But as it is true that Srinivasa had

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rendered services of real value to Gopala I think that the deed can be supported. Gopala had by a registered deed in effect conveyed his share in the family property to Srinivasa in consequence of these services and as the first appellant has received his individual share in the family estate in full he cannot be allowed to repudiate the transaction. The other appellants were not born at the time and standing alone have no right to challenge the transaction.

Here it will be convenient to examine some of the authorities which have been quoted to us in the course of the arguments. The first of these is that of *Shivajirao v. Vasantrao*(1). A perusal of the report in that case shows that their Lordships of the Privy Council had at an earlier stage dealt with the validity of a deed whereby a son in consideration of a monetary payment by the father relinquished his own share in the ancestral property, and that at a later stage the Bombay High Court held that this operated to prevent a son born subsequently from having any claim to share in the property. There was here, however, no express transfer by the son to the father and the facts differ to that extent. I will now turn to the series of connected decisions to be found in the reports of *Ganesh Row v. Tulja Ram Row*(2), *Venkata Row v. Tuljaram Row*(3) and *Venkata Row v. Tuljaram Row*(4). One Venkata Row who died in 1871 had four sons, Ramachandra Row, Luchmana Row, Rajaram Row and Tuljaram Row. After the dissolution of the family in 1881 a large

(1) (1908) I.L.R. 33 Bom. 267.
(3) 1917 M.W.N. 30.

(2) (1913) 26 M.L.J. 460.
(4) (1921) I.L.R. 45 Mad. 298 (P.C.).

part of the family property remained in the hands of Tuljaram Row. In 1886, Atmaram, the son of Luchmana, brought a suit for the purpose of ascertaining what the assets in the hands of Tuljaram Row were and for the recovery of his share. In the course of this case it was held that Tuljaram Row was liable to Rajaram Row and his branch of the family in certain sums of money. Rajaram on behalf of his branch agreed to release Tuljaram from payment of these monies in consideration of Tuljaram agreeing not to appeal. In other words, Rajaram gave up his own and his son's rights without any struggle. On the son attaining majority he filed a suit to enforce his rights. This suit failed both in the trial Court and in this Court on appeal, but the case was carried to the Privy Council, where it was held that the compromise not having received the sanction of the Court was not binding on Rajaram's son who was a minor at the time. The agreement did not purport to be a release of individual rights nor to effect any division of the joint family property; it only purported to release the debts owing to Rajaram's branch of the family in consideration of Tuljaram refraining from appealing. The case was then sent back for retrial on the other issues. On the remand this Court decided that the compromise was binding to the extent of the father's share. Another appeal followed to the Privy Council which held that the agreement entered into by Rajaram Row did not purport to be a release of individual rights or shares in the fund at all, and it did not purport to effect any division of the joint family estate then existing between Rajaram Row and

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his son in the subject-matter of the decrees. Their Lordships accordingly held that Rajaram Row's attempt to alienate, or to release from the estate, substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated. But the case before us goes further than this. Gopala did in fact execute in favour of Srinivasa a transfer of half the property and put him into possession of it.

In *Veeranna v. Seetanna*(1) it was pointed out that the compromise there did not purport to alienate the father's share alone but the whole of the family interest in the property and therefore was not binding on the family. It was recognised, however, that when such an alienation has been effected, the Court will enforce an equity in favour of the alienee to the extent of the alienor's share, though it does not follow that the Court will enforce such a compromise before the equity has in fact arisen. In *Natesa Iyer v. Rathai Ammal*(2) it was held that a gift by a member of a joint Hindu family made in consideration of past services voluntarily rendered to the family would not bind any of the members of the family other than the donor, without proof that they were for family necessity or for family benefit; but it would be binding on the donor himself as one made for consideration received. In that case it was pressed upon the Court that past services voluntarily rendered would not amount to consideration to support a promise, but the Court held that it did not follow that the

(1) (1929) 59 M.L.J. 139.

(2) (1908) 19 M.L.J. 62.

services were not of value when set against an alienation. The services rendered were in fact capable of valuation and the defendant had valued them and paid for them by the transfer. This is exactly the case here. It seems to me that in the circumstances of this case the Court, exercising as it does jurisdiction in equity, is entitled to say that the first appellant shall not be allowed to tear up the transfer deed so far as it affects his father's share.

For these reasons I think the decree passed by the learned trial Judge was a correct one. The appeal will accordingly be dismissed with costs.

VARADACHARIAR J.—I agree and shall only add a few observations on the points of law argued before us.

The conclusion of the learned trial Judge that the facts which he found proved "would unquestionably justify the equal division" between the two brothers seems to me, with all respect, open to criticism. On behalf of the appellants, it was contended, with some justification, that, when under the law Srinivasa was only entitled to a fourth of Gopal's share, the fact that Srinivasa (who was the family manager) had by his labours or even with the aid of his self-acquisitions improved the family properties or paid off its debts would not entitle him to claim a larger share. The learned Counsel for the respondent sought to support the lower Court's conclusion as a finding based on the principles applied in favour of family settlements; and he relied in this connection on the decisions in *Ramdas v. Chabildas*(1), *Anantanarayana Iyer v. Savithri Ammal*(2) and *Yechuri*

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(1) (1910) 12 Bom. L.R. 621.

(2) (1911) I.L.R. 36 Mad. 151.

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Ramamurthi v. Yechuri Ramamma(1). The grounds on which "family settlements" are supported are well established; but in applying to a case like the present observations in judgments dealing with family settlements, there is an obvious distinction, which ought not to be lost sight of, between cases in which the question of validity arises only as between the parties to the transaction and those in which it is sought to bind by the transaction persons who were only represented therein by one of the parties thereto. This distinction is material when it is sought to bind Hindu reversioners or minor coparceners in a joint family by transactions entered into by a widow or an undivided father. In this latter class of cases it will not be enough merely to prove that the transaction was intended to secure peace and harmony in the family or the preservation of its property and that it was not tainted by fraud or similar vitiating circumstances.

In *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(2) the sons of a Hindu father impeached an arrangement under which the father had allotted a share in the family property to one who claimed to be a coparcener as the result of an adoption. The sons contended that there had been no valid adoption; but the Courts in India, without trying this question, upheld the allotment on the ground that in the absence of any allegation of fraud or collusion the sons would be bound by their father's act, as

"the arrangement was in the nature of a compromise of a claim either disputed or which might have been disputed".

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

(2) (19:3) I.L.R. 40 Cal. 966 (P.C.).

The judicial Committee remanded the case for further investigation, observing that if on a partition a share is given to a stranger (which the respondent would have been but for the alleged adoption)

"the partition may be impeached as a disposition of property made without consideration unless it can be supported as a *bona fide* compromise of a disputed claim".

I see no difference in principle between the allotment of a share to a person who has no legal claim and the allotment to an admitted coparcener of a share far in excess of his legal claim. The cases relied on by the respondent's learned Counsel will on examination be found to satisfy the test indicated in the extract above quoted. In the present case, the respondent's father raised a plea on the same lines in the written statement; but the respondent did not seriously attempt to establish it at the trial. I am therefore of opinion that the partition under Exhibit I cannot as such be held binding on the plaintiffs' branch.

The respondent is however entitled to succeed on another ground. Gopala had only one son at the date of the partition and his own share would then have been two-fifths of the whole estate. If on any grounds recognised by law, Srinivasa could be held to have become entitled at least to that share, the respondent could insist on maintaining the division under Exhibit I because Srinivasa had not thereby obtained more than his own one-fifth plus the two-fifths share of Gopala. On this footing plaintiffs 2 and 3 who were not in existence on the date of Exhibit I cannot claim any right to disturb the arrangement, Exhibit I; *Shivajirao v. Vasantrao*(1). It has

(1) (1908) I.L.R. 33 Bom. 267.

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been held in some decisions of this Court, *Peddayya v. Ramalingam*(1) and *Thangavelu Pillai v. Doraisami Pillai*(2), that it is open to one coparcener to relinquish his share to another coparcener individually and that no pecuniary consideration is necessary to validate such a relinquishment. It is, however, difficult to read into Exhibit I an intention on the part of Gopala to relinquish or transfer his share as such. The decision of the Judicial Committee in *Venkata Row v. Tuljaram Row*(3) is an authority against reading any such intention into the document; see also *Veeranna v. Seetanna*(4). But, as recognised in *Veeranna v. Seetanna*(4), there is another class of cases in which, though the father's transaction is not valid in law and did not distinguish his own share from that of his son, the law will split the transaction and on grounds of equity hold the father's transferee entitled to stand in his transferor's shoes and claim the share which he could have got if a partition between the transferor and his son had taken place at the date of the transfer. That this principle of equity may be invoked even in connection with transactions in the nature of a partition was recognised by the Judicial Committee in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(5) already referred to. On page 981 their Lordships observe that, as between Kedarnath and Jainarayan,

"it may well be that the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath on a partition; and that the Court, if that position were established, would itself, at Jainarain's

(1) (1888) I.L.R. 11 Mad. 406.
(2) (1914) 27 M.L.J. 272.
(3) (1921) I.L.R. 45 Mad. 298 (P.C.).
(4) (1929) 59 M.L.J. 139.
(5) (1913) I.L.R. 40 Cal. 966 (P.C.).

instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other".

As pointed out in *Veeranna v. Seetanna*(1), this principle of equity can be invoked only when there is a completed transfer by the father, and the transfer is not gratuitous. In *Venkata Row v. Tuljaram Row*(2) the Courts in India had applied this principle but the Judicial Committee reversed that decision because in their Lordships' opinion the facts of the case did not warrant its application. In the present case, Mr. Rajah Ayyar, the learned Counsel for the appellants, sought to exclude that principle on the ground that the transfer of the excess share under Exhibit I was gratuitous. He contended that, as Srinivasa must be deemed to have "blended" his self-acquisitions with the joint family property, the whole property that was divided under Exhibit I had become joint property and there was accordingly no independent consideration moving from Srinivasa. This question of "blending" was not distinctly raised by the plaintiffs at any stage of the case and the limitations governing such a plea are indicated in the recent judgment of the Privy Council in *Nutbehari Das v. Nanilal Das*(3). Even on the evidence as it stands, there is nothing to support the theory of "blending" so far as the house in the village is concerned. Further, assuming for the sake of argument that Srinivasa could not have enforced at law a claim to retain any portion of the properties as his self-acquisition, that will not by itself exclude the equities arising on a transfer for value. That, in

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(1) (1929) 59 M.L.J. 139.
(2) (1921) I.L.R. 45 Mad. 298 (P.C.).
(3) (1937) 2 M.L.J. 114 (P.C.).

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entering into the arrangement embodied in Exhibit I, Gopala acted, and rightly acted, on the footing that he had greatly benefited at the expense of Srinivasa is clearly established by the evidence. This, in my opinion, is sufficient to entitle Srinivasa to the benefit of the equitable principle above referred to; see *Natesa Iyer v. Rathai Ammal*(1). As the transfer had been completed by Exhibit I and the rights of the parties have to be determined as on the date of Exhibit I, the death of Gopala before the institution of this suit or the death of Srinivasa pending the suit can make no difference.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Newsam.

RM. AL. RM. ALAGAPPA CHETTIAR AND ANOTHER
(DEFENDANTS), APPELLANTS,

v.

KANNAPPA CHETTIAR AND THREE OTHERS (PLAINTIFFS
2 TO 5), RESPONDENTS.*

Insolvency—Composition scheme selling all “assets” of insolvents mentioned in schedule—“Assets”—Meaning of—If includes Hindu father’s right to bind his son’s share for proper reasons.

In pursuance of a composition scheme the Official Assignee sold all the “assets” of the insolvents described in their schedule with all the right, title and interest of the insolvents therein to certain persons. On a point arising as to the meaning of the word “assets”,

(1) (1908) 19 M.L.J. 62.

* Appeal No. 228 of 1935.

held: The word “assets” is sufficiently wide to include a Hindu father’s right to bind his son’s share for proper reasons and as such the son’s share was also validly conveyed.

Procedure to be followed in the administration of insolvents’ estates pointed out.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 75 of 1931.

B. Sitarama Rao and V. Ramaswami Ayyar for appellants.

S. Parthasarathi and V. K. Thiruvenkatachari for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by NEWSAM J.—The plaintiffs’ suit for a declaration of their title to a house has been decreed. The two defendants appeal.

The relevant facts may be briefly stated as follows: In Insolvency Petition No. 2 of 1927 on the file of the Rangoon High Court a firm of Nattukottai Chettiers, of which the father of each defendant was a partner, was adjudicated insolvent. On January 17, 1928, what is described as a composition scheme was approved by the Court in an order which has been exhibited as D. The terms were as follows: The Official Assignee was to be paid his expenses and his commission; the creditors agreed to receive and were guaranteed payment of five annas in the rupee by two Chettiar firms, who were described as sureties but who were in reality purchasers of the entire assets of the insolvent firm. In pursuance of this scheme the purchasers of the assets paid Rs. 52,173-9-9 privately to certain creditors and Rs. 55,450 to the Official Assignee for distribution

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to the remaining creditors. These payments amounted to paying five annas in the rupee of the insolvent firm's liabilities. Thereupon by a deed of indenture, dated 22nd February 1928, (Exhibit E) the Official Assignee transferred all the "assets" of the insolvents described in their schedule with all the *right, title and interest* of the said insolvents therein to the sureties (or rather purchasers).

On 28th September 1929 the purchasers sold the suit house to the plaintiff (Meyyappa Chetti) for Rs. 75,000.

The defendants (appellants) are the undivided sons of the insolvent partners. The chief argument developed on their behalf is that the order of the High Court, Rangoon, only empowered the Official Assignee to convey the "assets of the insolvents now vested in him". The power of a Hindu father, manager of a trading family, to sell his sons' share is not, it is argued, an "asset" of the insolvent father. It is an obligation of the sons to their father's creditors, it is said. On the contrary, we are of opinion that it is a pious obligation of the sons to their father, which can only be evaded by attacking the father's debts as immoral. No such attempt has been made in this case. We further think that the word "assets" is sufficiently wide to embrace the father's right to bind his son's share for proper reasons. It undoubtedly enhances a Hindu father's credit that he is entitled to pledge his sons' shares for the good of the family business. This right is therefore an "asset". The same result can be reached in another way: Admittedly the insolvent fathers'

power to sell their sons' share does vest in the Official Assignee. Admittedly also this power was exercised by the Official Assignee under Exhibit E, for he conveyed all the right, title and interest of the insolvents. There is absolutely nothing in the order of the High Court (Exhibit D) which negatived or forbade the exercise of this power. Consequently the sons' share was validly conveyed.

We overrule this contention. But, before leaving this part of the case, it may not be out of place to make a few general remarks on the administration of bankrupt estates. Any deviation from the letter or the spirit of Insolvency law is calculated to open the door to fraud and profiteering. It is far from our purpose to criticise what has happened in this case but to express our views as to what ought to be done in all cases. We think that both the realization and the distribution of the assets of an insolvent should be entirely carried out by the official agency. That is the only safeguard provided both for the insolvent and for his creditors. Incidentally it is the only way in which the Official Assignee can properly earn his commission. We are strongly of the opinion that a purchaser from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money.

Moreover, a composition between an insolvent and his creditors and a sale of an insolvent's assets by the Official Assignee are two distinct things and should be kept distinct. When the two are combined in one hybrid transaction, the issue of the unnatural union must necessarily be of doubtful character.

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We express ourselves thus strongly because, while aware of the practice which exists both here and elsewhere, we think that a stricter adherence to the underlying principles of the Insolvency Act would clarify its complexities and inspire greater confidence by reducing the opportunities for fraud and speculation in bankrupt estates.

The other point taken in appeal is that there was a secret agreement between one of the insolvents (second defendant's father) and the transferees from the Official Assignee whereby the latter, in return for the former's help in realizing assets and a cash consideration of Rs. 5,000, promised to leave each insolvent brother his house. Now this was obviously a fraudulent agreement, assuming it to be a true agreement. It is an agreement which we cannot countenance, being a secret collusive agreement by the appellants' insolvent fathers and the purchasers of their assets from the Official Assignee not to make all their assets available to their creditors but to reserve something, in other words, to defeat the very object of the insolvency proceedings. That is clearly against public policy, and we can only add that the very fact that such an agreement should be openly pleaded is evidence that in insolvency matters dishonesty is commonplace.

We dismiss this appeal with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Newsam.

THE COLLECTOR OF KISTNA AT MASULIPATAM
(FIRST RESPONDENT), APPELLANT,

1937,
August 3.

v.

SREEMANTHU RAJA YARLAGADDA SIVARAMA
PRASAD BAHADUR, ZAMINDAR OF
CHALLAPALLI (PETITIONER-CLAIMANT), RESPONDENT.*

Land Acquisition Act (I of 1894), sec. 23—Zamindar—Land of, acquired—Melwaram interest of zamindar in—Capital value of—Assessment of—Proper method of—Twenty years' purchase rule—Applicability and implication of.

Where land belonging to a zamindar is acquired under the Land Acquisition Act the proper method of assessing the capital value of his melwaram interest therein is to start with his gross income from that land; next to ascertain his net annual revenue therefrom; then to capitalise that net annual revenue by computing the number of years' purchase; and to add to the figure thus arrived at fifteen per cent as compensation for compulsory acquisition.

The net income can be ascertained by deducting a proportion of the peshkush payable by the zamindar to Government and also a proportion of the cost of revenue collection and administration. There is no uniform rule as to the deduction to be made under the latter head. In view of the nature of the property acquired a deduction of ten per cent of the gross income would be fair and equitable.

The rule of the number of years' purchase is not a theoretical or legal rule, but depends upon economic factors, such as, the rate of interest prevailing on gilt-edged securities at the time of the acquisition, i.e., on the date of the notification under section 4 of the Act. There is no uniform or rigid principle that no more than twenty years' purchase should be allowed. Twenty times the net income would be fair if the

* Appeals Nos. 290 to 295 and 354 to 391 of 1935.

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prevailing rate of interest was five per cent. But when there is definite evidence that the prevailing rate of interest was three and a half per cent the number of years' purchase which it would be right to allow would be thirty.

Implication of the twenty years' purchase rule explained.

APPEALS against the decrees of the District Court of Kistna at Masulipatam in Compensation Cases Nos. 1, 5, 7, 10, 20, 22, 42, 47, 49, 50, 51, 53, 58, 60, 63, 65, 66, 68, 71, 73, 77, 79, 87, 88, 90, 94, 96, 98, 100, 102, 104, 108, 112, 114, 127, 138, 143, 146, 154, 156, 162, 164, 197 and 200 of 1935 respectively (Original Petitions Nos. 1, 5, 7, 10, 26, 28, 71, 76, 78, 79, 80, 82, 87, 89, 92, 94, 95, 97, 100, 102, 106, 108, 116, 117, 119, 123, 125, 127, 129, 131, 133, 137, 141, 143, 156, 167, 172, 175, 183, 185, 191, 193, 242 and 245 of 1935 respectively).

(Reference under section 18 of the Land Acquisition Act for enhancement of the amount awarded by the Special Deputy Collector, Masulipatam, in his Awards Nos. 112, 111, 121, 120, 123, 124, 129 and 130 of 1934 ; 1, 2, 3 and 8 of 1935 ; 11 of 1934 ; 15, 12, 19, 17, 23, 16, 6, 18, 21, 49, 50, 51, 53, 52, 62, 75, 74, 45, 66, 60, 67, 39, 31, 81, 69, 77, 63, 86, 72, 76 and 14 of 1935 respectively, dated 30th October 1934, 30th October 1934, 15th November 1934, 15th November 1934, 30th November 1934, 30th November 1934, 31st December 1934, 31st December 1934, 23rd February 1935, 23rd February 1935, 28th February 1935, 25th February 1935, 25th February 1935, 25th February 1935, 26th February 1935, 26th February 1935, 27th February 1935, 25th February 1935, 27th February 1935, 26th February 1935, 27th February 1935, 30th March 1935, 31st March 1935, 31st March 1935, 5th April 1935, 2nd April 1935, 15th April 1935, 24th

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Government Pleader (K. S. Krishnaswami Ayyangar) for appellant.

V. Govindarajachari for respondent.

Cur. adv. vult.

JUDGMENT.

NEWSAM J.—The short question arising for decision in all these appeals is what is the proper method of valuing the melwaram interest in land which is being acquired for public purposes. The method adopted by the Land Acquisition Officer in these cases was to deduct the proportionate peshkush from the melwaram revenue and then to multiply the net income thus found by twenty. The learned District Judge was unable to find a better method but thought that the net income should have been multiplied by thirty. Many of the reasons which he gave for adopting the figure thirty in preference to the figure twenty do not at all commend themselves to us.

These appeals have been filed by Government with the object of restoring the award passed by the Land Acquisition Officer. Cross-appeals have also been filed by the zamindar.

Now, it seems to us that the principles which should be applied in assessing the capital value of the melwaram interest in land may be thus stated. It is necessary to start with the one

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known fact—the gross income of the zamindar from the land which is being acquired. The next step should be to ascertain the net income. This can be done only roughly by deducting a proportion of the peshkush payable by the zamindar to Government and also a proportion of the cost of revenue collection and administration. Neither calculation presents any real difficulty. We think that it would be fair and equitable to make a deduction of ten per cent of the gross income towards the expenses of a revenue collecting and administrative staff. Having thus ascertained the net annual revenue of the zamindar from the land being acquired, it must be capitalised by computing the number of years' purchase. Twenty times the net revenue from property has in the past been commonly taken to be the capital value of any property or interest in property, and the true justification for this was that approximately five per cent was the prevalent rate of interest. But it is clear that the number of years' purchase must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition, i.e., on the date of the notification under section 4 of the Act. The higher the rate of interest on that date, the fewer will be the number of years' purchase. Twenty times the net income would be fair if the prevailing rate of interest was five per cent but if it was two and a half per cent nothing less than forty times the net income would be adequate compensation.

Of course, to the figure thus arrived at must be added the usual fifteen per cent for compulsory acquisition.

Applying these principles to the cases in hand, we find that both the Land Acquisition Officer and the learned District Judge failed to make any deduction from the gross income on account of the costs of a revenue establishment. Further we find that the notifications in these cases were made at the end of 1933 in some cases and at the beginning of 1934 in others, when the rate of interest on gilt-edged securities was approximately three and a half per cent. In the circumstances we are not prepared to interfere with the District Judge's order adopting thirty years' purchase as the proper estimate of the capital value of the melwaram, but the income to be multiplied by thirty should first be reduced by ten per cent in order to arrive at a true estimate of the zamindar's income by allowing for essential establishment charges.

We direct therefore that ten per cent be first deducted from the gross income to allow for collection charges, then proportionate peshkush should be deducted and the result multiplied by thirty. Finally fifteen per cent should be added as compensation for compulsory acquisition.

The Government appeals have thus succeeded in part, though not on the grounds urged, while the cross-appeals have failed. In the circumstances, each party will bear his own costs in the appeals and in the memoranda of objections.

Let these cases fall into two batches (one batch, Appeals Nos. 290 to 295 of 1935, and second batch, Appeals Nos. 354 to 391 of 1935) for the purpose of computing the fees between the Government and the Government Pleader.

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VENKATASUBBA RAO J.—I agree. The only real question that these appeals raise is, what is the number of years' purchase at which the rental of the lands acquired should be capitalised? The contention of the learned Government Pleader that there prevails a rule, to be rarely departed from, that no more than twenty years' purchase should be allowed does not rest upon any sound principle. What does the twenty years' purchase rule imply? It means that the value of the property might be taken to be a capital sum which, if invested at the rate of five per cent per annum, would yield an income equivalent to the rent. Thus, if Rs. 500 represent the annual return and the twenty years' rule is adopted, the capitalised value of the property would be Rs. 500×20 , i.e., Rs. 10,000. Now let this sum be invested at five per cent interest. It would yield a return of Rs. 500. Therefore the twenty years' purchase rule rests upon this assumption: the owner of the property compulsorily acquired, if paid twenty times the annual rental, would get a five per cent return upon his money (five per cent of any given amount being the 1/20th of it). There is another assumption upon which this rule rests, namely, that the return expected from immovable property is five per cent and that therefore if the rental is capitalised at twenty years' purchase, the owner would be properly compensated for the acquisition. It will thus be seen that the rule of the number of years' purchase is not a theoretical or legal rule, but depends upon economic factors, such as, the prevailing rate of interest. That there is no uniform or rigid principle in regard to

the number of years' purchase is illustrated by several decisions. In *Harish Chunder Neogy v. The Secretary of State for India in Council*(1) and *The Secretary of State for India in Council v. Shanmugaraya Mudaliar*(2), the rentals were capitalised at twenty five years' purchase and in *Secretary of State for India in Council v. Sham Bahadoor*(3), twenty-three years' purchase was awarded.

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The return from landed property, generally speaking, reflects the prevalent rate of interest on money investments. One of the criteria in determining the compensation to be awarded is the market-value of the land at the date of the publication of the notification under section 4 (1) (Section 23, Land Acquisition Act). In the present cases, the relevant notifications were published towards the end of 1933 and the beginning of 1934. The Government of India loan at that time took the form of a three and a half per cent issue liable to income-tax. The issue price was reckoned at Rs. 96 per cent, and the loan was repayable at par between 1947 and 1950. When there is definite evidence that the actual return on investments is three and a half per cent, it would be wrong to adopt the arbitrary rule of the twenty years' purchase. The return having been ascertained, the years' purchase is arrived at by dividing 100 by the figure of such return. In the present cases, the return is about three and a half per cent and the number of years' purchase which it would be right to allow would therefore be about thirty.

(1) (1907) 11 C.W.N. 875.

(2) (1893) I.L.R. 16 Mad. 369 (P.C.).

(3) (1884) I.L.R. 10 Cal. 769, 774.

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The learned District Judge has capitalised the rentals at thirty years' purchase and with his conclusion we agree, although, as pointed out by my learned brother, his reasons are wrong.

The rent that is to be capitalised is the net and not the gross rent and the question arises, what should be the deduction on account of collection charges and other contingencies? Here again there is no uniform rule but, having regard to the nature of the property acquired, we think that besides the peshkush, ten per cent of the gross collections may be deducted on account of outgoings.

On this basis the computation should be made and to that sum will be added the statutory allowance of fifteen per cent.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

NAGARUR SAMBAYYA (PLAINTIFF), APPELLANT,

v.

NAGARUR PEDDA SUBBAYYA AND ANOTHER
(DEFENDANT AND NIL), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 78 (2)—Time to be deducted under—Period between date of adjudication and date of annulment and not between date of presentation of petition and date of annulment—Ss. 28, 29 and 78—Scope of and principle underlying—Indian Limitation Act (IX of 1908), sec. 19—"Period prescribed" in—Meaning and computation of.

On 7th May 1922 A executed two promissory notes in favour of B. On 7th November 1922 the creditors of A presented a petition to adjudicate A insolvent. On 21st March 1923 an order of adjudication was passed against A. On 5th April 1928 the order of adjudication was annulled. On 23rd October 1930 a suit on the promissory notes was instituted and the plaintiff sought to escape the bar of limitation by alleging that he was entitled to exclude the whole period during which the proceedings in insolvency were pending, that is, from 7th November 1922, the date of the presentation of the insolvency petition, to 5th April 1928, the date of annulment.

Held: under section 78 (2) of the Provincial Insolvency Act a creditor is entitled to deduct only the period from the date of adjudication (21st March 1923) to the date of annulment (5th April 1928) and as such the suit was barred by limitation.

Atchuta Ramayyagaru v. Official Receiver, East Godavari(1) dissented from.

* Appeals Nos. 449 and 450 of 1931.
(1) (1935) I.L.R. 58 Mad. 1032.

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SUBBAYYA.*Kaliaperumal Naicker v. Ramachandra Aiyar*(1) followed.*Machanjeeri Ahmed v. Govinda Prabhu*(2) distinguished.*Subramania Aiyar v. Meenakshisundaram Chettiar*(3) referred to.

Held further: The relevant provisions which deal with the effect of insolvency on the maintainability of actions are sections 28, 29 and 78. Under these sections the material date is the date of the order of adjudication. Insolvency does not *per se* bar the maintenance of an action. Before the date of the adjudication an action is maintainable without the leave of the Insolvency Court, but thereafter, that is, after the date of the order of adjudication, an action is not maintainable without leave. If any action had been commenced before the date of an order of adjudication, the moment the order of adjudication is passed, the Court before which the suit is pending can either stay or continue it. The statute of limitation for the maintenance of an action in law, once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If an order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment, and if the adjudication is annulled, the period between the date of the adjudication and that of the annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. A prudent creditor, in order to keep his debt alive, would be obliged to file a suit to save it from the bar of limitation in spite of insolvency. No doubt, it may in a sense be futile if an order of adjudication takes place; but he runs the risk of losing the claim altogether if no adjudication is made. If the presentation of an insolvency petition *per se* laid the creditor under a disability, of course, it may stand to reason that the time occupied by the pendency of the insolvency, that is, commencing from the date of the petition, should be excluded; but since the creditor is placed under no such disability, the Legislature has provided that the period during which he is under a disability should be excluded.

(1) (1927) 53 M.L.J. 142.

(2) (1928) I.L.R. 51 Mad. 862.

(3) (1937) 1 M.L.J. 637.

APPEAL against the decree of the District Court of Cuddapah, dated 31st December 1930, in Original Suits Nos. 18 of 1930 and 29 of 1929.

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SUBBAYYA.*B. Sitarama Rao* for appellant.*Kasturi Seshagiri Rao* for *B. Somayya* for respondents.*Cur. adv. vult.*

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—Appeal No. 449 of 1931 raises a question of limitation. The suit was to recover a sum of money due in respect of two promissory notes, dated 7th May 1922 executed by the defendant in favour of the plaintiff. Subsequent to the execution of the promissory notes, the creditors presented a petition in insolvency on 7th November 1922 to adjudicate the defendant an insolvent. The order of adjudication was passed on 21st March 1923. The adjudication order was annulled on 5th April 1928. The suit was instituted on 23rd October 1930. The plaintiff seeks to escape the bar of limitation by alleging that he is entitled to exclude the whole period during which the proceedings in insolvency were pending, that is, from 7th November 1932, the date of the presentation of the insolvency petition, to 5th April 1928, the date of annulment. The contention of the defendant is that the plaintiff is entitled to exclude only the period from the date of the order of adjudication, namely, 21st March 1923 to 5th April 1928, the date of annulment. The learned District Judge has given effect to the contention of the defendant and hence this appeal is preferred by the plaintiff.

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The question is, is this view right?

The relevant provision bearing on the question is section 78, clause 2, of the Provincial Insolvency Act which runs thus :

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section 2 of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded."

Unfettered by authority, according to the plain terms of the section, the period of exclusion is from the date of the order of adjudication to the date of the order of annulment. But it is contended that the date of the order of adjudication in section 78, clause 2, must be deemed to be the date of the presentation of the petition and reliance is placed on section 28, clause 7, of the Provincial Insolvency Act which provides that

"an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made".

The contention is outlined thus. Section 28, clause 7, is a general section relating to adjudication and the consequences of adjudication and must govern the interpretation of the expression "the order of adjudication" wherever it occurs in the Act. This contention seems to be untenable on an examination of the principle underlying that provision and other sections of the Act where the expression "order of adjudication" occurs. Section 28, clause 7, only enunciates the well-known doctrine of relation back in Insolvency law. The principle underlying that

doctrine is that the adjudication has relation to the act of bankruptcy and the property vests by relation from that time in the Trustees in bankruptcy, i.e., the title of the Trustee in bankruptcy or Receiver relates back to the commencement of the insolvency. This is the English rule. Under the English law, the insolvency commences either on the date of the presentation of the petition, or from the earliest act of insolvency committed within three months before the date of the presentation of the petition, and the title of the Trustee in bankruptcy relates to that date. It is also the law under the Presidency-towns Insolvency Act. Under section 28, clause 7, of the Provincial Insolvency Act, the insolvency commences from the date of the presentation of the petition. We do not think that a rule different from the English law and that laid down in the Presidency-towns Insolvency Act was intended to be laid down in regard to the legal consequences flowing from the doctrine of relation back. The only difference, as pointed out by Mulla (Law of Insolvency, page 413), is as to the point of time when the insolvency commences. The whole of section 28 deals with the property of the insolvent and the order of adjudication relates back to and takes effect from the date of the presentation of the petition vesting the property of the insolvent in the Official Receiver as from that date. As explained in *In re Pollitt. Ex parte Minor*(1),

"the result of the relation back is that all subsequent dealings with debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed . . .";

(1) [1893] 1 Q.B. 455.

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vide *Kalianji v. The Bank of Madras*(1) where *In re Pollitt. Ex parte Minor*(2) is cited with approval. And the same view is expressed in *Rangiah v. Appaji Rao*(3), a case on which strong reliance was placed by the appellant, where the learned Judges observe at page 302 that

"section 28, clause 7, is a general clause which applies to all dealings by or with the insolvent, unless any particular dealing is expressly exempted from its operation".

The question now under consideration has nothing to do with any dealing by or with the insolvent but it relates to the maintainability of an action on a debt due by him in a Court of law. The relevant provisions which deal with the effect of insolvency on the maintainability of actions are sections 28, 29 and 28. It will be seen from these three sections that the material date is the date of the order of adjudication. The insolvency does not *per se* bar the maintenance of an action. Before the date of the adjudication an action is maintainable without the leave of the Insolvency Court, but thereafter, that is, after the date of the order of adjudication, the action is not maintainable without leave. If an action had been commenced before the date of an order of adjudication, the moment the order of adjudication is passed, the Court before which the suit is pending can either stay or continue it. The statute of limitation for the maintenance of an action at law, once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If an order of adjudication is made, the operation

of the statute of limitation is suspended till the date of annulment and if the adjudication is annulled, the period between the date of the adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So, under the law as it stands, a prudent creditor, in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. No doubt, it may in a sense be futile if an order of adjudication takes place; but he runs the risk of losing the claim altogether if no adjudication is made. If the presentation of an insolvency petition *per se* laid the creditor under a disability, of course, it may stand to reason that the time occupied by the pendency of the insolvency, that is, commencing from the date of the petition, should be excluded; but since the creditor is placed under no such disability, the Legislature has provided that the period during which he is under a disability should be excluded. Considerable reliance was placed on the decision in *Atchuta Ramayyagaru v. Official Receiver, East Godavari*(1). It was no doubt held in that case that a suit filed and a decree obtained therein after the date of presentation of the insolvency petition and before the date of adjudication were incompetent because the leave of the Insolvency Court had not been obtained before the commencement of the suit. With respect, we are unable to follow this decision. If a suit can

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(1) (1915) I.L.R., 39 Mad. 693, 699. (2) [1893] 1 Q.B. 455.
(3) (1926) I.L.R. 50 Mad. 300.

(1) (1935) I.L.R. 58 Mad. 1032.

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be filed by a creditor without leave before the date of the order of adjudication and the Court before which it is filed has jurisdiction to entertain it and pass a decree thereon, it is difficult to understand how an order passed *ex post facto* by another Court could render such a suit incompetent and the decree passed therein void. The learned Judges have not given due weight to the word "thereafter" in section 28, clause 2, and to the provisions of section 29 of the Act which clearly apply to a state of affairs which occurred in the case with which they were dealing. Under section 29, it was competent to the Court to pass an appropriate order and it was not necessary to pronounce the suit to be incompetent or the decree void. It seems to us that to apply the doctrine of relation back to a suit instituted before an order of adjudication is against the plain language of section 28, clause 2. The view expressed by RAMESAM J. in *Kaliaperumal Naicker v. Ramachandra Aiyar*(1) seems to be sound, viz. :

"Once the order (adjudication) is made, the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or in other words the commencement of the insolvency. For all purposes of the Insolvency Act, this fiction has to be used and it is a very useful fiction; but outside those purposes, it has no place. The filing of a suit prior to the adjudication may be regarded as being outside these purposes with reference to the provisions of section 28, clause 2."

The result of the decision in *Atchuta Ramayyagaru v. Official Receiver, East Godavari*(2) is that, if a creditor files a suit without obtaining leave of the Insolvency Court before the date of the order

(1) (1927) 53 M.L.J., 142.

(2) (1935) I.L.R. 58 Mad. 1082.

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of adjudication, his suit is incompetent; but if he does not file a suit and no order of adjudication is made, he may find his claim barred. We do not think that such a state of affairs was contemplated by the Legislature in enacting section 28, clause 7, and we are therefore unable to adopt the interpretation placed by the learned Judges in *Atchuta Ramayyagaru v. Official Receiver, East Godavari*(1). Again, an examination of several other sections of the Act does not lead to the conclusion that wherever the date of the order of adjudication occurs it must mean the date of the presentation of the petition. The Legislature has kept in view the distinction between these two dates. For example, see sections 30, 74 (5) and proviso to section 55, where the contrast between the two dates is clearly brought out.

There is no direct decision on the point with which we are now dealing, but our attention has been drawn to certain observations in two reported cases, viz., *Machanjeeri Ahmed v. Govinda Prabhu*(2) and *Bandeally Jaffer v. Peer Mohamed*(3). In both these cases the question was whether a creditor was entitled to rely on section 78 (2) in regard to a suit filed while the insolvency proceedings were pending and there was no annulment of adjudication. The learned Judges in both the cases rightly held that section 78 (2) would not apply. In *Machanjeeri Ahmed v. Govinda Prabhu*(2) there is an observation to the following effect:

"If the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period

(1) (1935) I.L.R. 58 Mad. 1082.

(2) (1928) I.L.R. 51 Mad. 862.

(3) A.I.R. 1933 Ban. 75.

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during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property."

We do not think that the learned Judges meant, having regard to the context, that the insolvency proceedings would include for the purpose of exclusion under section 78 (2) the period between the date of the presentation and the date of adjudication. In *Bandeally Jaffer v. Peer Mohamed*(1), no doubt, there are observations to the effect that the whole of the time taken by the proceedings commencing from the date of the presentation of the petition should be excluded; but the observations are entirely *obiter* and are not necessary for the decision of that case.

Again, considerable reliance was placed on a recent decision reported as *Subramania Aiyar v. Meenakshisundaram Chettiar*(2) where it was held that, even though a debt is barred before the date of adjudication, it can be proved in insolvency under section 34 (2). It seems to us that it is unnecessary to examine the correctness of the decision for the purpose of this case; probably that decision may be explainable upon the principle that, once the order of adjudication is made, the administration of the insolvent's estate is under the supervision of the Bankruptcy Court and all the property is vested or must be deemed to have vested in the Trustee in bankruptcy from the date of the presentation of the petition by the doctrine of relation back and the Trustee in bankruptcy is deemed to be a trustee for the creditors who cannot plead the statute of

(1) A.I.R. 1933 Ran. 75.

(2) (1937) 1 M.L.J. 637.

limitation against the creditors for whose benefit he is administering the estate. This seems to derive support from the decision in *Ex parte Ross. In the matter of Coles*(1) cited with approval in *In re Benzon. Bower v. Chelwynd*(2), where CHANNEL J. observed thus:

"*Ex parte Ross. In the matter of Coles*(1) shows that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this, there can be no doubt, but this is only in the bankruptcy."

The proof of a debt in bankruptcy is one thing and the maintainability of an action thereon in a Court of law is another. However, as we have stated, we think it unnecessary to express an opinion in regard to the construction of section 34 as the debt in the present case was not barred on the date of the adjudication.

We therefore hold that under section 78 (2) a creditor is entitled to deduct only the period from the date of adjudication to the date of annulment. The decision of the lower Court is therefore correct and we accordingly dismiss the appeal with costs.

Appeal No. 450 of 1931.

This appeal also raises the same question of limitation, but the facts are slightly different. The material dates are as follows:—

Date of the promissory note ...	8th January 1920.
Payment towards interest ...	1st May 1921.
Date of the presentation of the petition in insolvency ...	7th November 1922.

(1) (1825) 2 Gl. & Jam. 46 & 330.

(2) (1914) 2 Ch. 68.

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Date of adjudication ... 21st March 1923.
Acknowledgment of the debt. 2nd June 1927.
Date of the annulment of the
adjudication ... 5th April 1928.
Date of the filing of the suit ... 23rd September 1929.

But for the acknowledgment relied on, the suit would be obviously barred by limitation in the view we have taken in the connected Appeal No. 449 of 1931. The question is, whether the acknowledgment on the said date would not save the bar of limitation. The learned District Judge has held that the acknowledgment relied on cannot have the effect of extending the time on the ground that it was made after the period of limitation had expired. It seems to us that this view is wrong. Under section 19 of the Limitation Act where, before the expiration of the period prescribed for a suit, an acknowledgment of liability is made, a fresh period of limitation shall be computed from the date of the acknowledgment. The word "prescribed" in section 19 of the Limitation Act is not limited to the period mentioned in the First Schedule of the Act; in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force should be taken into account. This is clear from the recent decision of the Privy Council in *Maqbul Ahmed v. Pratap Narain Singh*(1), where their Lordships observe thus:

"In order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period."

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

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If this principle is given effect to, there can be no question that the acknowledgment in the present suit was made before the expiration of the prescribed period. The suit is therefore in time.

We therefore reverse the decision of the learned District Judge and pass a decree in favour of the plaintiff for the amount claimed with interest at six per cent from the date of the plaint with costs here and in the Court below.

G.R.

APPELLATE CIVIL.

*Before Mr. Justice Pandrang Row and Mr. Justice
Abdur Rahman.*

G. MEENAKSHISUNDARAM IYER (APPELLANT),
APPELLANT,

1937,
November 11.

v.

SWAMINATHA IYER (RESPONDENT), RESPONDENT.*

*Execution of decree—Mortgage suit—Final decree in—Execution
of—Bar to—Unregistered agreement by decree-holder
after preliminary decree and before final decree not to
execute decree against some of hypotheca—If can be plead-
ed in bar of execution.*

It is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder agrees not to execute the decree against two out of four items of the hypotheca and to take out execution only as against the remaining two items.

Chidambaram Chettiar v. Krishna Vathiyar(1) and *Papamma v. Venkayya*(2) followed.

* Letters Patent Appeal No. 11 of 1936.

(1) (1916) I.L.R. 40 Mad. 233 (F.B.). (2) (1935) I.L.R. 58 Mad. 994 (F.B.).

MEENAKSHI-
SUNDARAM
v.
SWAMINATHA.

APPEAL under Clause 15 of the Letters Patent preferred against the judgment of WADSWORTH J., dated 29th November 1935 and made in Appeal Against Appellate Order No. 65 of 1932 against the order of the Court of the Subordinate Judge of Tanjore, dated 8th December 1931 and made in Appeal Suit No. 126 of 1931 (Appeal Suit No. 18 of 1931, District Court, West Tanjore) (Execution Petition No. 137 of 1930 in Original Suit No. 51 of 1914, District Munsif's Court, Tiruvadi).

K. P. Ramakrishna Ayyar for appellant.

K. S. Champakesa Ayyangar for respondent.

JUDGMENT.

PANDRANG
ROW J.

PANDRANG ROW J.—In this appeal the only question for determination is, as stated by WADSWORTH J., whether it is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder agreed not to execute the decree against two out of four items of the hypotheca which were in the enjoyment and possession of the appellant. The learned Judge appears to have thought that the agreement was drafted with a view to avoid the application of sections 17 and 49 of the Registration Act and of Order XXI, rule 2, of the Code of Civil Procedure. This view does not seem to be correct, because if, as contended by the appellant, it is an agreement relating to the execution of the final decree arrived at before the final decree was passed, none of these provisions of law would

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come into operation or affect the agreement in question and there would have been no need to attempt any evasion of such provisions. The general principle was laid down so long ago as 1916 in *Chidambaram Chettiar v. Krishna Vathiyar*(1) which itself recognised the general rule followed for many previous years. This Full Bench decision was again considered comparatively recently in 1935 in *Papamma v. Venkayya*(2) and the judgment of the Full Bench in that case, which was delivered by me, stated that the Full Bench ruling in *Chidambaram Chettiar v. Krishna Vathiyar*(1) covers agreements which relate to the execution of the decree, but not agreements which attack the decree itself. In other words, it has been made clear by this Full Bench decision that any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree. The simple question therefore for decision in this appeal is whether the agreement in this case whereby after the preliminary decree but before the final decree the decree-holder agreed in writing to exclude two items of the hypotheca from execution and to take out execution only as against the remaining two items is an agreement which relates to the execution of the decree or is an agreement which attacks the decree itself. There is nothing in the agreement to show that it was intended to attack the decree sought to be executed, for it cannot be said that it was intended to attack the final decree which had not yet been passed. There is no doubt that

(1) (1916) I.L.R. 40 Mad. 233 (F.B.). (2) (1935) I.L.R. 58 Mad. 994 (F.B.).

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where there is a decree against more than one defendant, an agreement prior to the decree whereby the plaintiff agreed not to execute the decree against one of the defendants can be pleaded in bar of execution of the decree as against him. The present case is more or less similar, for the decree in this case is one for sale and some items otherwise liable to be sold in execution were agreed to be released from such liability to be sold in execution. I do not see how in view of the general rule prevailing in this Presidency an agreement of the kind pleaded in this case can be said to be one which cannot be pleaded. This is not a case in which any money has been paid outside Court when the preliminary decree directs that the money should be paid into Court, in which case it may be said that the payment pleaded is one which is contrary to the preliminary decree. To my mind the point seems to be fairly clear, namely, that the agreement that is pleaded in this case is one that can be pleaded and is not one which the appellant is debarred from pleading in bar of execution of the decree against the items agreed to be released.

The appeal must therefore be allowed with costs. It follows therefore that the order of the first Court allowing execution to proceed without determining the truth of the agreement pleaded must be set aside as well as all proceedings in execution taken thereafter. The first Court must now restore Execution Petition No. 137 of 1930 to its original number on the file and dispose of it according to law after determining, in particular, whether the agreement pleaded by the appellant is true. The appellant is entitled to have his

costs in all the Courts from the respondent decree-holder.

ABDUR RAHMAN J.—Whatever may be my personal view in the matter, I agree that in view of the Full Bench decisions of this Court it is impossible to come to any other conclusion.

A.S.V.

APPELLATE CRIMINAL

Before Mr. Justice Lakshmana Rao.

SINA THANA NAVANA NACHIAPPA CHETTY
(ACCUSED), PETITIONER,

1937,
September 30.

v.

M. NACHIAPPA CHETTIAR (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 503—Examination of a witness in Burma—Issuing commission for—Legality of.

Section 503 of the Code of Criminal Procedure does not empower a District Magistrate to issue a commission for the examination of any witness beyond British India or the territories of any Prince or Chief in India where there is an officer representing the British Indian Government.

Held accordingly that the order of the District Magistrate of Ramnad refusing to issue a commission for the examination of a witness in Burma was legal since Burma has ceased to be part of British India.

Empress v. S. Moorga Chetty(1) and *Emperor v. Corporal Allen*(2) referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High

* Criminal Revision Case No. 384 of 1937 (Criminal Revision Petition No. 352 of 1937).

(1) (1881) I.L.R. 5 Bom. 338 (F.B.). (2) (1909) 10 CrL. L.J. 571.

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NACHIAPPA
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Court to revise the order of the Court of the District Magistrate of Ramnad, dated 12th June 1937 and made in L. Dis. No. 474 of 1937 in Calendar Case No. 23 of 1937, Subdivisional Magistrate, Devakottai.

N. Suryanarayana for petitioner.

T. L. Venkatarama Ayyar for respondent.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

This is an application to revise an order of the District Magistrate refusing to issue a commission for the examination of a witness in Burma and the sole question for determination is whether the District Magistrate has jurisdiction to issue the commission. Section 503 of the Code of Criminal Procedure does not empower the District Magistrate to issue a commission for the examination of any witness beyond British India or the territories of any Prince or Chief in India, where there is an officer representing the British Indian Government [vide *Empress v. S. Moorga Chetty*(1) and *Emperor v. Corporal Allen*(2)] and it is not disputed that Burma has ceased to be part of British India. The existence of Magistrates in Burma to whom commissions might issue if permissible under the Code of Criminal Procedure has no bearing and it follows that the District Magistrate has no power to issue the commission. The revision petition therefore fails and is dismissed.

V.V.C.

(1) (1881) I.L.R. 5 Bom. 338 (F.B.). (2) (1909) 10 Cr.L. L.J. 571.

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APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.*

IN RE A PLEADER, MANNARGUDI.*

1937,
December 6.

*Legal Practitioners Act (XVIII of 1879), sec. 13 (b) and (f)—
Pleader instructing bribing of record clerk of a Court—
Professional misconduct, if.*

For a member of the Bar to suggest that an official or any one should be bribed amounts to professional misconduct of a grave nature.

Where, therefore, a pleader wrote a letter to a Vakil's clerk containing instructions to give a bribe to the record clerk of a District Court for supplying information with regard to certain records,

held, that the pleader was guilty of grave professional misconduct.

The fact that proceedings of this nature are instituted as the result of a grudge makes no difference to the gravity of the offence and cannot be pleaded in excuse.

PROCEEDINGS under section 13 (b) and (f) of the Legal Practitioners Act, dated 26th November 1937, issued to a Pleader, Mannargudi, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty.

The facts of the case are set out in the judgment.

N. Rajagopala Ayyangar for the Advocate-General (Sir A. Krishnarwami Ayyar) for the Crown.—The pleader in this case wrote a letter to a Vakil's clerk in Tanjore asking him to get a copy of the judgment in Small Cause Suit No. 541 of 1925 on the file of the District Munsif's Court, Mannargudi, by offering a bribe to the record clerk of the District Court.

* *In re* A Pleader, Mannargudi.

A PLEADER,
In re.

[The letter Exhibit A was then read.] Giving instructions to bribe the record clerk and get the record clandestinely amounts to professional misconduct on the part of the pleader and he is liable to be punished under section 13, clause (b) or (f), of the Legal Practitioners Act.

A. K. Balakrishnan for the Pleader.—The complainant started the proceedings against the pleader on account of some personal grievance and private grudge. The letter does not show that the pleader intended that the judgment should be obtained secretly. No doubt he suggested that a bribe should be given to the record clerk.

[THE CHIEF JUSTICE.—That is professional misconduct of a grave nature and ought to be dealt with severely.]

Such a practice is common especially in the mofussil. He sincerely repents for writing the letter. The pleader has been practising at the Bar for the last twenty-five years and has an unblemished record. He is aged fifty-six years and wants to retire shortly. So, he may be dealt with leniently with a warning.

K. Sundararaja Ayyangar for complainant.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—A Pleader practising in the Court of the District Munsif of Mannargudi has been charged with professional misconduct and the District Judge of West Tanjore has submitted to this Court his report on the inquiry. The charge against the respondent was that he wrote to one Ramachandra Ayyar, a Vakil's clerk at Tanjore, to obtain surreptitiously a copy of the judgment in Small Cause Suit No. 541 of 1925 on the file of the District Munsif's Court, Mannargudi, by offering some inducement or bribe to the record clerk of the District Court. The learned District Judge has held the charge to be proved, but in the circumstances of the case has suggested that a suspension for a period of two or three months or a severe warning would meet the case.

The letter on which the complaint was based reads as follows :

"Plaintiff's witness, K. Sambasiva Ayyar (Ettakudi Sambu). In the judgment of the above suit, it has been said that Sambu has given false evidence and that he is not honest. So the judgment in the said Small Cause Suit No. 541 of 1925 is necessarily required. Sambu has been committed to the Court of Session, Tanjore. The case is posted for hearing on 31st August 1936 in the Court of the Assistant Sessions Judge. Can we get the above judgment? Give something to the record clerk and ascertain. If you write to me that the above judgment can be got, I shall at once send there Sakti Ammal with money for expenses. Please write a reply to me regarding the above judgment before the coming Tuesday or Wednesday. Let no one know that I have written this letter. Please at once make enquiries in Court and write a reply to me."

We are unable to read this letter as meaning that the respondent was intending to obtain a copy of the judgment referred to surreptitiously. But it certainly does contain instructions to the Vakil's clerk to give to the record clerk a bribe for supplying information with regard to the record. For a member of the Bar to suggest that an official or any one should be bribed amounts to professional misconduct, and professional misconduct of a grave nature. The fact that bribes of this nature have been given by others is no excuse. In this case the learned District Judge has suggested that a lenient view should be taken because the respondent has been a member of the legal profession for twenty-five years and has hitherto held an unblemished record. We will accept this recommendation of the learned District Judge and in view of the past record of the respondent we will not impose the penalty which the offence deserves. We consider that in this case a suspension from practice from now until the end of

A PLEADER,
In re.

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A PLEADER,
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January 1938 will be sufficient, and the respondent will be suspended for this period. But we wish it to be clearly understood that we regard offences of this nature as being grave offences and in future the punishment will be made to fit the offence. I will add that the fact that proceedings of this nature are instituted as the result of a grudge—as appears to be the case here—makes no difference to the gravity of the offence and cannot be pleaded in excuse.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mookett.*

1937,
December 6.

ABUBACKER LABBAI CHINNATHAMBI ROWTHER,
PETITIONER,

v.

MADARSA LABBAI AND ANOTHER, RESPONDENTS.*

Indian Stamp Act (II of 1899), Sch. I, arts. 40 and 57, corresponding to arts. 33 and 46 of the Madras Stamp Amendment Act of 1922—Order of Court under Provincial Insolvency Act (V of 1920), sec. 21—Security bond in favour of Sheristadar of the Court by sureties—Sureties hypothecating immovable property and binding themselves to the Sheristadar that an insolvent would attend when called upon—Stamp duty on such bond to be calculated under art. 40 and not art. 57, Sch. I.

On a reference under section 57 of the Indian Stamp Act by the Board of Revenue,

held, that a security bond for Rs. 4,500 executed by two sureties in pursuance of an order of a Subordinate Judge under

* Referred Case No. 4 of 1936.

section 21 (1) of the Provincial Insolvency Act in favour of the Sheristadar of that Court hypothecating also immovable property and binding themselves to the Sheristadar that an insolvent would attend when called upon, should be stamped under article 40, Schedule I (corresponding to article 33 of the Madras Stamp Amendment Act of 1922), and not under article 57, Schedule I, of the Indian Stamp Act (corresponding to article 46 of the Madras Stamp Amendment Act of 1922).

Stamp Reference by the Board of Revenue(1) and *Akshay Zemindary v. Ramanath*(2) followed.

Raj Raghubar Singh v. Jai Indra Bahadur Singh(3), relied on.

In re Stamp duty on Security bond under Provincial Insolvency Act, section 21(4) and *Tullah Shah-Ram Saran Shah v. Ghulam Hussain*(5) not followed.

CASE stated under section 57 of the Indian Stamp Act II of 1899 by the Additional Joint Secretary of the Board of Revenue, Madras, in his letter, Reference No. P. 4167/36-1, dated 4th November 1936.

Government Pleader (K. S. Krishnaswami Ayyangar) for the Board of Revenue.—The security bond in the case was executed by two sureties in pursuance of an order of the Subordinate Judge under section 21 of the Provincial Insolvency Act in favour of the Sheristadar of the Court. In and by that bond they hypothecated certain immovable properties and also bound themselves to the Sheristadar that the insolvent would attend when called upon. The question for decision is whether stamp duty should be levied under article 40, or article 57, of the First Schedule to the Indian Stamp Act, corresponding to articles 33 and 46 of the Madras Stamp Amendment Act, 1922, respectively. Article 40 deals with a mortgage deed which is not a security bond and article 57 deals with a security bond or mortgage executed by a surety for the due performance of a contract. The Allahabad and Calcutta High Courts have held that article 40 is applicable but the Lahore

(1) (1929) I.L.R. 52 All. 844 (F.B.). (2) (1936) 40 C.W.N. 1281.
(3) (1919) L.R. 46 I.A. 228; I.L.R. 42 All. 158.
(4) (1935) I.L.R. 17 Lah. 74 (F.B.). (5) (1933) I.L.R. 15 Lah. 78.

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High Court has held that article 57 is applicable. In Oudh the latter view has been held to be correct. There is no reported case in Madras or Bombay. Mulla and Pratt in their book on the Indian Stamp Act at page 215, 1935 Edition, say that article 40 is applicable. In section 17 (2) of the Indian Stamp Act a mortgage is defined as an engagement and not as a contract. In section 2 of the Indian Contract Act a contract is defined as an agreement enforceable by law. Section 10 of the Indian Contract Act says that all agreements are contracts if certain conditions are satisfied.

Though the bond is given in the name of the Sheristadar it is really given to the Court. The Court is not a juridical person; see *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1). So there cannot be a contract between the sureties and the Court. Article 57 would apply only if the bond was executed for the due performance of a contract. *In re Stamp duty on Security bond under Provincial Insolvency Act, section 21(2)* is a case similar to the present one. There, it was held that article 57 applied, following an earlier decision in *Tullah Shah-Ram Saran Shah v. Ghulam Hussain* (3) which deals with a security bond executed under Order XLI, rule 5, of the Code of Civil Procedure. There is no discussion in the latter case.

In a Full Bench case, *Stamp Reference by the Board of Revenue* (4), the Allahabad High Court held that article 40 was applicable to a security bond executed under Order XLI, rule 5, of the Code of Civil Procedure. In *Akshay Zemindary v. Ramanath* (5) the Calcutta High Court followed the Allahabad view.

[The Junior Secretary to the Board of Revenue, United Provinces at Allahabad. In the matter of a deed executed by one Thakur Lalta Bakhsh Singh (6) referred to.]

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The following question has been referred to the Court under section 57 of the

(1) (1919) L.R. 46 I.A. 228; I.L.R. 42 All. 158.
(2) (1935) I.L.R. 17 Lah. 74 (F.B.). (3) (1933) I.L.R. 15 Lah. 78
(4) (1929) I.L.R. 52 All. 844 (F.B.).
(5) (1936) 40 C.W.N. 1281. (6) (1930) I.L.R. 6 Luck. 601 (F.B.).

Indian Stamp Act by the Board of Revenue as the chief controlling revenue authority of the Presidency:

“Whether the document, a security bond for Rs. 4,500 executed in pursuance of an order of the Court of the Subordinate Judge of Tiruvarur hypothecating also immovable property, should be stamped under article 40, Schedule 1, or under article 57, Schedule 1, of the Indian Stamp Act.”

These articles correspond respectively to articles 33 and 46 of the Madras Stamp Amendment Act of 1922.

The facts are shortly these. One Abubacker Labbai Chinnathambi Rowther applied in the Court of the Subordinate Judge of Tiruvarur under the Provincial Insolvency Act to be adjudged an insolvent, and under section 21 (1) of that Act was required to give a bond with two sureties for his due appearance in the insolvency proceedings. A bond was accordingly executed by two sureties in favour of the Sheristadar of the Court in the sum of Rs. 4,500 and was stamped under article 57 of the Stamp Act, or rather, under the corresponding article of the local Act. The Madras Board of Revenue have asked the Court to decide whether this is correct. If article 57 does not apply the only other article which can be article 40. This is common ground.

Article 40 prescribes the duty to be paid on a mortgage deed not being an agreement relating to a deposit of title deeds, pawn or pledge, a bottomry bond, a mortgage of a crop, a respondentia bond and a security bond. Article 57 prescribes the duty payable in respect of a security bond or mortgage deed executed by way of security for the due execution of an office, or to

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account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract. It is said that article 57 and not article 40 applies because the bond in question is a surety bond for the due performance of a contract. Section 2 (h) of the Contract Act defines a contract as being an agreement enforceable by law.

The Lahore High Court held in a case headed *In re Stamp duty on Security bond under Provincial Insolvency Act, section 21(1)* that a bond of this nature is a bond for the due performance of a contract and consequently is to be stamped under article 57. In that case the bond differed materially from the bond we are now considering. The bond in the present reference was not executed by the debtor, but merely by the sureties. In the Lahore case the bond was executed by the debtor as well as the sureties. This decision followed a previous decision of the Lahore Court, *Tullah Shah-Ram Saran Shah v. Ghulam Hussain*(2), which concerned a bond given under Order XLI, rule 5, of the Code of Civil Procedure.

The Allahabad High Court has taken a contrary view in *Stamp Reference by the Board of Revenue*(3). A Full Bench consisting of KENDALL, YOUNG and KING JJ. held that the bond given under Order XLI, rule 5, was not a bond for the due performance of a contract, because there could be no contractual relation with the Court. An agreement amounting to a contract must be entered into by the parties with the object of

(1) (1935) I.L.R. 17 Lah. 74 (F.B.). (2) (1933) I.L.R. 15 Lah. 78.
(3) (1929) I.L.R. 52 All. 844 (F.B.).

creating contractual relations between themselves and this was impossible where the Court was concerned. A Bench of the Calcutta High Court in *Akshay Zemindary v. Ramanath*(1) expressed a similar opinion, and expressly held that the word "contract" used in article 57 means a contract as defined in section 2 (h) of the Indian Contract Act.

We agree with the decisions of the Allahabad and Calcutta High Courts. As the Privy Council pointed out in *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(2), the Court is not a juridical person and is incapable of contracting. Moreover, in circumstances such as these there is nothing in the nature of a contract with the Court. When a debtor applies to be adjudicated an insolvent, he is required by law to attend before the Insolvency Court when required. It is not a matter of agreement; it is his duty to be there and if he does not attend when he should attend, the Court can compel his attendance. In this case the sureties did bind themselves to the Sheristadar that the insolvent would attend when called upon, but their obligation was not an obligation connected with the performance of a contract by the insolvent.

For the reasons indicated we are of the opinion that article 40, not article 57, is the appropriate article. We answer the reference accordingly.

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(1) (1936) 40 C.W.N. 1281. (2) (1919) L.R. 46 I.A. 228; I.L.R. 42 All. 158.

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APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and
Mr. Justice Varadachariar.

1937,
August 19.

S. MEERA SAHIB AND BROTHERS (DEPENDANT),
APPELLANT,

v.

HAJEE M. ABDUL AZEEZ SAHIB (SECOND PLAINTIFF),
RESPONDENT.*

Passing off action—Trade mark—Manufacturer of goods not establishing a reputation for a particular trade mark at a particular place—Right of manufacturer to sue for passing off in that place—Importer of such goods establishing a reputation for that trade mark in that place—Right of such importer to sue for passing off in that place—Circumstances creating such right in importer—Knowledge of ultimate purchaser that goods having a particular mark have a reputation and his intention to buy such goods—Essential ingredients to be proved in a passing off action—Knowledge of the ultimate purchaser of the name of the owner of the goods—If necessary.

M.A. was a piece-goods merchant carrying on business in Madras. For twelve years before suit he had been in the habit of buying white twill from B.S. & Co., Ltd., a company carrying on business in London, who was treated for the purposes of the case as the manufacturer of the goods. Having bought the twill from B.S. & Co., Ltd., and imported the same into Madras, M.A. sold it in the Madras Presidency where it had become well known as "diamond" twill. It was known as "diamond" twill because on it was stamped in gold the picture of a diamond with lines representing radiation from the diamond. Above the diamond, was printed in gold the word "diamond", and below, the word "twill". The form of these letters was unusual. The mark was designed by B.S. & Co., Ltd., and so far as the business in England was concerned it had been accepted as belonging to them, but they had never sold goods in

India bearing that mark. Their business had been confined to MEERA SAHIB selling twill to M.A. who, with the full consent of B.S. & Co.,^{v.} ABDUL AZEEZ. Ltd., sold it in India as his own "diamond" twill. S.M. was another piece-goods merchant in Madras doing business throughout the Presidency by importing twills and other classes of piece-goods for sale. From 1933 to 1935 he was importing twill under a mark called the "gold-star" mark. The lettering was of a different character to the lettering of the "diamond" mark. In 1935 he deliberately changed his mark into one which constituted a colourable imitation of the "diamond" mark. B.S. & Co., Ltd., and M.A., filed a suit in Madras against S.M. for an injunction restraining him from using the altered mark and for damages.

Held: (a) Inasmuch as B.S. & Co., Ltd., had not established that they had acquired a reputation for "diamond" twill in India, they had no cause of action against S.M.

(b) M.A. was entitled to an injunction and damages against S.M.

Held also: (i) A merchant who sells particular goods under a particular trade mark is entitled to protection for that mark if he can show that it is associated in the market with the goods which he sells and, in a case where the merchant is not the manufacturer but only an importer who sells the goods under a particular trade mark, the statement in *Imperial Tobacco Company of India, Ltd. v. Bonnan*(1), namely, that "an importer might get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness, and if, therefore, goods though of the same make are passed off by his competitors as being imported by him he will have a right of action", is not exhaustive of all the circumstances in which an importer may acquire the right to the exclusive use of a trade mark.

Ullmann & Co. v. Cesar Leuba(2), *Ebrahim Currim v. Essa Abba Sait*(3) and *West End Watch Company v. Berna Watch Company*(4) followed.

(1) [1924] A.C. 755.
(3) (1900) I.L.R. 24 Mad. 163.

(2) [1908] A.C. 443.
(4) (1910) I.L.R. 35 Bom. 425.

* Original Side Appeals Nos. 20 and 29 of 1937.

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(ii) In such a case it is not necessary either, to show that the ultimate purchaser associates a particular mark with the seller's name. No doubt a reputation must be established, but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods. It is sufficient if the ultimate purchaser knows that goods bearing the particular mark have a reputation and that the mark denotes the goods which he wishes to buy.

Birmingham Vinegar Brewery Company v. Powell(2) and *Madharji Dharamsey Manufacturing Co. v. The Central India Spinning, Weaving and Manufacturing Co.*(3) followed.

Batchayi Rowther v. Ramaswami Pillai(4) referred to and explained.

APPEALS against the judgment of GENTLE J. dated 7th December 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 149 of 1936.

K. Krishnaswami Ayyangar for E. Anthoney Lobo for appellant.

Dr. V. K. John for respondent.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal (Appeal No. 20 of 1937) and Appeal No. 29 of 1937 arise out of a suit which was filed on the Original Side of this Court for an injunction in a passing off action and as they have been heard together they will be dealt with in one judgment. The appellant in this appeal was the defendant in the suit, and the appellant in Appeal No. 29 was the first plaintiff. The respondent in this appeal was the second plaintiff. It will be convenient to refer to them

as the first plaintiff, the second plaintiff and the defendant respectively.

The second plaintiff is a piece-goods merchant carrying on business in Madras. For twelve years before the suit he had been in the habit of buying white twill from the first plaintiff, a company carrying on business in London. For the purposes of the case the first plaintiff has been treated as the manufacturer of the goods, although he in fact did not make them. Having bought the twill from the first plaintiff and imported it into Madras, the second plaintiff sold it in the Madras Presidency where it has become well known as "diamond" twill. It is known as "diamond" twill because on it is stamped in gold the picture of a diamond with lines representing radiation from the diamond. Above the diamond, is printed in gold the word "diamond", and below, the word "twill". The form of these letters is unusual. The mark was designed by the first plaintiff and so far as business in England is concerned it has been accepted as belonging to the first plaintiff, but it is common ground that the first plaintiff has never sold goods in India bearing this mark. His business has been confined to selling twill to the second plaintiff who, with the full consent of the first plaintiff, has sold it in India as his own "diamond" twill. In fact, the goods have been shipped by the first plaintiff to the second plaintiff with the mark stamped on them, and in a letter, dated 12th July 1928, written by the first plaintiff to the second plaintiff the first plaintiff said :

"We have already assured you that we would not under any conditions supply other dealers with twill stamped with your trade mark."

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(1) [1924] A.C. 755.

(3) (1916) I.L.R. 41 Bom. 49.

(2) [1897] A.C. 710.

(4) (1935) 48 L.W. 210.

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LEACH C.J. The words "your trade mark" refer to the diamond mark. In the plaint, however, it was claimed that the plaintiffs were jointly entitled to the exclusive use of the mark and an injunction was asked for on this basis.

The defendant is also a Madras piece-goods merchant doing business throughout the Presidency. He, like the second plaintiff, imports twills and other classes of piece-goods for sale here. From 1933 to 1935 he was importing twill under a mark which he called the "gold-star" mark. It consisted of a five-pointed star with another star in the centre of it. Around this central star were ten other smaller stars. From the star were thin lines intended to represent radiation. Above the star, were the words "gold-star", and underneath, the word "twill". The lettering was of an entirely different character to the lettering of the mark used by the second plaintiff. In 1935 the defendant changed his mark in the following respects: (i) he altered the form of the letters to the very distinctive form used by the second plaintiff; (ii) he filled in the body of the star which had the effect of changing its appearance considerably and made it more in conformity with the plaintiffs' diamond; and (iii) he changed the thin lines representing rays of light to thicker ones and thus made them more like the lines in the "diamond" mark. It is this new mark which the plaintiffs allege constitutes a colourable imitation of the "diamond" mark and in respect of which they seek the injunction.

The case was tried by GENTLE J., who held that the defendant had deliberately changed his mark for the purpose of making it look like the

"diamond" mark and that in its altered form it constituted a colourable imitation of that mark. After discussing the evidence the learned trial Judge rejected the contention that the plaintiffs were the joint owners of the mark, but held that the second plaintiff was entitled to an injunction on the ground that the mark had become associated in the public mind with the goods sold by him. Accordingly he dismissed the first plaintiff from the suit, but granted an injunction to the second plaintiff with costs. He also awarded him a sum of Rs. 500 by way of damages. The defendant has appealed against the decree passed against him, and the first plaintiff has appealed against the order embodied in it dismissing him from the suit.

I will first deal with the appeal against the dismissal of the first plaintiff from the suit. In India there are no statutory enactments of the nature of the Trade Mark Acts which have been passed in England, and relief here can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing off action to show that there has been a false representation. It is not enough for a plaintiff to claim that he has adopted a device as a trade mark and that the defendant has copied this device or used one so like it that deception is probable. The plaintiff must show that he has used the mark claimed by him on his goods or in connection with them and that the mark has become associated in the minds of the public with his goods. There must be user of the mark because without user no reputation can be acquired. In this case the evidence does

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MEERA SAHIB not show any reputation in the first plaintiff
 v. ABDUL AZEEZ. SO far as India is concerned and this finding
 LEACH C.J. is sufficient to dispose of the first plaintiff's
 appeal. It will be necessary to return to the
 question of user when discussing the position
 of the second plaintiff, but the first plaintiff,
 having clearly failed to establish a cause of action
 against the defendant, his appeal must be
 dismissed. I might add that in the course of his
 arguments the learned Advocate for the first
 plaintiff pointed out that it was not necessary for
 the plaintiffs, in view of the attitude of the
 defendant, to lay any stress in the trial Court on
 the plea of joint ownership. The defendant there
 conceded that either the first plaintiff or the
 second plaintiff or both of them together had the
 exclusive right to the use of the "diamond" mark
 in India. We appreciate this, and it is our inten-
 tion merely to deal with the case so far as it
 affects the defendant and to say as little as possible
 with regard to the rights of the plaintiffs *inter se*.

Turning now to the defendant's appeal, I have
 no doubt that the defendant deliberately changed
 his mark in 1935 in order to make it resemble
 the mark used by the second plaintiff and that
 he did this with the object of acquiring part of
 the second plaintiff's trade. I am further of the
 opinion that the alteration was of such a character
 as to make it likely that the mark would be
 mistaken for the "diamond" mark. We have here
 a deliberate intention to defraud. The learned
 Advocate for the defendant, however, contends
 that the second plaintiff is not entitled to the
 injunction granted to him for two reasons. In
 the first place, he says that the second plaintiff is

not the maker of the goods, but merely an MEERA SAHIB
 importer, and therefore he must show that the ABDUL AZEEZ.
 mark has become associated with his name in LEACH C.J.
 some special way as the importer of the goods, and
 not merely as the seller. In the second place, he
 says that before the second plaintiff can obtain
 relief he must also show that the ultimate
 purchaser associates the mark with his name. He
 maintains that these conditions have not been
 fulfilled in this case.

On the first point the learned Advocate for the
 defendant has cited many cases, but a detailed
 discussion of them is not called for. His argu-
 ment is really based on a passage in the judgment
 of the Privy Council in the case of *Imperial
 Tobacco Company of India, Ltd. v. Bonnan*(1),
 where it was pointed out that an importer might
 get a valuable reputation for himself and his
 wares by his care in selection or his precautions
 as to transit and storage, or because his local
 character is such that the article acquires a value
 by his testimony to its genuineness, and if there-
 fore, goods though of the same make, are passed
 off by competitors as being imported by him he
 will have a right of action. But this statement
 does not pretend to be exhaustive and to declare
 all the circumstances in which an importer may
 acquire the right to the exclusive use of a trade
 mark. A merchant who sells particular goods
 under a particular trade mark is entitled to
 protection for that mark if he can show that it is
 associated in the market with the goods which he
 sells, because the law will not permit a person to

(1) [1924] A.C. 755.

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pass off his goods for those of another. This is the governing principle and it matters not whether the merchant has goods made for him abroad or whether he has them made for him within the country. A decision of the Privy Council which has a direct bearing on this case is that of *Ullmann & Co. v. Cesar Leuba*(1). The plaintiffs there were manufacturers of watches in Switzerland and had acquired the business and trade marks of another Swiss firm of watch manufacturers. The firm from which the plaintiffs had acquired these trade marks had been in the habit of supplying watches to a customer carrying on business at Hong Kong who sold them under the manufacturers' trade marks. The plaintiffs instituted a passing off action in Hong Kong against another dealer there on the ground that he was infringing the rights which they had acquired. Their Lordships held that the trade in Hong Kong belonged to the original importer and that the plaintiffs had not sufficient interest to found a cause of action. The same principle was applied by this Court in *Ebrahim Currin v. Essa Abba Sait*(2) and by the Bombay High Court in *West End Watch Company v. Berna Watch Company* (3).

In this case the evidence does establish the fact that the "diamond" mark is associated with the twill sold by the second plaintiff, and he having established his reputation in connection with this mark the fact that the suppliers of the goods have also acquired a reputation in connection with it in another country does not affect him.

(1) [1908] A.C. 443.
(2) (1900) I.L.R. 24 Mad. 163.

(3) (1910) I.L.R. 35 Bom. 325.

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The manufacturer has never used the mark in India, and it was open to the second plaintiff to adopt it for his business in India, which, as I have already pointed out, he did with the full consent of the manufacturer. The defendant has altered his mark for the purpose of gaining for himself part of the business which his rival has built up, and in view of the probability of deception the second plaintiff has a cause of action.

The contention of the defendant that the second plaintiff must show that the ultimate purchaser associates this mark with his name is also fallacious. A reputation must be established, but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods. In this connection I will refer to certain passages in the judgments in *Birmingham Vinegar Brewery Company v. Powell*(1) which is the well-known *Yorkshire Relish* case(1). Lord HALSBURY observed (page 713):

"It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants 'Yorkshire Relish' to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not 'Yorkshire Relish' in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

In the same way it would be a fraud to place in the hands of a customer who wanted "diamond" twill, twill bearing the mark of the defendant.

(1) [1897] A.C. 710.

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ABDUL AZEEZ. In the course of his judgment Lord HERSCHELL said (page 715):

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"In the present case it seems to me that 'Yorkshire Relish' meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular manufacture, and that when a person sold 'Yorkshire Relish,' as the defendants did by selling it as 'Yorkshire Relish' and calling it 'Yorkshire Relish,' they represented to the public that it was that manufacture which was known as and by the name of 'Yorkshire Relish'."

In *Madhavji Dharamsey Manufacturing Co. v. The Central India Spinning, Weaving and Manufacturing Co.*(1) SCOTT C.J. held that where goods have acquired, by a particular fancy description, combination or device, a reputation in the market it is immaterial that the customers do not know who the maker is, and relied on the remarks of Lord HALSBURY in the *Yorkshire Relish* case(2) and similar remarks of Lord HATHERLEY in *Wotherspoon v. Currie*(3). It is, therefore, quite clear that the second plaintiff has not got to show that the ultimate purchaser knows his name and associates his name with the "diamond" mark. It is sufficient if the ultimate purchaser knows that goods bearing this mark have a reputation and that this mark denotes the goods which he wishes to buy.

We do not regard the damages awarded as excessive and the only further question requiring consideration is the form of injunction. The learned trial Judge has issued an injunction prohibiting the use of the offending mark on all classes of piece-goods. It has been said on behalf of the defendant that this is too wide. In their

(1) (1916) I.L.R. 41 Bom. 49.

(2) [1897] A.C. 710, 715.

(3) (1872) L.R. 5 H.L. 508.

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plaint the plaintiffs asked for an injunction in respect of all classes of piece-goods and in the trial Court it was not contended by the defendant that an injunction of this nature would be too wide if the plaintiffs succeeded in establishing their rights to the "diamond" mark. It was in fact taken for granted that they would be entitled to an injunction in this form if the right to exclusive user was proved. The second plaintiff and the defendant deal in the same kind of piece-goods and the "diamond" mark has become associated in the trade with the second plaintiff. In these circumstances we see no reason to alter the form of the injunction. Both the appeals are accordingly dismissed. In Appeal No. 20 the second plaintiff will be entitled to costs against the defendant, but the defendant will be entitled to costs in Appeal No. 29, as he has been successful there.

VARADACHARIAR J.—I agree. I wish to add a few words with reference to the decision in *Batchayi Rowther v. Ramaswami Pillai*(1) as the learned Counsel for the appellant relied on some observations of mine there as supporting his contention that the plaintiff in a "passing off" action must show that the persons purchasing the goods knew of the manufacturer or merchant by name and associated such name with the goods. That this is not the law is shown by the observations quoted by my Lord from the *Yorkshire Relish* case(2). To the same effect there are also statements in *William Edge & Sons, Limited v. William Nicolls & Sons, Limited*(3) and *Slazenger &*

VARADACHARIAR J.

(1) (1935) 43 L.W. 210.

(2) [1897] A.C. 710.

(3) [1911] A.C. 693, 702, 705.

MEERA SANIB Sons v. *Spalding & Brothers*(1). See also *Wul-*
ABDUL AZEEZ. *ving v. Jivandas & Co*(2). As the observations of
VARADA- Lord HERSCHELL in the *Yorkshire Relish* case(3)
CHARIAR J. have been referred to in my judgment in *Batchayi*
Rowther v. Ramaswami Pillai(4), it will not be a
 fair interpretation of that judgment to suggest
 that there is anything in it to support the appel-
 lant's present contention. The point I had then
 to determine was whether the plaintiff had shown
 a right to sue at all. He had certainly to establish
 some connection in a sense known to law, such as
 manufacturer, seller, importer, etc., between him-
 self and the article which was alleged to have
 obtained a reputation. On the evidence in that
 case, it appeared that it was the plaintiff's brother
 that had been manufacturing and selling the goods
 but the plaintiff did not claim in his brother's
 right. There was very little evidence as to what
 happened after the brother's death. It was on
 those facts that, after making a quotation from
Mahomed Esuf v. Rajaratnam Pillai(5), I observed
 that there was

"no evidence to establish any such association in the
 public mind between the plaintiff's business and the goods
 bearing the mark in question".

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(1) [1910] 1 Ch. 257.

(3) [1897] A.C. 710.

(2) [1924] I.L.R. 50 Bom. 402, 412.

(4) (1935) 43 L.W. 210.

(5) (1909) I.L.R. 33 Mad. 402.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice Stodart.

THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM
 (REFERRING OFFICER), APPELLANT,

1937,
 May 4.

v.

SRI RAJA VYRICHERLA NARAYANA GAJAPATIRAJU
 BAHADUR GARU, ZAMINDAR OF CHEMUDU AND PROPRIETOR
 OF ANAKAPALLE, ETC., ESTATES, VIZAGAPATAM
 (FIRST CLAIMANT), RESPONDENT.*

*Land Acquisition Act (I of 1894), sec. 18—Court to which
 reference made under—Jurisdiction of, to consider basis of
 value not put forward before Land Acquisition Officer and
 in objections to his award—Sec. 24 (5) of the Act—Use to
 which land will be put when acquired—Increase to its value
 likely to accrue from—Compensation for—Claimant's
 right to.*

Though section 18 (2) of the Land Acquisition Act requires
 that the application for a reference to Court shall state the
 grounds on which the objection is taken, there is a sufficient
 compliance with the provisions of that sub-section if the
 application states on which of the four heads of objection
 detailed in sub-section 1 the applicant proposes to rely. On a
 reference to Court under section 18 of the Act, though as a
 matter of procedure a claimant should ordinarily be confined to
 the basis of value which has been put forward before the Land
 Acquisition Officer, the Court has jurisdiction in a proper case
 to consider the effect of valuation on a different basis.

Held, accordingly, that the Court below had jurisdiction to
 award compensation for the value of the "special adaptability"
 of the land acquired for supplying drinking water otherwise
 than to the claimant's own unacquired lands, though the
 claimant had not claimed either in his original statement of
 claim or in his objections to the award of the Land Acquisition
 Officer compensation for that value.

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Pramatha Nath Mullick v. The Secretary of State for India(1) and *Lakshminarasamma v. Assistant Commissioner of Labour*(2) explained and distinguished.

The Secretary of State for India in Council v. Subramania Aiyar(3) held to go too far if it intended to lay down that the Court has no jurisdiction in a proper case to allow the claimant to vary the basis of his objection or to frame an issue relating to the same head of objection but not arising precisely out of the pleadings.

Where it was found that the "special adaptability" of the land acquired for supplying drinking water had no value apart from the value created by the scheme for the purpose of which it was acquired, that the "special adaptability" had no prospect of becoming an element of value apart from that scheme and that its value therefore was the result of that scheme.

held further that the Court below erred in awarding compensation for the "special adaptability" of the land acquired for supplying drinking water to persons outside the claimant's estate.

To award compensation for the "special adaptability" in such a case would be to do that which cannot be done with reference to section 24 (5) of the Land Acquisition Act, i.e., to take into account the increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired.

Case-law reviewed.

APPEAL against the award of the Court of the Subordinate Judge of Vizagapatam, dated 11th September 1933 and made in Original Petition No. 32 of 1929.

W. W. K. Page (of the Calcutta Bar) and *K. I. Subramania Ayyar* for appellant.—The respondent not having made any claim before the Land Acquisition Officer for compensation for the value of the "special adaptability" of the land acquired for supplying drinking water otherwise than to his unacquired lands, the Subordinate Judge had no jurisdiction to award compensation for that "special adaptability". There is no doubt nothing on the face of the Land Acquisition Act to restrict his

(1) (1929) L.R. 57 I.A. 100.

(2) (1925) 23 L.W. 731.
(3) (1929) 59 M.L.J. 30.

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jurisdiction, nothing in that Act which says that if a claimant does not make a claim under one of the four heads mentioned in section 18 thereof he shall not make a claim under that particular head when he comes to Court. We must look to the scheme of the Act to see whether or not jurisdiction does extend so as to re-open the whole matter before the Court. The relevant sections of the Act are sections 9, 11, 12, 15, 18, 20, 21 and 23. Section 9, the first relevant section, requires the claimant to appear before the Land Acquisition Officer and to state the nature of his interest in the land sought to be acquired and the amount and particulars of his claim to compensation for such interest. He must put forward all the objections he has to the notification and to state particulars. [Sections 11, 12 and 15 were then referred to.] Section 18 requires the claimant to state by a written application that he requires the matter to be referred to the Court. The section contemplates four kinds of objection being taken to the award (*vide* sub-section 1) and the claimant may take objection under any one of the heads mentioned in that sub-section. Sub-section 2 of the section, however, requires him to state the grounds of his objection. He is not bound to mention the sub-heads nor is he bound to state *verbatim* what his grounds are. It will be noticed that there is nothing in section 18 to restrict the grounds of objection to anything which might or might not have been urged before the Land Acquisition Officer. Section 20 speaks of "the objection"; that is, it is all one objection, whether based on one head or more heads than one. The Privy Council has held in *Pramatha Nath Mullick v. Secretary of State for India*(1) that the jurisdiction of the Court with reference to section 18 (1) of the Land Acquisition Act is confined to the objection which has been raised in the written application of reference, that is to say, that the objection considered by the Court must fall under the same category in section 18 (1) as the objection pleaded. If, therefore, in his written application of reference the claimant takes objection to the measurement of the land and then comes to Court and takes objection to the amount of compensation, the Court has no jurisdiction to consider that objection. But the point for decision in the present case is different. It is whether a claimant, provided he keeps to the same head,

(1) (1929) L.R. 57 I.A. 100.

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can make a new claim which he did not make before the Land Acquisition Officer and whether the Court has jurisdiction to consider such a claim. The contention of the appellant is that a claimant cannot by merely keeping to the same head make a new claim which he did not make before the Land Acquisition Officer and the Court has no jurisdiction merely because the head of claim before it is the same as the head of claim before the Land Acquisition Officer to consider a claim that was never put forward before that officer. If, in advancing a claim before the Land Acquisition Officer, the claimant bases it on more than one footing, such as (i) the value of the land as agricultural land and (ii) the value of the land as a potential building site, and confines his claim for compensation to those two bases alone, and then requires the Land Acquisition Officer under section 18 to make a reference stating that he objects to the amount of compensation as being too low, he cannot in the Court, in addition to or substitution for those two bases of claim, make a claim on another and a totally different basis, as, for example, that he is entitled to a larger amount of compensation on the basis of the potential adaptability of the land as a marble quarry or as a reservoir for water-supply. The Court is not entitled to range over the whole field of compensation but is confined to those fields of compensation which were urged before the Land Acquisition Officer. There would be no end to acquisition proceedings if claimants were entitled to change their case as and when it suited them. There is no hardship in confining a claimant to the grounds which he urged before the Land Acquisition Officer. It is not in any way contrary to the policy of the Act that the Court should be limited to what was advanced before the Land Acquisition Officer because a statutory duty is laid on the claimant by section 9 of the Act to state the nature of his interest and the amount and the particulars of his claim. The question is not one of mere procedure which can be waived but is one of jurisdiction.

[Reference was made to the following cases as appearing to be contrary to the contention of the appellant:—*Hughli Mills Co. v. Secretary of State for India in Council*(1), *In re Land Acquisition Act. In re Rustomji Jijibhai*(2), *Gangadara Sastri v. The Deputy Collector of Madras*(3), *Zia-ud-Din v. Secretary*

(1) (1903) 12 C.L.J. 489

(2) (1905) I.L.R. 30 Bom. 341.

(3) (1912) 22 M.L.J. 379, 386.

of State(1), *Mahananda Pal v. The Secretary of State for India in Council*(2), *Promotha v. Secretary of State for India in Council*(3) and *Provident Investment Co., Ltd. v. The Land Acquisition Officer*(4).]

[The following cases were referred to as supporting the appellant's contention: *Abu Bakar v. Peary Mohan Mukerjee*(5), *The Secretary of State for India in Council v. Fakir Mohammad Mandal*(6), *The Secretary of State for India in Council v. Subramania Aiyar*(7), *Lakshminarasamma v. Assistant Commissioner of Labour*(8) and *Collector of Chingleput v. Krishnaveni Ammal*(9).]

There is nothing in any of the above decisions which is directly against the appellant's contention, while, so far as this Court is concerned, *The Secretary of State for India in Council v. Subramania Aiyar*(7) and *Lakshminarasamma v. Assistant Commissioner of Labour*(8) support that contention, the former being a clear and direct authority on the point.

The next question is whether, assuming that the Subordinate Judge had jurisdiction to entertain the claim to compensation based on the "special adaptability" of the lands acquired, the respondent was entitled to compensation on the basis that the lands were a potential reservoir and a potential source from which he might have supplied water to the Harbour administration. Sections 23 and 24 of the Act are the only sections relevant to this part of the case. Section 23 enumerates the matters which the Court ought to take into consideration in determining the amount of compensation to be awarded. They are, *inter alia*, the market-value of the land acquired as on the date of the notification, the damage, if any, sustained by the claimant at the time of the Collector's taking possession of the land by reason of severance thereof from his other lands and the damage, if any, sustained by him at that time by reason of the injurious affection of his other property. Section 24 enumerates the matters which the Court must exclude from consideration in determining the amount of compensation. The only two matters which need be stressed are the degree of urgency which has led to the acquisition and any increase to the value of the land acquired likely to

(1) (1919) I.L.R. 1 Lah. 352, 354.

(3) (1924) 40 C.L.J. 105.

(5) (1907) I.L.R. 34 Cal. 451.

(7) (1929) 59 M.L.J. 30.

(2) (1919) 24 C.W.N. 716.

(4) (1935) I.L.R. 60 Bom. 1.

(6) 1926) 45 C.L.J. 185, 186, 187

(8) (1925) 23 L.W. 731.

(9) A.I.R. 1933 Mad. 190.

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accrue from the use to which it will be put when acquired. Land in India does not include water. This must be borne in mind in considering some cases where the subject-matter is water alone. What is acquired under the Indian Act is land which word is defined in section 3 (a) thereof. Water is capable of acquisition only as an incident of land whether it be in the form of a tank or a stream. In England also, under the Land Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), water as such cannot be acquired. [Sections 2 and 63 of the Act were referred to.] In England when it is desired to acquire water as such, recourse is had to the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). [Sections 2, 3, 6 and 12 of that Act were referred to, to make clear the statutory provisions under which the cases in England are decided.] There is one other Act in England, the Acquisition of Land (Assessment of Compensation) Act, 1919, the effect of which the Subordinate Judge has misunderstood. That misunderstanding has led him into the error into which he has fallen in the present case. The Act of 1919 contains an express provision that the special adaptability of the land acquired for a particular purpose cannot be taken into account when there is no market apart from the special needs of the particular purchaser. That provision has led the Subordinate Judge to the erroneous inference that the law in England as it stood prior to that Act was entirely changed by it. The question in the present case falls to be decided by the principles laid down in the English decisions prior to the Act of 1919. The briefest summary of the law will be found set out in Hailsham's Edition of Halsbury's Laws of England, Vol. VI, pages 45 and 46. The principles deducible from the cases cited may be stated shortly as follows:—

(i) What the owner is entitled to receive as compensation is the value of the property to him and not its value to the acquiring authority.

(ii) The value to the owner is to be assessed, not having regard alone to the use to which he has put the property at the date of the notification under section 4 of the Land Acquisition Act, but having regard also to all its potentialities as at that date and having regard also to any then existing restrictions on the user of the property in the hands of the owner; that is to say, regard is to be had to the most lucrative use to which, subject to such restrictions, it could then be put by the owner.

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(iii) In ordinary circumstances, the best test of the value to the owner is the market-value at the date of the notification; and if such value exists, the Court is bound to take it into consideration. Market-value means the price which the owner, if a willing seller, would obtain in the market at the date of the notification from a willing buyer, i.e., a buyer not under any compulsion to buy. But market-value is not the only test. It may be that the real value of the property lies not in itself but in its relation to other property of the owner, i.e., that the compensation to be awarded must be the amount of loss suffered by reason of damage done to other property of the owner by depriving him of the property acquired.

(iv) In assessing market-value, the market may be an imaginary market. It is not necessary that there should be evidence of actual offers made for the property. There need not be evidence of the existence of specified purchasers. It is sufficient if there are found circumstances in view of which it is reasonable to presume that there exist what may be termed "natural" buyers, persons who may reasonably be presumed to be probable buyers.

(v) There must be excluded from consideration in assessment of the value any value which will accrue to the land acquired by reason of the use to which it will be put after acquisition, any value which will in future—after the date of the notification—accrue to the property by reason of further development or completion of the undertaking for the purpose of which the acquisition is made. But that clearly is not to say that there must be excluded from consideration any value which has accrued to the property at the date of the notification by reason of the then partial execution of the undertaking.

(vi) Where there exists in the property "special" or "natural" adaptability, that is to say, where it is found that the property is peculiarly fitted for or adaptable to a particular use, that is an element in its potential value which must be taken into consideration.

(vii) In taking any potentiality or adaptability into consideration, the value to be put on such potentiality or adaptability must be its value as an unrealised possibility, not a value calculated on the basis that the property had been in fact put to such use at the date of the notification. The value

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of such potentialities must be estimated by prudent business calculations, not by speculative or unpractical imagination.

(viii) Where there is no buyer of the property—that is to say no person, who, regard being had to the circumstances existing at the date of the notification, can be reasonably presumed to be a probable buyer—other than the acquiring authority—"special" or "natural" adaptability cannot be taken into consideration. To take it into consideration in such circumstances would be to make the public or other acquiring authority pay for its own improvements, to render the statutory power of compulsory purchase of no value, to make the value payable the value to the acquirer and not that to the owner and to take into consideration the urgency which has led to the acquisition.

[Reference was made to the following cases:—*Ferrand v. The Corporation of Bradford*(1), *Stone v. Corporation of Yeovil*(2), *Lord Blantyre v. Babbie*(3), *Trent-Stoughton v. Barbados Water Supply Company*(4), *Vallabhdas Naranji v. The Collector*(5), *Collector of Chingleput v. Krishnaveni Amma*(6), *Mohini Mohan Banerjee v. The Secretary of State for India in Council*(7), *South Eastern Railway v. London County Council*(8), *In re Gough and Aspatria, Silloth and District Joint Water Board*(9) the appellate judgment in the case being reported as *Gough and Aspatria, Silloth and district Joint Water Board, In re*(10), *In the matter of Countess Mary Ossalinsky and the City of Manchester*(11), *In re Lucas and Chesterfield Gas and Water Board*(12) the appellate judgment in the case being reported as *Lucas and Chesterfield Gas and Water Board, In re*(13), *Cedars Rapids Manufacturing and Power Company v. Lacoste*(14), *Inland Revenue Commissioners v. Clay*(15), *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*(16), *Marwadi Padmaji Maichand v. Deputy Collector of Adoni*(17), *Fraser v. City of Fraserville*(18), *Bijayakanta Lahiri Chaudhury*

(1) (1856) 21 Beav. 412, 414; 52 E.R. 918. (2) (1876) 2 C.P.D. 99, 108, 112.

(3) (1888) 13 App. Cas. 631, 638.

(5) (1929) 56 M.L.J. 750 (P.C.).

(7) (1921) 25 C.W.N. 1002, 1005.

(9) [1903] 1 K.B. 574.

(11) Browne and Allan's Law of Compensation, Appx. pages 659, 662, 665, 674.

(12) [1908] 1 K.B. 571, 577.

(14) [1914] A.C. 569, 573, 578.

(16) (1901) L.R. 28 I.A. 121, 142; I.L.R. 26 Bom. 1.

(17) (1914) 27 M.L.J. 106.

(4) [1893] A.C. 502.

(6) A.I.R. 1933 Mad. 190.

(8) [1915] 2 Ch. 252, 258.

(10) [1904] 1 K.B. 417.

(13) [1909] 1 K.B. 16, 24, 33, 37.

(15) [1914] 3 K.B. 466, 471.

(18) [1917] A.C. 187.

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The Advocate-General (Sir A. Krishnaswami Ayyar, with him K. Umamaheswaran and P. Venkataramayya) for respondent.

[WADSWORTH J.—You need not go into the jurisdiction question.]

In attempting to rely on cases relating to the purpose of the acquisition being taken into account the appellant has practically assumed throughout the argument that the purpose of the acquisition was the Harbour scheme. The Harbour scheme did not, however, originate with the acquisition nor was the acquisition for the purpose of starting the Harbour. The Harbour scheme was an accomplished fact on the date of the acquisition. It was started in about 1920 and it was expected that the Harbour itself would be opened in about a year after the acquisition. Before the time of the acquisition when the property was with the respondent, the existence of the Harbour scheme would have necessarily entered as an element in the consideration of the value of the properties in the locality.

As regards the value of the property acquired, in any compensation proceedings what a person is entitled to is to get the *quid pro quo* for his property. Compensation is the equivalent in money which an owner receives for his property. The value of the property to the owner is the price which it will fetch in the most profitable manner having regard to the most advantageous ways in which the property can be disposed of. The existence of a market, the existence of possible buyers and the existence of some authorities able to put the property to some effective use are all factors to be taken into consideration in assessing that value. But the method adopted for the purpose of finding out the value ought not to be confounded with the value itself. The existence of an open

(1) (1933) 58 C.L.J. 38, 44, 45.

(3) (1923) 45 M.L.J. 339.

(5) (1924) L.R. 52 I.A. 133, 135; I.L.R. 6 Lah. 69.

(6) (1929) 57 M.L.J. 81 (P.C.).

(2) [1914] 3 K.B. 629, 637.

(4) (1919) I.L.R. 44 Mad. 264.

(7) (1875) 10 Ch. App. 435.

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market for property is not the criterion laid down in any of the decided cases. The market is merely one method for the purpose of finding out the value. The non-existence of a market or the difficulty of assessing the value does not take away the duty of the Court to assess compensation or place some value on the property. The existence of a community or a multiplicity of buyers is not a necessary basis of value or even market-value. The existence of a community or a multiplicity of buyers may enhance value but does not impart value. Competition is only a factor or an item in the computation of value; it is not the source of value. The only basis is the price which a normal willing buyer will give a normal willing seller acting as a business man, neither taking advantage of the other's position and each being guided by considerations of self-interest but proceeding on the view that in serving the interests of the other he does not destroy his own interests. Therefore a willing buyer and a willing seller are the only things necessary and not a community of buyers and a community of sellers.

[WADSWORTH J.—Suppose we had a buyer and a seller on an island and they are the only inhabitants. There would be no value except the might of the parties.]

That is why I introduced the standard of reasonableness.

[WADSWORTH J.—Apart from competition value cannot be conceived of.]

Then we must have intrinsic value.

[WADSWORTH J.—Is there such a thing as intrinsic value?]

Yes; what another man would make out of the property, what the property would earn, the way in which the value would be assessed on the basis of profit. Further, though the Court is concerned with the value of the property in the hands of the owner on the date of the acquisition and not in the hands of the acquiring authority, the use to which the acquiring authority is putting the property is of strong evidentiary value as regards the use to which it can be put in the hands of the owner on the date of the acquisition. In the case of the acquiring authority it is a realised possibility while in the case of the owner it is only a contingent possibility. But it is none the less a possibility which has to enter into the value of the property. In assessing the value of the property all factors which have come into being

down to the date of the acquisition must be taken into account. If the Harbour scheme which was conceived of about eight or ten years prior to the date of the acquisition is found to have added to the value of the properties in the locality, that must be taken into account. The established facts in regard to the value of the spring as on the date of the acquisition are: The Harbour scheme did not originate with the acquisition and was in no way connected with it. The scheme was in full operation prior to the date of the acquisition. Even if there had been no acquisition the Harbour authorities would have required water for the purpose of the labour camps, oil depots, etc. The municipal supply could not be had on the southern side, at any rate, without considerable difficulty. If the respondent had put himself to some expense and been willing to supply the water, the Harbour authorities would have taken it from him, or he could have undertaken to supply the oil depots and labour camps directly. By reason of the Harbour scheme having been in operation for years prior to the date of the acquisition, the property had, even prior to that date, acquired a certain value as a source of water-supply. Compensation will have to be assessed with reference to all these facts. The respondent would no doubt not be entitled to compensation for the value of the property as a source of water-supply if that value had been imparted to the property for the first time consequent on and from the date of the acquisition. But if that value existed on the date prior to the acquisition, if the property could be shown to have been of general value as a water source quite apart from the acquisition, then compensation must be given to the respondent for that value. The Harbour being a possible purchaser of the water from the respondent must not be excluded. While the utility or the value in the hands of the original owner is a test, the fact that the acquiring authority may itself be a purchaser on a business basis cannot be ignored. The factors that must be taken into consideration as affecting the value of the property are: Scarcity of the thing in demand, whether it affords peculiar facilities for the carrying on of a particular business or operation and whether there is a real demand, a real value at least to one person. The totality of the demand will no doubt determine the ultimate value. The area of the demand will be a great factor in determining the market-value but it would be wrong to say that that value is impaired only by the

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area of demand. Commercial value and value are two different things.

[Reference was made to the following cases in addition to those referred to by Mr. Page:—*Re Arbit., Mayor, &c., of Tynemouth & Duke of Northumberland*(1), *Kailas Chandra v. Secretary of State for India in Council*(2), *R. H. Wernicke v. The Secretary of State for India in Council*(3) and *Kathirasan v. Special Collector*(4).]

W. W. K. Page in reply.

Cur. adv. vult.

JUDGMENT.

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WADSWORTH J.—This appeal is from the order on a reference by the Land Acquisition Officer under section 18 of the Land Acquisition Act. The acquisition covered land of the total extent of 108·90 acres situated to the south of the Vizagapatam Harbour and required for harbour purposes. The appellant is the acquiring authority. There is a memorandum of cross-objections by the first claimant, the proprietor of the Anakapalle Estate, otherwise known as the Zamindar of Chemudu. We are no longer concerned with the rival claimants to the land, whose claims were overruled by the Subordinate Judge. The Land Acquisition Officer awarded in all a sum of Rs. 17,745-1-3 as compensation, including Rs. 5,000 for damage to the unacquired property of the respondent by reason of the diversion of a spring situated in the acquired land which helps to irrigate the respondent's Lova Garden, the cultivated land of which has not been acquired. The respondent claimed compensation amounting in all to Rs. 3,96,730,

(1) (1903) 89 L.T. 557.

(3) (1909) 13 C.W.N. 1046.

(2) (1910) 17 C.L.J. 34, 35.

(4) A.I.R. 1936 Ran. 226.

the important features of this claim being a sum of Rs. 1,30,680 claimed for value of the land acquired at Rs. 1,200 an acre and Rs. 2,50,000 claimed for "damage sustained by severance". The Subordinate Judge allowed in all Rs. 1,03,004-14-9, the bulk of which is made up of the estimated value of the spring in the acquired land, in addition to the amount already awarded by the Land Acquisition Officer.

The following questions arise for decision in this appeal and cross-objections: (i) Did the respondent in fact claim either in his original statement of claim or in his objection to the award by the Land Acquisition Officer compensation for the value of the "special adaptability" of the land acquired for supplying drinking water otherwise than to the unacquired lands of the respondent? (ii) If no such claim was made before the Land Acquisition Officer, had the Subordinate Judge jurisdiction to award compensation for the "special adaptability"? (iii) If there was jurisdiction, has the special adaptability of the land for supplying drinking water any value apart from the scheme for the purpose of which the acquisition was made? (iv) Can the requirements of the Harbour authorities for water be taken into consideration in estimating the value of the land acquired? (v) Was the Subordinate Judge wrong in holding that the water-supply on the land acquired had no potential value as a possible supply of drinking water for a building scheme in connection with the unacquired land of the respondent? (vi) What is the correct way of calculating the compensation and what is the proper figure?

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In order to understand the contentions of the parties it is necessary to describe the chief topographical features of the neighbourhood of the area acquired. The Vizagapatam Harbour, the construction of which was begun in 1920, was formed by excavations in swampy land adjoining the existing creeks and by dredging a deep water channel so as to give access to the artificial basin thus created. The town of Vizagapatam is situated to the north of this entrance channel and to the east of the land originally taken up for Harbour purposes. There is no road across this channel, the only communication with the south side of the Harbour land being by ferry. Running west to east along the south of the Harbour land is the Anakapalle road which terminates inside the Harbour land about half a mile from the entrance to the Lova Garden owned by the respondent. Except for an almost abandoned path there is no access to the respondent's garden from this road. The Harbour land to the south of the entrance channel intervenes between the road and the Lova Garden. The area acquired consists of a large heart-shaped block of barren hilly land separated from the south shore of the Harbour by a line of hills and containing the catchment area of the spring which has given rise to this litigation. In the north-east corner of this large block the Harbour authorities have also acquired a narrow tongue of land running in a north-easterly direction to accommodate a small reservoir and channel and pipe line ; and another narrow piece from the northern extremity of this tongue running towards the north-west, through which a tunnel has been cut so as to carry both

drainage water and pipe line through the hilly barrier separating the respondent's land from the reclaimed land of the Harbour to the north. The spring in the acquired land naturally drains to the north-east into a valley known as the Lova Garden which is cultivated. Owing to its natural beauty, this valley was held in great affection by the Rani of Wadwan who was the owner at the time when the notification was issued in 1928. She died in 1928 after the acquisition and her successor in title is the Zamindar of Chemudu who is the respondent. At the time of the acquisition there had been practically no development of the Harbour land to the south of the channel. This area is very malarious. It had no water-supply, the Harbour getting its water from the town of Vizagapatam so far as the main area is concerned. With a view to the development of the south side of this Harbour, the land on both sides of the Anakapalle road had been acquired and villages situated therein which were very malarial had been shifted further to the west. The Harbour authorities intended by undertaking anti-malarial works and by creating a southern water-supply to make this land on the south banks of the channel suitable for commercial purposes such as oil installations and for the construction of a labour colony for the coolies employed on the Harbour.

The malaria problem was very serious. Not only did it render the southern area unfit for development but there was considerable danger to the workers in the Harbour office situated on the northern bank of the channel and it was feared that the crews of the dredgers and other

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vessels in the Harbour might be infected. In 1926 (*vide* Exhibit XXIV) an anti-malaria survey was undertaken. This showed that the villages all along the south side of the channel were full of malaria and that the Lova Garden belonging to the respondent was one of the principal breeding places of mosquitoes which endangered the health not only of the adjacent villagers but also of the harbour staff. The Anti-malarial Officer suggested that operations to get rid of the mosquitoes in the Lova Garden could most economically be carried out in conjunction with the utilisation of the water from the valley to provide a pipe water-supply to the south side of the Harbour. This suggestion was welcomed by the Harbour authorities, more especially as the existing agreement for the supply of water from the Municipality, while it provided a sufficient supply during the early stages of the scheme, would not suffice for the ultimate needs of the Harbour. Moreover the spring at the head of the Lova Garden was one hundred and fifty feet above the sea level so that a gravitation flow was practicable. The alternative water-supply then in contemplation was either the development of the wells in the evacuated villages on the south side or a much more ambitious scheme entailing the utilisation of the water of the Meghadrigedda stream on the west of the Harbour, a scheme which entailed difficulties because it required the co-operation of the Harbour, the Railway, the Municipality and the Government of Madras. It was estimated that the Lova Garden spring would give 50,000 gallons of excellent water daily. The original

scheme was to take this water in pipes through the garden and out by the mouth of the valley which emerges into the entrance channel. This was eventually abandoned in favour of the plan for tunnelling through the hilly area to the north of the spring and leading the water in an almost direct line to the point at which it was required, this tunnel being utilised not only to carry the pipe line, but also to carry away flood water so as to prevent the stagnation of water in the valley and thus eliminate one of the breeding places for mosquitoes. The scheme for utilisation of this water and the carrying out of anti-malarial operations in the valley was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding places of mosquitoes all round the southern side of the Harbour so as to make the whole of this area fit for development. The modification of the scheme by the proposal for a tunnel rendered it unnecessary to acquire the Lova Garden proper which the owner was most anxious to retain. All that had to be done in that Garden was the construction of suitable drainage works. Full particulars of this scheme were communicated to the Rani who then owned the property. In 1927 (*vide* Exhibit D) the Diwan reported to the Rani on this scheme pointing out that it was not purely an anti-malarial measure but had a commercial bearing, that the constant supply of water was of great value and that compensation would have to be paid for it. This report was not apparently communicated to the Harbour authorities at the time. Work on the tunnel so far as it was on Harbour land was

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started in November 1927. On 13th February 1928 we have the notification under section 4 (1) of the Land Acquisition Act for the acquisition of the land with which we are now concerned and other adjacent lands for the execution of anti-malarial works. It is to be noted that this preliminary notification as well as the draft declaration issued later referred only to anti-malarial works; but there is no doubt that the greater portion of the area acquired from the respondent was acquired primarily not merely for anti-malarial works, but as the catchment area of the water-supply required in connection with the development of the south side of the Harbour and that this larger objective was communicated to the respondent some time before the acquisition began. The respondent's objection to the acquisition (*vide* Exhibit F) states that there was no objection to anti-malarial operations provided that the water-source of the valley was not affected, but that if the water-supply from the springs in the upper portions of the valley was to be cut off, the cultivation and amenities of the lower valley would be adversely affected and should be taken into consideration in fixing compensation. In April 1928 the notification, Exhibit HH-1, was issued to enable the acquiring authority to take immediate possession of small portions of land required. Again (*vide* Exhibit XIX) the respondent objected to the diversion of the water so as to cut off the water-supply of the lower portions of the valley. There was no reference to any value which the water might possibly have except for the irrigation of the valley. In the autumn of 1928 the respondent

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engaged Diwan Bahadur A. V. Ramalinga Ayyar, formerly Chief Engineer to the Government of Madras, as an expert to examine the property which was to be acquired and value it. His report is Exhibit III, dated 21st December 1928. He expressed the opinion that the water at the head of the valley could be utilised for the development of a building estate on the unacquired lands of the respondent situated round the valley and that such building sites would be in demand for persons connected with the Harbour; and on this assumption, taking into consideration the value of the whole of the area which in his opinion could be developed for building and concluding that the diversion of the spring would put an end to this development, he suggested that a claim be made for Rs. 8,00,000 as compensation. This valuation was communicated to the Harbour authority in Exhibit KKKK, dated 5th January 1929, and the Diwan states therein, quoting the agreement between the Harbour and the Municipality for the supply of water, that the respondent would be justified in claiming at least Rs. 4,00,000 by way of compensation and threatening to take the matter to the Privy Council if necessary. On the same day (*vide* Exhibit XX) the respondent filed before the Land Acquisition Officer a statement of claim which sets forth the importance of the water-supply for the cultivation of the Garden, the natural amenities of the valley and its attractions as a pleasure resort, the possibility of the development of the Garden as a building estate and the consequent use to which the water of the spring could be put both for irrigation and for the supply of drinking water and the valuation

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put upon the property by Mr. Ramalinga Ayyar.
The actual details of the claim were :

	RS.
Land value at Rs. 1,200 per acre ...	1,29,480
Value of the masonry structures and roads ...	15,000
Value of trees ...	1,050
Damage sustained by severance ...	2,50,000
Value of portions already taken possession of ...	1,200
Total ...	3,96,730

It is to be noted that, though there is a big claim for "damage sustained by severance" which presumably must be the damage to the un-acquired land by reason of the acquisition, there is no express claim based on the value of the water to any one else other than the respondent. The award of the Land Acquisition Officer, which was not apparently based on any further representations made on behalf of the respondent or any materials to show that this water had a value other than its irrigation value, proceeds on the basis that the adverse effect on the irrigation facilities of the Lova Garden would not reduce the income from the valley by more than half and estimates the loss owing to the diversion of the major portion of the spring water at Rs. 5,000. The lands are valued on the basis of similar acquisitions in the neighbourhood and for the masonry structures, all of which are in a completely ruined condition as a result of a cyclone, the Land Acquisition Officer awards Rs. 3,950 the figure estimated by the Executive Engineer. On receipt of this award the respondent objected and claimed a reference under section 18. The

only words referring to the grounds of objection are the following :

"The compensation awarded is very low and inadequate for the portion acquired and for the damages sustained by severance to the other portions of the valley garden."

Clearly this objection is not based on any value which the spring might have for sale to the public generally. After the reference to the Court the respondent filed in Court what is called a statement of claim under Order VIII, rule 1, Civil Procedure Code. This document, besides dilating on the beauties and fertility of the valley and the adverse effect of acquisition upon these amenities, states also :

"There is a growing demand for sites for building purposes and for bungalows in Vizagapatam and the Lova Garden including the sites in question has by reason of its adaptability for building sites a potential value as such if drinking water is available. The sites in question are also fit for a water reservoir in order to store and supply water both for drinking and irrigation purposes and they can also be utilised for quarrying purposes. If the present sites be acquired with the spring water thereon, the zamindar will not only lose the above advantages but the plantations and gardens in the lower valley would be rendered useless and unattractive and sustain irreparable loss. The palatial buildings built in the lower valley for pleasure resort would be useless and lose their value if the garden adjoining them does not thrive by the deprivation of the only permanent water-source."

In the schedule the claimant repeats the details given in the statement of claim filed before the Land Acquisition Officer, the main item being again "Damage sustained by severance : Rs. 2,50,000". By doing what appears to be violence to the wording of the passage extracted above and by ignoring the particulars in the schedule attached thereto the learned Subordinate Judge has arrived at the conclusion that this statement

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of claim embodies a claim for compensation for the market-value of the water-supply apart from its development in connection with the building estate and apart from its value for irrigation purposes to the land remaining in the ownership of the respondent. There are no materials other than the correspondence which show that the Diwan knew that the Harbour wanted this water for drinking purposes and had every intention of making the authorities pay for this drinking water, to justify the conclusion that there was a specific claim made before the Land Acquisition Officer or in the first statement filed before the Subordinate Judge to the market-value of the special adaptability of the acquired land for supplying drinking water to any one other than the prospective occupants of the respondent's own land. It seems to us quite clear that this basis of valuation was not put forward by the respondent until the actual trial of the reference before the learned Subordinate Judge. It follows that, on the first question, our finding is that the respondent has not in fact claimed either in his original statement of claim or in his objections to the award of the Land Acquisition Officer compensation for the value of the "special adaptability" of the land acquired for supplying drinking water otherwise than to his own unacquired lands.

The next question is whether the Subordinate Judge had jurisdiction to award compensation for that value in the absence of what may be called a pleading. There is very little in the Act itself to afford a basis for the appellant's argument that there is no jurisdiction. Section 18, which deals with reference to Court, contemplates four kinds of

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objection, namely, (i) to the measurement of the land, (ii) to the amount awarded as compensation, (iii) to the person to whom the payment of compensation is to be made and (iv) to the apportionment of the compensation. Sub-section 2 requires the claimant to state the grounds of his objection. Whether the claim based on the acquisition of the spring is a claim for the value of the land acquired as specially adapted to supply drinking water to the outside public or whether it is merely a claim for damages for detriment to the unacquired land of the claimant by the loss of a potential drinking water-source to the occupants of the unacquired land, the claim falls under the second head in section 18 (1), namely, compensation. Under section 20 the Court is directed to "proceed to determine the objection". The only sections which appear to restrict the jurisdiction of the Court in this matter are sections 21 and 25 with which we are not now concerned. Section 53 of the Act makes the provisions of the Code of Civil Procedure applicable to all proceedings before the Court under the Land Acquisition Act where the Code is not inconsistent with the Act. That being so, it may well be contended that Order XIV, rule 3, of the Code will apply and will enable the Court to consider in framing the issues not only the pleadings (that is, the statement of claim, the award and the objections thereto) but also the allegations of the pleaders where they are not inconsistent with the pleadings. If so, it would follow that the Court would have jurisdiction to frame an issue which does not directly arise from the objections taken provided that it is not totally inconsistent with them. Moreover,

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if Order VI, rule 17, of the Code of Civil Procedure applies to proceedings before the Court under the Land Acquisition Act, surely the Court could have given the respondent leave at the time of framing the issues to amend his statement of objections by including in it a claim for the value of the natural suitability for water-supply of the land acquired subject of course to such terms as might be proper. In fact the learned Subordinate Judge did not receive any application to amend the statement of objections; but, if the power to amend exists, then the question is one of procedure rather than of jurisdiction. In the absence of a clear authority to the contrary we should be constrained to hold that no question of jurisdiction arises. Mr. Page, appearing on behalf of the acquiring authority, has cited numerous cases on this part of his argument, but, as we agree generally with the learned Subordinate Judge on the jurisdiction question, we do not think it necessary to deal at length with the case-law which has been fully set forth in the lower Court's judgment. It is sufficient to state that there is good authority for the view that, though section 18 (2) requires that the application for a reference to Court shall state the grounds on which the objection is taken, there is a sufficient compliance with the provisions of this sub-section if the application states on which of the four heads of objection detailed in sub-section 1 the applicant proposes to rely. It has been held by the Judicial Committee in *Pramatha Nath Mullick v. The Secretary of State for India*(1) that the jurisdiction of the Court with reference to section 18 (1) is confined to considering and pronouncing upon

(1) (1929) L.R. 57 I.A. 100.

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the objection which has been raised in the written application of reference, that is to say, the objection considered must fall under the same category in section 18 (1) as the objection pleaded. As their Lordships said, once it is ascertained that the only objection taken is to the amount of compensation, that alone is the "matter" referred, and the Court has no power to determine or consider anything beyond it. This however does not amount to a decision that, when an objection to the amount of compensation has been taken, the Court has no jurisdiction to work out the amount of compensation in a manner different from that which has been adopted in the statement of objections. The case which goes nearest to the position for which Mr. Page contends is the ruling of a single Judge of this Court in *The Secretary of State for India in Council v. Subramania Aiyar*(1). In that case, the learned Judge holds, quoting only a ruling of the Punjab Chief Court, that the raising of new grounds of compensation not taken in the statement of objections could only be allowed before the Court by virtue of some section of the Land Acquisition Act and that there is no section which gives power to the Court to entertain such fresh grounds. The learned Judge does not consider the effect of section 53 of the Act which introduces the provisions of the Code of Civil Procedure in the trial of references under the Act. He states :

"In all ordinary circumstances, a claimant can and should present his case fully before the Collector, and should

(1) (1929) 59 M.L.J. 30.

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be held bound throughout the proceedings by what may be termed his pleadings",

and with reference to section 18 (2) he observes :

"The proceedings before the Court are of the nature of objections to the Collector's award, and not a judicial enquiry independently undertaken into such questions as the claimant may raise. On this view, it would not be open to a claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise."

If this be taken as a rule of procedure, subject to all just exceptions as are provided in the Code of Civil Procedure, there is no reason to quarrel with this statement of the law; but if the decision of CURGENVEN J. is to be taken to mean that the Court has no jurisdiction in a proper case to allow the claimant to vary the basis of his objection or to frame an issue relating to the same head of objection but not arising precisely out of the pleadings, then, in our opinion and with all respect, he goes too far. There is another ruling of this High Court, *Lakshminarasamma v. Assistant Commissioner of Labour*(1), which deals with a case in which compensation was claimed for land on the basis of its use as a coconut tope, and in the reference to the District Judge a claim was made for compensation on the footing of its possible use as a building site. It was held that the claim on the basis of the building site value was inconsistent with the claim for its value as a coconut tope and that the claimant should not be allowed to base her case in Court on a valuation of the land which was inconsistent with the basis on which it was valued in proceedings before the Land

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Acquisition Officer. Here again, the decision does not purport to go any further than to hold that as a matter of procedure a claimant should ordinarily be confined to the basis of value which has been put forward before the Land Acquisition Officer. There is no decision that the Court has no jurisdiction in a proper case to consider the effect of valuation on a different basis. Our conclusion on the second question, therefore, is that the Subordinate Judge had jurisdiction to award compensation on the basis of the value of this land for water-supply apart from its value to the respondent's own lands, though no express objection was taken on this basis and no specific claim for compensation to this effect was urged before the Land Acquisition Officer.

The next question is primarily one of fact, namely, whether the natural adaptability of the land acquired as a source of drinking water for areas outside the land of the respondent had any value at the time of the notification apart from the scheme for which the land acquisition was made. In answering this question we must leave out of consideration for the moment both the possibility of the owners themselves using the water-supply as part of some building scheme on their unacquired land and also the realised possibility of the water being required by the Harbour for the scheme which led to the acquisition. The answer to the question depends very largely on the topography of the area north of the land acquired.

[His Lordship then discussed the evidence in and the circumstances of the case and proceeded:—]

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The conclusion therefore on the question of fact must be that the special adaptability of this land for the supply of drinking water has no value apart from the scheme for which the acquisition is made and apart from the use to which it might conceivably be put for the development of the building scheme by the respondent himself.

The next question is whether the requirements of the Harbour itself for water can be taken into consideration in estimating its value. This is purely a question of law and we are indebted to Mr. Page and the learned Advocate-General for a very complete discussion of the English and Indian authorities on the subject. The general principles upon which Courts must estimate the value of lands compulsorily acquired are set forth in sections 23 and 24 of the Land Acquisition Act and in a series of English decisions which have been followed by the Privy Council and the Courts in India. It is well settled that English decisions under the Land Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act. The cases which have been quoted before us are all considered by the learned Subordinate Judge who seems however to have been misled by a consideration of the effect on the English law of the Land Clauses Act of 1919. Apparently the express provision of that Act that the special adaptability of the land acquired for a particular purpose cannot be taken into account when there is no market apart from the special needs of the particular purchaser seems to have led the learned Subordinate Judge to the inference that the law

in England as it stood prior to the Act of 1919 was entirely changed by that Act. This appears to be an error. It is unnecessary for the purpose of this case to go into the question of the effect on the English law of the Act of 1919. All the leading cases upon which we propose to base our decision are anterior to that Act, and the proper course seems to be to consider the effect of those decisions and to ignore the subsequent changes in the statute law in England, which have no application to India.

Under section 23 (1) of our Act the Court, in determining the amount of compensation to be awarded for land, is required to take into consideration, first, the market-value of the land as on the date of the notification under section 4 (1); secondly, the damage sustained by the loss of standing crops or trees; thirdly, the damage by severance; and fourthly, the damage by reason of the acquisition injuriously affecting other property of the owner. We are not now concerned with the other matters for consideration specified in the section. Section 24 provides that the Court shall not take into consideration the degree of urgency that led to the acquisition, the disinclination of the owner to sell, any damage which would not give a right of suit, any damage to the land acquired after the date of the declaration by the use to which it will be put, the increase in the value of the land acquired likely to accrue from the use to which it will be put when acquired, the increase to the value of the other land of the owner likely to accrue from the use to which the land acquired will be put and any expenditure on the land acquired after the date of the notification

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under section 4, sub-section 1. We are concerned here mainly with the fifth of these considerations, namely, the increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. Applying this clause to the present case, it is argued that the Court cannot take into consideration the increase to the value of the land acquired by reason of the use of the water on the land for providing a drinking water-source to the Harbour.

It is settled law that in a case of compulsory acquisition the owner is entitled to receive compensation based on the value of the land to himself, not based on its value to the acquiring authority. In assessing the value regard must be had not only to the use which the owner has made of the land up to the date of the notification under section 4, but also to all its potentialities and the restrictions on its user as on that date. Ordinarily the market-value as on the date of the notification is the best criterion of value. "Market-value" means the price which a willing owner as on that date would get by a process of bargaining with a willing seller. Apart from the market-value the owner is also entitled to compensation for any damage done to his unacquired lands by the loss of the lands acquired. It is settled that in considering the market-value, the market may be an imaginary market, there need not be evidence of the existence of specified purchasers. It is laid down in the Act that in assessing the value the Court must exclude any increments of value which would accrue to the land by reason of the use to which it is to be put after acquisition and

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any value which will after the date of the notification under section 4 accrue to the land by reason of the further development of the scheme for the purpose of which it is to be acquired. What is called the "special adaptability" of the land, that is to say, the natural suitability of the land for some special use other than the use to which it is put by the owner, is an element to be taken into consideration in assessing the value and the compensation to be awarded for such special adaptability is its value based on prudent business calculations having reference to the position on the date of the notification under section 4.

So far there is no doubt as to the law. Apart from the above propositions, the appellant contends that where on the date of the notification there exists no person who can reasonably be presumed to be a probable buyer of the property for the special purpose to which it is naturally adapted, then the special adaptability cannot be taken into consideration at all in assessing the compensation, for to take it into consideration in such circumstances would be to make the acquiring authority pay for its own improvements, would nullify the effect of the statutory power of compulsory purchase, would involve the valuation of the land on the basis of its value to the acquirer and not on the basis of its value to the owner and would involve the consideration of the urgency which has led to the acquisition.

On the other hand, the learned Advocate-General for the respondent contends that the intrinsic value of the special adaptability must be considered and not merely its market-value, that

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this intrinsic value exists even when there is in prospect no possible purchaser other than the acquiring authority. It is argued that the value of the land to the owner includes necessarily the price which he might reasonably have expected to get on the date of the notification for the special adaptability of the property to the needs of the acquiring authority. The respondent contends that the owner, quite apart from the compulsory acquisition, would be likely to get a reasonable price for his facilities by a process of bargaining between himself as a willing seller and the acquiring authority as a willing buyer even in the absence of possible rival purchasers. It is argued that compulsory acquisition does not involve the expropriation of the owner without giving him the price which he might reasonably have expected to get in view of the development of the locality as it stood on the date of the notification, that is to say, the owner would naturally be aware of the development of the Harbour and the likelihood of the use of the land to the south of the Harbour for oil tanks and other commercial purposes and that the mere existence of this probability would give an intrinsic value to the supply of water which was likely to be required for those probable developments, quite apart from the actual scheme of the acquisition. It is also contended that the only practicable way of assessing the price which a willing seller can expect to get in such circumstances is by taking as a basis of calculation the price which the buyer was actually paying for similar facilities elsewhere, and that is the

basis which the learned Subordinate Judge has adopted.

It is unnecessary to dwell on the numerous cases cited which lay down propositions about which there is no dispute, but we must carefully consider those leading cases which help us to decide which of the two conflicting views outlined above is correct. In the case of *Vallabhdas Naranji v. The Collector*(1) the Privy Council had to deal with the valuation of certain land acquired under the Land Acquisition Act, which land was absolutely worthless except as a potential site for salt works. It was held that the owner on compulsory acquisition was entitled to the present market-value of that potentiality and that where in fact it was found that the exploitation of this land as a salt factory was not likely to be profitable, the land should be valued as waste land. The case of *South Eastern Railway v. London County Council*(2) has been quoted for the respondent merely because of the observation that the market-price is not a conclusive test of real value. There is nothing in the actual ruling which has any bearing on the facts before us. An important case on the acquisition of water rights is that of *In re Gough and Aspatria, Silloth and District Joint Water Board*(3), the appellate judgment being reported as *Gough and Aspatria, Silloth and District Joint Water Board, In re*(4). That was a case in which land was acquired which had a special adaptability for use as a reservoir and it was wanted for that purpose by a public authority. There was no evidence that the

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(1) (1929) 56 M.L.J. 750 (P.C.).
(3) [1903] 1 K.B. 574.

(2) [1915] 2 Ch. 252.
(4) [1904] 1 K.B. 417

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land could not be used as a reservoir for other places but there was in fact no other buyer in view at the moment. It was held that it was right to take into consideration the fact that the land in question had peculiar natural advantages for supplying water to the district, apart from any value created or enhanced by the scheme for appropriating the water to the particular local authority, and it was not necessary to prove that the land could be similarly used by other specified local authorities. The effect of that decision is most clearly seen from the brief judgment of the Master of the Rolls. He says :

"To exclude the element of adaptability it would be necessary, as it seems to me, to show that there is no reasonable possibility of the site coming into the market. The value of the possibility if it exists is a question entirely for the arbitrator."

That is to say, the burden of proof lies upon the acquiring authority to show that no one else has any use for the special adaptability other than the acquirer; it is not enough merely to show that at the moment no offer has been received from anybody else. The case of *In the matter of Countess Mary Ossalinsky and the City of Manchester*(1) is often quoted on this subject. It arose out of the acquisition of land adjacent to Thirlmere in the Lake District for the construction of a reservoir to supply the Manchester Corporation. At page 662, dealing with the argument that the arbitrator erred in taking into consideration the value of the land to the Manchester Corporation for use as a reservoir, GROVE J. observes :

"You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put

(1) Browne and Allan's Law of Compensation, Appx. page 659.

land to when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case as going to enhance the value of the land, are not visionary, but are schemes with certain probability in them."

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Later on, at page 665, the learned Judge observes :

"There is not a single fact stated from the shorthand writer's notes to show me that the arbitrator did that which he ought not to have done, namely, based his valuation upon the particular circumstances and particular price which the Manchester Corporation might be interested to pay for this compulsory sale."

The judgment of STEPHEN J. points out that the geographical position of Thirlmere with a large quantity of water at such a level as to make it available to nearly any large town in England makes it absurd to say that there is no special value attaching to its natural features. This case may therefore be taken as an authority for the position that the special requirements of the acquiring authority cannot be taken into consideration in fixing the value of the special adaptability but may be used as an illustration of the way in which the special adaptability might be of value to others, and when it has been shown that the special adaptability has such a general value, compensation must be awarded for it.

The most instructive of all the English cases on this subject is that of *In re Lucas and Chesterfield Gas and Water Board*(1), the appellate judgment in which is reported as *Lucas and Chesterfield Gas and Water Board, In re*(2). That was a case in which the Chesterfield Gas

(1) [1908] 1 K.B. 571.

(2) [1909] 1 K.B. 16.

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and Water Board owned two reservoirs, one above the other. Through the land between the two reservoirs ran a pipe line belonging to the Board. Apart from the pipe line the intervening land was the property of Mr. Lucas, and it was admittedly specially suitable for use as a reservoir. The argument on behalf of the Board was that this land had no value on account of its special adaptability as a reservoir because no other purchaser could use it for that purpose without acquiring statutory powers and without interfering with the Board's pipe line. It was held that the special value must be taken into consideration in awarding compensation, on the basis that the Court would assume that any possible purchaser would have been able to get statutory powers for the development of a scheme and that a public body would not use the existence of its pipe line merely as a lever to force the owner to part with the rest of his land for less than its worth. The judgment of FLETCHER MOULTON L.J. has been repeatedly quoted with approval both by their Lordships of the Privy Council and by Courts in India. The learned Judge at page 31 states as a proposition of law :

"Where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of a scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes."

He observes also at page 32 :

"As I read the award of the Umpire, he has specifically found as a fact that there exists such a special suitability in the lands in question, and that there also exists such a possible competition in the district in respect of the supply of water as would entitle him to estimate the compensation in the way I have described."

And then at page 34 :

"But if the land still remains in the position that there is no competition for it by reason of its special position and adaptability and that when the compensation has to be assessed there is no one (apart from the one purchaser who has obtained compulsory powers of purchase) to whom the land has a higher value than its value for ordinary purposes, I can see nothing to exclude the operation of the principle that you are to look at the value to the seller and not at the value to the purchaser."

There can be little doubt that this exposition of law when applied to the facts of the present case as we have found them would justify the conclusion that no value can be awarded to the special adaptability of this land for supplying drinking water to the Harbour alone, if it can be shown that the land cannot have any value as a source of drinking water to anyone else. The judgment of FLETCHER MOULTON L.J. has been approved by the Privy Council in *Cedars Rapids Manufacturing and Power Company v. Lacoste*(1), which was a case of the acquisition of lands required for developing a hydro-electric project on a river in which the owner of the land had certain water rights. Their Lordships held that the proper basis for compensation was the amount for which the respondent's lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or

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some other company or person might obtain those powers. The most that could be said for the respondent on the strength of this case is that the respondent would be entitled to the value of the water-supply on his land as it existed before the scheme for the development of the southern lands of the Harbour was promulgated but in view of the possibility that some such scheme might come into existence. Their Lordships say:

"The value of the land is the price which it would fetch, enhanced above the bare value of the ground, which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility."

Applying this ruling to the facts of the present case it seems most unlikely that the land acquired would in fact have received any increment of value by reason of its adaptability for supplying drinking water, which adaptability only existed for the malarial tract of land to the south of the Harbour, had it been offered for sale before there was any proposal to clear those lands of malaria and render them fit for habitation and development.

In the case of *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*(1) it was held that the plaintiffs were entitled to the market-value including any actual speculative advance which was shown to have arisen at the date of the notice, but excluding any future speculative advance from the same cause. It was pointed out that the Court should not award more because the object of the scheme is likely to

increase the value of the land, nor give less because the same object was likely to increase the value of the owner's unacquired land, but that the Court should exclude for both parties speculations on the effects which the scheme might produce on prices, except to the extent to which it is shown that such speculations had actually entered into the market price on the date of the notification. There is in the present case not only no evidence that speculations had affected the market-value of this land as a source of drinking water-supply on the date of the notification, but the evidence makes it clear that the respondent had no idea that this drinking water was of any value until investigations were made by Mr. Ramalinga Ayyar months after the notification was issued.

In the case of *Fraser v. City of Fraserville*(1) the Privy Council confirmed the decision of the Court which set aside the arbitrators' award on the ground that the arbitrators had estimated the potential value of the property due to the acquiring authority's reservoir and capitalised the estimated profit arising therefrom. It may be pointed out that the arbitrators' procedure was very similar to that which has been followed by the learned Subordinate Judge. Their Lordships summarise the leading cases referred to above and approve of the principle that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantages due to the carrying out of the scheme for which the property

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(1) [1917] A.C. 187.

(1) (1901) L.R. 28 I.A. 121; I.J.R. 26 Bom. I.

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is compulsorily acquired. In the case of *Sidney v. North Eastern Railway*(1) ROWLATT J. points out that, where there is no competition or where the price has been raised by biddings to a point at which competition ceases, there is no room for the application of the doctrine of special adaptability. At page 637 the learned Judge states :

"If and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market-value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail, to what can any further value be attributed? . . . There can be only one answer—in respect of the value to him for his scheme."

Other cases have been quoted which do no more than give effect to the same principles. There is however one case which it is desirable to refer to as a warning that the report is based on a misquotation. The report of the case of *Katherasan v. Special Collector*(2) misquotes a passage from the case of *Fraser v. City of Fraserville*(3), probably owing to a copyist's error, and makes it read that the value for purpose of compensation is the value to the seller with all its advantages due to the carrying out of the scheme for which it is acquired. The words "excluding those advantages" which should be read after "all its advantages" have been omitted thus making the decision quoted exactly the contrary of its true import. This error has been carried into the headnote.

(1) [1914] 3 K.B. 629.

(2) A.I.B. 1936 Ran. 226.

(3) [1917] A.C. 187.

Let us apply the law as laid down in these rulings to the facts of the present case. It has been shown that there was at the time of the notification no other purchaser besides the Harbour who was reasonably possible as a purchaser for the drinking water-supply on the respondent's land. That being so, this special adaptability has no value apart from the value created by the scheme for the purpose of which it is acquired. Even if we are to take into account the speculative rise of price which might have taken place by reason of the owner conceiving the possibility of the development of some such scheme as has been put forward, it is on the evidence apparent that no one foresaw this scheme until the actual investigation began and there is no evidence whatever of any speculative rise of price until after the scheme had resulted in the notification. Though the special adaptability existed it had no prospect of becoming an element of value apart from the scheme; its value therefore was the result of the scheme and to award compensation for it is to do that which cannot be done with reference to section 24 (5) of the Act—i.e., to take into account the increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. It follows that the learned Subordinate Judge erred in awarding compensation for the special adaptability of this land to supply drinking water to persons outside the respondent's estate.

In view of this conclusion it is unnecessary to go into the correctness of the Subordinate Judge's method of valuation. It must however be pointed

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out that his valuation rests on various assumptions for which there is no adequate basis if regard is had to the position before the issue of the notification. It assumes a realised possibility of the scheme maturing; it fails to consider the possibility of the scheme not being taken up or of the Harbour deciding on one or other of the two alternative schemes of water-supply which were under consideration; it assumes that the Harbour would be willing to pay in perpetuity a rate for water which it had agreed to pay only for five years; it seems to overlook the fact that even this agreement with the Municipality reduced the price by one half for the succeeding five years. In fact the learned Subordinate Judge has really awarded compensation based on the value to the Harbour of a completed scheme, and not on the possibility of some such scheme being completed.

The memorandum of cross-objections, so far as it deals with the details of the learned Subordinate Judge's method of calculation, need not be considered. As to the rejection of the alternative basis of claim, namely, the possible development of a building estate on the respondent's land to utilise the water on the land which has been acquired, we would only say that we agree with the learned Subordinate Judge that such a building scheme was not a practical proposition and need not be taken into consideration in estimating compensation. It is unnecessary to repeat the grounds upon which the learned Subordinate Judge's decision is based.

As to the actual value of the lands acquired, we consider that the learned Subordinate Judge is in error in treating as conclusive an estimate

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prepared for the Harbour authorities at the early stages of the investigation and in deducing therefrom that the proper value of the land at the head of the valley was considerably more than the price which the respondent himself claimed. In actual fact none of the land acquired was yielding any income at all to the respondent at the time of the acquisition. The learned Subordinate Judge finds as a fact that the diversion of the water has not adversely affected the cultivation of the valley. The Land Acquisition Officer has awarded a substantial sum for the loss of a part of the irrigation supply. We consider that the award of the Land Acquisition Officer is ample compensation for the value of the land with its potentialities and for any damages that may have been done by the diversion of the water from it away from the unacquired land. There is no reason to consider that the Land Acquisition Officer's estimate of the value of the buildings on the land acquired is too low.

In the result, therefore, we allow the appeal with costs here and in the Court below and restore the award of the Land Acquisition Officer *in toto*. The memorandum of cross-objections is dismissed with costs.

STODART J.—I concur with my learned brother. The diversion of the water of the respondent's spring had two purposes: (i) to intercept the water and thus render the lower part of the Lova Gardens free from malaria and (ii) to provide drinking water to the area south of the Harbour. As a source of drinking water the spring could only be utilised in that area, but,

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apart from the scheme which was being undertaken at the time of this acquisition, that area was uninhabitable, or at least not habitable by people in such numbers as would require a moderately copious supply of drinking water. It is not contended that any other public authority or private undertaker except the Harbour authority would even have come forward to develop this area and make it habitable. Thus the value of the respondent's spring as a source of drinking water—ruling out the respondent's scheme for developing a building estate in his valley—arose entirely from the anti-malarial scheme carried out by the Harbour authority and depended on the success of that scheme. To my mind section 24, sub-section 5, of the Land Acquisition Act is completely applicable to the facts of this case. If under that section the Court is debarred from taking into consideration, "any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired", what was the use to which, at the date of this acquisition, it was proposed to put this spring? Partly to drain the lower end of the valley. Partly, by developing and improving the south side of the Harbour, to supply with drinking water the persons who might possibly be located there.

By Court :—Certified for two Counsel.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

E. SUNA. SHEIKH DAVOOD ROWTHER AND TWO OTHERS
(DEFENDANTS 3 TO 5), APPELLANTS,

1937,
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v.

N. R. M. N. RAMANATHAN CHETTIAR BY POWER OF
ATTORNEY AGENT, SIVABAMAN CHETTIAR, AND TWO OTHERS
(PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 70—Attested document under—Meaning of—Question of attestation in issue in suit—Admission of execution within the meaning of section—What amounts to.

In a suit to enforce a security bond two circumstances were relied on by the plaintiff as relieving him from the obligation of calling any attesting witness to prove the document, viz., (i) an alleged admission of execution in the written statement of some of the defendants that they signed the document but that at the date they signed it there were neither alterations nor the signatures of attesting witnesses, and (ii) the admission of the execution of the bond in a power of attorney which was executed by them for the purpose of registering the bond.

Held: (i) The statement in the written statement amounted to a denial and not to an admission of execution. Under section 70 of the Indian Evidence Act, an attested document means a duly attested one, and the execution that is contemplated in the said section is a due execution or execution in accordance with what the law requires for a particular document; so, if a question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before the said section can be relied on.

Hira Bibi v. Ram Hari Lall(1), *Arjun v. Kailas*(2) and *Benoy v. Dhirendra*(3) followed. *Thayammal v. Muthukumaraswami Chettiar*(4) dissented from.

* Appeal No. 304 of 1934.

(1) (1925) I.L.R. 5 Pat. 58 (P.C.). (2) (1922) 36 C.L.J. 373.
(3) (1923) 38 C.L.J. 114. (4) (1929) 57 M.L.J. 588.

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(ii) An admission to be within section 70 must be one made for the purpose of, and having reference to, the cause, either in the pleadings or during the course of the trial and must not refer to any admission antecedent to the suit; as such, the admission in the power of attorney was not enough.

Abdul Karim v. Salimun(1) and *Raj Mangal Misir v. Mathura Dubain*(2) followed. *Nageshwar Prasad v. Bachu Singh*(3) and *Aung Rhi v. Ma Aung Krwa Pru*(4) dissented from.

The quantum of proof required when a deed is sought to be enforced against a *purdanashin* lady pointed out.

APPEAL against the decree of the District Court of Trichinopoly in Original Suit No. 2 of 1932 which was filed as Original Suit No. 74 of 1930, Sub-Court, Trichinopoly.

S. Ramaswami Ayyar for appellants.

M. S. Vaidyanatha Ayyar for first respondent.

A. V. Narayanaswami Ayyar for second respondent.

Third respondent was not represented.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—These two appeals arise out of a suit to enforce a security bond, dated 3rd August 1924, alleged to have been executed by defendants 1 to 5. The learned District Judge of Trichinopoly passed a decree for the amount claimed against all the defendants. The second defendant has not preferred an appeal and the decree against him has become final. The first defendant and defendants 3 to 5 have preferred appeals; Appeal Suit No. 304 of 1934 is by defendants 3 to 5 and Appeal Suit No. 305 of

(1) (1899) I.L.R. 27 Cal. 190.
(3) (1919) 4 P.L.J. 511.

(2) (1915) I.L.R. 38 All. 1.
(4) (1923) I.L.R. 1 Ran. 557.

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1934 is by the first defendant. Defendants 1 to 4 are brothers and the fifth defendant is their sister. The case of the plaintiff is that a security bond was taken by him for the purpose of securing advances made by him to the first defendant for carrying on a business wherein all the defendants were interested, and that all the defendants agreed to hypothecate the immovable properties specified in the schedule to the security bond as security for the said advances.

Various defences were raised by the defendants. The first defendant admitted the execution of the bond, but stated that he had made two payments, namely, Rs. 10,000 and Rs. 5,000, and endorsed the same on the last but one sheet of the bond and the plaintiff remitted the balance and there was therefore a discharge of the suit bond, that the plaintiff had torn away that sheet, substituted another for it and sued upon it, and therefore the bond sued on was not duly executed and not validly attested and not enforceable against him. Defendants 3 and 4 stated that, when they signed the bond purporting to be dated 3rd August 1924, there were no alterations or erasures and there were no attesting witnesses to the bond and therefore it was not a validly attested document. The fifth defendant denied execution of the bond and stated that she knew nothing about it. Save in regard to the fifth defendant there was no specific issue as to the execution of the bond and there was a general issue raised in the case:

"Issue No. 4. Is the suit document invalid in part or in whole for all or any of the reasons mentioned in the defendants' written statements?"

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At an early stage of the case an application was made for raising a specific issue, whether the security bond was duly attested as required by law, but the application was not granted on the ground that issue No. 4 would cover it. It may be noticed that no attesting witness had been called to prove the document, but, nevertheless, the learned District Judge held that the bond was duly executed by all the defendants and the bond was not invalid for all or any of the reasons mentioned in the written statements. It is contended on behalf of defendants 3 to 5 that the document has not been validly proved according to law and no decree can be passed against them; at any rate, so far as the fifth defendant is concerned, the validity of the bond has not been established.

The case of the fifth defendant can be easily disposed of. It is admitted that she is a *purdanashin* lady. It is settled by more than one decision of the Judicial Committee that, if a person seeks to enforce a deed executed by a *purdanashin* lady, it is incumbent upon him to prove not only that the bond was executed by her but also that it was explained to her and she perfectly understood its contents and that she executed the document of her own free and independent will. The only evidence relating to the validity of the document is the evidence of the plaintiff himself who says that, when it was agreed that the bond should be executed by all, he went to the fifth defendant who told him that she would execute the bond. Beyond this there is not a scintilla of evidence to show that the bond which is sought to be enforced was the original

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bond to which she affixed her signature, and that the bond which is alleged to have been executed by her was explained to her and she understood the contents of it. So far as the evidence of the plaintiff is concerned, we think the evidence is such that we cannot act on it; and very rightly the learned District Judge would not base his conclusion in regard to the execution of the document on his evidence. In our opinion, the plaintiff has failed to discharge the onus which is incumbent on him to establish the validity of the document against her. We therefore must hold that the bond has not been established to be valid so far as she is concerned. We accordingly allow the appeal with costs so far as the fifth defendant is concerned.

So far as defendants 3 and 4 are concerned, it is contended on behalf of the plaintiff that he is relieved of the obligation of calling any attesting witnesses to prove the document by reason of two facts, namely, (i) an alleged admission of execution in the written statement, and (ii) the admission of the execution of the bond in the power of attorney which was executed by them in favour of the first defendant for the purpose of registering the bond. Taking the first point, on a perusal of the written statement it will be seen that what defendants 3 and 4 stated is this: they say that they signed the document, but at the date when they signed it there were neither alterations nor the signatures of attesting witnesses; therefore the document now sued on was not the document which they executed and it was not a duly attested document. In our opinion, in substance, the plea is a denial of execution and

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not an admission of execution. Reliance is placed on section 70 of the Indian Evidence Act. Section 70 runs thus :

"The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

The execution contemplated by section 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. Section 59 of the Transfer of property Act says :

"Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

For a mortgage of the description contemplated by section 59, and the suit security bond comes under that description, there cannot be a due execution unless there has been a signing by the mortgagor in the presence of two witnesses as contemplated by the said section, and the execution can never be said to be complete unless the deed is duly attested by two witnesses. What section 70 says is that there must be an admission of a party to the attested document. "Attested" in that section means duly attested. So, if a question of attestation is put in issue, it is incumbent upon the plaintiff to prove that the document has been duly attested before section 70 can be relied on. It is clear from the pronouncement of the Judicial Committee in *Hira Bibi v. Ram Hari Lall*(1) that, where the attestation is disputed, the plaintiff is not relieved of the

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obligation of calling an attesting witness under section 68 of the Indian Evidence Act. Under section 68, in the case of a document which is required by law to be attested, unless an attesting witness is called, it shall not be received as evidence. Therefore he must call an attesting witness. It may be that, on the strength of the evidence given by him, he may invoke the aid of section 70. We find that the view which we have taken was adopted in two decisions of the Calcutta High Court, one in *Arjun v. Kailas*(1) which has been followed by another Division Bench, of which Sir ASUTOSH MOOKERJEE was a member, in *Benoy v. Dharendra*(2). The observations of a Division Bench of this High Court in *Thayammal v. Muthukumaraswami Chettiar*(3) indicating a contrary view have been relied on. But we find on a reference to the case that there is no discussion of the question and no reasons are given. We therefore are not inclined to follow this decision in preference to the aforesaid decisions of the Calcutta High Court with which we agree.

The next point relates to the admission in the power of attorney. It is an admission antecedent to the suit. In our opinion, the admission contemplated under section 70 is an admission made for the purpose of, or having reference to, the suit and made either in the pleadings or during the course of the trial. From the scheme of the Evidence Act it is clear that the Legislature contemplates a distinction between admissions made for the purpose of dispensing with proof at the trial

(1) (1922) 36 C.L.J. 373.

(2) (1923) 38 C.L.J. 114.

(3) (1929) 57 M.L.J. 588.

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and evidentiary admissions. The scope and purpose of the two classes of admissions are distinct. The one relates to relevancy and the other relates solely to proof at the trial. Sections 68 to 71 are based upon the English rules of evidence. According to the strict English rule, in the case of documents required by law to be attested, it is incumbent upon the plaintiff to call the attesting witness, even though execution is admitted by the party to the deed. Later, the rigour of this rule was relaxed in certain cases, one of such cases being in the case of admissions made for the purpose of a cause. The necessity for calling the attesting witnesses and the reasons for the exception have been very clearly stated in *Whyman v Garth*(1) by POLLOCK C.B. in the following terms :

"The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution. If, therefore, the attesting witness is not called, the deed cannot be read, because this agreement cannot be broken ; but any agreement may be waived by the parties to it. If, then, in the course of the proceeding in the cause, the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the agreement, and the other party, accepting the waiver, does not call the attesting witness."

Thus, as stated by Phipson in his book on Evidence,

"the reason is not that proof by the attesting witness is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be waived for the purposes of dispensing with proof at the trial".

(1) (1853) 8 Ex. Rep. 803, 807.

The agreement is therefore with reference to a contemplated litigation and waiver of such an agreement can only arise after the suit is filed. It is thus clear that the English rule is that the admission must be for the purpose of and with reference to a cause, and we do not think that it was the intention of the author of the Indian Evidence Act to depart from the English rule ; there is also clear indication that he did not want to depart from it. Sir James Fitzjames Stephen who, it is well known, drafted the Indian Evidence Act prepared the Digest of the Law on Evidence some years later and in his introduction to it he stated that he framed the Digest on the Indian Evidence Act. In Article 66 of his book he clearly states that the attesting witness can be dispensed with only in cases where the admission has been made for the purpose of, or having reference to, the cause. In *Abdul Karim v. Salimun*(1) this view had been taken and the same interpretation was adopted by a Bench of the Allahabad High Court in *Raj Mangal Misir v. Mathura Dubain*(2). Two decisions which have taken a contrary view have been brought to our notice, one, *Nageshwar Prasad v. Bachu Singh*(3), and the other, *Aung Rhi v. Ma Aung Krwa Pru*(4). On a reference to those cases we find that they state that there is nothing in section 70 of the Indian Evidence Act to limit the admissions only to admissions made for the purpose of the cause ; but there is no discussion of the question at all. In the circumstances we decline, with respect, to follow the said decisions, and we hold that the

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(1) (1899) I.L.R. 27 Cal. 190.
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(2) (1915) I.L.R. 38 All. 1.
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admission within section 70 must be an admission made for the purpose of or having reference to the cause either in the pleadings or during the course of the trial. On this interpretation the admission of execution in the power of attorney cannot be availed of for the purpose of dispensing with the citation of the attesting witness. In the view we have taken the document must be held not to have been validly received in evidence as against defendants 3 and 4. The question is, what is the relief we should grant having regard to the circumstances of this case? Should we dismiss this suit or give the plaintiff an opportunity of examining witnesses for the purpose of proving that the document had been validly attested? As already indicated by us, except the general issue no specific issue has been raised in the case. It would have been better if the learned Subordinate Judge before whom the application was made had raised the issue. Probably if the Subordinate Judge had himself tried the case he would have had this fact in view, but as the trial was before another Judge the importance of this aspect of the matter had not been sufficiently kept in view. And we also think that the observations of the Division Bench of this High Court in *Thayammal v. Muthukumaraswami Chettiar*(1) may have induced the plaintiff's Counsel to adopt the attitude that he had taken of not calling the attesting witness. In the interests of justice, we think, having regard to the amount of the claim, we should give the plaintiff an opportunity of

(1) (1929) 57 M.L.J. 588.

adducing further evidence in regard to this matter. We therefore frame the following issue :

"Whether the security bond dated 3rd August 1924 has been duly executed by defendants 3 and 4 and validly attested as required by law."

We give both parties an opportunity to adduce evidence in regard to this issue. The learned District Judge is hereby required to submit his finding within two months from the date of receipt of this order and the parties will have ten days for filing objections after receipt of the finding. We allow one-third of the costs of this appeal and one-fifth of the costs in the lower Court so far as the fifth defendant is concerned. We allow two-thirds of the costs of the appeal to defendants 3 and 4 and the costs in the Court below will be dealt with later.

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APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and Mr. Justice Venkataramana Rao.

SIVASANKARA MUDALIAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

1937,
September 22.

v.

AMARAVATHI AMMAL AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Will—Executors appointed under, declining to act and administrator not duly constituted—Effect—Heir-at-law—Suit on behalf of estate of deceased testator by—Maintainability of.

In India the entire estate, both movable and immovable property, left by a deceased person must be deemed to vest in

*Appeal No. 182 of 1936.

SIVASANKARA v. AMARAVATHI. the heir-at-law until an administrator is duly constituted and until then the heir-at-law is competent to maintain a suit on behalf of the estate.

Where the executors appointed under the will of a Hindu executed in the mufassal declined to accept office and there was no duly constituted administrator,

held, accordingly, that the widow and heir of the deceased was competent to maintain a suit to recover possession of the estate left by her husband including properties not specifically bequeathed to her under the will.

Case-law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Chingleput in Original Suit No. 37 of 1931.

T. M. Krishnaswami Ayyar and S. Panchapagesa Sastri for appellants.

P. S. Narayanaswami Ayyar for respondents.

Cur. adv. vult.

VENKATA-RAMANA RAO J. The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This appeal raises a question of some importance. It relates to the rights of an heir-at-law with reference to an estate left by a testator where the executors appointed under his will decline to accept office. The facts necessary for the disposal of the exact point in controversy in the suit may be briefly stated. The plaintiff-first respondent—Amaravathi Ammal—was the widow of one Balasundara Mudali. He died on 9th February 1919, leaving him surviving his widow and his last will and testament, dated 19th November 1918. In the said will he said that he became divided in status from his brother, the first defendant—first appellant, Sivasankara Mudali, that some properties were divided and that, as regards the other properties, he had been getting equally the income

SIVASANKARA v. AMARAVATHI. derived from them. He made several dispositions in the said will and, among others, bequeathed certain immovable properties and monies to his widow Amaravathi. He also provided for certain charities and appointed Ratna Mudali and Jagannatha Mudali as his executors. Subsequent to the execution of the said will, through the intervention of mediators, some of the immovable properties of the family were divided and two lists were drawn up specifying separately the properties that fell to each and the two lists were signed by both the brothers. The date of the lists is 30th December 1918. The case of the plaintiff is that in pursuance of the said division the said Balasundara Mudali was in possession and enjoyment of the said properties. Immediately after the death of Balasundara, the first appellant, Sivasankara Mudali, began to set up that his brother died undivided and disputed the possession of Balasundara with reference to the properties that fell to his share. Thereupon the plaintiff presented for registration the said two lists, but it was opposed by Sivasankara and this led to a litigation which lasted till 1931 and was finally disposed of by a judgment in a Letters Patent Appeal, dated 20th October 1931, in her favour. Before the close of this litigation, as twelve years from her husband's death were about to expire, she filed the present suit on 19th November 1930 for recovery of possession of the properties left by her husband. She recited the said will and the bequests in her favour and also the fact that the executors did not accept office. She therefore alleged that as heir and legatee she was entitled to sue and recover the properties left

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by her husband for the purpose of carrying out all the directions in his will and she also further stated that she was willing to carry out the charities in accordance therewith. She set out in the several schedules to the plaint the properties whereof she sought possession. In the first schedule, she specified the immovable properties which fell to the share of Balasundara at the division of 30th December 1918. In the second schedule, she specified the properties still to be divided between Balasundara and the first appellant and claimed a half share therein. In the third schedule, she specified the businesses wherein Balasundara and the first appellant were partners and claimed half a share in the monies and profits due therefrom. The second appellant—the second defendant in the suit—is the undivided son of the first appellant. Both of them denied the will and also pleaded that the deceased Balasundara died undivided and that the will left by him was inoperative. They further pleaded that the suit as laid was incompetent as the widow was neither the executrix nor the duly constituted administratrix under the law and that, if at all, she could only recover the properties specifically bequeathed to her under the will. They also raised the plea of limitation.

As already stated, the two executors, Ratna Mudali and Jagannatha Mudali, did not accept office and by the date of the suit Ratna Mudali was dead and Jagannatha, who was alive, was made the third defendant in the suit. On 30th January 1935 before the trial began, he was transposed as the second plaintiff. The learned Subordinate Judge held that Balasundara died

divided in status leaving a will, that the suit was competent and that the widow could recover possession of the estate left by her husband and further any defect that there was in the original frame of the suit was cured by the transposition of Jagannatha as the second plaintiff. He held that, so far as the immovable properties left by the testator were concerned, there was no question of limitation but that, in regard to the claim for the profits of the businesses specified in the third schedule, the suit was barred by limitation. He accordingly gave a decree for the immovable properties as claimed in the first and second schedules and also a specific sum of Rs. 500 which was claimed in schedule VI as being a certain sum of money deposited with a certain Nidhi, empowering her to draw that amount. This appeal has been preferred by defendants 1 and 2.

The main argument addressed by the learned Counsel for the appellants, Mr. T. M. Krishnaswami Ayyar, related to the competency of the suit by the plaintiff, the first respondent. His contention is briefly this. Where the executors failed to accept office, in the absence of a duly constituted administrator, the plaintiff cannot recover possession of any properties left by the testator save those which were specifically bequeathed to her under the will and the decree in so far as it directed delivery of possession of properties other than those to which she was entitled is wrong. The question is, is this contention tenable? If this case were governed by English law, there can be no question that the suit would be competent so far as the immovable

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property is concerned. Before Lord Birkenhead's Act, where an executor died or failed to accept office, the legal position was that so far as realty is concerned, it vested in the heir until a legal representative was duly constituted. As observed by Williams in his book on Real Property:

"An heir-at-law is the only person in whom the law of England vested property whether he would or not. As the estate cannot therefore remain in abeyance, 'where there is no executor, the estate descended to the heir pending the appointment of an administrator'"; Williams on Real Property, 24th Edition, pages 101 and 102.

This position was made clear by Lord North in *John v. John*(1), where the learned Judge at page 576 pointed out that until probate was taken the estate remained "where the law makes the legal estate go when a man died intestate, i.e., in the heir-at-law."

In a later case, *In re Griggs. Ex parte School Board for London* (2), Lord COZENS-HARDY M.R. observed :

"Until there is a personal representative, the property vests in the heir. He could recover the rents and maintain actions for trespass."

This statement of the law has been always accepted to be correct and has been recently affirmed by the Privy Council in *Macleay v. Treadwell*(3), where Lord BLANESBURGH at pages 641 and 642 remarked thus :

"Under section 6 (of the New Zealand Act of 1879) the vesting of the real estate of a deceased person in the executor is, as will have been seen, to take effect immediately upon 'the granting of probate of the will or administration of the estate or an order to administer the estate of' the deceased. But not before. And in Victoria, under the Administration Act, 1872,

(1) [1898] 2 Ch. 573.

(2) [1914] 2 Ch. 547, 552.

(3) [1937] A.C. 626.

of that State, No. 427 S.6—a section admittedly indistinguishable from this S.6 of the New Zealand Act of 1879—it was held as long ago as 1875 in *Larkin v. Drysdale*(1), that there was in that section nothing to destroy the status of the old heir-at-law between the death of the deceased and grant of administration to his estate, and an action of ejectment brought during that interval by the heir-at-law in respect of the property of the deceased was accordingly there sustained. The correctness of the principle enunciated in *Larkin v. Drysdale*(1) was not canvassed by the respondents here. Nor could it well have been; it is fundamental; it has been applied in England in analogous circumstances under the Land Transfer Act, 1897, when in *In re Griggs. Ex parte School Board for London*(2) Lord COZENS-HARDY M.R. observed: 'Until there is a personal representative, the property vests in the heir'."

The question is, is there anything to preclude the applicability of that doctrine in this country to a mofussal will such as the one now in question? Whatever may be the state of the Indian law before the enactment of the Hindu Wills Act and the Probate and Administration Act, which were intended to embody the principles of English jurisprudence, at any rate after the said enactments, there is nothing to preclude the applicability of the principles of English law. The principle, that, until an administrator is duly constituted, an heir-at-law can recover the estate, has been applied by the Indian High Courts. In *Rajah Parthasarathy Appa Rao v. Rajah Venkattadri Appa Rao*(3) KUMARASWAMI SASTRI J. observed thus :

"In cases where probate is not necessary, there should be some indication that the person appointed executor is willing to accept office and perform the duties of the executor. In cases where he does not accept office, I think, the estate must vest in the legal representative until an application is made by

(1) (1875) 1 V.L.R. (L) 164, 166.

(2) [1914] 2 Ch. 547. (3) (1922) I.L.R. 46 Mad. 190, 226.

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It is an instructive case. A testatrix died leaving a will appointing an executor. On the date of the will the property which she left thereunder was the subject-matter of a pending litigation wherein she was the plaintiff. The executor did not accept office. The heirs-at-law brought themselves on the record as the legal representatives at the same time alleging that, in case the will left by the testatrix was found to be true, they would deliver possession of the properties to the legatees just as the plaintiff in this case said that she would carry out the directions in the will. They continued the litigation and brought it to a successful termination and recovered the property which she disposed of under the will. After such recovery, the legatees under the will sued the heirs-at-law for recovery of possession of the estate and the suit was held to be in time. One of the arguments advanced by the heirs-at-law in that case was that inasmuch as there was a will, they were not the legal representatives of the testatrix and the recovery by them could not be deemed to be on behalf of the legatees and it was the duty of the legatees to have themselves brought on the record or got a duly constituted administrator appointed to carry on the litigation and therefore they (the heirs-at-law) must be deemed to have been in possession of the estate adversely to the estate. It was in combating this argument that KUMARASWAMI SASTRI J. made the observations cited above and held that as the executor did not accept office, the heir-at-law was the proper person to come on the record and

continue the litigation. The same view was taken by the Calcutta High Court in *Basunta Kumar Chuckerbutty v. Gopal Chunder Das*(1). It was held in that case that it is competent to a legal heir to maintain a suit for the benefit of the estate so long as any other claimant does not establish his rights to the same under the will. This view has been again affirmed in a recent decision in *Gopal Lal Chandra v. Amulya kumar Sur*(2) where the legal heirs were held competent to maintain a suit on a mortgage in the name of the deceased testator until an administrator was duly constituted (page 916). In this country there is no distinction made between realty and personalty and therefore the entire estate, both movable and immovable property, left by the deceased must be deemed to vest in the heir-at-law until an administrator is duly constituted; vide *Antony Cruz Gonzales v. Makis Boopalra-yan*(3). A legatee does not represent the estate and he has no direct right of action against the person who is claiming adversely to the estate. Therefore to preserve and safeguard the estate, a right of action must vest in somebody to prevent an adverse claim against the estate and the heir-at-law is the person in whom the law vests the estate whether he will or not even under Hindu law. Therefore there is nothing to preclude an heir-at-law from maintaining an action in ejectment or otherwise recovering possession of the estate left by the testator. The heir-at-law, if he likes, can get himself appointed administrator but he is not bound to do so. It is open to legatees

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(1) (1914) 18 C.W.N. 1136.

(2) (1931) I.L.R. 59 Cal. 911.

(3) (1910) I.L.R. 34 Mad. 395.

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to have an administrator duly constituted. As soon as such an administrator is constituted, the estate would be divested from the heir-at-law and the person competent to maintain a suit on behalf of the estate will be such administrator.

An argument has been advanced by Mr. Krishnaswami Ayyar based on section 17 of the Limitation Act. He contends that section 17 uses the expression "legal representative" which must be deemed to connote an executor or an administrator and that this is a clear indication of the intention of the Legislature that in cases where a testator dies leaving a will, the heir-at-law could not be the person in whom the law would vest the estate. It seems to us that section 17 does not throw any light on the question in issue as it does not say who a "legal representative" within the meaning of the section is. Again the argument in our opinion proceeds upon a misconception of the true meaning of the expression "legal representative" in the section. There is no definition of the expression "legal representative" in the Limitation Act. According to the plain language of section 17, legal representative would also include an heir. A legal representative is one who represents in law the estate of the deceased and in whom the legal personality of the deceased is deemed to continue. He may be an heir, executor or administrator. Where a person dies intestate, it cannot be said that the legal representative of the deceased in section 17 would not include an heir and that no limitation would run if there was an heir capable of suing. Herein must be noted the

distinction between English and Indian law. Under the English law,

"if the statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out"; vide *Burdick v. Garrick*(1).

This is because the personalty did not vest in the next of kin under the early English law and later in the Court of Probate until an administrator is constituted but under the Indian law the movable property vests in the heir-at-law. All that section 17 contemplates is that if there is no legal representative who is capable of suing, the statute of limitation would not run. The heir-at-law may be a minor in which case limitation would not run by virtue of section 6 but, as soon as an administrator of the estate is constituted, limitation would begin to run against him and the fact that there is an heir-at-law who is a minor would not prevent the operation of the law of limitation. This position is made clear by section 17, clause 2, which deals with a suit against a legal representative of a deceased person. There, there is no qualification to the effect that he must be capable of being sued because an heir-at-law, whether a minor or not, an executor or administrator, all of them are capable of being sued. That the expression "legal representative" is not intended to be confined to an executor or administrator seems to be clear from the decision in *Rivett-Carnac v. Goculda's Sobhanmull and others*(2) which has been affirmed by the Privy Council in *Bhagwandas v. Rivett-Carnac*(3). That was a case of dissolution of partnership. The suit was by the

(1) (1870) 5 Ch. App. 233, 241.

(2) (1895) I.L.R. 20 Bom. 15. (3) (1898) I.L.R. 23 Bom. 544 (P.C.)

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administrator of a deceased partner claiming the assets of the partnership for recovery of the amount due to him. The partner died in 1889 having dissolved the partnership. The suit was instituted in 1894. *Prima facie*, the suit would be barred by limitation under article 106 of the Limitation Act. It was contended that, as letters of administration were granted to the estate of the deceased partner and an administrator was duly constituted only in March 1894, under section 17 of the Limitation Act the time could only be deemed to have run from this date. CANDY J., before whom the case came on for trial, took the view that, though after the grant of the letters no person other than the administrator can act as the representative of the deceased partner, there was no reason why a person claiming to be the heir of the deceased partner should not have filed the suit, and he therefore held that the suit was barred. In that case, the heir-at-law was a minor. When the matter came up on appeal, the learned Judges who heard the appeal took the view that as the heir-at-law was a minor, there was no legal representative capable of suing until letters of administration were granted and therefore the suit must be deemed to be in time. They interpreted the words "capable of suing" as meaning not under a disability to sue, and infancy would be such a disability. It is thus clear that the learned Judges would have upheld CANDY J.'s decision if it were not for the fact that the heir-at-law was a minor. This view was affirmed by the Privy Council—vide *Bhagwandas v. Rivett-Carnac*(1). at

(1) (1898) I.L.R. 23 Bom. 544 (P.C.).

page 549. It seems to us therefore that the argument based on section 17 of the Limitation Act is not a tenable one. SIVASANKARA
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We are therefore of the opinion that the suit by the plaintiff was competent. There is no other point of substance in the appeal and none has been pressed before us in the view we have taken of the competency of the suit. In the result, the appeal fails and is dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and
Mr. Justice Madhavan Nair.*

RAJA VELUGOTI SARVAGNA KUMARA KRISHNA
YACHENDRA BAHADUR VARU, OF VENKATAGIRI,
PETITIONER,

1937,
October 12.

v.

N. V. RAMA NAIDU AND ANOTHER, RESPONDENTS.*

*Contempt of Court—Suit for injunction, filed by petitioner—
Pending—Respondents published an article in a weekly
paper—Case of defendants stated and inferred to be
true—Petitioner accused of several wrongful acts against
defendants—Author of the article and the editor of the
paper—Liability of.*

During the pendency of a suit filed by the petitioner, the holder of an impartible estate, for an injunction restraining some of the inhabitants of his estate from entering his forests and cutting firewood therein, an article was published in a weekly paper which stated the defendants' case and inferred that it was true and accused the petitioner of having ruined the defendants, of having concocted false criminal cases against

* Criminal Miscellaneous Petition No. 1084 of 1937.

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them and of using his influence maliciously and to the detriment of the defendants. In proceedings for contempt of Court against the respondents, the author of the article and the editor of the paper in which the article was published,

held: (i) The article constituted gross contempt of Court notwithstanding that it closed with an appeal for assistance for the defendants.

Anything which tends to excite prejudice against the parties, or their litigation, while it is pending, constitutes contempt of Court.

(ii) The belief of the respondents that the article was not of a nature which would prejudice the fair trial of the suit did not excuse the offence.

(iii) The fact that the trial Judge would not be affected by the article had no bearing on the matter.

PETITION praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to punish the respondents therein for contempt of Court for having published in the Telugu Weekly paper called "Zamin Ryot" in its issue of 27th August 1937 an article containing certain statements, a true translation of which was annexed to the petition as Exhibit "A", and a similar article in the same weekly in its issue dated 10th September 1937 relating to Original Suit No. 308 of 1937 on the file of the Court of the District Munsif of Nellore.

M. Patanjali Sastri for P. S. Raghavarama Sastri for petitioner.

B. Somayya for respondents.

LEACH C.J. The ORDER of the Court was delivered by LEACH C. J.—This is an application by the Raja of Venkatagiri for an order against the respondents for contempt of Court. The petitioner is the plaintiff in a suit in the District Munsif's Court, Nellore, for an injunction restraining

forty inhabitants of Venkatagiri from entering the petitioner's forests and cutting firewood therein. The defendants claim that they have the right to cut firewood there and to sell it. They base this right on grant, custom and prescription. The suit was filed in June 1937 and on 27th of August the following article appeared in the "Zamin Ryot" which is published in Nellore :

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"HELP THE ARAVA-MALAS OF VENKATAGIRI.

Means of livelihood enjoyed for generations deprived of by the estate.

Appeal by Kamatam Shunmugam, M.L.A.

There are about 500 families of Harijans in Venkatagiri. During the time of Chevi Reddi, the original ancestor of the Rajas of Venkatagiri Estate, one Yachadu, the original ancestor of the Malas, sacrificed his life as offering at the bidding of Bhairavamurti (Deity) in order to provide the Estate with money. In pursuance of the (last) favour asked for by Yachadu prior to the sacrifice, whenever marriages take place in the house of the Estate (people) even to this day, they first perform the marriage of one among the Malas, take the holy rice showered on the (bridal) couple and thereafter perform their own marriages. Out of such Malas about 300 families have been serving the Estate for the past about twenty-nine generations, as grooms, keepers of the elephants and as servants getting fodder to the said animals. The salaries paid to them are not even enough to satisfy their barest necessities. Consequently, they have been, in addition to their salaries, eking out their livelihood by bringing and selling dry firewood from the forests situate in Venkatagiri. None of the late rulers of the Estate ever raised any objection in regard to this. Since about one year, the Estate has been selling firewood by opening a firewood depot and has (thereby) not only ruined the occupation of these people, but also caused an injunction order to be issued against them. Now the estate has prepared some (kind of) statements and while forcing them to sign or affix their marks therein, dismissed from

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service forty persons who did not do so. When they go to the small villages nearby to gather green and dry grass with a view to sell the same and earn a living, they are setting up the ryots to obstruct these people in the respective villages. Every now and then criminal cases are being concocted and filed and these people are sent to prisons. The Estate, besides not only ruining their occupation in this manner, has also been putting them to considerable trouble and loss by maliciously using their entire influence. Civil cases are going on between the two parties. Certain kind-hearted Advocates are conducting the proceedings on behalf of the Malas free (of cost). Until the cases are disposed of, the said 300 families have to suffer for their food and raiment. I, therefore, pray that countrymen, who have the welfare of the poor at heart, will naturally render assistance to these people, either in cash or paddy or any other article necessary for their life.

Kind-hearted donors are requested to send in their contributions to the following persons:—

- (1) Arava Surayya, Kapadipalem, Nellore.
- (2) Arava Padanarasayya, Yeguvapalem, Venkatagiri Town."

The author of the article is the second respondent who is a member of the Madras Legislative Assembly. The first respondent is the editor of the paper. The petitioner complains that the article constitutes gross contempt of Court, and we consider this to be the case. The article states the defendants' case and infers that it is true. It then accuses the petitioner of having ruined the defendants and of having concocted false criminal cases against them. It further accuses the petitioner of using his influence maliciously and to the detriment of the defendants. The fact that the article closes with an appeal for assistance for the defendants does not help the respondents. This appeal could have been made without the accusations which preceded it.

The law is quite clear and is stated thus at page 91 of the third edition of Oswald's Contempt of Court :

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" All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely, those which (1) scandalise the Court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers, or proceedings; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party, his witnesses or solicitor, constitute contempts, though a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action."

In *The St. James's Evening Post* Case(1), Lord HARDWICKE observed :

" Nothing is more incumbent upon Courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."

And he added :

" There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

In *re The William Thomas Shipping Co.*(2), MAUGHAM J. observed :

" I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason."

(1) (1742) 2 Atk. 469; 26 E.R. 683. (2) [1930] 2 Ch. 368, 376.

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The fact that the trial Judge would not be affected by the article has no bearing on the matter, as was pointed out by this Court in the case of *Sathappa Chettiar v. Ramachandara Naidu*(1).

The defence set out in the affidavit is that the respondents did not regard the article as being of a nature which would prejudice the fair trial of the suit and they offered to express their regret if the Court were of a contrary opinion. The belief of the respondents does not excuse the offence. Lord LANGDALE M.R. in *Little v. Thomson*(2) said:

"Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences, if his publication has been of such a nature as to disturb the free course of justice. The effect of such publications would seem to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. What I am to consider is, whether these papers are or are not calculated to disturb the free course of justice."

At a later stage in the case Lord LANGDALE observed:

"I am surprised that a gentleman of education and science should think that it was serving the cause of truth and justice, or likely to benefit the gardeners, whose interest he professes to advocate, to publish articles of this description pending the progress of a cause."

The respondents have appeared before us and the Court having informed them that it considers that the article does constitute grave contempt, they have expressed their regret for their action. In these circumstances we do not consider it necessary to take any action in the matter beyond ordering the respondents to pay the costs of the petitioner, which we fix at Rs. 100.

V V.C.

(1) (1931) I.L.R. 55 Mad. 262.
(2) (1839) 2 Beav. 129; 48 E.R. 1129.

PRIVY COUNCIL.

BALASUBRAHMANYA PANDYA THALAIVAR,
APPELLANT,

v.

M. SUBBAYYA TEVAR AND ANOTHER,
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu law—Succession—Mitakshara—Priority amongst atma-bandhus inter se—Adoption—Widow in Madras Presidency—Power of—Implied authority to make second adoption—Association in first adoption—Sapindas whose consent required for adoption—Confined to agnates, if—Absence of sapindas—Widow's power of adoption in—Court of Wards Act (Madras Act I of 1902), sec. 34—Confirmation of will by Court of Wards after death of testator and relinquishment of estate—Validity of.

Under the Mitakshara, succession amongst bandhus of the same class *inter se* is governed by nearness of blood relationship and the test of religious efficacy is applied to determine priority only when members are related to the last male holder in equal degree. A maternal uncle is, therefore, preferred to a father's sister's son as he is one degree nearer to the last male holder.

In the Madras Presidency an adoption by a Hindu widow is only valid if made under the authority of her husband or, failing that, with the assent of his kinsmen, the term kinsmen being understood as not limited to agnates.

Where the boy adopted by the husband in conjunction with his wife died after the husband and where there is nothing to show that the husband ever contemplated a second adoption or that he was prepared to leave the selection of another boy to his wife, an authority in her favour to make a second adoption

* Present: LORD WRIGHT, SIR GEORGE LOWNDES and
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is not necessarily to be implied from her mere association in the first adoption.

It would be difficult to hold that under the Madras law there is any residuary power in the widow to make an adoption in the absence of sapindas.

Jatindranath Ray v. Nagendranath Ray(1), *Vedachela Mudaliar v. Subramania Mudaliar*(2) and *Muttusami v. Muttukumarasami*(3) referred to.

No limit of time is fixed by the proviso to section 34 of the Court of Wards Act within which the Court of Wards may confirm a will. The confirmation of a will by the Court of Wards after the death of the testator and the relinquishment of the estate is valid.

CONSOLIDATED APPEALS (Nos. 84 and 113 of 1936) from decrees of the High Court (April 2, 1935) which varied decrees of the District Judge of Tinnevely (January 3, 1929).

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

Pugh K.C. for appellant, Navanithakrishna.—Amongst Hindus the greatest importance is attached to adoption—*Amarendra Mansingh v. Sanatan Singh*(4). The four schools differ in their views as regards the widow's power to adopt—*The Collector of Madura v. Mootoo Ramalinga Sathupathy*(5)—but they all found on Vashista's text, "Nor let a woman give or accept a son in adoption except with the consent of her lord". The family council is required only to show that everything is done properly—*Patnaloo Appalswamy v. E. Moosala*(6), *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(7) and *Kristnayya v. Lakshmipathi*(8). It is held in every school that, where a husband has given a power to adopt a son, his widow can make any number of successive

(1) (1931) L.R. 58 I.A. 372; I.L.R. 59 Cal. 576.

(2) (1921) L.R. 48 I.A. 349; I.L.R. 44 Mad. 753.

(3) (1892) I.L.R. 16 Mad. 23, 38.

(4) (1933) L.R. 60 I.A. 242, 247, 248; I.L.R. 12 Pat. 642.

(5) (1868) 12 M.I.A. 397, 432.

(6) (1933) I.L.R. 12 Ran. 22.

(7) (1899) L.R. 26 I.A. 113; I.L.R. 22 Mad. 898.

(8) (1920) L.R. 47 I.A. 99; I.L.R. 43 Mad. 650.

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adoptions—*Suryanarayana v. Venkataramana*(1). The fact that in the present case there was an adoption in conjunction with Meenakshisundaram is equivalent to giving her power to make other adoptions. If the husband's intention was that he should have a son, there is an implied authority to adopt. The fact that the husband prohibited his other wife from making an adoption must also be taken into consideration. There is a further question as to whether a widow can adopt when there are no sapindas. This was not pressed before the District Judge and is not dealt with by the High Court. Admittedly the point was not raised in the grounds of appeal to the High Court or in the statement of the case here. The authority to adopt, it is submitted, is fortified by the fact that forty-nine of the widow's relations signed a document evidencing their consent to the adoption.

Godfrey following.—[Reference was made to *Seetharamamma v. Suryanarayana*(2).] The Zamindar's purpose in making the adoption in conjunction with Meenakshisundaram, as the evidence shows, was to secure an heir. [*Annapurni Nachiar v. Forbes*(3) was also referred to.]

De Gruyther K.C. and *Sidney Smith* for respondent.—The Courts below have concurrently found as a fact that no authority was given by the husband to make an adoption. In *Suryanarayana's* case (1) the Board came to the conclusion that the actual authority was sufficiently large to provide for a second adoption. Here there was no authority. In *Seetharamamma's* case (2) the husband had manifested his intention to adopt and had taken preliminary steps. The widow merely completed what the husband had begun. In *Kesar Singh v. Secretary of State for India*(4) it was held that, in the absence of agnates, a widow can adopt with the consent of the nearest cognate. [Mulla's Hindu Law (last edition), page 523, was also referred to.] The only authority for the proposition that, if there are no sapindas, the widow is free to adopt is *Patnaloo Appalswamy's* case(5). But here no evidence was directed to the point that there were no sapindas. There were no agnates, but several defendants claimed as cognates. Moreover

(1) (1906) L.R. 33 I.A. 145; I.L.R. 29 Mad. 382.

(2) (1926) I.L.R. 49 Mad. 969.

(3) (1899) L.R. 26 I.A. 246; I.L.R. 23 Mad. 1.

(4) (1926) I.L.R. 49 Mad. 652.

(5) (1933) I.L.R. 12 Ran. 22.

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the point was not raised in the appeal to the High Court or in the appellant's case here. Some of the witnesses were sapindas of the husband and, if the consent of sapindas is necessary, there should be a remitter to ascertain whether consent was given. There is no allegation that sapindas were consulted. There is no reason for assuming from the fact that an adoption has been made that authority is given to make another adoption.

Pugh K.C. in reply.—The consent of sapindas meant consent of agnatic sapindas and cognatic sapinda's consent was not required.

Dunne K.C. and *Subba Rao* for appellant, Balasubrahmanya.—*Jatindranath Ray v. Nagendranath Ray*(1) is against me. I cannot say it is wrong but it rests on another decision and I can only submit that the whole question should be reargued. The position is this, that while Subbayya is nearer in degree, that is, in blood relationship, to the last male holder than Balasubrahmanya, the latter offers oblations in which the propositus would benefit and the former does not. Balasubrahmanya is in the line *ex parte paterna* while Subbayya is in the line *ex parte materna*. In some cases in Madras it has been held that the line *ex parte paterna* is to be preferred, in other cases the test applied is spiritual efficacy. In *Jatindranath's* case (1) there was equality in degree in the competitors and it was laid down that religious efficacy arose only when persons were equal in degree. It is submitted that what has been laid down by the Board in other cases is that, when there is competition in any class, then the test of religious efficacy must be applied, irrespective of the degree of nearness in that class. In *Muttusami v. Muttukumarasami*(2), spiritual efficacy in bandhus of the same class is laid down in the fourth rule. [Reference was made to the texts. Sons, gentiles, etc.; Setlur, page 36. On failure of agnates, cognates are heirs. Cognates are of three kinds; "The sons of his own father's sister, etc."; Setlur, section VI, page 48. Viramitrodaya, Setlur, Chapter II, Part I, page 343, and Viramitrodaya, Setlur, Chapter III, Part VII, paragraph 5, page 424, were referred to.] The greatest amount of spiritual benefit in each class regulates succession. This is what was laid down in *Muttusami's case*(2).

(1) (1931) L.R. 58 I.A. 372; I.L.R. 59 Cal. 576.
(2) (1892) I.L.R. 16 Mad. 23.

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There are persons in the *pitru bandhu* class who are nearer in degree than some in the *atma bandhu* class. It follows, therefore, that in construing propinquity under the Mitakshara, degree is not the test. [*Vedachela Mudaliar v. Subramania Mudaliar*(1) was referred to.] There is nothing in the texts, in Viramitrodaya or in *Muttusami's case*(2) which conflicts with the doctrine that in each class spiritual efficacy is the test.

De Gruyther K.C. and *Sidney Smith* for the respondents.—From the first edition of Mayne's Hindu Law in 1878 to the ninth edition in which all the rulings are referred to, it has always been stated that under the Mitakshara the rule is nearness in degree; Mayne (9th edition), pages 737, 742. Against this a different rule is suggested, founding on the fourth rule in *Muttusami's case*(2).

[The Board intimated that they did not wish to hear Mr. De Gruyther further.]

De Gruyther K.C. and *Sidney Smith* for the appellant, Subbayya.—The Act applicable is the Madras Court of Wards Act I of 1902. [Mr. Pugh agrees.] The consent of the Court of Wards to a will must be given before the death of the testator or in any event before the release of the estate. Here the estate was released on 23rd June 1931 and the consent was not given till after the preliminary judgment of the High Court in 1935. It is not disputed that the cash amounting to Rs. 9,000 which the Rani had might be disposed of as her own. As regards the dedication of the jewels on her body to the temple, I am content that the Rani's wishes should be respected. As regards the huq right of the temple, I accept the High Court's decision to leave the matter for adjudication. That Navanithakrishna takes as *persona designata* is not disputed, but it is submitted that the High Court was wrong in adding Rs. 9,000 to the Rs. 80,000. It is submitted that the words of the will, "I have transferred", should be read as "I have transferred by my will", that is, that the words should not be interpreted as used in regard to a transfer already made.

Pugh K.C. and *Godfrey* for the respondent.—The Rani could make a will without the sanction of the Court of Wards.

(1) (1921) L.R. 48 I.A. 349; I.L.R. 44 Mad. 753
(2) (1892) I.L.R. 16 Mad. 23.

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[Section 34 of the Act was referred to.] If the Court of Wards has come in on the application of the proprietor, he may make a will. Here the Court of Wards took possession under Regulation IV of 1804. On Act I of 1902 being passed the Court of Wards must be deemed to have taken possession under that Act, but it was on the Rani's application that they took possession and she would come in under section 18.

[LORD WRIGHT: The next question is that of consent. Section 34 does not place any limitation on the discretion of the Court of Wards in granting its consent and secondly there is no limitation of time.]

De Gruyther K.C. in reply referred to sections 19 and 62 of the Act.

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The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE LOWNDES.—In these consolidated appeals the main question to be decided is as to the right of succession to the Uttumalai Estate situated in the Tinnevely district of the Madras Presidency. There are now three claimants each of whom filed separate suits in assertion of his claim and has appeared by Counsel before the Board in support of it. They are respectively:—

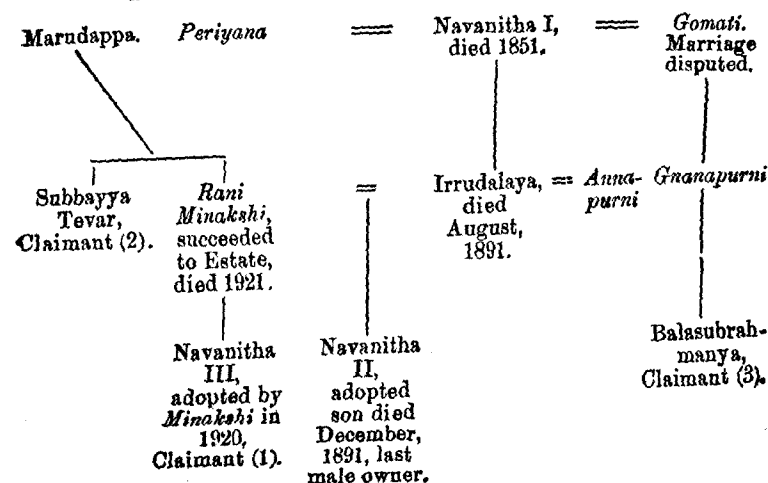
- (i) Navanithakrishna Marudappa Tevar, who claimed by adoption to the father of the last male holder. He will be referred to for convenience as the "adopted son";
- (ii) Subbayya Tevar, and
- (iii) Balasubrahmanya,

each of these last-mentioned denying the validity of the adoption and claiming to be the nearest *sapinda* of the last male holder. There were other claimants in the Indian Courts and other parties to the suits, but none of them have

appeared before the Board and they may be disregarded for the purpose of these appeals.

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The following pedigree sets out the position of the respective parties:—



N.B.—The names of females are printed in italics.

Navanitha II, the last male owner, was duly adopted by Irrudalaya and his second wife Minakshi to the exclusion of the first wife Anna-purni, and after his death his adoptive mother Minakshi (hereinafter for convenience referred to as the "Rani") was held entitled to succeed for a Hindu widow's estate [see *Annapurni Nachiar v. Forbes*(1)]. In 1901 she handed over the management of the Uttumalai Estate to the Court of Wards, who remained in possession until her death in 1921, when the disputed succession opened. On 28th January 1920, the Rani purported to adopt Navanitha III. She also made certain testamentary dispositions in his favour which are disputed by the other claimants and

(1) (1899) L.B. 26 I.A. 245; I.L.R. 23 Mad. 1.

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which will be considered by their Lordships in a later part of this judgment.

As regards the main question, the succession to the estate, it is obvious that if the adoption of Navanitha III is valid no other question will arise. Their Lordships will, therefore, proceed in the first instance to deal with his claim.

The *factum* of the adoption, though at first in dispute, is now admitted, but, under the interpretation of the Mitakshara law as generally accepted in the Madras Presidency and by which the parties are governed, it would only be valid if made under the authority of the lady's husband, or, failing that, with the assent of his kinsmen. In the present case the express authority of the husband was alleged, but it has been negatived by both Courts in India, and in accordance with the established practice of the Board these concurrent findings on what is a pure question of fact must be held conclusive.

It was, however, contended in the Indian Courts that in the circumstances of this case, an implied authority should be inferred. The argument was that the association by Irrudalaya of the Rani with himself in the adoption of Navanitha II (the last male holder) which put her in the position of his adoptive mother, necessarily implied authority to make a second adoption if the first boy died (as he did) in infancy.

This contention was repelled by the Indian Courts. Both the District Judge by whom the suits were tried and the High Court on appeal held that the mere association of one's wife in an adoption by the husband was no indication of an authority to her to make a second adoption.

They therefore held that the adoption of Navanitha III was without authority.

There is nothing to show that the husband ever contemplated a second adoption or that he was prepared to leave the selection of another boy to his wife. Their Lordships are not laying down that the requisite authority must necessarily be express, but they agree with the District Judge that

"in order to constitute an implied authority there must be circumstantial evidence of a cogent character", and they are satisfied that no such evidence was forthcoming in the present case.

Whether a particular intention can be inferred from a particular set of circumstances is, their Lordships think, rather a question of fact than of law, and on this question the Courts in India have concurred in their findings. But apart from this their Lordships see no reason to differ from the conclusion at which they arrived.

A further question was debated in the Indian Courts as to the necessity of the consent of the Court of Wards to the adoption, but having regard to what has been said above, it is not now material to discuss it.

No assent of kinsmen is alleged, but in the plaint a somewhat novel point was taken, that there being no agnates of Irrudalaya in existence at the time of the adoption, whose assent could be sought, the lady had an inherent authority to adopt of her own volition. An issue was raised as to this in the trial Court but the contention was subsequently abandoned. It found no place in the argument before the High Court and is not referred to in the printed case filed on behalf of

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the adopted son before the Board, but the contention is sought to be revived before it by his Counsel. Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates, nor is there any evidence as to what sapindas of Irrudalaya were in existence at the date of the Rani's adoption. Their Lordships think, moreover, that it would be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas but the contention was so clearly abandoned in India that it is not necessary to consider it further.

For these reasons their Lordships are of opinion that the judgments of the District Judge and the High Court on the claim of the adopted son to the estate were right and that his appeal upon this part of the case fails.

Their Lordships now turn to the contentions of the other two claimants, Subbayya and Balasubrahmanya. They are respectively the mother's brother, and the son of an alleged half sister of the father, of the last male owner.

The marriage of Gomati (*see* the pedigree above) to Navanitha I is not admitted. The District Judge held that it was not proved and the High Court did not think it necessary to decide the question as, assuming it to be established, they affirmed the superiority of Subbayya's claim. Their Lordships for the purpose of this judgment will make the same assumption.

Both of these claimants admittedly belong to the class of cognates known to the Hindu law as *atma bandhus*, i.e., cognates of the propositus (the

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last male owner) who have precedence in questions of succession over *pitri bandhus*, i.e., cognates of his father, and *matri bandhus*, cognates of his mother. The question between the claimants is as to the rights of such *atma bandhus* inter se. It is not disputed that Subbayya as the maternal uncle is a step nearer in degree to the propositus than the rival claimant as father's sister's son. But for the latter it is contended that nearness in degree is no test as between *atma bandhus*, and that the sole criterion should be religious efficacy, i.e., which of the two claimants would by his religious offerings confer most benefit upon the propositus in the other world, and it is admitted that upon this test Balasubrahmanya's claim would prevail. The question between them therefore seems to be a clear cut one, namely, which of the two is the proper test to apply.

At first sight it would appear that the question is covered by the direct authority of the Board [*Jatindranath Ray v. Nagendranath Ray*(1).] In this case it was laid down that the test of religious efficacy was applicable between *atma bandhus* only when the parties were equal in degree.

At the time the District Judge gave his judgment this case had not come up to the Board, but a decision given ten years previously [*Vedachela Mudaliar v. Subramania Mudaliar*(2)], in which a question as to the right of succession between *atma bandhus* was discussed, was before him, and relying upon it and upon the view taken in Mayne's Hindu Law he held that Subbayya was the preferential heir.

(1) (1931) L.R. 58 I.A. 372; I.L.R. 59 Cal. 576.
(2) (1921) L.R. 48 I.A. 349; I.L.R. 44 Mad. 753.

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It was not until six years later—a delay which their Lordships greatly regret—that the appeal was heard in the High Court, and by that time the report in *Jatindranath's* case(1) was available. The learned Judges thought that any possible doubt as to the rule to be applied was set at rest by this later decision, and they accordingly affirmed the judgment of the District Judge on this point.

Balasubrahmanya has nevertheless appealed to His Majesty in Council against the rejection of his claim. In his petition to the High Court for leave to appeal it was urged that the learned Judges of the High Court had misinterpreted *Jatindranath's* case(1). But before their Lordships, Mr. Dunne, with characteristic courage, admits that he cannot distinguish it, but attacks the decision as unsound and in conflict with the reasoning in the earlier case, *Vedachela Mudaliar v. Subramania Mudaliar*(2).

It might be sufficient in the present case to say that the question is clearly covered by the latest decision of the Board, but in view of the able argument of Mr. Dunne it may perhaps be desirable to examine the position a little more closely.

The argument put shortly is that in *Vedachela Mudaliar v. Subramania Mudaliar*(2), in which the contest was between the father's sister's son's son and the maternal uncle, the Board expressly affirmed certain rules which had been enunciated by MUTTUSAMI AYYAR J. in a previous Madras case, *Muttusami v. Muttukumarasami*(3),

“that as between bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in the *Viramitrodaya* a ground of preference”.

(1) (1931) L.R. 58 I.A. 372; I.L.R. 59 Cal. 576.

(2) (1921) L.R. 48 I.A. 349; I.L.R. 44 Mad. 753.

(3) (1892) I.L.R. 16 Mad. 23.

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The affirmation of this rule, it was contended, made spiritual benefit the sole test as between members of the class and treated nearness of degree as irrelevant. Mr. Dunne admitted that agnatic succession under the Mitakshara law as interpreted in Madras depends solely upon proximity of blood connection, and that the Bengal doctrine of religious efficacy has no application, but he claimed that the rule quoted above established that among cognates the exact opposite was the case, i.e., that proximity of blood relationship went out altogether and religious efficacy came in as the sole test.

Their Lordships think that such a change over would be, to say the least of it, remarkable. Mr. Mayne, in a passage that has often been quoted before the Board, after a detailed discussion of the Bengal law, says (section 509) :

“When we go a stage back to the Mitakshara, and still more to the actual usage of those districts where Brahminical influence was less felt, the whole doctrine of religious efficacy seems to disappear. In the chapters which deal with succession, the *Daya Bhaga* and the *Dayakrahma-sangraha* appeal to that doctrine at every step, testing the claims of rival heirs by the numbers and nature of their respective offerings. The Mitakshara never once alludes to such a test.”

It is also clear that the *Viramitrodaya*, Chapter III, part VII (5), which is the principal authority for the well recognised priority of *atma bandhus* over the two other classes, clearly bases it on propinquity. Their Lordships think therefore that it would be impossible to say that under the Mitakshara the principle of propinquity does not apply beyond agnatic succession.

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A reference to the judgment delivered by Mr. AMEER ALI in *Vedachela's* case⁽¹⁾ makes it clear that no such change over in the case of cognates was contemplated, and the rule above referred to, which was affirmed towards the end of the judgment, obviously does not make religious efficacy the only test among *bandhus* of the same class, though it does make it an admissible test, and it is perhaps worth noting that the view taken by the Subordinate Judge, to whose judgment their Lordships have referred and which was held to be well founded, was that the religious test was only applicable if the proximity test failed. The final conclusion at which the judgment of the Board then arrived is stated as follows (page 364):—

“In the present case before their Lordships, the appellant and the deceased were sapindas to each other; and he (the appellant) is undoubtedly nearer in degree to the deceased than Subramania (the respondent). He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit resulting from the appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no pinda to the deceased's ancestors. On all these grounds their Lordships think that the view taken by the Subordinate Judge was well founded.”

It is difficult to suggest that the Board here discarded the test of nearness of degree, and adopted only that of religious efficacy; they clearly applied both, and it is perhaps not without significance, in view of what the Subordinate Judge had said, that nearness of degree is put first.

(1) (1921) L.R. 48 I.A. 349; I.L.R. 44 Mad. 753.

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In *Jatindranath Ray v. Nagendranath Ray*⁽¹⁾ the question was between *atma bandhus*, admittedly equal in degree so that the test of proximity was no guide, and it was laid down, strictly as their Lordships think in accordance with the general scheme of the Mitakshara, that it was only when the test of proximity failed that religious efficacy came in. Their Lordships can see no inconsistency between the two decisions of the Board, and no antagonism between the later decision and the rule enunciated by MUTTUSAMI AYYAR J. upon which Mr. Dunne relies so strongly. They must therefore confirm the decision of both Courts in India that, as between Claimants 2 and 3, Subbayya as nearer in degree to the last male owner is entitled to succeed to the estate.

There remains to be considered the testamentary dispositions made by the Rani in favour of her adopted son. By her will, dated 9th May 1921, the due execution of which is not now disputed, she bequeathed to him the accumulations of the income of the estate amounting to Rs. 89,000 and her jewels, vessels, etc. The District Judge held that the savings were not her property but went with the estate, and that it was not established that the jewels, etc., in her possession at the time of her death were her personal property. He therefore rejected the claim of the adopted son. The High Court on appeal came to a different conclusion. They held that the savings which were found to be a sum of Rs. 80,900 in the hands of the Court of Wards and Rs. 9,244 in the lady's own possession, were the personal property of the Rani and would pass under her will. With regard to the jewels,

(1) (1931) L.R. 58 I.A. 372; I.L.R. 59 Cal. 576.

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etc., they came to the same conclusion. Subbayya has appealed against this decision, but the correctness of the High Court's finding has not been seriously contested before the Board in either case, and their Lordships see no reason to differ from the High Court's findings.

A further point, however, remains. The Rani's estate being in the hands of the Court of Wards, she was not qualified to dispose of her property by will without the consent of the Court, provided, nevertheless, that the Court could confirm a will made without its previous consent (Madras Court of Wards Act, 1902, section 34). In this case there was admittedly no previous consent, but the Court of Wards, which had been a party in each of the suits, intimated its readiness to confirm the will so far as the dispositions made by it were otherwise legally valid. The High Court accordingly, after affirming the validity of the bequests referred to above, invited the Court of Wards to confirm them, and the Court's confirmation has been given. It is however contended that no confirmation could be given after the death of the Rani, or after the Court of Wards had given up possession of the estate, which they admittedly did in June 1921.

Their Lordships think that there is no substance in this contention, the proviso to section 34 fixed no limit of time within which such confirmation must be made, and their Lordships think that in this respect the confirmation is sufficient.

Another and possibly a more serious objection was taken to the confirmation as given, namely, that it confirmed part only of the will. Besides the bequests of the savings and jewels, the Rani

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also purported by her will to make over to the adopted son the management of a temple on the estate with a certain endowment for the idol. No issue had been raised as to this in the lower Court and the High Court had refused to deal with it, leaving the question to be decided, if necessary, in another suit, and the confirmation by the Court of Wards does not purport to cover this part of the will. At the hearing of the appeal, however, both parties were satisfied that all questions as to the temple should be left over, and the Court of Wards' confirmation treated as sufficient for the purposes of the present appeal. Their Lordships are therefore relieved from the further consideration of this objection.

For the reasons stated above, their Lordships will humbly advise His Majesty that each of the present consolidated appeals should be dismissed, that the decrees of the High Court so far as they affect the parties to these appeals should be affirmed, including such orders as have been made thereunder as to costs. Their Lordships think that there should be no order as to costs before the Board. A petition to adduce further evidence lodged by M. Subbayya Tevar was not supported and stands formally dismissed.

Solicitors for Balasubrahmanya Pandya
Thalaivar : Hy. S. L. Polak & Co.
Solicitors for M. Subbayya Tevar : Sanderson
Lee & Co.

Solicitors for Navanithakrishna Marudappa
Tevar : Nehra & Co.

c.s.s.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.

S. MARUTHAMUTHU NAICKER, PLAINTIFF,

v.

P. KADIR BADSHA ROWTHER AND THREE OTHERS,
DEFENDANTS.*

*Promissory note—Indorsement—Execution of the note by
manager of joint Hindu family—Remedy of indorsee—
Liability of non-executant coparceners.*

Held by the Full Bench: The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well, and the stamp law is complied with; and, therefore, in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law.

Nataraja Naicken v. Ayyasawmi Pillai(1) overruled.

Krishna Ayyar v. Krishnasami Ayyar(2) explained.

Sadasuk Janki Das v. Sir Kishan Pershad(3), *Lewin v. Edwards*(4) and *In re Soltykoff. Ex parte Margrett*(5) referred to.

CASE stated under Order XLVI, rule 1, of Act V of 1908 by the Subordinate Judge of Tanjore in Small Cause Suit No. 204 of 1936 on his file.

G. Chandrasekhara Sastri for S. Narasimha Ayyangar for plaintiff.—The first and second defendants executed the suit promissory note in favour of the plaintiff's indorser. Defendants 3 and 4 are impleaded as they are the undivided sons of the second defendant. They are sought to be made liable on the ground that the debt was borrowed by their father as the

* Referred Case No. 4 of 1937.

(1) (1916) 32 M.L.J. 354.

(2) (1900) I.L.R. 23 Mad. 597 (F.B.).

(3) (1918) I.L.R. 46 Cal. 663 (P.C.).

(4) (1842) 9 M. & W. 720; 152 E.R. 304.

(5) [1891] 1 Q.B. 413.

managing member for family purposes. The liability of the sons arises under the Hindu law.

[THE CHIEF JUSTICE.—How can you say that Hindu sons can be sued on the note? If their names are not on the note they cannot be sued.]

They are liable to pay the suit claim unless they can show that the promissory note was executed for an illegal or immoral purpose. The fact that the plaintiff is an indorsee does not make any difference since the liability of the sons depends upon the liability of their father. Their liability arises immediately after the father is made liable. The sons are joined merely to give them an opportunity to show that the debts were incurred for an illegal or immoral purpose; *Ramasami Nadan v. Ulaganatha Goundan*(1). The indorsement transfers to the indorsee the debt evidenced by the note and the indorsee becomes the assignee of the chose in action; *Muhammad Khumarali v. Ranga Rao*(2).

[VARADACHARIAR J.—Then what is the difference between an indorsement and an assignment?]

It is pointed out in the above case at page 656. The right to sue on the debt passes to the indorsee under section 8 of the Transfer of Property Act; *Nataraja Naicken v. Ayyasawmi Pillai*(3).

[VARADACHARIAR J.—The scheme of the Negotiable Instruments Act is based on the theory of compensation and not of debt. Look at section 117 of that Act.]

By the indorsement the indorsee steps into the shoes of the payee and will be entitled to all the rights and remedies open to the payee as against the original maker. Otherwise the position will be this: the payee can maintain a suit against the sons on the debt whereas the indorsee can sue the father alone on the note though the cause of action against the father and sons is the same; *Nachiappa Chetty v. Dakshinamurthy Servai*(4) and *Thankammal v. Kunhamma*(5). That is how the decision of the Full Bench in *Krishna Ayyar v. Krishnasami Ayyar*(6) has been understood in later decisions. The decision of the Privy Council in *Sadasuk Janki Das v. Sir Kishan*

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(1) (1898) I.L.R. 22 Mad. 49 (F.B.). (2) (1901) I.L.R. 24 Mad. 654.

(3) (1916) 32 M.L.J. 354.

(4) 1915 M.W.N. 217.

(5) (1918) 37 M.L.J. 369.

(6) (1900) I.L.R. 23 Mad. 597 (F.B.).

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Pershad(1) does not relate to a case of joint Hindu family of father and sons. If under the Hindu law the father, as managing member of the joint family, has power to borrow money on a promissory note and the loan is binding on the sons also, it necessarily follows that, as incidental to such borrowing, the indorsee must have the right to sue the sons also.

T. S. Venkatarama Ayyar for defendants 3 and 4.—Under section 50 of the Negotiable Instruments Act an indorsement does not pass title to the consideration but only transfers the property in the note to the indorsee: *In re Soltykoff. Ex parte Margrett*(2), *Periakaruppan Chetti v. Mottayya Mudali*(3) and *Seshayya v. Sanjivarayudu*(4). The indorsement of the promissory note does not operate as an assignment of the debt due by the maker to the original payee, as there is no privity of contract between the maker and the indorsee in respect of the original debt and no action can be maintained by the indorsee on the debt; *per* LORD ABINGER and BARON PARRE in *Lewin v. Edwards*(5). It is a fundamental principle of the Law Merchant that no person can be made liable on a bill of exchange or promissory note unless his name appears on the face of the instrument; *Sadasuk Janki Das v. Sir Kishan Pershad*(1) and *Seshayya v. Sanjivarayudu*(4). Endorsement is not an assignment of the debt and the question of Hindu law liability is irrelevant; *per* MADHAVAN NAIR J. in *Gura Sahu v. Krishnamma*(6). *Nataraja Naicken v. Ayyasawmi Pillai*(7) is based upon a misunderstanding of the Privy Council case of *Karmali Abdulla v. Karimji Jiwaji*(8), which was a case of accounting and not an action on the bill. *Nataraja Naicken v. Ayyasawmi Pillai*(7) and *Thankammal v. Kunhamma*(9) cannot be regarded as good law after the decision of the Privy Council in *Sadasuk Janki Das v. Sir Kishan Pershad*(1). An indorsement is not an assignment of the chose in action. So an indorsee can only sue the maker or his legal representatives after the maker's death. [Bhashyam and Adiga's Negotiable Instruments Act, 6th edition, page 260, was referred to.]

Cur. adv. vult.

(1) (1918) I.L.R. 46 Cal. 663 (P.C.).

(3) (1934) 41 L.W. 177, 181.

(5) (1842) 9 M. & W. 720;

(6) (1932) 36 L.W. 482, 433.

(8) (1914) I.L.R. 39 Bom. 261 (P.C.).

(2) [1891] 1 Q.B. 413.

(4) (1933) 67 M.L.J. 393, 396.

152 E.R. 304, 306.

(7) (1916) 32 M.L.J. 354.

(9) (1918) 37 M.L.J. 369.

JUDGMENT.

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LEACH C.J.—This is a reference under Order XLVI, rule 1, of the Code of Civil Procedure, by the Subordinate Judge of Tanjore in a suit on a promissory note. The note was executed by the first and second defendants in favour of one Ponnuswami Naicker who indorsed it to the plaintiff. The two sons of the second defendant who constitute with him an undivided family have been made defendants, as it is sought to make them liable on the ground that the debt was incurred for family purposes by the second defendant in his capacity of managing member. The sons having raised the plea that the plaintiff as the indorsee is not entitled to sue them on the strength of the indorsement of the instrument, the Subordinate Judge has referred to us this question:—

“Whether an indorsee of a promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu law or whether he is limited to the remedy available on the note.”

It is a fundamental principle of the law relating to negotiable instruments that no one whose name does not appear on the instrument can be held liable thereon, but this principle has unfortunately been lost sight of in some of the cases which have come before this Court. Before examining the reports which have been quoted to us in the course of the arguments I wish to refer to a decision of the Privy Council and to two English cases as the law is to be found there clearly stated. The decision of the Judicial Committee is that in *Sadasuk Janki Das v. Sir*

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Kishan Pershad (1) which was an appeal arising out of a suit on a hundi. LORD BUCKMASTER in delivering the judgment observed :

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand."

Later in the judgment LORD BUCKMASTER said :

"Their Lordships' attention was directed to sections 26, 27 and 28 of the Negotiable Instruments Act of 1881, and the terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connection to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

In *Lewin v Edwards* (2) it was held that where the drawer of a bill indorses it in blank, and delivers it to another, who passes it without a fresh indorsement to a third person, the latter cannot maintain an action of debt against the drawer. The contract transferred by the delivery of the bill being only the contract on the bill the holder could not sue the drawer with whom he had no privity of contract. In *In re Soltykoff. Ex parte Margrett* (3) LORD ESHER M.R. had to consider the claim of an indorsee of bills of exchange accepted by a minor. It was said that the bills were accepted for necessities supplied to the minor. LORD ESHER in deciding that the

(1) (1918) I.L.R. 46 Cal. 663 (P.C.). (2) (1842) 9 M. & W. 720, 152 E.R. 304.
(3) [1891] 1 Q.B. 413.

petitioner was not entitled to hold the minor liable said :

"He supplied no necessities to the infant; he is only the indorsee of some bills of exchange accepted by him. As regards an indorsee of a bill of exchange it is immaterial whether there was any consideration for the bills as between the drawer and the acceptor; he can sue the acceptor as the indorsee of the bills, and nothing else. The question, therefore, whether necessities were supplied to the infant by the drawer of the bill, is immaterial."

From these decisions it will be observed that there are two principles to be borne in mind. The first is the principle which I have already stated, namely, that no one whose name does not appear on a negotiable instrument can be sued on it. The second is that there is no privity of contract between an indorsee and the maker or acceptor.

Turning now to the cases quoted to us, in *Ramasami Nadan v. Ulaganatha Goundan* (1) a Full Bench of this Court consisting of SHEPHARD, SUBRAMANIA AYYAR, BENSON and MOORE JJ. held in a suit brought by a creditor of a Hindu family in respect of debts which were said to have been incurred for the benefit of the family that the plaintiff could have prosecuted his claim against the sons in that suit and have obtained a decree, making their shares in the family property liable for the debts of the father. There was no negotiable instrument here and the correctness of the decision is, therefore, not open to question. In *Krishna Ayyar v. Krishnasami Ayyar* (2) SHEPHARD, SUBRAMANIA AYYAR and DAVIES JJ. had to consider a suit on a promissory note in which the plaint was sufficiently widely drawn to cover a claim on the debt as well. In this case a

(1) (1898) LL.R. 22 Mad. 49 (F.B.). (2) (1900) I.L.R. 23 Mad. 597 (F.B.).

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member of an undivided Hindu family had borrowed money from the plaintiff to purchase lands for the benefit of his family and executed a promissory note in respect of the loan. It was sought to make the other members of the family also liable, and it was held that they were, DAVIES J. dissenting. It is clear, however, from the judgments of SHEPHARD and SUBRAMANIA AYYAR JJ. that the non-executant members of the family were held liable because as against them the suit could be regarded as being on the debt and not on the instrument. In the course of his judgment SHEPHARD J. said :

"It is argued that the present suit was strictly confined to a demand for payment of the note and that the plaint did not include a demand in respect of the original debt. It appears to me on reading the plaint that it contains all the allegations that are needed in order to charge the appellants with liability. The charge is that the debt was incurred for the expenses of the family and that they are bound to discharge it. There can be no doubt that the Courts below as well as the appellants understood fully the case which the plaintiff was seeking to establish."

DAVIES J. dissented because he considered that the suit as framed was on the note alone, which did not allow the non-executant members of the family to be held liable. While it is manifest that SHEPHARD and SUBRAMANIA AYYAR JJ. did not hold that where a promissory note has been signed by the managing member of the family alone the other members of the family can be made liable on the instrument itself, it has unfortunately been interpreted in the contrary sense. The case which I have at present in mind is that of *Nataraja Naicken v. Ayyasawmi Pillai*(1), where

(1) (1916) 32 M.L.J. 354.

AYLING and SESHAGIRI AYYAR JJ. held that an indorsee of a promissory note executed by a member of a joint Hindu family could sue not only the maker, but the other members of the family on the instrument. The learned Judges here not only failed to appreciate the real nature of the decision in *Krishna Ayyar v. Krishnasami Ayyar*(1) but also misunderstood the judgment of the Judicial Committee in *Karmali Abdulla v. Karimji Jiwanji*(2) which they considered to decide that on a negotiable instrument executed by one member of a partnership the other members can be held liable. Their Lordships did not so hold. A perusal of the judgment shows that they treated the suit as being one for an account embracing mercantile transactions between the parties.

In *Nachiappa Chetty v. Dakshinamurthy Servai*(3) WALLIS C.J. and HANNAY J. held that in a suit upon a promissory note against a Hindu father and his sons the cause of action was the same as the cause of action against the father and it was necessary for the holder of the note to prove that the debt was incurred for family purposes. The sons could be joined in order to give them an opportunity of showing that the debt was not binding on them. The learned Judges regarded the decision in *Krishna Ayyar v. Krishnasami Ayyar*(1) being the authority for this. The case cannot be interpreted as deciding that the sons could be sued on the note. In *Thankammal v. Kunhamma*(4), however, SADASIVA

(1) (1900) I.L.R. 23 Mad. 597 (F.B.).

(2) (1914) I.L.R. 39 Bom. 261 (P.C.).

(3) 1915 M.W.N. 217.

(4) (1918) 37 M.L.J. 363.

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AYYAR J. sitting with SPENCER J. went much further and held that a creditor could not join two separate causes of action in the same suit, one on the debt and one on the note, and that the junior members could be held liable on a promissory note executed by the manager for proper debts. This is going too far, and we must express our dissent. The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the family or by the father for his own purposes, provided that they are not incurred for illegal or immoral purposes, does not affect the principle involved. We are not in this reference called upon to decide whether the decision of the Privy Council in *Sadasuk Janki Das v. Sir Kishan Pershad*(1) affects the decisions in *Krishna Ayyar v. Krishnasami Ayyar*(2) and *Nachiappa Chetty v. Dakshinamurthy Servai*(3), as these were not suits by indorsees.

Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of the debt, as was pointed out by MADHAVAN NAIR J. in *Periakaruppan Chetti v. Mottayya Mudali*(4). An indorsement may operate to assign the debt as well when it is so worded and the requirements of the law with regard to stamping are complied with, but unless there is an indorsement of this nature the indorsee has rights merely on the instrument. In *Muhammad Khumarali v. Ranga Rao*(5) SHEPHARD and BHASHYAM AYYANGAR JJ.

(1) (1918) I.L.R. 46 Cal. 663 (P.C.).

(2) (1900) I.L.R. 23 Mad. 597 (F.B.).

(3) 1915 M.W.N. 217.

(4) (1934) 41 L.W. 177.

(5) (1901) I.L.R. 24 Mad. 654.

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decided in a case where a promissory note had been made in favour of two payees, one of whom indorsed it to the other, that the indorsee could not sue on the note in the capacity of indorsee or in the capacity of one of two joint payees, but he could maintain a suit for the sum due under the instrument as the assignee of the chose in action by reason of the other joint payee having transferred his interest therein to him. The plaintiff there sued a person whose name appeared on the face of the instrument as the maker which is quite a different matter. We are concerned here merely with a case in which an indorsee is seeking to make liable persons whose names do not appear on the instrument. This he clearly cannot do. Accordingly, we answer the reference in this way: The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore, in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law. It follows from this that we consider that *Nataraja Naicken v. Ayyasawmi Pillai*(1) was wrongly decided and it is overruled.

The costs of this reference will be costs in the cause.

VARADACHARIAR J.—I concur in the above answer. See also *Waynam v. Bend*(2). I only wish to add that in his capacity as assignee of the debt the transferee will be governed by the

VARADA-
CHARIAR J.

(1) (1916) 32 M.L.J. 354.

(2) (1808) 1 Camp. 175; 170 E.R. 918.

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principles laid down in Chapter VIII of the Transfer of Property Act and will not be entitled to all the privileges of an indorsee under the Negotiable Instruments Act. Section 137 must be deemed to exclude these principles in the case of negotiable instruments only to the extent that they are dealt with and are sought to be enforced as such instruments. I have elsewhere dealt with *Nachiappa Chetty v. Dakshinamurthy Servai*(1) and reserve my opinion on the point dealt with therein.

MOCKETT J.—I agree with my Lord the Chief Justice.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Pandrang Row.

1937,
December 1.

DEVULAPALLI SOBHANADRI SASTRULU (SECOND
APPELLANT IN APPEAL NO. 201 OF 1936), PETITIONER,

v.

DORBALA NAGAYYA SASTRY AND SEVENTEEN OTHERS
(RESPONDENTS IN APPEAL NO. 201 OF 1936), RESPONDENTS.*

*Insolvency—Undischarged insolvent—After-acquired property—
Suit or proceedings in respect of—Insolvent's right to
institute or conduct—Intervention of Official Receiver—
What amounts to—Effect of.*

K, the petitioner's mother, instituted a suit to recover possession of properties which she claimed constituted the estate

(1) 1915 M.W.N. 217.

* Civil Miscellaneous Petition No. 4869 of 1937.

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of her deceased father. Her mother had predeceased her father and she was the only issue of the marriage. She averred that her father had separated from his brothers and on this footing claimed the estate as the sole heir. The lower Court dismissed the suit and K filed an appeal. During the pendency of the appeal she died. The petitioner was then an insolvent. The Official Receiver applied to the Court for an order directing that he should be brought on the record in the place of K, but he withdrew the application as he had not been placed in funds to meet the costs. The petitioner himself thereafter filed an application seeking to be allowed to continue the appeal because the Official Receiver had refused to become the appellant.

Held by the Full Bench: (i) The application by the Official Receiver for an order to make him the appellant in the place of the petitioner's mother constituted an intervention; he having intervened, and being unable to withdraw, the Official Receiver alone could maintain the appeal. The petitioner, therefore, could not be permitted to continue the appeal.

Quaere: Whether the rule in *Herbert v. Sayer* (1) is applicable to mofussil insolvencies in India. In any view it must be read in the light of the rule which has been added to it by *Hill v. Settle* (2).

(ii) The petitioner's right in the property in suit is based on the claim that he is the actual reversioner of the last male owner. Therefore, he desires to continue the appeal in his own right, not through his mother. His rights in the property, whatever they are, have devolved on the Official Receiver and the law does not permit him to maintain the appeal.

Per Varadachariar J.—The question, whether the same principles as are laid down in this case will be applicable even to cases where a "legal representative" in the strict sense is applying to continue an appeal or a suit preferred or instituted by his predecessor in title, left open.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner

(1) (1844) 5 Q.B. 965; 114 E.R. 1512.

(2) [1917] 1 Ch. 319.

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therein to continue Appeal No. 201 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Guntur in Original Suit No. 7 of 1934 as the legal representative of Devulapalli Kanchamma, the deceased appellant in the said appeal, and also grant leave, if necessary, to the petitioner therein to continue the said appeal.

P. V. Vallabhacharlu for petitioner.—The petitioner who is an undischarged insolvent can continue the appeal, as the subject-matter of the appeal relates to after-acquired property. *Ramanatha Iyer v. Nagendra Iyer*(1), the decision of a Bench of this Court, is a case under section 28, clause 4, under the present Provincial Insolvency Act and is directly in point. That case follows an earlier decision in *Sriramulu Naidu v. Andalammal*(2), which applies the principle in *Herbert v. Sayer*(3) and distinguishes *Cohen v. Mitchell*(4). This is no doubt a case under section 7 of 11 and 12 Vict. c. 21, but the right to institute or to continue proceedings, there being no question of contract or transfer, is not affected by the Privy Council decision in *Kala Chand Banerjee v. Jagannath Marwari* (5); [vide *RANKIN J.* in *Dasarathy Sinha v. Mahamulya Ash* (6)]. The case of *Kala Chand Banerjee v. Jagannath Marwari* (5) is distinguishable as it is a case of a decree obtained against the insolvent without impleading the Official Receiver as a party and it was held that such a decree was a nullity as against the Official Receiver. The question is not whether the principle in *Cohen v. Mitchell*(4) is applicable to cases under the Provincial Insolvency Act, after the Privy Council decision in *Kala Chand Banerjee v. Jagannath Marwari*(5) which is negatived in *Girikant Shirlal v. Vadilal Vrijlal*(7), *Ma Phaw and others v. Maung Ba Thaw*(8), *Abdul Rahman v. Nihal Chand* (9) and *Lingayya v. Venkatapathy*(10). The question is the application of the limited principle in *Herbert v. Sayer*(3).

(1) (1923) 45 M.L.J. 827.

(3) (1844) 5 Q.B. 965; 114 E.R. 1512.

(5) (1927) I.L.R. 54 Cal. 595 (P.C.).

(7) (1935) I.L.R. 60 Bom. 141.

(9) (1935) I.L.R. 58 All. 132 (F.B.).

(2) (1906) I.L.R. 30 Mad. 145.

(4) (1890) 25 Q.B.D. 262.

(6) (1920) I.L.R. 47 Cal. 961, 970.

(8) (1926) I.L.R. 4 Ran. 125.

(10) (1935) 42 L.W. 33.

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B. Somayya and *M. S. Ramachandra Rao* for respondents 1 to 4.—The Indian decisions relied on by the petitioner are all cases decided under the old Insolvency Act (11 and 12 Vict., c. 21) which applied only to the Presidency-towns. The principle underlying the English decisions [viz., *Fowler v. Down* (1), *Herbert v. Sayer*(2) and *Cohen v. Mitchell*(3)] is that there is a kind of "special property" in the insolvent in regard to after-acquired property. In other words the right to maintain an action is dependent upon the right to the property. The present Provincial Insolvency Act, section 28 (4), clearly says that after-acquired property shall "forthwith vest" in the Receiver. The words "forthwith vest", on which I lay emphasis, indicate that the English decisions cannot have any application to cases arising under the Provincial Insolvency Act. [*Kala Chand Banerjee v. Jagannath Marwari*(4), *Ma Phaw and others v. Maung Ba Thaw*(5), *Girikant Shirlal v. Vadilal Vrijlal*(6), *Abdul Rahman v. Nihal Chand*(7) and *Lingayya v. Venkatapathy*(8) were referred to]. As regards property at the date of adjudication the insolvent cannot maintain an action because the property did not vest in him; *Subbaraya Chettiar v. Papathi Ammal*(9). In this case the Official Receiver actually intervened. Intervention need not be continuous or effective. Once there is intervention the insolvent loses his right of action even though the Official Receiver refuses to take further action; *Hill v. Settle*(10).

P. V. Vallabhacharlu in reply.—There is no intervention by the Official Receiver in this case. So the insolvent should be allowed to continue the appeal.

ORDER.

LEACH C.J.—The petitioner's mother, Devulapalli Kanchamma, instituted Original Suit No. 7 of 1934 in the Court of the Subordinate Judge of Guntur to recover possession of properties which she claimed constituted the estate of her deceased father, Dorbala Narasimha Sastri. Her mother

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(1) (1797) 1 Bos. & Pul. 44; 126 E.R. 769.

(2) (1844) 5 Q.B. 965; 114 E.R. 1512. (3) (1890) 25 Q.B.D. 262.

(4) (1927) I.L.R. 54 Cal. 595 (P.C.). (5) (1926) I.L.R. 4 Ran. 125.

(6) (1935) I.L.R. 60 Bom. 141. (7) (1935) I.L.R. 58 All. 132 (F.B.).

(8) (1935) 42 L.W. 33. (9) (1917) 7 L.W. 516.

(10) [1917] 1 Ch. 319.

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had predeceased her father and she was the only issue of the marriage. She averred that her father had separated from his brothers and on this footing claimed the estate as the sole heir. The lower Court dismissed the suit and Kanchamma then appealed to this Court. During the pendency of the appeal she died and the petitioner applied to be allowed to continue the appeal. This petition is now before us and is opposed.

The petitioner is an insolvent and was an insolvent when he filed the petition. He seeks to be allowed to continue the appeal because the Official Receiver has refused to become the appellant. The Official Receiver did apply to this Court on 12th July for an order directing that he should be brought on the record in the place of Kanchamma, but on 12th October he withdrew the application as he had not been placed in funds to meet the costs.

The petitioner has relied on the rule in *Herbert v. Sayer*(1) which allows a bankrupt to maintain a suit to recover after-acquired property in the hands of a stranger unless the trustee has intervened. This rule has frequently been applied in India, but the respondents say that as the result of the decision of their Lordships of the Privy Council in *Kala Chand Banerjee v. Jagannath Marwari*(2) it can no longer be applied. It is, however, not necessary to decide this question, because even if the decision in *Kala Chand Banerjee v. Jagannath Marwari*(2) has not the effect which the respondents maintain it has, *Herbert v. Sayer*(1) must now be read in the light of

(1) (1844) 5 Q.B. 965; 114 E.R. 1512. (2) (1927) I.L.R. 54 Cal. 595 (P.C.).

Hill v. Settle(1) and when this is done it is clear that the present petition does not lie.

In *Hill v. Settle*(1) it was decided that when once a trustee in bankruptcy has intervened in regard to after-acquired property of an undischarged bankrupt that property vests in the trustee and he cannot by withdrawing his intervention divest himself of the property and re-vest it in the bankrupt. In that case a person had entered into an agreement with the bankrupt under which he had to make payments to the bankrupt and the trustee in bankruptcy gave notice requiring these payments to be made to him. For reasons which it is not necessary to go into the trustee withdrew the notice. It was contended that as the result of the withdrawal, the original position was restored. The Court of Appeal, consisting of LORD COZENS-HARDY M.R., WARRINGTON L.J. and LAWRENCE J., held that this was not so. Once the trustee in bankruptcy had intervened the property vested in him and remained with him in spite of the withdrawal of the notice. The property being in the trustee, nothing remained in the bankrupt.

If the rule in *Herbert v. Sayer*(2) applied here, we must also apply the rule which has been added to it by *Hill v. Settle*(1). There can be no doubt that the application by the Official Receiver to this Court for an order making him the appellant in the place of the petitioner's mother did constitute an intervention. It was a far greater act of intervention than that in *Hill v. Settle*(1). The Official Receiver having intervened

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and being unable to withdraw he alone could maintain the appeal.

It has been suggested that the petitioner does not ask to have his name brought on the record as the owner of the property, but merely as the legal representative of his mother. But this is not the case. His right in the property in suit is based on the claim that he is the actual reversioner of the last male owner, his grandfather. Therefore he desires to continue the appeal in his own right, not through his mother. His rights in the property, whatever they are, have devolved on the Official Receiver and the law does not permit him to maintain the appeal.

The application must therefore be dismissed with costs.

VARADACHARIAR J.

VARADACHARIAR J.—I agree that the insolvent is not entitled to continue this appeal; but I wish to make one reservation to avoid a possible misapprehension. I have felt some difficulty in this case on account of the fact that the petitioner is certainly within the definition of the expression "legal representative" given in the Code of Civil Procedure though in strict law he does not claim *under* his mother. As pointed out by my Lord, the petitioner's claim is substantially for his own benefit and not for the benefit of his mother's estate. I wish to guard myself against being understood as deciding that the same principles as are laid down in this case will be applicable even to cases where a "legal representative" in the strict sense is applying to continue an appeal or a suit preferred or instituted by his predecessor in title. In such a case, the considerations applicable to a suit instituted by the insolvent himself will not

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apply in their entirety because, so far as that particular litigation is concerned, the legal representative will only be taken to assert or safeguard the title of the original party. The decision in that case of a question like the present will depend upon the scope of the words in Order XXII, rule 8, of the Code of Civil Procedure, namely, whether the proceeding which the legal representative who has been adjudged insolvent wishes to continue can be regarded as a proceeding which the Assignee or Receiver in the insolvency of the legal representative might maintain for the benefit of his creditors. I do not read the judgment in *Kala Chand Banerjee v. Jagannath Marwari*(1) as concluding this question.

PANDRANG ROW J.—I agree with my Lord the Chief Justice and I have only to add that whether the rule in *Herbert v. Sayer*(2) applies to mofussil insolvencies is not being decided by us, and that our decision rests mainly, if not entirely, on the decision in *Hill v. Settle*(3) by the Court of Appeal in England.

PANDRANG
ROW J.

V.V.C.

(1) (1927) I.L.R. 54 Cal. 595 (P.C.). (2) (1844) 5 Q.B. 965; 114 E.R. 1512.
(3) [1917] 1 Ch. 319.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, Mr. Justice
Varadachariar and Mr. Justice King.

A. N. C. T. SUBBIAH THEVAR, TRUSTEE OF SREE
VEDAPURANEESWARASWAMI KOIL, NEMAM, AND
FOUR OTHERS (FIRST PLAINTIFF AND NIL), APPELLANTS,

v.

N. R. SAMIAPPA MUDALIAR AND FIVE OTHERS
(DEFENDANTS 1 TO 3, SECOND PLAINTIFF
AND NIL), RESPONDENTS.*

Indian Limitation Act (IX of 1908), arts. 36 and 120—Public trust—Loss sustained by the trust by reason of omission of a trustee to collect moneys due to the trust—Suit by a succeeding trustee or co-trustee against the trustee to make good the loss—Limitation—Art. 120 and not art. 36 applicable—Defaulting trustee being the sole trustee or a co-trustee with another who is also liable or co-trustee with another who is not liable—Distinction between the cases as regards the accrual of the right to sue.

Held by the Full Bench: (i) Article 120 of the first Schedule of the Indian Limitation Act, 1908, and not article 36, applies to a suit filed against a trustee or co-trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust.

Krishna Kudva v. Sri Venkataramana Temple(1) followed.

(ii) There can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation.

Murray v. The East India Company (2), *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian*

* Appeal No 287 of 1932.

(1) (1934) 40 L.W. 275.

(2) (1821) 5 B. & Ald. 204; 106 E.R. 1167.

Chitty(1), *Charu Chandra Pramanik v. Nahush Chandra Kundu*(2) and *Mst. Bolo v. Mst. Koklan*(3) followed.

(iii) If a sole trustee of a public trust commits a breach of trust, the loss cannot be made good, without voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case lies in abeyance until a new trustee is appointed, in which case, the period of six years' limitation would not commence until a new trustee is appointed.

(iv) If there are other trustees who are themselves not liable, the period of limitation starts running immediately the loss is occasioned, because they have in themselves the right to sue their co-trustee for the loss occasioned by him. If the co-trustees themselves had also made themselves liable for the breach of trust, then the position would be the same as in the case of a defaulting sole trustee.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Original Suit No. 36 of 1930.

This appeal coming on for hearing, the Court (VARADACHARIAR and KING JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

VARADACHARIAR J.—The only point arising for determination at this stage is the question of limitation on which the lower Court held against the plaintiffs and dismissed the suit *in limine*.

The plaintiffs and the third defendant were the trustees of a temple on the date of the institution of the suit. The first defendant was the managing trustee of the temple from 1921 up to September 1927; the second defendant is said to have been the trustee from 26th July 1914 to 8th February 1928; the third defendant was appointed trustee on 22nd May 1927 while the plaintiffs were appointed trustees only in June and July 1928. The suit was instituted on 15th September 1930 claiming that the defendants should be directed to pay certain amounts to the plaintiff temple in the following circumstances:—Two schedules, schedules A and B, were attached to the plaint.

(1) (1916) 20 C.W.N. 833 (P.C.). (2) (1922) I.L.R. 50 Cal. 49.

(3) (1930) I.L.R. 11 Lah. 657 (P.C.).

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Schedule A mentions items of amounts due to the temple up to fasli 1332 which remained uncollected up to the date of the suit. Schedule B mentions amounts said to have accrued due to the devasthanam subsequent to the commencement of fasli 1332, and remaining uncollected up to the date of the suit. The plaintiff refers to the difficulties experienced by the plaintiffs in getting possession of the account books relating to the trust after they were appointed to the office and proceeds to say in paragraph 7 that on a scrutiny of the accounts and documents handed over by the first defendant it was found that the various amounts specified in schedules A and B had not been collected and that as many of them had become barred the temple had been put to loss thereby. There was a further allegation that in respect of items which had become barred even before the defendants took office, the defendants would be liable to the temple by reason of their failure to take steps against their predecessors in office to recover damages under that head. It is to this claim that the defendants pleaded the bar of limitation under article 36 of the Limitation Act. The learned Subordinate Judge held that the plea was well founded and was supported by the decision in *Subramania Aiyar v. Gopala Aiyar*(1) and accordingly dismissed the suit. Hence this appeal.

It cannot be denied that the decision in *Subramania Aiyar v. Gopala Aiyar*(1) does support the defendants' contention. But there is very little discussion of the question in that judgment and no reference has been made in that judgment to *Ranga Pai v. Baba*(2) which clearly proceeded on the footing that an action like the present would be governed by the six years' rule, apparently under article 120, though the article is not specifically referred to. We might add that there are several reasons which in our opinion make it unreasonable to hold that article 36 applies to a case like the present. The words "malfeasance, misfeasance, and non-feasance" may not perhaps be said to be inappropriate words to be applied to a trustee; but it hardly seems to us right to speak of a claim like the present on behalf of the trust as a claim for compensation. We may in this connection refer to the first column of article 98 which uses the very language found in illustration (a) to section 23 of the Trusts Act, namely, that the trustee is in such

(1) (1909) I.L.R. 33 Mad. 308.

(2) (1897) I.L.R. 20 Mad. 398.

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cases liable to make good to the trust estate the amount lost by reason of his breach of trust. Referring to the third column of article 36, we may also point out that it will be scarcely reasonable to expect the very trustee who has been guilty of breach of trust to take steps against himself to recover damages for the benefit of the trust, whereas, if the third column of article 36 is to be applied, the suit would become barred on the expiry of two years from the date of misfeasance, malfeasance or non-feasance irrespective of the fact that the same trustee may continue in office. Again, comparing the third column of article 36 with the third column of article 98, it will be noticed that, where a claim like the present is made against the estate of a deceased trustee, limitation starts from the date of the trustee's death, and if loss has not resulted on that date, from the date of the loss. It could scarcely have been intended that, when a breach of trust has been committed by a trustee by negligence to collect trust funds, limitation could start immediately on the date of the breach of trust if the action to recover the amount of the loss should be brought during his lifetime, but there should be a fresh starting point from the date of his death or from the date of the loss, when the loss is sought to be made good out of his general estate. These considerations lead us to think that it could not be the intention of the Legislature that the general language of article 36 should be applied to a well-known category of cases in the law of trusts.

It is true that there is no article (corresponding to article 98) which specifically deals with actions for breach of trust brought during the lifetime of the trustee or ex-trustee. But the absence of such an article will only lead to the application of article 120 to such actions and will not justify the Court putting an unreasonable interpretation on article 36. In *Shirinbai Dinshaw v. Navroji Pestonji*(1) the learned Judges were of opinion that a suit similar to the present would be governed by article 120. It has not been seriously contended before us that the present case is governed by section 10 of the Limitation Act; vide *Tholasingam Chetty v. Vedachella Aiyah*(2). The only question therefore is whether the case is governed by article 36 or by article 120.

(1) A.I.R. 1936 Bom. 30.

(2) (1917) I.L.R. 41 Mad. 319.

If article 120 is to be held applicable, the further question will arise what is the starting point. The general expression, "right to sue accrues", has been held in several cases to be an expression that must be construed in the light of the substantive law. There can be no doubt that in several English cases and in *Shirinbai Dinshaw v. Navroji Pestonji*(1) limitation has been held to commence to run from the date of the breach of trust. Whatever may be the appropriateness of this view in the case of private trusts where the beneficiary may be expected to enforce his own rights, there are obvious difficulties in applying this view to public trusts where, as long as the trustee remains in office, there may be no other person entitled to sue the trustee to make good the loss occasioned by the breach of trust, unless some member of the public takes steps to institute a suit under section 92, Civil Procedure Code, and have a receiver appointed in whom the right of action may be vested. Here again the third column of article 98 would rather suggest that the date of the cessation of the trusteeship, whether by death or otherwise, may be a reasonable starting point, but there is no authority which specifically supports that view. Even if the starting point under article 120 is held to be the dates of the various breaches complained of, the decree of the lower Court dismissing the entire suit cannot be sustained, because, according to the plaint allegations, some of the breaches of trust might have happened within six years of the institution of the suit. It is therefore necessary for the purpose of the case to decide whether article 36 or article 120 is the proper article applicable to a suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect monies due to the trust. In view of the conflict between *Ranga Pai v. Baba*(2) and *Subramania Aiyar v. Gopala Aiyar*(3) we would refer the question to a Full Bench; we would also invite the opinion of the Full Bench on the question whether, if article 120 is applicable, what is the starting point.

ON THE REFERENCE :

V. Rajagopala Ayyar and *T. V. Ramiah* for appellants.—
Owing to the default of a trustee, loss has been occasioned to a

(1) A.I.R. 1936 Bom. 30.

(3) (1897) I.L.R. 20 Mad. 398.

(3) (1909) I.L.R. 33 Mad. 308.

public trust. The right to sue the trustee to make good the loss occasioned to the trust arises when the demand for accounts by a co-trustee or a succeeding trustee, as the case may be, is made on the defaulting trustee; alternatively, when there is a co-trustee who is competent to sue or when a succeeding trustee comes into existence. Article 36 of the Indian Limitation Act uses the word "compensation" which is inapplicable to the claim by a trustee against his co-trustee who has got to make good the loss occasioned to the trust. Article 98 of the Indian Limitation Act is applicable to a case where the claim is made against the estate of a deceased defaulting trustee. The article uses the words, "make good . . . out of the general assets of a deceased trustee". So article 98 is not applicable to the present case. It uses the language employed in illustration (a) to section 23 of the Indian Trusts Act. So article 120 is the article applicable to the present case.

In *Subramania Aiyar v. Gopala Aiyar*(1) article 36 was held to be applicable. There is no discussion in the same. It completely ignores the case of *Ranga Pai v. Baba*(2). The phrase "right to sue" has been construed in *Mst. Bolo v. Mst. Koklan*(3) and *Annamalai Chettiar v. A.M. K. C.T. Muthukaruppan Chettiar*(4).

[KING J.—How does *Annamalai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar*(4) support you?]

The right to sue accrues only when the succeeding trustee takes charge and comes to know of the loss to the trust. In *Krishna Kudva v. Sri Venkataramana Temple*(5) article 120 was held to be applicable. To the same effect is *Shirinbai Dinshaw v. Navroji Pestonji*(6). The cause of action comes into existence only when there is a party capable of suing; see *Charu Chandra Pramanik v. Nahush Chandra Kundu*(7) and *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian Chitty*(8).

K. Rajah Ayyar and *R. Sundaralingam* for respondents.—
Article 120 is the residuary article. It can come into operation

(1) (1909) I.L.R. 33 Mad. 308.

(3) (1930) I.L.R. 11 Lah. 657 (P.C.).

(5) (1934) 40 L.W. 275.

(7) (1922) I.L.R. 50 Cal. 49.

(2) (1897) I.L.R. 20 Mad. 398.

(4) (1930) I.L.R. 8 Ran. 645 (P.C.).

(6) A.I.R. 1936 Bom. 30.

(8) (1916) 20 C.W.N. 833 (P.C.).

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only when there is no other article applicable to the present case. Article 98 makes provision only for a special class of cases when the claim is made against the estate of the deceased defaulting trustee. This article is not applicable. Article 36 is the article applicable. It is only when the case could not be brought under article 36 that the Court would be justified in applying article 120. *Subramania Aiyar v. Gopala Aiyar*(1) decided that article 36 was applicable.

[THE CHIEF JUSTICE.—If your contention is correct, a cause of action that was barred during the lifetime of a defaulting trustee would be revived against his estate under article 98.]

[VARADACHARIAR J.—Do you know of any legal principle under which death gives rise to a different cause of action against the legal representative?]

[KING J.—If article 36 is applicable to cases of trusts also would you expect to find article 98 in the statute?]

There is really no conflict between *Subramania Aiyar v. Gopala Aiyar*(1) and *Ranga Pai v. Baba*(2). *Bhim Singh v. Liquidator, Union Bank of India*(3) is followed in *Narasimha Ayyangar v. Official Assignee of Madras*(4). Cases under section 235 of the Indian Companies Act have been held to come under article 36.

[VARADACHARIAR J.—There a long line of cases in all the High Courts dissenting from that view. Such cases could not come under article 36 because the cause of action is not one arising independently of contract.]

Cur. adv. vult.

LEACH C.J. The Opinion of the Court was delivered by LEACH C.J.—This reference embraces two questions, which may be stated as follows :—(i) Does article 36 or article 120 of the first schedule of the Indian Limitation Act, 1908, apply to a suit filed against a trustee or ex-trustee to make good loss sustained by the trust by reason of his omission to collect moneys due to the trust? (ii) If article

(1) (1909) I L.R. 33 Mad. 308.
(3) (1926) I.L.R. 8 Lah. 167.

(2) (1897) I.L.R. 20 Mad. 398.
(4) (1931) I.L.R. 54 Mad. 153.

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120 is applicable, when does limitation commence to run?

Article 36 relates to suits for compensation for malfeasance, misfeasance or non-feasance independent of contract and not specially provided for in the schedule of the Act. It fixes a period of two years from the date when the malfeasance, misfeasance or non-feasance takes place. Article 120 is the residuary article. It fixes a limitation period of six years in respect of suits for which no period of limitation is provided elsewhere in the schedule and time begins to run when the right to sue accrues. It has been necessary to refer the questions set out above to a Full Bench because there are conflicting decisions of this Court with regard to the first question, and the second question follows if article 120 applies, because in some cases for more than six years there may be no one in a position to sue. In the case of *Ranga Pai v. Baba*(1) SHEPHARD and DAVIES JJ. applied article 120. In the case of *Subramania Aiyar v. Gopala Aiyar*(2) BENSON OFFG. C.J. and KRISHNASWAMI AYYAR J. considered that article 36 governed a suit of the nature of the one under discussion. In *Ranga Pai v. Baba*(1) the plaintiffs and the defendants together with one Subbaraya Pai were the trustees of a temple. Subbaraya Pai died in 1884, but, for some years before his death, he was left in exclusive management of the temple affairs. He was succeeded in the management by the defendants who remained in management of the temple until 1891, when their co-trustees filed the suit to

(1) (1897) I.L.R. 20 Mad. 398.

(2) (1909) I L.R. 33 Mad. 308.

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exclude them from the trust and to compel them to make good sums lost as the result of breaches of trust alleged to have been committed by them. The question whether section 10 of the Limitation Act applied was discussed and the Court was of the opinion that it did not. It was, however, held that the defendants were liable for the loss occasioned by them within six years before the date when the suit was instituted. Article 120 of the Limitation Act was not specifically referred to, but, as the Court decided that the period of limitation was six years, it follows that it considered that this article applied.

In *Subramania Aiyar v. Gopala Aiyar*(1) the suit was instituted by the plaintiff as the trustee of a temple for recovery of a sum of money representing the loss to the temple occasioned by breaches of trust committed by the father of the defendant, he having been the preceding trustee. The suit was dismissed on the ground that it was barred by the law of limitation. On appeal it was argued that article 98 was applicable, but the argument was rejected as the Court was of the opinion that the suit against the father was time-barred under article 36 and, therefore, no suit would lie against his son. Another case bearing on the first question embodied in the reference and quoted to us is that of *Shirinbai Dinshaw v. Navroji Pestonji*(2), where a Division Bench of the Bombay High Court held that a suit against trustees for alleged breaches of trust was governed by article 120 and time began to run from the date of the breach. In none of these cases

(1) (1909) I.L.R. 33 Mad. 308.

(2) A.I.R. 1936 Bom. 80.

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however, was there any real discussion of the questions now under consideration. In *Ranga Pai v. Baba*(1) and *Shirinbai Dinshaw v. Navroji Pestonji*(2) the learned Judges took it for granted that article 120 did apply and in *Subramania Aiyar v. Gopala Aiyar*(3) the discussion was limited to the application of articles 36 and 98. I may here mention that my learned brother, VARADACHARIAR J., sitting alone, held in *Krishna Kudva v. Sri Venkataramana Temple*(4) that a suit by a trustee of a temple against a previous trustee to recover moneys misappropriated by him was governed by article 120 and not by article 61 or article 62 of the Limitation Act and that no cause of action accrued to anybody as long as the defaulting trustee continued to be in office. This decision really embodies the answers to the questions under reference.

Article 36 applies to torts not specially provided for, and if it stood alone there would be little to indicate that it was not intended to apply to breaches of trust of the nature of those we have now in mind. But there is article 98, and when the two articles are considered together there are strong indications that the Legislature did not intend article 36 to apply to trustees. In the first place, in article 36 the word "compensation" is used, which is the appropriate word to apply in connection with a suit to remedy an injury to a person or a person's property. Article 98 speaks of suits "to make good" the loss, which are more appropriate than the word "compensation" when the loss is not a personal

(1) (1897) I.L.R. 20 Mad. 398.
(3) (1909) I.L.R. 33 Mad. 308.

(2) A.I.R. 1936 Bom. 30.
(4) (1934) 40 L.W. 275.

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one. Then it must be remembered that when the prescribed period of limitation has commenced it continues until the sands have run out. Something may happen to start a fresh period of limitation, but that is another matter. If article 36 were to apply to an act of non-feasance on the part of a trustee, it would mean that if the trustee lived he would be free from all liability in two years, but if he died before the two years had elapsed his estate would continue to be liable for another three years. This could never have been the intention of the Legislature and leads in itself to the conclusion that article 36 does not include wrongs committed by trustees in respect of trusts. As article 36 does not apply, the only article which can apply to a suit like the one out of which this reference arises is article 120 and we answer the first question accordingly.

With regard to the second question, it will be observed that article 120 declares that limitation shall start to run when the right to sue accrues. There can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation; see *Murray v. The East India Company*(1), *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian Chitty*(2), *Charu Chandra Pramanik v. Nahush Chandra Kundu*(3) and *Mst. Bolo v. Mst. Koklan*(4). It follows that if a sole trustee of a public trust commits a breach of trust the loss cannot be made good, without voluntary

(1) (1821) 5 B. & Ald. 204; 106 E.R. 1167.
(2) (1916) 20 C.W.N. 833 (P.C.). (3) (1922) I.L.R. 50 Cal. 49.
(4) (1930) I.L.R. 11 Lah. 657 (P.C.).

action on the trustees's part, until there is a new trustee. The right to sue in such a case would have to lie in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. Of course, if the co-trustees have also made themselves liable for the breach of trust the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach of trust. It will, therefore, depend on the circumstances when the time will commence to run and we answer the second question in this sense.

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APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar, Mr. Justice Burn, Mr. Justice King
and Mr. Justice Venkataramana Rao.

1937,
November 5.

IN RE DHANUKODI NAYAKKAR AND THREE OTHERS
(DEFENDANTS 1, 4, 5 AND 7), APPELLANTS.*

*Court Fees Act (VII of 1870), sec. 7 (iv) (f)—Suit for account—
Preliminary and final decrees in—Defendant's appeals from
—Court-fees payable in—Applicability of sec. 7 (iv) (f) to
appeals by defendants.*

Held by the Full Bench: (i) A defendant appealing from a preliminary decree in a suit for an account is not at liberty to place an arbitrary value on his relief but is ordinarily bound to accept the valuation given by the plaintiff in the plaint and to stamp his memorandum of appeal according to that valuation.

(ii) A defendant appealing against a final decree should pay a court-fee on the amount of the decree passed against him except in cases where he appeals only against a portion of the decree.

Srinivasacharlu v. Perindevamma(1) approved.

Venkatanandam, In re(2) overruled.

Faizullah Khan v. Mauladad Khan(3) explained and distinguished.

Quaere whether there is justification for the view that clause (iv) (f) of section 7 of the Court Fees Act applies to appeals by defendants. The wording of the clause and of section 11 of the Court Fees Act read in the light of the history of the section suggests that the defendant was not within the contemplation of those who were responsible for the drafting of the Act.

APPEAL against the decree of the District Court, Madura, in Appeal Suit No. 169 of 1932, preferred against the decree of the Court of the

* Second Appeal No. 393 of 1937.
(1) (1915) I.L.R. 39 Mad. 725 (F.B.). (2) (1932) I.L.R. 56 Mad. 705.
(3) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.

Subordinate Judge of Madura in Original Suit DHANUKODI,
No. 3 of 1930. *In re.*

K. Rajah Ayyar for appellants.—In a suit for accounts the plaintiff is *dominus litus* and he can choose his forum and estimate the value of the subject-matter as he likes. The matter is entirely one between him and the Court and the defendant has no concern with it. He has no right or opportunity to question the correctness of the plaintiff's valuation. Section 7 (iv) (f) of the Court Fees Act speaks of the plaintiff or memorandum of appeal. A suit for accounts occupies a peculiar position. Until the litigation is finally terminated it is not possible to say who is liable for whom and for what amount the particular party is liable. A suit for accounts comes directly within section 7 of the Act. In an appeal by a defendant against a decree in a suit for accounts the subject-matter is incapable of valuation. The Court Fees Act allows an arbitrary valuation of the subject-matter in a suit for accounts. The plaintiff can certainly value the relief sought by him as he likes. The defendant must be allowed the same liberty.

[BURN J.—Suppose a decree for Rs. 6,000 is passed against the defendant and he appeals from it. Where is the difficulty in estimating the value of the subject-matter of the appeal?]

A suit for accounts does not cease to be such a suit the moment it results in a money decree against the defendant. It continues to be a suit for accounts till the final result is reached. Notwithstanding that a money decree has been passed against him it may be impossible for the defendant in a complicated case to decide what portions of the claim he ought to admit and what portions he ought to contest. Section 7 (iv) (f) allows the subject-matter of the appeal to be valued as the appellant likes. A defendant against whom a decree for money has been passed can therefore value the subject-matter of the appeal as he likes under the terms of that provision.

[VARADACHARIAR J.—Section 7 (iv) (f) does not apply to an appeal by a defendant at all.]

[The report of the decision of the Privy Council in *Faizullah Khan v. Mauladad Khan*(1) in 34 Bom. L.R. 841 at 843 and

(1) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.

DRANUKODI, *In re.* in 57 M.L.J. 281, 282 and *C.K. Ummar v. C.K. Ali Ummar*(1) were referred to.]

Section 7 (iv) (f) of the Court Fees Act need not necessarily be considered with reference to section 11 of that Act. In every case provided for by clause (iv) of section 7, plaintiff or appellant, whether plaintiff or defendant, can value the relief sought by him as he likes. Reference to section 11 need not come in because suits for accounts are only one class of suits under section 7 (iv). Section 11 cannot apply to cases under section 7 (iv) not falling under clause (f).

[VARADACHARIAS J.—Section 11 cannot apply to cases falling under other clauses of section 7 (iv) because the contingency of getting a decree for a larger amount cannot arise.]

[Reference was made to *Faizullah Khan v. Mauladad Khan*(2), *Maung Nyi Maung v. The Mandalay Municipality Committee*(3), *Sharfuddin v. M. Khadim Ali Khan*(4), *Hari Das v. Murli Prasad*(5), *Kanhaiya Lal v. Seth Ram Sarup*(6), *Chunni Lal v. Sheo Charan Lal*, *Lalman*(7), *Deoji Goa v. Tricumji Jivan Das*(8), *Kuldip Sahay v. Harihar Prasad*(9), *Vershi v. Kakw*(10), *Pochalal Ranchhod v. Umedram Kalidas*(11) and *Sunderabai v. The Collector of Belgaum*(12) and to page 488 of Mr. B.V. Viswanatha Ayyar's Court Fees Act for a summary of the law on the subject.]

Government Pleader (*K.S. Krishnaswami Ayyangar*) for Government.—The case of an appeal by a defendant from a final decree in a suit for accounts need not be dilated upon. *Mussammatt Niamati Bai v. Daulat Ram*(13), *Kailas Chandra Das v. Narayan Chandra Das*(14), *Kantichandra Tarafdar v. Radharaman Sarkar*(15) and *Sharfuddin v. M. Khadim Ali Khan*(4) deal with that question and are all against the appellants. *Venkatanandam, In re*(16) is the only case the

- (1) (1931) I.L.R. 9 Kan. 165 (F.B.).
 (2) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.
 (3) (1934) I.L.R. 12 Kan. 335, 338, 343.
 (4) A.I.R. 1934 All. 807; 1934 A.L.J. 643.

- (5) 1937 A.L.J. 480.
 (6) (1922) I.L.R. 44 All. 542. (7) (1925) I.L.R. 47 All. 756, 761, 763.
 (8) (1935) I.L.R. 14 Pat. 658, 665-6 (S.B.).
 (9) (1923) I.L.R. 3 Pat. 146. (10) (1934) 37 Bom. L.R. 148.
 (11) (1928) I.L.R. 52 Bom. 904, 927.
 (12) (1918) I.L.R. 43 Bom. 376, 382 (P.C.).
 (13) (1933) I.L.R. 14 Lah. 738.
 (14) (1934) 59 C.L.J. 447.
 (15) (1929) I.L.R. 57 Cal. 463.
 (16) (1932) I.L.R. 56 Mad. 705.

other way. [*Faizullah Khan v. Mauladad Khan*(1) was explained.] As regards an appeal from a preliminary decree in a suit for accounts, one of two views can be taken, viz., that the case of a defendant appealing is governed by section 7 (iv) (f) or by article 1 of Schedule I. Suit and plaint in section 7 (iv) (f) are not convertible terms. Suit will include a memorandum of appeal because an appeal is a mere continuation of a suit while plaint cannot include a memorandum of appeal; see article 17 of Schedule II to the Court Fees Act. The privilege of valuing the subject-matter under section 7 (iv) (f) is limited to the plaintiff. The view of the Allahabad High Court ignores the language of the section and necessitates the addition of the word appellant after the word plaintiff in the section. *Srinivasacharlu v. Perindevamma*(2) no doubt does not explain the principle but *Samiya Mavali v. Minammal*(3), which is followed in *Srinivasacharlu v. Perindevamma*(2), does; see page 491. *Bunwari Lal v. Daya Sunker Misser*(4), though not a direct decision, states a principle which lends considerable support to the view of the Full Bench in *Srinivasacharlu v. Perindevamma*(2). If section 7 (iv) (f) is held not to apply to the case of a defendant the only provision which can apply is article 1 of Schedule I, and under that provision he must value the subject-matter of the appeal. [Reference was made to *Bunwari Lal v. Daya Sunker Misser*(4) on the question of valuing the subject-matter of the appeal.] Bombay and Patna are in favour of the Madras view; see *Pochalal Ranchhod v. Umedram Kalidas*(5) and *Deoji Goa v. Tricumji Jivan Das*(6). Even in the case of the plaintiff he cannot, if the subject-matter of the appeal is identical with the subject-matter of the suit, value the subject-matter of the appeal differently.

Cur. adv. vult.

The Order of the Full Bench was delivered by LEACH C.J.—This reference raises the much discussed question of the bearing of section 7 (iv) (f) of the Court Fees Act of 1870 when the defendant is the appellant. In a suit for recovery of possession

- (1) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.
 (2) (1915) I.L.R. 39 Mad. 725 (F.B.). (3) (1899) I.L.R. 23 Mad. 490.
 (4) (1909) 13 C.W.N. 815, 820. (5) (1928) I.L.R. 52 Bom. 904.
 (6) (1935) I.L.R. 14 Pat. 658 (S.B.).

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of immovable property and for an account filed in the Court of the Subordinate Judge of Madura the plaintiff valued his relief, so far as it concerned his claim for an account, at Rs. 3,000. He obtained a preliminary decree, which was followed in due course by a final decree, by which he was declared to be entitled to recover a total sum of Rs. 32,000. The preliminary decree was challenged on appeal to the District Court of Madura, but this appeal had not been decided at the time of the passing of the final decree by the trial Court. An appeal against the final decree was also filed, and the District Court heard the two appeals together. The result was that the decree of the trial Court, so far as it directed the payment of money, was varied, it being held that the plaintiff was only entitled to recover Rs. 6,554-5-2. The defendants concerned then appealed to this Court and valued their relief at Rs. 100 paying the court-fee of Rs. 11-3-0 thereon. This valuation was accepted by the office, as it was in accordance with the decision of this Court (RAMESAM and MOCKETT JJ.) in the case of *Venkatanandam, In re*(1) but when the appeal came before BURN J. for admission my learned brother questioned the right of the appellants to make an arbitrary valuation and suggested that *Venkatanandam, In re*(1) should be reconsidered as it appeared to go beyond the decision of the Privy Council in *Faizullah Khan v. Mauladad Khan*(2) on which RAMESAM and MOCKETT JJ. had relied. This Bench has consequently been constituted to consider the whole question of the

stamping of appeals by defendants in suits for accounts, as it is important for the legal profession and necessary for the guidance of the officials of the Court whose duty it is to check the stamping of memoranda of appeal that there should be a clear statement of the practice to be followed as regards both preliminary and final decrees.

The Courts of India have always regarded section 7(iv) (f) of the Court Fees Act as applying to appeals by defendants as well as to appeals by plaintiffs, but whether there is justification for including defendants is open to question. Certainly support can be found for the contention that the Legislature did not intend it to apply to appeals by defendants. In the first place, the Act was passed when the Code of Civil Procedure of 1859 was in force and that Code did not contemplate an appeal from a preliminary decree in a suit for an account. In the second place, section 11, which was inserted to prevent a litigant escaping payment of the proper court-fee, only applies to plaintiffs. There is no corresponding provision to meet the case of a defendant who appeals and under-values his relief. Then clause (iv) (f) itself only mentions the plaintiff. It states that in suits falling within the clause the amount of fee payable shall be computed according to the amount at which the relief is valued in the plaint or memorandum of appeal and concludes with these words :—

“ In all such suits, the plaintiff shall state the amount at which he values the relief.”

Although the memorandum of appeal is included, the emphasis is on the plaintiff. It is he who must value the relief. The wording of the clause

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(1) (1932) I.L.R. 56 Mad. 705.
(2) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.

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and of section 11 read in the light of the history of the section certainly does suggest that the defendant was not within the contemplation of those who were responsible for the drafting of the Act. Assuming this to be in fact the case, it would not follow that a defendant-appellant would escape payment of a court-fee. Section 4 or 6 read with article 1 of Schedule 1 could be called in aid to prevent this, and a defendant-appellant would here find no loophole for placing an arbitrary value on his relief.

In view of the unanimity of previous opinion, we will accept the contention that clause (iv) (f) does apply to appeals by a defendant and discuss the matter from that standpoint. The case of an appeal from a preliminary decree will be taken first. This question was considered by this Court in 1889, when SHEPHARD and SUBRAMANIA AYYAR JJ. in *Samiya Mavali v. Minammal*(1) held that the valuation given by the plaintiff was the valuation to be accepted, except when the appeal did not comprise the entire subject-matter of the suit. The question was raised again in 1915 in the case of *Srinivasacharlu v. Perinde- vamma*(2) which was decided by a Full Bench consisting of WALLIS C.J., SADASIYA AYYAR and SRINIVASA AYYANGAR JJ. who concurred in the opinion expressed in *Samiya Mavali v. Minammal* (1). This decision has governed the practice in the Madras Presidency ever since. Therefore for nearly forty years a defendant appealing from a preliminary decree for an account has ordinarily had to stamp his memorandum according to the

(1) (1899) I.L.R. 23 Mad. 490. (2) (1915) I.L.R. 39 Mad. 725 (F.B.).

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plaintiff's valuation. The decision has, however, not found general acceptance and some High Courts consider that when a defendant appeals from a preliminary decree in a suit for an account he is at liberty to value his appeal at whatever amount may seem to him to be approximately correct. The reasoning which challenges the correctness of the decision in *Srinivasacharlu v. Perindevamma*(1) will be gathered from the judgments delivered by SULAIMAN and BOYS JJ. in *Chunni Lal v. Sheo Charan Lal, Lalman*(2) and may be summed up in very few words. Clause (iv) (f) allows the plaintiff to state his own valuation and as it does not compel the defendant to accept the plaintiff's valuation it is just to read it as placing the defendant-appellant on the same basis as the plaintiff-appellant. SULAIMAN J. frankly acknowledged that this interpretation of the section will be unsatisfactory in some cases and may lead to inconvenience. It ignores the fact that section 11 only applies to the plaintiff and that there is no corresponding section so far as the defendant is concerned.

Before deciding whether the practice laid down in *Srinivasacharlu v. Perindevamma*(1) should continue to be followed, it is necessary to pause to consider the decision of the Judicial Committee in *Faizullah Khan v. Mauladad Khan*(3) which was an appeal by the plaintiffs in a suit for an account. They valued their relief in the plaint at Rs. 3,000, but the trial Court passed a decree against them for Rs. 19,991. They appealed and valued their relief for the purpose

(1) (1915) I.L.R. 39 Mad. 725 (F.B.). (2) (1925) I.L.R. 47 All. 756.
(3) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.

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of the appeal at Rs. 19,991, but they did not stamp the memorandum to include the Rs. 3,000 which they claimed they were entitled to. The appellate Court in remanding the matter for retrial ordered that they should not have a decree for any sum which might be due to them, as the court-fee paid did not cover that relief, and to that extent the appeal was barred by limitation. The Privy Council held that the court-fee paid on the sum of Rs. 19,991 was largely in excess of the true sum of relief at which a sound valuation could in the circumstances be said to reach and it covered the appeal as a whole, including the sum of Rs. 19,991, on the one hand and the smaller sum of Rs. 3,000 on the other. In the course of the arguments, which are to be found reported in 57 M.L.J. 281 and 31 Bom. L.R. 841, it was pointed out by LORD TOMLIN that the scheme of the Act was that the plaintiff should be allowed to value his own relief, and the decision proceeded on this basis. Their Lordships were not called upon to consider the case of a defendant-appellant and consequently their decision cannot be taken as a guide when deciding whether *Srinivasacharlu v. Perinde-vamma*(1) or *Ohunni Lal v. Sheo Charan Lal, Lalman*(2) should be followed.

After careful consideration, we have come to the conclusion that the Full Bench decision of this Court in *Srinivasacharlu v. Perinde-vamma*(1) should not be disturbed. By reason of its concluding sentence, clause iv (f) can be construed in the way it was construed in that case, but even if the decision means reading into the

(1) (1915) I.L.R. 39 Mad. 725 (F.B.). (2) (1925) I.L.R. 47 All. 756.

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clause something which is not there, it does not read into it anything more than those who prefer the Allahabad opinion would read into it. There are, however, other reasons why the decision should stand. It cannot be said that in compelling a defendant to follow a plaintiff's valuation hardship is likely to result. A plaintiff is never anxious to pay more than is necessary in court-fees. A Court is naturally reluctant to depart from a long established practice and should only do so when it is clear that the practice is contrary to law, which is certainly not the case here. Moreover the Madras High Court does not stand alone. The decision in *Srinivasacharlu v. Perindevamma*(1) found acceptance with the majority of the Court in *Pochalal Ranchhod v. Umedram Kalidas*(2) and in *Deoji Goa v. Tricumji Jivan Das*(3). The decision in *Srinivasacharlu v. Perindevamma* (1) will, therefore, continue to govern the practice in this Presidency with regard to appeals by defendants from preliminary decrees in suits for account.

Until the decision in *Venkatanandam, In re*(4) it was never questioned in the High Courts of India that a defendant appealing against a final decree should pay a court-fee on the amount of the decree passed against him—except in cases where he appealed only against a portion of the decree—and we are unable to concur in the opinion that *Faizullah Khan's* case (5) has put a different construction on the section. *Faizullah Khan's* case(5), as I have already indicated, only

(1) (1915) I.L.R. 39 Mad. 725 (F.B.). (2) (1928) I.L.R. 52 Bom. 904.
(3) (1935) I.L.R. 14 Pat. 658 (S.B.). (4) (1932) I.L.R. 56 Mad. 705.
(5) (1929) L.R. 56 I.A. 232; I.L.R. 10 Lah. 737.

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dealt with the case of a plaintiff-appellant. The section gives great freedom to plaintiff-appellants, but we do not consider that it gives the same freedom to defendant-appellants. When a defendant-appellant appeals against a final decree he knows exactly the value of his relief. It follows that we consider that *Venkatanandam, In re* (1) was wrongly decided and, therefore, should not be followed.

In the present case, according to the heading of the memorandum of appeal, the appeal relates only to the preliminary decree for an account, but at the end of the memorandum there is this note :

"The appeal is from a combined preliminary and final decree passed by the appellate Court in a suit for taking of accounts and hence it is impossible to state accurately what the net liability of the appellants will be on a proper taking of the accounts, accepting the contention raised in the memorandum of grounds."

In the course of his arguments the learned Advocate for the appellants intimated that the intention was to limit the appeal to the preliminary decree, because if that was set aside the final decree would also fail. We see no objection to the appellants treating their appeal as an appeal against the preliminary decree, if they so desire, but they will have to value their relief in accordance with the valuation in the plaint.

A.S.V.

(1) (1932) I.L.R. 56 Mad. 705.

APPELLATE CIVIL.

before Mr. Justice Burn and Mr. Justice Abdur Rahman.

SHEIK MUHAMMAD ROWTHER AND ANOTHER
(DEFENDANTS), APPELLANTS,

v.

AYEESHA BEEVI (PLAINTIFF), RESPONDENT.*

Muhammadan law—Dower—Prompt or deferred—Rule of law in Madras Presidency—Presumption—Express stipulation—Absence of.

As regards the time for payment of dower, the rule of law in this Presidency is that unless the whole or any part of the dower is expressly postponed, it must be presumed to be prompt and payable on demand. The Full Bench decision in *Masthan Sahib v. Assan Bivi Ammal*(1) which laid down this rule of law intended that it should govern all classes of Mahomedans, whether Shias or Sunnis.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 59 of 1932 preferred against the decree of the Court of the District Munsif of Palni in Original Suit No. 431 of 1931.

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

ORDER :—

Three points have been argued by Mr. Rajah Ayyar in this second appeal, one relating to a question of fact and the other two relating to questions of law. The question of fact relates to the genuineness of Exhibit F, which is the document on which the suit claim for dower is based. There is a concurrent finding of both the Courts that Exhibit F is genuine, and it is not open to Mr. Rajah Ayyar to challenge it in second appeal.

* Second Appeal No. 343 of 1933.
(1) (1900) I.L.R. 23 Mad. 371 (F.B.).

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The second point urged before me is that, as the contract, Exhibit F, does not fix any time for payment of the dower and as the parties are governed by Hanafi law, part of the dower must be presumed to be prompt and part deferred, and that the view of the lower Court following *Husseinkhan Sardarkhan v. Gulab Khatum*(1) is not correct. It is admitted that the parties to this suit are Hanafis. The text-writers on Muhammadan law seem to make a distinction between the Shia law and the Hanafi law in regard to the payment of dower where the contract does not fix the time for payment. In Shia law the presumption seems to be that, in the absence of a contract fixing the time for payment, the dower is prompt and payable on demand; but in Hanafi law the presumption seems to be otherwise. In *Mussammat Bibi Mahbooban v. Sheikh Muhammad Ammeruddin*(2) Das J. states the rule of law thus: "It seems to be well settled that amongst the Sunnis, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of dower settled." According to the learned Judge, the presumption will apply even in a case where an agreement is set up but is not substantiated. This seems to be the view also of the Allahabad High Court in *Umda Begam v. Muhammadi Begam*(3). But Mr. Panchapagesa Sastri contends that so far as this Presidency is concerned no such distinction is drawn between Shia law and Hanafi law and that the Full Bench in *Masthan Sahib v. Assan Bivi Ammal*(4) must be deemed to have laid down the law for all Muhammadans. According to the said decision, unless payment of the whole or any part is expressly postponed, it must be presumed to be prompt and payable on demand. It is not clear, from the judgment or from a reference to the printed papers, whether the parties were Shias or Sunnis. In the argument of Mr. K. Srinivasa Ayyangar for the appellant before the Full Bench there is a statement to the effect that he contended that the parties were Shias. At any rate, both the Allahabad and the Patna High Courts are inclined not to treat that case as laying down any rule of Hanafi law but that

(1) (1911) I.L.R. 35 Bom. 386.

(3) (1910) I.L.R. 33 All. 291.

(2) (1929) I.L.R. 8 Pat. 645, 649.

(4) (1900) I.L.R. 23 Mad. 371 (F.B.).

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the principle of that decision must be confined to Shias. I may observe that the decision in *Masthan Sahib v. Assan Bivi Ammal*(1) purports to follow a decision of the Privy Council in *Mirza Bedar Bukht Mohammed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan Bahadoor*(2) where the parties were Shias. It is not clear from the Full Bench decision whether it is intended to govern all classes of Muhammadans, whether Shias or Hanafis. In view of the decisions of the Allahabad and Patna High Courts which have taken a definite view on this matter, it is desirable that there should be an authoritative ruling whether the decision of the Full Bench in *Masthan Sahib v. Assan Bivi Ammal*(1) was intended to lay down the law for all Muhammadans, whether Shias or Sunnis. I accordingly refer the matter to a Bench for disposal.

The other point raised by Mr. Rajah Ayyar relates to the question of interest. This matter also will be disposed of by the Bench dealing with the second appeal.

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

ON THE REFERENCE—

K. Rajah Ayyar for appellants.

S. Panchapagesa Sastri for respondent.

Cur. adv. vult.

JUDGMENT.

BURN J.—The facts are all set forth in the judgment of my learned brother which I have had the advantage of perusing. Since I agree with his conclusions, it is not necessary for me to say more than a few words upon the subject for decision in this appeal.

The point upon which our learned brother VENKATARAMANA RAO J. felt some doubt was whether the Full Bench in disposing of the case,

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1873) 19 W.R. 315 (P.C.).

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Masthan Sahib v. Assan Bivi Ammal(1), intended to lay down the law for all Muhammadans whether Shias or Sunnis. If it did, there is no question about the binding nature of the decision so far as we are concerned, and since the decision is now thirty-seven years old, I should be very reluctant to suggest that it requires reconsideration, whatever the nature of the decisions in other Provinces might be.

I do not think there is any room for doubt upon this matter. The order of reference to a Full Bench, which gave occasion for the decision reported as *Masthan Sahib v. Assan Bivi Ammal*(1), states simply that the parties were "Muhammadans". It goes on to state that this Court in the case of *Tadiya v. Hasanebiyari*(2) in 1870 held that "according to Muhammadan law dower is presumed to be prompt in the absence of express contract". The ground of this decision was stated to be that "the authorities agreed that there was a presumption of Muhammadan law to this effect". Later in the order of reference the learned Judges draw attention to Amcer Ali's work on Muhammadan law in which a distinction is made between the Shia law and the Hanafi doctrines. Nevertheless in the opinion delivered by the Full Bench there is no reference to any difference between Hanafi doctrine and Shia doctrine. It cannot be presumed that the learned Judges overlooked the reference to Amcer Ali's work and the only conclusion I can draw from their opinion is that they deemed themselves to be laying down the law for all Muhammadans irrespective of sect.

(1) (1900) I.L.R. 23 Mad. 371 (F.B.).

(2) (1870) 6 M.H.C.R. 9.

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There is undoubtedly a divergence of view between Macnaghten and Baillie in those parts of their treatises in which they were propounding the principles of *Hanafi* law. There was not I believe at any time any question about Shia doctrine on this point. According to Shia law, the whole dower is prompt when the contract is silent. I agree with my learned brother that the remarks attributed to Mr. K. Srinivasa Ayyangar in the report of his argument in *Masthan Sahib v. Assan Bivi Ammal*(1), "These parties are Shiahs", must be the result of incorrect reporting. If the parties had been Shias the contention put forward on their behalf could never have arisen. Macnaghten and Baillie differed. This Court in *Tadiya v. Hasanebiyari*(2) (which was a case affecting Shafis, i.e., Sunnis) followed Macnaghten in preference to Baillie and their Lordships of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan Bahadoor*(3) expressed the opinion that the view laid down in Macnaghten's Principles was "the admitted rule". I am quite clear that we should do nothing now to indicate any doubt about the correctness of the decision in *Masthan Sahib v. Assan Bivi Ammal*(1).

On the question of interest no sufficient reason was shown for interference with the decree of the lower Court.

The appeal must be dismissed with costs.

ABDUR RAHMAN J.—This appeal arises out of a suit brought by one Ayeesha Beevi for the recovery of her dower amounting to Rs. 2,000 and for

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(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1870) 6 M.H.C.R. 9.
(3) (1878) 19 W.R. 315 (P.C.).

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subsequent interest. The suit was filed on the basis of a deed of dower which was silent on the point whether the dower was prompt or deferred. It was alleged on behalf of the plaintiff, however, that as the deed was silent on the point, the dower should be presumed to be prompt and in any case there was a communal custom prevailing to that effect in the Nallampillai community. In answer to this claim, her husband, the second defendant, pleaded that the deed filed on behalf of the plaintiff was a forgery and that a sum of 2,000 tangas only and not Rs. 2,000 (a tanga being one-third of a rupee) was fixed as dower between the parties and was so entered in a document which had also provided that the whole of the dower was deferred in character. It was also pleaded that the aforesaid dower of 2,000 tangas, i.e. Rs. 667, was, although deferred, already paid to the plaintiff. In the alternative it was pleaded that the plaintiff was not entitled to recover any mahar during the continuance of the Nikah and that there was no custom which would entitle her to claim it before dissolution of marriage.

Finding that the plea of payment raised on behalf of the defendants was not substantiated and that the deed of dower relied upon by the plaintiff was a genuine document, the trial Court did not give an explicit finding on the custom alleged on behalf of the plaintiff but referring to the question of law it stated that the view taken by the Bombay High Court was probably the more correct view. It therefore found that the whole of the dower was payable on demand and decreed the claim.

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Aggrieved by this decree the defendants filed an appeal to the Subordinate Judge at Dindigul who went into the questions of fact carefully but disposed of the question of law with a statement that according to the Bombay High Court, if the document was silent on the point when the dower was to be paid, it should be taken to be payable at once.

Not being satisfied with the decrees of the trial and the lower appellate Courts, the defendants came up to the High Court. The appeal was heard in the first instance by my learned brother VENKATARAMANA RAO J. who came to the conclusion that the genuineness of the deed of dower could not be challenged in the second appeal. But, in view of a Full Bench decision of this Court reported as *Masthan Sahib v. Assan Bivi Ammal*(1) which followed a decision of the Privy Council in *Mirza Bedar Bukht Mohammed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan Bahadoor*(2) on the one hand, and the divergent views taken particularly by the High Courts of Allahabad and Patna in *Umda Begam v. Muhammadi Begam*(3) and *Mussammât Bibi Mahbooban v. Sheikh Muhammad Ammeruddin*(4) on the other, he considered it desirable to refer the case for an authoritative ruling and the case has consequently been sent to a Bench of this Court for disposal. This was done particularly as some doubt existed on the question whether the Madras Full Bench case and the Privy Council case, both of which have been cited above, intended to lay down the law for all

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1873) 19 W.R. 315 (P.C.).
(3) (1910) I.L.R. 33 All. 291. (4) (1929) I.L.R. 8 Pat. 645.

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Muhammadans whether of Shia or Sunni persuasion or only for Muhammadans of the Shia sect. This doubt was natural as the Privy Council decision was given in the case of certain members of the ruling house of Oudh who were Shias and, although there was nothing in the records of the Madras Full Bench case of *Masthan Sahib v. Assan Bivi Ammal*(1) to show that the parties were Shias, a statement has been printed as having been made by Mr. K. Srinivasa Ayyangar, Counsel for the appellant, that the parties to that suit were Shias. This is surprising as this statement is preceded by the words: "Syed Ameer Ali in his work on 'Muhammadan Law', Vol. 11 at page 386, draws a distinction between Shias and Hanafis." If the Counsel for the appellant in that case were alive, as he must have been, to the distinction pointed out by Syed Ameer Ali, which laid down that under the Shia law, where no time was specified for the payment of the dower or where its nature was described only in general terms and it was not mentioned in the contract of marriage how much was prompt and how much deferred, the whole was to be considered as prompt, Mr. Srinivasa Ayyangar was contending for the appellant in that case that the dower in Muhammadan law, if not specified to be prompt, could not be presumed to be so. He is then stated to have cited in support of his contention the following words out of Baillie's Digest of Muhammadan Law:

"When the parties have explained how much of the dower is to be Mooujjul or prompt, that part of it is to be promptly paid. When nothing has been said on the subject

(1) (1900) I.L.R. 23 Mad. 371 (F.B.)

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both the women and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman and so much is to be Mooujjul or prompt, accordingly, without any reference to the proposition of a fourth or a fifth but what is customary must also be taken into consideration."

If the parties to the suit were on the other hand Shias, Baillie's Digest of Muhammadan Law, Vol. I, which deals with the law amongst Sunnis, would not have been quoted at all particularly when the Counsel had, as pointed above, admitted that in the case of Shias, the presumption would be otherwise. It might be stated here that Baillie discusses the Imamea law in the second volume of his work.

The contention that Mr. Srinivasa Ayyangar could not have made such a statement in *Masthan Sahib v. Assan Bivi Ammal*(1) was also supported by the Counsel for the respondent by a reference to Wilson's Muhammadan Law, who has pointed out that an admission of that nature would have been fatal to the appellant's case (pages 118, 119—5th Edition). I have gone through the records of the case of *Masthan Sahib v. Assan Bivi Ammal*(1) and find nothing there which would show that the parties to the suit were Shias. In view of what has been said, I have no hesitation in finding that the statement imputed to Mr. Srinivasa Ayyangar to the effect that the parties to that suit were Shias and printed at page 375 of the case of *Masthan Sahib v. Assan Bivi Ammal*(1) could not have been made by him. On the other hand, a reference to the other authorities which were cited by the Division Bench in referring the case

(1) (1900) I.L.R. 23 Mad. 371 (F.B.).

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to the Full Bench for decision and those which were cited before the Full Bench leads me to conclude that the Full Bench was dealing with a case between persons who were of Sunni persuasion and not those who followed the Imamea law.

As for the decision given by their Lordships of the Privy Council in *Mirza Bedar Bukht's* case(1), it is true that the parties to that suit must be presumed to have been Shias as the ruling family of Oudh was a Shia family. But a reference to the judgment in that case shows that their Lordships of the Judicial Committee did not, while considering this question, refer to Shia texts but to those which were applicable to Sunnis. There is nothing to show in fact that they intended to differentiate between the two schools of thought. The observations which they made in that case were wholly general in character. It would thus follow that the Full Bench case reported as *Masthan Sahib v. Assan Bivi Ammal*(2) is binding on us and is really based on the observations made by their Lordships of the Privy Council in *Mirza Bedar Bukht's* case(1), in which they preferred to follow the law as laid down in Macnaghten's Principles and Precedents, Chap. VII, *vide* article 22, to the effect that

"where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand".

Had the Full Bench case not been based on the law laid down by the Privy Council, it would have been necessary to consider whether, in view of the pronouncements of the learned Judges of the Allahabad and Patna High Courts

(1) (1873) 19 W.R. 315 (P.C.). (2) (1900) L.L.R. 23 Mad. 371 (F.B.).

based as they are on the dicta of learned authors like Baillie and Ameer Ali, it would not be advisable to refer the case to another Full Bench. But in view of the conclusions arrived at by me, I do not feel called upon to do so. Moreover, while examining the original authorities referred to by Ameer Ali and Baillie, I came across an original text from Hammadayah—a work of great authority and fully recognised to be so amongst the Sunni Mussalmans in India—in which the position of the law has been stated as described by Macnaghten in his Principles of Muhammadan Law. I find at page 89 of Vol. I of Hammadayah (1825 Edn.) a passage which, rendered into English, would read as follows:—

"The dower is not free then from one condition and other. It would either be with a condition of immediate payment (i.e., *Mooujjil*) or with a condition of its being deferred (*Movajjal*) or it may be silent. But if it is with a condition of immediate payment or is silent, it would become immediately payable (*Muajjal*) for it is a contract with consideration and is therefore required to be equal on both the sides. As the woman (wife) has established the husband's right, it is essential that he (husband) may establish hers and this would be established on payment."

The learned author then proceeds to refer to expressly deferred dower with which we are not concerned here.

It is true that Ameer Ali has based his opinion on Fatawa Alamgiri which relies for its authority on a passage from Fatawa Kazi Khan. I have consulted both these original authorities and find that the statement of the law as given by them has been correctly put down by Ameer Ali in his well-known work at page 499 (Vol. II) and by Baillie in his Digest at page 127 (1875 Edn.).

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But the fact remains that Hammadayah lays it down differently and this view of law was propounded by Macnaghten and recognised by the Privy Council in *Mirza Bedar Bukht's* case(1) and followed subsequently by this High Court in *Masthan Sahib's* case(2).

This rule of law is more commendable as it makes it more exact and workable in practice and fits in with the advancing state of society which gives more rights to helpless ladies in getting what they do not generally get on account of their dower—a liability which flows from the contract of marriage and which was although generally discharged previously, yet from which the husbands have latterly tried to escape in spite of a contract of which they have taken full advantage themselves.

As in *Masthan Sahib's* case(2), the defendants in this case appear to have entertained the view themselves that the dower was payable on demand as, in spite of the plea that it was deferred, they pleaded payment of the whole sum and thus, as pointed out in *Masthan Sahib v. Assan Bivi Ammal*(2), showed their consciousness that it ought to have been so paid.

At all events it would be dangerous to go back upon or overrule decisions which are not manifestly erroneous. They have stood the test of time and must be deemed to have influenced a majority of Muhammadans living in this Presidency at least into a belief that if the character of dower is not specified, it would be taken to be prompt.

(1) (1872) 19 W.R. 315 (P.C.).

(2) (1900) I.L.R. 23 Mad. 371 (F.B.).

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The question of interest was not seriously contested and there is no reason why the plaintiff should not get it at the rate allowed by the lower Court, when she has been deprived of the use of her dower for such a long time although it has been found to have been payable to her on demand.

For the reasons given I would dismiss the appeal with costs throughout.

A.S.V.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Madhavan Nair.

VARADA NARAYANA AYYANGAR (SECOND DEFENDANT),
APPELLANT, 1937,
September 30.

v.

VENGU AMMAL AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS 3 AND 4), RESPONDENTS.*

Hindu Law—Adoption—Testator giving strong directions in his will to his widow to adopt and appointing some executors to be in possession during minority of adopted son—Refusal of widow to adopt—Absence of right to compel her to adopt—Claim by her of estate in the hands of executors—Resistance by executors on the ground that she might change her mind—Illegality of.

A testator by his will directed his widow to adopt his nephew S and stated that if S's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on his attaining majority they should hand over the estate to him. The

* Appeal No. 38 of 1932.

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executors took possession of the properties. The widow refused to exercise the power of adoption and filed a suit against the executors for the recovery of possession of the properties of her husband.

Held: A widow cannot be compelled to follow her husband's wishes in the matter of adopting a son however strong the directions of her husband might have been and she cannot be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest.

Bamundoss Mookerjee v. Mussamut Tarinee(1), *Uma Sunduri Dabee v. Sourobinee Dabee*(2), *Shamavahoo v. Dwar-kadas Vasanji*(3) and *Vanama Akkayya v. Vanama Laksh-mamma*(4) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 22 of 1929.

C. Narasimhachari and *M. E. Rajagopalachari* for appellant.

P. N. Appuswami Ayyar for respondents.

LEACH C.J.

LEACH C.J.—This appeal arises out of a suit filed by the first respondent to recover from the appellant and the second and the third respondents her deceased husband's estate. The first respondent is the widow of one Tirumala Ayyangar, who died on 23rd February 1921 having made a will four days previously. The appellant and the second and third respondents are the executors under the will. By his will the testator directed his widow to adopt his nephew Srinivasan and stated that if Srinivasan's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on

(1) (1858) 7 M.I.A. 169.

(3) (1 78) I.L.R. 12 Bom. 202.

(2) (1881) I.L.R. 7 Cal. 288.

(4) (1927) 27 L.W. 370.

his attaining majority they should hand over the estate to him. The will also directed that Rs. 10 a year should be spent on the expenses of his annual ceremony, Rs. 10 towards the expenses of the annual ceremonies of his two deceased wives, and a sum of Rs. 3 on the annual ceremony of his deceased *guru*. The will was drafted and executed on the assumption that the first respondent would fulfil the testator's direction and adopt his nephew Srinivasan or failing him another boy. The first respondent refused to carry out her husband's wishes. She alleged that the will had been executed while her husband was of unsound mind and was, therefore, invalid. On 4th July 1921 she instituted Original Suit No. 405 of 1921 in the District Munsif's Court of Srivilliputtur for a declaration to this effect and for the recovery of possession of the properties. The District Munsif held that the testator was of sound mind and that the will was a valid one, but he refused to give the first respondent possession of the properties on the ground that the first respondent might change her mind and adopt a son to her deceased husband. In that suit it was alleged by the executors that the testator had in fact adopted Srinivasan before he died, but this was held not to be true. An appeal followed to the Court of the Subordinate Judge of Ramnad, who reversed the decree passed by the District Munsif and ordered the estate properties to be delivered to the first respondent as the widow of the testator. This decision followed a finding that the authority to adopt had been given to the executors and, therefore, was not a valid authority. The learned Subordinate Judge agreed, however, with the

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District Munsif that there had been no adoption of Srinivasan. The matter was carried to this Court (Second Appeal No. 597 of 1926). This Court held that the Subordinate Judge was wrong in holding that the power of adoption had been given to the executors. The power had been given to the widow. The appeal was accordingly allowed and the parties were left to their respective rights on the basis that the will was genuine.

On 29th September 1928 the first respondent filed the present suit in the Subordinate Judge's Court for a declaration that she was entitled to the estate, having refused to adopt a son to her husband, and for possession of the properties with mesne profits. The learned Subordinate Judge held that as she had refused to adopt she was entitled to the estate and that the executors were, therefore, bound to hand the properties over to her. This decision is challenged on three grounds:—(i) that the decision in the previous suit operated as *res judicata*; (ii) that the will created a trust in favour of the executors and they were entitled to remain in possession because the first respondent might change her mind; and (iii) that on a proper construction of the will Srinivasan was entitled to the properties as the legatee.

The plea that the previous litigation operated as *res judicata* cannot be maintained in view of the judgment of this Court in Second Appeal No. 597 of 1926. In the previous appeal there was much argument on the question of what were the rights of the first respondent under the will. The Court, however, did not consider that it was

necessary to go into that question, because the first respondent's claim was against the will and not under it. This having been pointed out by the Court, the learned Advocates agreed that there should be no adjudication of the first respondent's claim under the will. So far as that was concerned the question was left open. There having been no decision on questions arising under the will, the doctrine of *res judicata* can have no application here.

Coming now to the second point, it is quite clear that the will does not create any trust. It directs that the executors shall remain in possession of the properties and the income during the minority of the adopted son, but it is conceded that if a son had been adopted they would be bound under its terms to hand all the properties over to him on his coming of age. It is also conceded that on this event happening the duty of fulfilling the testator's directions with regard to the annual ceremonies would devolve on the adopted son, and the executors would have no further duties to perform. But it is said that because the widow has refused to adopt it does not mean that she will persist in her refusal. She may change her mind, and that, pending this uncertain event, the executors are in law entitled to remain in possession. I might mention here that the executors also happen to be the reversioners. The argument amounts to this. The properties must remain in the hands of the executors until the death of the first respondent, because until the breath has departed from her body she may change her mind. But a widow cannot be compelled to follow her husband's wishes in the

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matter of adopting a son; *Bamundoss Mookerjee v. Mussamut Tarinee*(1). Now, as a Hindu widow cannot be compelled to adopt, however strong the direction of her husband might have been, is she to be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest? The answer to my mind must be in the negative. If she says "I refuse to adopt", she is entitled to be put in possession of her deceased husband's estate and it was decided so in a case which resembles in many respects this case; *Uma Sunduri Dabee v. Sourobinee Dabee*(2). In that case the husband directed by his will that if his wife (who was *enciente* at the time the will was made) did not give birth to a son, or if she did and the son died, she was to adopt a son. She refused to comply with his direction. It was held that she was entitled to do so and the fact that she did refuse made the direction under the will for all legal purposes non-existent. CUNNINGHAM J. observed:

"We think, however, that the observations of the Sadr Court must be accepted as favouring the proposition that such a legal obligation cannot be created; and the remarks of PEACOCK C.J. in *Prasannamayi Dasi v. Kadambini Dasi*(3) are an authority for the view that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

We cannot therefore regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do so is no bar to her rights of inheritance. Accordingly the contingency for which the will provides not having occurred,

(1) (1858) 7 M.I.A. 169.

(2) (1881) I.L.R. 7 Cal. 288.

(3) (1868) 3 Ben. L.R. (O.J.) 85, 90.

and there being no gift over, the testator must be regarded as intestate and his widow as heiress-at-law entitled to succeed".

In the case before us there is no gift over. A similar decision was given by SARGENT J. in *Shamavahoo v. Dwarkadas Vasanthi*(1) and by DEVADOSS J. in *Vanama Akkayya v. Vanama Lakshamma*(2). There is, therefore, ample authority in support of the decision of the trial Court. As I have mentioned, the will was drawn up and executed on the basis that she would adopt. She has refused to adopt, and therefore she is entitled to receive the properties as on intestacy.

The argument that the testator did use words in his will which warrant the Court holding that Srinivasan was named as his heir is based on this passage:

"In accordance therewith, I have hereby authorised the said executors to have the said Srinivasan, son of Govindam Ayyangar, adopted after my lifetime and to have my funeral rites performed by him."

There is here, however, nothing to support the argument and the matter is put beyond all doubt by the next passage which is as follows:

"In case the said Govindam Ayyangar raises any objection to give his son in adoption in the said manner, the executors are authorised to seek for a proper son elsewhere and to get him adopted."

Srinivasan got nothing under the will unless the adoption took place, and the appellant's third argument must therefore fall to the ground.

A further point has been taken which has nothing to do with the other arguments, namely, that the learned trial Judge was wrong in only allowing the executors a sum of Rs. 516-10-0 as costs of the previous litigation. The executors

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(1) (1878) I.L.R. 12 Bom. 202.

(2) (1927) 27 L.W. 370.

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say that they should be allowed a sum of Rs. 1,085-5-0, which is the amount actually spent by them in this litigation. The learned Subordinate Judge has given very good reasons why he did not allow the full claim. In the previous suit the executors, as I have indicated, set up a case that Srinivasan had, in fact, been adopted by the testator before his death. This was found to be untrue, and as they had put forward a false plea, the learned Subordinate Judge held that they were not entitled to all that they had spent in the litigation. I consider that this is a proper decision. The objection to the decree in this respect must, therefore, also be dismissed.

As the appeal fails it must be dismissed with costs in favour of the first respondent.

MADHAVAN
 NAIR J.

MADHAVAN NAIR J.—I entirely agree, but as the point of Hindu law argued before us is of some importance and as there has been no express decision by any Bench of this Court I wish to add a few words. Adoption by a Hindu widow is a power which she exercises in her own right, but she exercises that power under direction from her husband or by obtaining the consent of the nearest sapindas. But this power she cannot be compelled to execute. The fact that a boy to be adopted is mentioned in the will of her husband does not, in my opinion, affect the question. In this connection a passage from Mayne's Hindu Law may be usefully referred to. The learned author says :

"It is no doubt upon the same principle that an express authority, or even direction, by a husband, to his widow to adopt is, for all legal purposes, absolutely non-existent until it is acted upon."

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I think it may now be taken that the law is well settled that a Hindu widow cannot be compelled to adopt, nor will a suit lie to enforce her to do so. The reason is obvious. Adoption is not a compulsory religious obligation whatever the moral obligation on the widow may be. This being the position, what would be the result if a Hindu widow who was enjoined by her husband to adopt refused to adopt? The texts of Hindu law are silent on this point; but there are a few decisions on the question and as these have been referred to by my Lord in his judgment, it is not necessary for me to refer to them again. Of course, the position would be different if a trust had been created by the husband in his will. There is no foundation for the argument put forward in this case that a trust has been created under the will. The chief argument urged in favour of the view that the widow is not entitled to get the properties from the executors is, what will happen if the widow adopts at some later stage? The answer is, if she adopts she will then be deprived of the properties and they will vest in the adopted son. The purpose for which the will has been executed by the husband has not been found to be enforceable. In my opinion the property would, on the refusal of the widow to adopt, vest in her. I agree with the order passed by my Lord the CHIEF JUSTICE. On the subsidiary points also I entirely agree with him and have nothing to add.

G.B.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
Abdur Rahman.

1937,
December 3.

BHAMIDIPATI SATYANARAYANA, RECEIVER,
CHINCHINADA ESTATE, IN ORIGINAL SUIT NO. 28 OF 1923,
SUB-COURT, NARSAPUR (SECOND RESPONDENT), APPELLANT,

vs.

ALLURI KRISHNAMRAJU (APPELLANT) RESPONDENT.*

*Madras Estates Land Act (I of 1908), sec. 42—Retrospective
effect—Adjudication under the section, if has—Back rent, if
can be decreed under.*

Section 42 of the Madras Estates Land Act does not refer to
back rent and a decree cannot be granted in respect of an
excess area for past faslis also.

Section 42 is a special piece of legislation involving an
invasion of accrued rights and must be strictly construed.

APPEAL under Clause 15 of the Letters Patent
preferred against the judgment of WADSWORTH J.
in Second Appeal No. 722 of 1932 preferred to the
High Court against the decree of the District
Court of West Godavari at Ellore in Appeal Suit
No. 203 of 1930 (Summary Suit No. 8 of 1929,
Deputy Collector, Narsapur Division).¹

A. Satyanarayana and P. Satyanarayana Rao
for appellant.

V. Rangachari for respondent.

Cur. adv. vult.

VENKATA-
SUBBA RAO J.

The JUDGMENT of the Court was delivered by
VENKATASUBBA RAO J.—The point is one of some
difficulty in regard to section 42 of the Madras
Estates Land Act (I of 1908). The landholder

filed an application before the Sub-Collector
under section 42 (2) praying for an alteration of
the amount of rent in respect of the excess area
in the defendant's holding. The rent which was
sought to be altered was being paid under the
terms of a patta, which had been for long in force.
At that time there was a previous suit filed by the
landholder, pending before the Sub-Collector, for
rent under the Act. The defendant had pleaded
that the rent claimed was excessive and issues had
been framed in the suit. It was at this stage that
the application under section 42 (2) was made.

The Sub-Collector heard the application and
the suit concurrently and gave a consolidated
decision, as it were, holding the defendant liable
in respect of a large excess area and passed a
decree upon that footing for back rent also, thus
giving retrospective effect to his adjudication
under section 42. It is not material to the ques-
tion, but it may be interesting to note, that the
patta rent was in respect of less than an acre and
the area found by the Sub-Collector was upwards
of six acres.

The short point raised by this Letters Patent
Appeal is, whether the Courts below are right in
holding that a decree can be granted in respect of
an excess area for the past faslis also. It would
be false analogy to refer to other sections of the
Act, or to other Acts which contain similar but
differently worded provisions. Section 42 obvi-
ously does not refer to land on which there has
been a trespass, for there are other sections dealing
with cases of trespass. Section 163 refers to the
ejectment of, and section 45 to the rent payable
by, trespassers. Section 42, the provisions with

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which we are concerned, is a special piece of legislation involving an invasion of accrued rights. Construing the section strictly—and there can be no doubt that such a provision should be so construed—we find it difficult to hold that retrospective effect was intended. The notion that the rent which has been acquiesced in can be abruptly altered with retrospective effect seems repugnant to every legal conception. WADSWORTH J., from whose decision this appeal has been filed, was also of the opinion that back rent cannot be claimed, but he seems to suggest the sanctity of contracts as the ground of his decision. We doubt, although we agree with his conclusion, if his reasoning is correct, for the section seems to proceed upon the footing of an absence of contract. For instance, in section 44, which prescribes the rules for determination of alteration of rent, it is stated that the Collector should have regard *inter alia* to the fact whether the rent was a consolidated rent for the entire holding. This and other similar rules seem to exclude the idea of an inroad upon people's rights where the tenancy has its origin in an express contract.

In support of our view that section 42 does not refer to back rent, we may refer to the marked contrast of its wording to that of section 45. The latter section deals, as already stated, with the case of trespassers. It makes the person in possession liable to pay not only what the Collector determines to be fair rent, but, in addition, such sum as he may award as damages for unauthorised occupation; thus, this section expressly enacts that an amount in respect of a past period

can be awarded. The omission of similar words in the section in question is significant.

In the result, the judgment of WADSWORTH J. is confirmed and the Letters Patent Appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Abdur Rahman.

IN RE VEERASWAMI PADAYACHI (PETITIONER),
APPELLANT.*

1937,
December 6.

Letters Patent (Madras), Cl. 15—Second appeal—Judgment of single Judge of High Court in—Review of—Order of that Judge refusing—Appeal from—Competent without leave of that Judge, if.

An appeal from an order of a Judge of the High Court refusing to grant a review of his judgment in a second appeal is not competent unless that Judge certifies under Clause 15 of the Letters Patent that the case is a fit one for appeal.

Clause 15 of the Letters Patent, properly construed, means that no judgment of a Judge of the High Court in the exercise of second appellate jurisdiction is appealable without leave. An order refusing to grant review of the judgment in a second appeal is made in the exercise of such second appellate jurisdiction.

APPEAL sought to be preferred under Clause 15 of the Letters Patent against the order of PANDRANG ROW J. dated 16th April 1937 and made in Civil Miscellaneous Petition No. 708 of 1937 for review of the judgment in Second Appeal No. 1188 of 1932 preferred to the High Court against the

* Serial Register No. 19677 of 1937

VEERASWAMI,
In re.
decree of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 3 of 1932 (Appeal Suit No. 7 of 1932, District Court, East Tanjore) (Original Suit No. 227 of 1930, District Munsif's Court, Shiyali).

K. P. Ramakrishna Ayyar for appellant.

VENKATA-
SUBBA RAO J.

The ORDER of the Court was delivered by VENKATASUBBA RAO J.—The point raised is a novel one. PANDRANG ROW J. decided a second appeal against the petitioner, who thereupon applied for a review of the learned Judge's judgment. Review was refused and the present appeal is from the order of refusal. The learned Judge was not asked to certify under Clause 15 of the Letters Patent that the case was a fit one for appeal, and the question is, whether the present appeal without leave is competent.

The argument turns on the following words in Clause 15:

"Not being a judgment passed in the exercise of . . . appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction . . . by a Court subject to the superintendence of the said High Court".

The contention is put thus: what these words contemplate is a judgment in respect of an appellate decree or order made by a subordinate Court; PANDRANG ROW J.'s judgment refusing to review (for the present purpose his order may be assumed to be a judgment) is not in respect of such decree or order; what the learned Judge refused to review was his own order. From this it follows, it is contended, that the order in question is not covered by the express wording of the exception. The argument, though plausible, is without substance. The clause

properly construed, means that no judgment of a Judge of the High Court in the exercise of second appellate jurisdiction is appealable without leave. Here, the order refusing to grant review was made in the exercise of such second appellate jurisdiction; that is the short answer to the objection.

To test the matter, let us suppose that instead of refusing a review, the learned Judge made an order granting it. Mr. Ramakrishna Ayyar, to be logical, has had to contend that from such an order an appeal will lie; but when after granting the review, the Judge proceeds to dispose of the second appeal, no appeal will without leave lie from the final decision—which of course is the undoubted effect of the clause. The position that results is most anomalous.

Apart from that, the absurdity of the contention is apparent. All that a defeated party in a second appeal need do is, to apply for a review and, on his request being refused, to come to the appellate Court and contend that an appeal lies from the refusal as a matter of right. No Court can accept a construction which involves such a startling result.

We hold that the Letters Patent Appeal is incompetent and accordingly reject it.

A.S.V.

VEERASWAMI
In re.

VENKATA-
SUBBA RAO J

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and
Mr. Justice Stodart.

1937,
December 14.

THE POLLACHI TRANSPORT, LIMITED, COIMBATORE
BY GENERAL MANAGER MR. G. D. NAIDU, COIMBATORE
(OPPOSITE PARTY), APPELLANT,

v.

ARUMUGA KOUNDAR (APPLICANT), RESPONDENT.*

*Workmen's Compensation Act (VIII of 1923), sec. 2 (n) (i) and
Sch. II, cl. (1)—“Workman”—Conductor of a motor bus
if a.*

The conductor of a motor bus is a “workman” within the meaning of the Workmen's Compensation Act.

The word “operation” in clause 1 of Schedule II of the Workmen's Compensation Act means the working of the vehicle. The duty of a conductor is not merely to sit in the car and issue tickets but also to see to the safety of the passengers in getting in and getting out, to the starting of the car and the stopping of the car at convenient places and co-operate with the driver in the proper running of the car throughout the journey. The conductor is therefore as much concerned with the operation of the mechanically propelled vehicle as the driver is within the meaning of that clause.

Nanda Kumar v. Pramatha Nath(1) followed.

V. Ramaswami Ayyar for *K. Rajah Ayyar* for appellant.

C. K. Viswanatha Ayyar for *Parakat Govinda Menon* for respondent.

APPEAL against the order of the Court of the Commissioner for Workmen's Compensation, Madras, dated 8th April 1936 and made in Workmen's Compensation Case No. 190 of 1935.

* Appeal Against Order No. 222 of 1936.
(1) (1937) 42 C.W.N. 123.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This appeal is under section 30 of the Workmen's Compensation Act against an order granting compensation to the respondent for an injury he suffered while he was doing the duties of a conductor in a vehicle belonging to the appellant company which plied from Palghat to Pattancheri on 13th March 1935.

So far as the amount of the award is concerned, it has not been challenged before us. Two points were argued before us by Mr. V. Ramaswami Ayyar, the learned Counsel on behalf of the appellant company. One is the question of limitation and the other is that the respondent is not a “workman” within the meaning of the Workmen's Compensation Act. In regard to the question of limitation, his point is that while the accident took place on 13th March 1935, the claim to compensation was instituted on 12th December 1935 and notice of compensation was given only on 6th November 1935. It is true that under section 10 (1) of the Act, notice of the accident must be given as soon as practicable and the claim must be instituted within six months of the occurrence of the accident. But there is a proviso which provides :

“The Commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been instituted, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or institute the claim, as the case may be, was due to sufficient cause.”

The learned Commissioner has taken the fact of the man's illness, his being a complete wreck after his discharge from the hospital and all other circumstances into consideration in coming

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to the conclusion that there was sufficient cause which enabled him to exercise the discretion which is conferred on him under the proviso and he did not see any reason to disallow the claim. We see no reason to differ from his conclusions on this part of the case. We therefore overrule the plea of limitation.

The second contention is that having regard to the definition of section 2 (n) (i) of the Act taken in conjunction with Schedule II, clause 1, the respondent is not a "workman" because he could not be said to be a person connected with the operation or maintenance of a mechanically propelled vehicle. We are not inclined to agree with this contention either. The word "operation" in clause 1 of Schedule II means the working of the vehicle. So far as the duties of a conductor in this case are concerned, there is evidence that his duties are not only to issue tickets, to collect fares, sign time-sheets at Police stations but also, as admitted by D.W. 1, to look after the convenience of the passengers and their luggage and generally do all that is prescribed in the Motor Vehicles Rules. Apart from any question of evidence, the duty of a conductor is not merely to sit in the car and issue tickets but he has to see to the safety of the passengers in getting in and getting out, to the starting of the car and the stopping of the car at convenient places and co-operate with the driver in the proper running of the car throughout the journey. In our opinion, he is therefore as much concerned with the operation of the mechanically propelled vehicle as the driver is within the meaning of that clause. The question whether the conductor

of an omnibus is a "workman" within the meaning of the Act was recently considered by a Bench of the Calcutta High Court and they have taken the same view as we have taken; *Nanda Kumar v. Pramatha Nath*(1). As observed in that case, the presence of a conductor is not only desirable but is really necessary and is indeed obligatory for the purpose of the proper working of the bus. We are therefore of the opinion that the respondent is a "workman" within the meaning of the Act.

In the result, the appeal fails and is dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE NEMICHAND PARAKH (ACCUSED), PETITIONER.*

1938,
January 26.

Indian Penal Code (Act XLV of 1860), sec. 405—Pledge of jewels—Sub-pledge of the same by pledgee with his financiers to raise capital at a lower rate of interest—Absence of dishonest intention—No express contract not to sub-pledge—Offence of criminal breach of trust, if.

The accused, in the regular course of his money-lending business, effected sub-pledges of the same jewels, for the same amounts and on the same dates as the pledges made to him, with his financiers or *khata-dars* to raise capital at a lower rate of interest. There was no express contract taking away the right to make sub-pledges and there was no evidence to show that the sub-pledges were made with a dishonest intention.

Held: (i) The accused was not guilty of the offence of criminal breach of trust. Under section 179 of the Indian

(1) (1937) 42 C.W.N. 123.

* Criminal Revision Case No. 747 of 1937.

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Contract Act the pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest.

(ii) Even if the accused had no right to make the sub-pledge, he must be deemed to have acted honestly under a mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot, in the circumstances, be regarded as amounting to criminal breach of trust.

Donald v. Suckling(1) followed.

(1871) 6 M.H.C.R. App. p. 28 referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Third Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras in Calendar Case No. 565 of 1937.

V. T. Rangaswami Ayyangar and *P. S. Kothandapani* for petitioner.

The Crown Prosecutor (T. S. Anantaraman) for the Crown.

ORDER.

The petitioner in this case, Nemichand Parakh, was convicted of criminal breach of trust on three counts and sentenced to undergo rigorous imprisonment for six months on each count, the three sentences to run concurrently. The charge against him was: "That you on or about the undermentioned dates at Madras being entrusted with properties stated below committed criminal breach of trust (i) on or about 4th April 1935 gold chain of the value of Rs. 175 belonging to P.W. 1, (ii) on or about 18th September 1935 ruby necklace of the value of Rs. 50 belonging to P.W. 3 and (iii) on or about 21st March

(1) (1866) 1 Q.B. 585.

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1936 ring of the value of Rs. 12-8-0 belonging to P.W. 1". The dates given in the charge are the dates on which the actual pledges were made of these jewels by the prosecution witnesses concerned with the accused. It is not pretended that the receipt of the pledged jewels was itself a criminal breach of trust. Presumably the criminal breaches of trust alleged against the accused were the sub-pledges effected by the accused of the same jewels, for the same amounts, and on the same dates as the pledges with his financiers or *khatadars*, Kanhiyal Lal, P.W. 6 and Amir Chand, P.W. 7. It is unfortunate that the charge should have been so badly drawn up as not to indicate clearly to the accused what it was that was charged against him as criminal breach of trust. It is however now conceded that what was charged against the accused was that the accused's sub-pledging all the jewels on the same dates for the same amounts amounted to criminal breach of trust. This raises a pure question of civil law, i.e., whether such sub-pledging to the same extent, that is to say, for the same amount as the debt for which the original pledge was made, is a wrongful act, for if such sub-pledging was within the rights of the pledgee, that is the petitioner, any sub-pledging by him cannot be regarded as amounting to a criminal offence, as it is obvious that what a man does within the limits of the right given to him by the law cannot amount to a criminal offence. The question was perhaps at one time not entirely free from doubt, but it is clear to me that the authorities on the point are in favour of the petitioner's contention,

namely, that as pledgee, he had a right to sub-pledge to the extent of his interest in the pledged properties. The law on the subject in this country is to be found in section 179 of the Indian Contract Act (IX of 1872) which runs as follows:—

“Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.”

The words “a person” found in this section would certainly include a pledgee, if it can be said that he has a limited interest in the goods pledged with him. The leading English case on the point is *Donald v. Suckling*(1). In that case the following passage from Story on Bailments is quoted without dissent, namely:

“The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same conditionally by way of pawn to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property for a debt beyond his own . . . it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee.”

This statement of the law in Story on Bailments and *Donald v. Suckling*(1) which was a case of 1866 was in all probability the source from which the rule laid down in section 179 of the Indian Contract Act of 1872 was taken. In any case it is not contended that the Indian law on the subject is different from the English law. In *Donald v. Suckling*(1) it is clearly laid down that the pawnee has a special property in the pawned

(1) (1866) 1 Q.B. 585.

goods, that is, he is invested with a right which is something more than the mere right of possession as in the case of a lien. COCKBURN C.J. describes it as a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time; it is also described as an inchoate right of property conferred upon him by the contract. In Halsbury's Laws of England, Vol. XXV, Hailsham's edition, it is stated that

“the pawnee's special property in the thing pledged may be assigned to a third party by way of assignment of the pawnee's interest or of a sub-pledge by him. Such a transfer is not inconsistent with the contract of pawn so long as it purports to transfer no more than the pawnee's interest against the pawner, the pawnee in the meantime being responsible for due care being taken for the custody of the property”.

It is unnecessary in my opinion to go further into the matter as the authorities already quoted are sufficient to show that the pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest, and that is exactly what the petitioner did in the present case. My attention has been called by the Crown Prosecutor to the proceedings of the High Court in 1871 reported in 6 M.H.C.R. Appendix, page 28, in which it is stated that a person who pledges what is pledged to him may be guilty of criminal breach of trust where the disposal is in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged and when such disposal is done with a dishonest intention. There is nothing in the present case to show that there was any express contract taking away the

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right given by the ordinary law to make a sub-pledge and there is certainly no other evidence to show that the sub-pledges were made with a dishonest intention. On the other hand, there is no reason to suppose that the defence of the petitioner on this point, namely, that he was doing this in the regular course of business, is not true. Apparently the petitioner is not a man with a large capital and he carries on his money-lending business by lending money on pledge of jewels and getting the capital necessary for the purpose by sub-pledging the same jewels with his financiers for the same amounts at a lower rate of interest. There is nothing to show that this course of business was followed with any dishonest intention. The High Court in the proceedings mentioned above also stated that great caution ought to be used in drawing the inference of dishonest intention from a breach of duty imposed by civil law and that whether it should be drawn or not is a question to be decided in each particular case. The High Court also added that

"when the law bearing upon the case is doubtful, *Donald v. Suckling*(1), it would be most indiscreet to raise the inference of dishonesty against a man who has mistaken it, simply because he has mistaken it".

It would therefore follow that even if the view that I have taken of the rights of the petitioner in this case is not correct, still the petitioner must be deemed to have acted honestly under a mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot be regarded as amounting to criminal breach of trust. It is unfortunate that this aspect of the

(1) (1866) 1 Q.B. 585.

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case was not dealt with by the learned Magistrate but it is quite possible that this omission is due to the fact that that aspect was not brought to his notice either by the prosecution or by the accused. In any case, the unfortunate result is the conviction of a man in respect of acts done by him within the exercise of his rights, and the only consolation is that he was let on bail very soon after he was committed to jail as a result of the conviction. In my opinion, he ought never to have been prosecuted. If the prosecution had informed itself of the law on the subject, as it ought to have done, there would have been no prosecution at all, as it would have then been found that, according to the case for the prosecu-

ERRATUM.

Page 240, line 21.—For "twenty-one" read "21".

CANCELED.

V.V.C.

PRIVY COUNCIL.

RAJA OF RAMNAD, APPELLANT,

v.

CHIDAMBARAM CHETTIAR AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Mortgage—Deed of settlement—Provision for maintenance—Subsequent hypothecation of maintenance—Charge on maintenance, whether valid—Transfer of Property Act (IV of 1882), sec. 6 (d)—Debts incurred subsequent to settlement—Liability of settled estate for subsequent debts—Amendment of plaint after close of evidence—Amendment involving new question and further evidence—Amendment, whether permissible—Interest on mortgage subsequent to filing of plaint—Discretion in allowing interest.

Raja B, the owner of an impartible estate, by a deed of settlement in July 1895 conveyed his estate to a trustee on trust for his eldest son with directions to pay the Government revenue, costs of management and certain debts which were scheduled and thereafter to pay certain allowances to members of his family including Rs. 5,500 a month to himself for his maintenance.

Raja B obtained after the date of the settlement loans from R who was one of the scheduled creditors under the settlement on three hypothecation bonds for Rs. 24,000, Rs. 71,000 and Rs. 35,000 respectively, executed the first in November 1895, and the second and third in November 1896. The mortgaged subjects under the first two bonds were certain jewels already under pledge to another scheduled creditor and the maintenance of Rs. 5,500 a month reserved under the deed of settlement. The subjects of the third bond were the same jewels, maintenance and some furniture.

In 1897 R brought a suit attacking the validity of the settlement. In compromise of the suit, the trustee under the settlement executed a mortgage on 6th July 1899 in favour of R on the security of the estate for a sum which was intended

to cover both the pre and post-settlement debts due to R. On 18th July 1899 he executed a mortgage of crops as security for the payment of a sum which under the prior mortgage was to have been paid in a week. The trustee subsequently paid the pre-settlement scheduled debt due to R and made a small payment towards the debts on the post-settlement bonds.

In 1900 R filed a suit on the mortgages of 6th and 13th July 1899 to recover the balance of the debt due to him and in 1902, Raja B's sons filed a suit against R and the trustee for a declaration that these mortgages were invalid. In these suits it was held that the mortgages were invalid.

R then brought the present suit in 1905 on the three hypothecation bonds of November 1895 and November 1896 seeking to charge the estate. In these suits,

held, (i) on the construction of the mortgage deed of 6th July 1899, that the hypothecation bonds and the invalid mortgage were independent and cumulative securities and R had a valid charge on the subject-matter of the bonds.

(ii) The charge on the maintenance was a valid charge, the allowance not being property restricted in its enjoyment under section 6 (d) of the Transfer of Property Act as it then stood and it was not intended by the mortgage deed of 6th July 1899 that the charge should be released whether the mortgage was valid or not.

Har Ohandi Lal v. Sheoraj Singh(1) referred to.

(iii) The property which came to Raja B's sons under the deed of settlement was not assets of Raja B at the time of his death and could not be made liable for the debts. The proper decree would be one for payment from the assets, if any, which came to the hands of Raja B's son at the time of his death.

(iv) An amendment of the plaint made in 1917 on the day the case was reserved for judgment after the conclusion of the evidence by the addition of a prayer that Raja B's son should redeem the jewels from the first pledgee or in the alternative that R should be allowed to pay the debt due to the first pledgee and have a charge on the settled estate, should not have been allowed.

(v) In the circumstances of the case under the third bond interest should be allowed at six per cent per annum on the

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J.C.*
1938,
January 27.

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

(1) (1916) L.R. 44 I.A. 60; I.L.R. 39 All. 178.

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principal sum only from the date of plaint to the date of payment. The award of interest was a matter of discretion of the trial Court.

CONSOLIDATED APPEAL (No. 51 of 1934) from a decree of the High Court (April 26, 1928 amended by order September 2, 1930) which varied a decree of the Temporary Subordinate Judge at Ramnad (September 12, 1917).

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

Sir Herbert Cunliffe K.C., Khambatta and A. C. Sampath Ayyangar for appellant.—By the settlement of July 12, 1895, Raja No. 1 divested himself of all his estate except the furniture. It is said to the contrary that he had jewels and maintenance. The decision as regards the jewels must turn on the construction of the document. The right to get the jewels back was a "claim" or "a right to prosecute any suit or other proceeding", viz., a suit to redeem within the meaning of the conveyance clause.

As regards maintenance, this has been treated in the Courts below as a reservation. It is submitted it is not a reservation, but something which has to come out of the estate which had passed to the trustee. Maintenance here is an inalienable sum. [Reference was made to section 6 (d) and (dd) of the Transfer of Property Act.] The amendment in 1929 by the addition of clause (dd) merely clarified the law. It expresses the view of the majority in the conflict of opinion in the decisions as to transferability in this matter. [Reference was made to *Subraya v. Krishna*(1), *Altaf Begam v. Brij Narain*(2) and *Rajat Kamini Debi v. Raja Satya Niranjan Chakrabarty*(3).] Even if the Raja's maintenance was alienable, Subramaniam gave it up by the mortgage of July 6, 1929.

As against the estate the Chettiar had no right of recourse unless and until he had paid Annamalai's claim. A second mortgagee cannot claim the rights of the first mortgagee without paying off the first mortgagee. The Chettiar lost his right to sue by suing on the mortgage of July 1899.

(1) (1923) I.L.R. 46 Mad. 659. (2) (1929) I.L.R. 51 All. 612, 616.
(3) (1919) 23 C.W.N. 824.

[LORD ROOPE.—How can suing on one remedy put an end to the right to sue on another?]

Sir Herbert Cunliffe.—He had to elect which remedy he would pursue; *Scarf v. Jardine*(1). By starting the action on the mortgage of July 1889 and pursuing it, he made his election and could not thereafter bring an action on the prior hypothecation. Even if the second action were maintainable, it could not give a remedy against the estate. If the Chettiar could proceed against the estate at all, it would be only as holding Annamalai's right. There is no process by which a creditor as regards post-settlement debts can claim to be paid under the settlement.

A. C. Sampath Ayyangar following.—As regards the question of interest, it must be considered as a whole, interest up to the plaint, up to the decree and subsequent to the decree. There is a discretion in the Court and it was rightly exercised by the Subordinate Judge. [On the question of election, *Ganesha Row v. Tuljaram Row*(2), *Payana Reena Saminathan v. Pana Lana Palaniappa*(3) and *Har Chandi Lal v. Sheoraj Singh*(4) were referred to and distinguished.] [On the question of maintenance, section 6 (d), Transfer of Property Act, and section 60, Code of Civil Procedure, were referred to.] Maintenance can be reserved either by law or by contract. section 6 (d) is wide enough to cover all cases and is intended to do so. If the Chettiar knew of the arrangement and knew there was no property and yet advanced money to the Raja, he did so at his own risk. He was gambling. There was a conflict of decisions regarding the alienability of maintenance and the Act was amended to settle the question; *Altaf Begam v. Brij Narain*(5). The question, therefore, narrows itself down to whether the reservation is maintenance. [*Subraya v. Krishna*(6) was referred to.] If the settlement is operative, the Raja has divested himself of all his property and should get maintenance. A question arises as to whether there can be an assignment of a portion of the maintenance.

[SIR GEORGE RANKIN.—Why should it not be an assignment of a portion charged on the whole?]

(1) (1882) 7 App. Cas. 345.
(2) (1913) L.R. 40 I.A. 132; I.L.R. 36 Mad. 295.
(3) (1913) L.R. 41 I.A. 142.
(4) (1916) L.R. 44 I.A. 60; I.L.R. 39 All. 178.
(5) (1929) I.L.R. 51 All. 612. (6) (1923) I.L.R. 46 Mad. 659.

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[Reference was made to the language of the bond.] The further question is whether the Chettiar has not relinquished any claim he may have had on the maintenance. It cannot be stated that the mortgage of 1889 goes out of the case entirely. There has been part execution and it is not open to the Chettiar to say it was not acted on. The promise to pay his father's debts is not good consideration. A promise to pay his own is. In *Asa Ram v. Karam Singh*(1) the question is raised but not answered. The general rule is that a promise made without consideration is void. An exception to a general rule must be strictly confined. The exception under which a promise to pay one's own debts is good consideration cannot be extended to a promise to pay a third persons debts.

As regards the question of the liability of the estate, the plaint ought not to have been permitted to be amended at such a late stage. The amendment raised fresh questions of fact and law.

Subba Row for respondents.—

[The Board intimated that they wished to hear him on, (i) the form of decree, (ii) the question of election, (iii) the question of interim interest and (iv) compound interest.]

As regards clause 1 of the decree, it is only a paper decree for there were no assets as the whole estate was settled except the jewels. Clause 2 is the most important relief. The Subordinate Judge held that, if the Raja's son did not pay, the estate could be proceeded against. He held it was the purpose of the trust to pay the Raja's debts and so the debt should be paid. The Raja assigned his rights to the Chettiar. The trustees paid all the pre-settlement debts except Annamalai's. The trustees were called upon to pay this debt. If the demand had been complied with at once, the debt would have been paid by the sale of the jewels. The Chettiar is entitled to the security of the estate because by the trustee's action he was deprived of the security of the first charge on the jewels. The Raja was entitled to redeem the jewels.

[LORD MACMILLAN.—The trustee was to pay the debt out of the income.]

If he did not pay out of the income the Chettiar could proceed against the estate. I rely on the equitable assignment and not on the suretyship.

(1) (1929) I.L.R. 51 All. 988.

[*Sir Herbert Cunliffe* intervening: Before there can be an equitable assignment, there must be a contract. An equitable assignment is subrogation.]

Sir Herbert Cunliffe in reply—Clause 2 should come out of the decree altogether. The decree should be for the amount to be realized from the assets, except the assets which were the subject of the settlement.

The Chettiar cannot sue because there is no privity of contract [*Nathu Khan v. Thakur Bartonath*(1) and *Jamna Das v. Ram Autar Pande*(2) were referred to]. Supposing he has the right to step in the Raja's shoes, he can bring an action for execution of the trust, but that is not this suit. The Raja could not have claimed that the debt should be paid out of the estate for he himself provided that the debts should be paid out of income. Here nothing was in fact paid out of income. The creditors were paid from the English loan and there was nothing for Annamalai. [Section 74, Transfer of Property Act, was referred to.]

The JUDGMENT of the Judicial Committee was delivered by SIR GEORGE RANKIN.—In this case three appeals have been consolidated: two of these relate to minor questions as to interest, but the main appeal [Civil Miscellaneous Petition No. 4220 of 1928] raises questions of more importance. These arise out of a mortgage suit brought on 15th April 1905 in the Court of the Subordinate Judge of Madura. The appellant in the main appeal (herein called "the appellant") is the grandson of the original mortgagor, whose eldest son, the appellant's father, was the first defendant to the suit. This defendant died pending suit and the appellant now represents the mortgagor: on one point, to be mentioned later, he has independent interests of himself and of his father to defend. Respondents 8 to 11 are the contesting respondents to the main appeal. They

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(1) A.I.R. 1922 P.C. 176.

(2) (1911) L.R. 89 I.A. 7; I.L.R. 34 All. 63.

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are the representatives of the original plaintiff in the suit, Subramaniam Chettiar who had succeeded his father, Ramanathan Chettiar, the original mortgagee. The decree dated 12th September 1917 of the Trial Judge was modified in certain respects by the High Court of Madras whose decree dated 26th April 1928 disposed of eleven appeals brought by divers parties. Their Lordships are concerned with two only of the appeals brought to the High Court—Appeal No. 26 of 1918 by the present appellant and Appeal No. 106 of 1918 by the plaintiff.

The suit was brought to enforce three securities described as hypothecation bonds or deeds, the first being dated 21st November 1895, the second 7th November 1896, and the third 25th November 1896. They were given to Ramanathan Chettiar by the appellant's grandfather, the then Raja of Ramnad, for the sums of Rs. 24,000, Rs. 71,000 and Rs. 35,000, respectively, amounting to Rs. 1,30,000. Interest on each bond was at the rate of twelve per cent per annum, but in the case of the first two bonds only this was to be calculated as compound interest with annual rests from the date of default. The mortgaged subjects under the first and second bonds were certain jewels already in pledge to a money-lender named Annamalai and the Raja's allowance of Rs. 5,500 per annum under a trust deed of 12th July 1895, executed by himself as hereinafter mentioned. Under the third bond, the jewels together with certain furniture, as to which no question now arises, were the security.

Objection has been taken by the appellant to the plaintiff's right as mortgagee under these

bonds to the principal sum of Rs. 1,30,000 claimed. It is said that Rs. 15,000 thereof comprised in the sum of Rs. 71,000 mentioned in the second bond, is without consideration, being the amount of a statute-barred debt of the Raja's father for which on 25th November 1895, the Raja had given a promissory note. The objection on behalf of the appellant is that by the Raja's evidence, given on commission in January 1903, it is proved that the promissory note was given but it is not proved that there was any stipulation for a fresh advance, and that accordingly this portion of the principal amount of the second bond is not recoverable unless, indeed, it be brought within clause 3 of section 25 of the Indian Contract Act. It is contended that it is not within this clause as it was not a debt of the mortgagor, but of his father. Their Lordships are of opinion that the Courts in India have rightly rejected this objection. A promissory note having been given, consideration is to be presumed. The question is not, therefore, whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the appellant that there was no consideration for the promissory note. This burden the appellant has certainly not discharged and there is every probability against him on the point. It is not necessary, therefore, for their Lordships to decide whether under clause 3 of section 25 above mentioned a debt of which the creditor might have enforced payment from the mortgagor would be excluded by the circumstance that it was not a debt of his own. Their Lordships must not be taken to cast doubt

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upon the view taken by the High Court if this question, which does not arise, is not now discussed. Their Lordships are satisfied that the principal amount due on the bonds in suit is Rs. 1,30,000 as decreed by the Indian Courts.

The next question is whether the bonds in suit confer a valid charge upon the jewels and the allowance already mentioned. On this point it is necessary to refer to the settlement of 12th July 1895 (herein called "the settlement"). The then Raja had become heavily involved in debt: a list of his creditors is given in the third schedule to this deed showing that he was indebted in a total sum of twenty lacs. His impartible zamindari of Ramnad was of great extent, covering no less an area than 2,351 square miles. This and much other property, aggregating in value fifty lacs of rupees, he conveyed to a trustee for the benefit of his heir-apparent and eldest son, then a minor, and for the purpose of making provision for the maintenance of the settlor and several members of his family as mentioned in the second schedule. The trustee was directed to pay Government revenue, certain expenses of management, of litigation and of repairs: in the fifth place he was directed to apply monies in his hands to the payment of the interest on and principal of the debts mentioned in the third schedule, and thereafter of the allowances mentioned in the second schedule. It was provided that on the settlor's eldest son attaining the age of twenty-one, the trustee should convey the trust premises then existing to him for the same estate as if he had inherited them, but subject to the several payments directed by the

deed and to the several trusts which should then be subsisting in respect thereof. The first of the allowances mentioned in the second schedule is the allowance of Rs. 5,500 per month to the settlor himself. In the third schedule among the creditors is mentioned the plaintiff's father Ramanathan (Muthia) Chettiar as a creditor for Rs. 1,30,000: this debt is entirely independent of the sum of Rs. 1,30,000 due upon the bonds now in suit. The creditor Annamalai is also mentioned as a creditor for Rs. 75,000, but in this deed there is no mention of the circumstance that Annamalai was a pledgee of any jewels.

The appellant contends that although the jewels are not specifically mentioned in the deed of 12th July 1895, the wide language of the fifth clause thereof is sufficient to comprise these jewels in view of the fact that the right of the Raja was a mere right to redeem. The fifth clause is very lengthy: upon examining it their Lordships are of opinion that the jewels are not within its language. They are not "claims now due, owing or payable" and the general language as to "all rights to prosecute any suit or other proceeding" and as to securities for money, furniture, fixtures and other articles in the offices of the zamindari are, in their Lordships' opinion, inapplicable to them. The settlor was the owner of these jewels although he had made a bailment of them by way of pledge. Having regard to their value, their importance to the settlor and the nature of his property in them, their Lordships have no difficulty in agreeing with the Courts in India that the jewels were not comprised in the settlement. They see no reason, therefore, why the settlor

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should not include them in the hypothecation bonds in suit.

A second question upon the settlement deed is whether or not the Raja's monetary allowance of Rs. 5,500 described by clause 3 as being for the purpose of making provision for the maintenance of himself, comes within clause (d) of section 6 of the Transfer of Property Act as it stood in 1899. The clause (dd) was inserted by the Legislature in 1929 and does not apply in the present case. Clause (d) runs as follows :—

“An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.”

In the present case the Raja was an owner in full right of certain property ; this he granted to a trustee upon trust *inter alia* to pay him this allowance of Rs. 5,500 per month, explaining no doubt in the deed that it was for the purpose of making provision for his maintenance. In their Lordships' opinion, this is not a “restricted” interest in the sense of clause (d) : whatever difficulty might arise upon the newer clause which uses the phrase, “a right to future maintenance in whatsoever manner arising, secured or determined”, their Lordships are satisfied that they would be giving much too wide an application to clause (d) if the present case were held to come within it. They think, accordingly, that the hypothecation bonds create a valid charge on the allowance.

A still further attack is made by the appellant upon the bonds in suit. This arises out of the fact that on 6th July 1899 (Ramanathan Chettiar having died in 1898) the trustee under the settlement of 1895 executed in favour of Subramaniam

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Chettiar a mortgage deed for a sum of Rs. 4,73,000 intended to comprise the sums due by the Raja prior to the date of the settlement deed, and the further sums which had been subsequently borrowed. On 13th July 1899, another mortgage, called the “paddy” mortgage, was given to secure the payment of Rs. 30,000 out of an amount of Rs. 50,000 which by the mortgage of 6th July 1899 was to have been paid within a week thereof. These mortgages were given in compromise of a suit brought in 1897 by Ramanathan Chettiar attacking the validity of the settlement of 12th July 1895. By 7th October 1899, the trustee had paid to Ramanathan Chettiar, or to his son who had succeeded him, the full amount with interest due upon the debt which the Raja had owed to Ramanathan Chettiar at the time of the settlement deed. He had not, however, discharged any portion of the debt which had been incurred after the date of the deed, save that Ramanathan had been paid Rs. 20,000 in cash and had received a certain amount under the paddy mortgage, which sums were in discharge of the Raja's post-settlement indebtedness. In this state of affairs Subramaniam Chettiar filed two suits on 30th January 1900, to enforce his securities under the mortgage of 6th July 1899, and the paddy mortgage of 13th July 1899, in order that he might recover the balance of the debt incurred by the Raja after the settlement. The Raja's son, however, counter-attacked by bringing a suit (No. 6 of 1902) against Ramanathan's representatives and the trustee to obtain a declaration that the mortgages of 6th and 13th July 1899 were invalid as against the settled estate. This suit succeeded in the Courts in India and also on

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appeal to His Majesty in Council (16th November 1915) [cf. *Subramaniam Chettiar v. Raja Rajeswara Dorai*(1)] Subramaniam was directed to repay the sum of Rs. 39,087, namely the sum of Rs. 20,000 cash and what he had received under the paddy mortgage. The sum of Rs. 87,421 which he had received in respect of his pre-settlement debt on 7th October 1899, he was not ordered to refund. It was within the terms of the settlement that this indebtedness should be discharged; the mere circumstance that it might not have been paid so soon had he not been willing to enter into the mortgages of July 1899 was not counted a sufficient reason for ordering that he should refund this money. The contention of the appellant is that in these circumstances the plaintiff, Subramaniam Chettiar, lost his right to have recourse to the hypothecation bonds in suit by reason that he elected in 1900 to bring a suit upon the mortgages of July 1899. Clause 12 of the mortgage of 6th July is as follows:—

"12. Except as hereunder provided your rights already existing for recovery of the whole or any portion or portions of the amount secured by this deed shall not be affected by this deed. That from this date your lien or charge on the allowance due to the Raja M. Bhaskara Sethupathi Avargal, under the said settlement deed for any portion or portions of the amount due under this deed shall cease. On the payment of the sums of Rs. 1,81,727-0-2 and Rs. 1,25,000 with interest on the said two sums as mentioned in paragraphs 5 and 6 of this deed, all other securities other than the securities created by this instrument shall cease."

The first question upon this clause is whether the plaintiff's charge on the Raja's allowance was intended to be released whether or not the

(1) (1915) L.L.R. 39 Mad. 115 (P.O.).

mortgage was valid, that is whether he gave up his old security on the footing that he was getting a new one, or taking a chance that he might not get a new one. In their Lordships' opinion, the intention of the plaintiff was entirely frustrated by the fact that the mortgage of 6th July 1899 turned out to be invalid and was set aside. While it is possible to put a case in which a mortgagee releases one security unconditionally with an intention to take the risk of a new security turning out to be invalid, there are no facts in this case pointing to so unusual a bargain. The result is that this contention as to the allowance fails. The case of *Har Chandi Lal v. Sheoraj Singh*(1) furnishes a complete answer to the suggestion that a beneficiary under the trust can claim the benefit of the mortgage of 6th July 1899 as a release of the hypothecation bonds so far as the allowance is concerned. The appellant's contention that because the plaintiff had received the amount that was due to him upon debts contracted prior to the deed of settlement and was not directed to refund it when the Raja's son elected to avoid the mortgage he can now claim that the mortgage has not been altogether set aside, is a contention which their Lordships reject. The appellant cannot single out a particular clause of the mortgage deed and claim to hold the plaintiff by its terms and in this way maintain that the release of the charge upon the allowance is a valid and subsisting release.

It will be noticed that by clause 12 it is expressly provided that the plaintiff's existing

(1) (1916) L.B. 44 I.A. 60; I.L.R. 39 All. 178.

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securities, apart from the allowance, should not be affected by the deed. By express agreement, therefore, the hypothecation bonds and the invalid mortgage of 6th July 1899 were to be cumulative and independent securities. No question of election could arise as between these securities, even on the hypothesis that the latter mortgage was valid; still less can it arise now that the mortgage has been set aside. As observed by the Vice-Chancellor in *Miln v. Walton*(1), "the earlier mortgage remains in force and maintains its rank notwithstanding the other and may be dealt with by the creditor separately". The following passage from the Board's judgment (delivered by Lord ROBERTSON) in *Shankar Sarup v. Mejo Mal*(2) discloses perhaps a fuller answer to the appellant's argument in the present case:

"If the bond of November 1888 be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the respondents was rather that the appellants by their suing on the bond of November and not on the bond of May, had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The appellants did not need to sue on the bond of May in order to obtain a sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation. . . ."

For these reasons their Lordships conclude that the plaintiff had a valid charge for the principal amount of his debt with interest upon the subjects comprised in the bonds in suit. The

(1) (1843) 2 Y. & C.C.C. 354, 361; 63 E.R. 156.
(2) (1901) L.R. 28 I.A. 203, 209 and 210.

objections of the appellant on these points have been rightly overruled by the admirable judgment of the learned Subordinate Judge which the High Court upheld.

In one matter, however, the appellant, in their Lordships' view, has made good a serious objection to the view taken by the Indian Courts. The present suit was brought in 1905 and the issues in it were settled on 24th November 1906: additional issues on 3rd September 1910. The case was heard in 1917 and judgment was reserved on 25th August 1917. On that day a petition was presented by the plaintiff asking leave to amend his plaint by adding a prayer that the first defendant, that is the Raja's son, be ordered to pay to the fourth defendant, namely, the representative of Annamalai, the amount due on account of the debt of Rs. 60,000 and interest in respect of which Annamalai had obtained the jewels in pledge; or, in the alternative, that on the plaintiff paying off Annamalai, the plaintiff be declared entitled to sell the settled property to realise the said amount. The learned Subordinate Judge took the view that the amendment asked for was formal and that if the plaintiff was entitled to the relief claimed on the facts already on record he should not be told that he had not asked for it and therefore could not be given it. The decree of the learned Subordinate Judge by its second clause directed the Raja's son to pay off Annamalai, whose debt of Rs. 60,000 with interest was held to have amounted to over two lacs; and ordered that in default the plaintiff should be entitled to have the settled property sold for satisfying the amount. He also

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directed that if the first defendant did not pay off Annamalai, the plaintiff, on bringing the money into Court, should get the jewels and certain securities in the hands of Annamalai. The learned Judge proceeded on the basis of the doctrine of subrogation. The High Court on appeal discovered that Annamalai had by that time sold the jewels to liquidate his debt; they made no order accordingly in respect thereof and deleted from the decree of the Subordinate Judge his direction in that regard. Against defendants 1 and 2 as representatives of their father, the original debtor, the High Court by clause 1 of their decree gave judgment for the mortgage debt payable out of the assets, if any, of their father coming to their hands; and the decree by its second clause directed as follows:—

“(2) In default of the first defendant paying as aforesaid within six months from 2-3-1928 (26-4-1928) the date of the High Court judgment, i.e. within 2-9-1928 (26-10-1928) the plaintiff be entitled to apply to the Court to have the estate in the first defendant's hands or a sufficient portion thereof sold for satisfying the aforesaid sum mentioned in clause (1) above.”

The result of this clause is to make the settled property liable for the whole of the plaintiff's claim upon his hypothecation bonds. As the property which came to the settlor's sons under the settlement deed of 12th July 1895 was not assets of the settlor at the date of his death, it is necessary to justify a direction which throws the Raja's post-settlement debts upon the trust estate. The learned Judges of the High Court appear to have considered that the relation between Annamalai and the plaintiff was analogous to that of principal and surety, an analogy which in

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their Lordships' opinion, is entirely inapplicable to the present case. Their Lordships are unable to see any method by which it is possible to justify a decree making the trust estate liable for the whole of the plaintiff's debt; but it is contended on the part of the plaintiff's representatives that the Raja as settlor had a right against the trustee to require him to pay off the debt of Annamalai; that he had by the bonds in suit represented that the plaintiff would have a charge upon the whole value of the jewels as the trust estate would pay off Annamalai; that accordingly the plaintiff had the right as equitable assignee of the settlor to call upon the trustee to discharge Annamalai's debt and in this way to make available to the plaintiff the security which the Raja had agreed to give. Now it may or may not be that had such a cause of action been pleaded and had evidence been adduced to show what had been done by the trustee under the deed, what monies were available to him, what obligations he had to provide for out of the settled property, what discretion he had exercised and so forth—it may be that a case could have succeeded on the lines suggested. But such a case would require careful and timely pleading and a careful trial. It is in effect a charge of breach of trust having serious consequences both to the trustee and to other beneficiaries. It would be necessary to determine first whether the trustee was under any obligation to pay off Annamalai's debt save out of income of the property, and the course of administration of the trust in the events that happened would require minute examination. What has happened in this suit is that at the last moment

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an amendment was permitted under which, in spite of the obvious objections to any such course, relief of so wide and exceptional a nature has been decreed without examination. The amendment authorised by the Subordinate Judge by his order of 28th August 1917 does not cover what the High Court have done. Their Lordships are of opinion that no such case should have been entertained by way of amendment at the end of the trial and that the plaintiff's endeavour to make the trust estate responsible for the debt due to him upon the bonds in suit must be rejected altogether.

It remains therefore that their Lordships should indicate the form of relief to which they think the plaintiff entitled. The first question on this point is as regards interim interest. For many years compound interest at twelve per cent per annum must be decreed under the first and second of the bonds, and simple interest at the like rate under the third bond. This covers the period down to the institution of the suit. In view of the great accumulation of interest the learned Subordinate Judge was well entitled to exercise his discretion by making an unusual order as regards interim interest: he directed that interim interest should be at the rate of six per cent on the principal amount only, both between the date of suit and the date of decree, and between the date of the decree and the date of payment. The learned Judges of the High Court do not appear to have appreciated the exact effect of the trial Court's order which they varied by granting simple interest at twelve per cent on the principal sum only, from the date of the decree. Their

Lordships do not think that there was any reason to interfere with the discretion of the trial Court and they prefer the order of the learned Subordinate Judge in all the circumstances of the case.

The result is that in their Lordships' view the appeal brought by Ramanathan Chettiar and others pursuant to special leave granted by Order in Council, dated 10th June 1932, should be dismissed and the other two appeals (brought by the representative of the first defendant) should be allowed. The decree of the High Court should be varied so as to include simple interest at six per cent on the principal amount of Rs. 1,30,000 from the date of the plaint to the date of payment. For the words "from the assets, if any, of the late Raja M. Bhaskara Sethupathi in the hands of defendants one and two" should be substituted the words "from the assets, if any, belonging to the late Raja M. Bhaskara Sethupathi at the date of his death coming to the hands of defendants one and two". This will make it clear that the judgment is intended to be in the form prescribed by section 52 of the Civil Procedure Code. Any question as to the liability of the sons for the Raja's debt by virtue of the doctrine mentioned in section 52 of the Code remains unprejudiced by the decree in this case and must be dealt with if it arises in execution. Clause 2 of the High Court's decree should be altogether deleted. As all parties interested in the redemption of the jewels were impleaded in the suit there should be liberty to the representatives of Subramaniam Chettiar to apply to the High Court within two months of

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the receipt by that Court of His Majesty's order upon this appeal to have an account taken of the sum due to Annamalai upon the security of the jewels and of the amount with which he should be debited as the proceeds thereof. It will be for the High Court to give directions for the taking of the necessary accounts and inquiries: the appellant as a party interested should have the right to take part in the proceedings, if any, but the liberty to apply should be given only to the representatives of Subramaniam. In other respects the decree appealed from should stand. Their Lordships will humbly advise His Majesty accordingly.

The order of the Subordinate Judge as to the costs of the trial Court will stand as also the High Court's order as to costs in Appeal No. 106. There will be no order for costs in the High Court in Appeal No. 26 and any costs paid in respect of that appeal under the High Court's decree should be returned. The parties will bear their own costs of all three appeals to His Majesty, but this will not interfere with the direction contained in the Order in Council of 10th June 1932 as to the costs of the petition for special leave.

Solicitor for appellant: *Harold Shephard*.
Solicitors for respondent: *Nehra & Co.*

C.S.S.

APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.*

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PETITIONERS,

v.

R. G. BALASUBRAMANIA AYYAR (PETITIONER AND
RESPONDENT), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sec. 41—Discharge of guardian—Discretion of Court—Exercise of—Principles—Order of District Judge granting a discharge—Revision against—Interference in—Mal-administration alleged against guardian inquired into and found against by District Judge.

The respondent was appointed guardian of the property of the petitioners who were brothers and constituted an undivided Hindu family. His appointment ceased on the first petitioner attaining majority. Thereupon the respondent filed a petition praying that he might be discharged from his guardianship. The petitioners filed two counter-petitions. In one they asked the Court to assign the security bond executed by the respondent to the first petitioner and the other was for an order directing the respondent's accounts to be audited. It was alleged that the respondent had been guilty of mal-administration and an affidavit in support of that charge was filed. After considering that affidavit the District Judge granted the respondent's petition, being of opinion that he had acted properly, and dismissed the petitioners' applications on the ground that they were frivolous. Two revision petitions were filed under section 115 of the Code of Civil Procedure to set aside the order of the District Judge discharging the respondent and his order refusing to direct the bond to be assigned to the first petitioner.

Held by the Full Bench that in discharging the respondent the District Judge exercised a jurisdiction vested in him and that his order could not be interfered with in revision.

* Civil Revision Petitions Nos. 1071 and 1072 of 1935.

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When the *quondam* guardian has complied with the directions of the Court under sub-section 3 of section 41 of the Guardians and Wards Act, the Court has full discretion in the matter and can discharge him, if it thinks fit.

The proper course for a Court which has appointed a guardian of the property to adopt on the minor coming of age is to refuse to grant a discharge if it appears that there is sufficient reason to keep open the question of the guardian's liability, and in that case to assign to the *quondam* minor the security bond. Similarly, if it considers that the guardian has acted properly throughout and no reasonable claim can be brought against him, it should exercise the power which it has of discharging the guardian.

PETITIONS under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Tinnevely dated 12th February 1935 and made respectively in Interlocutory Applications Nos. 62 of 1932 and 62 of 1933 in Original Petition No. 51 of 1918.

The petitions originally came on for hearing before VARADACHARIAR J. who made the following

ORDER OF REFERENCE TO A BENCH:—

Mr. T. L. Venkatarama Ayyar contends that except in cases where there is no dispute raised by the *quondam* minors, the Court should not pass an order of discharge under clause 4 of section 41 of the Guardians and Wards Act, as the result of such an order would restrict the minors' right of suit (implied in section 37) to cases of "fraud which may be subsequently discovered". There is no authority directly in point, though in another connection this Court had to consider the significance of the use of the word "may" in that clause; *Subbarami Reddi v. Pattabhirami Reddi*(1). If, as held in that case, the option rests with the Court, there is no reason to limit the power of the Court to uncontested cases. On the

(1) (1926) I.L.R. 50 Mad. 80.

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other hand there is this to be said in favour of the contention advanced by Mr. Venkatarama Ayyar, that there being no right of appeal against such an order, the minor will be deprived of his right of suit without even an opportunity of contesting the correctness of the order on the merits by an appeal. The question is one of general importance and it is desirable to have an authoritative ruling from a Division Bench, as even the decision in *Subbarami Reddi v. Pattabhirami Reddi*(1) dissents from the Allahabad view.

The petitions were directed to be posted before a Full Bench and came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

T. L. Venkatarama Ayyar for petitioners.—A guardian of the property of a minor ceases to be the guardian immediately on the ward coming of age; see section 41 (1) of the Guardians and Wards Act. Clause 2 of that section provides for the guardian delivering up all property and accounts. The preponderance of authority as to the construction of section 41 is that on the ward attaining majority the Court becomes *functus officio* and that if there is a dispute as to the guardian's liability it must not be gone into under that section but must be left to be decided in a suit.

[THE CHIEF JUSTICE.—Suppose the Court wrongly discharges the guardian in a case in which he had misappropriated the minor's property, has the minor no remedy in law?]

[Sections 20 and 37 were referred to.] Sections 35 and 36 refer to the period during minority.

[VARADACHARIAR J.—Do you contend that apart from section 35 there is any other provision providing for the assignment of the bond?]

There is no other provision in the Act. That is why this Court has held that section 35 is applicable both to the period during minority and to the period after the minor attains majority. The effect of the decisions may be stated thus: Proceedings under section 41 are summary. There is no trial and no evidence need be taken. If the District Judge

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improperly grants a discharge, his order practically becomes final. There is no appeal from the order and a revision will be practically useless, because under section 115, Civil Procedure Code, this Court cannot interfere except on a question of jurisdiction. *Subbarami Reddi v. Pattabhirami Reddi*(1) shows that in case of dispute the Court cannot and should not hold an inquiry but must refer the parties to a suit. The use of the word "may" in clause 4 of section 41 shows that the power to grant a discharge should be exercised only in uncontested cases. In case of dispute the District Judge has no jurisdiction to grant a discharge. In *Nabu Bepari v. Sheikh Mahomed*(2) the order of discharge was set aside in revision on this ground.

[VARADACHARIAR J.—That case merely decides that the District Judge has no jurisdiction under section 41 to go into the correctness of the accounts and direct payment of the amount found to be due on such taking of accounts. The Court did not consider the case of an order of discharge at all.]

The case is authority for the position that the District Judge has no jurisdiction to pass any order at all under section 41 in case of dispute. He becomes *functus officio* in such a case. The Full Bench held that the inquiry itself was beyond the scope of section 41. The section is sufficiently satisfied if its scope is confined to uncontested cases. Clause 4 of the section does not show in what circumstances an order of discharge can be made. The Calcutta High Court says it can be made in cases in which there is no dispute.

[THE CHIEF JUSTICE.—Clause 4 of section 41 vests a discretion in the Court appointing a guardian to grant a discharge and if it does exercise its discretion and grant a discharge there is an end of the matter even if the result may be unfortunate to the minor.]

The word "may" no doubt vests a discretion in the District Judge but the circumstances in which the discretion is to be exercised must be determined with reference to the scope of the Act and of the inquiry under section 41 and with reference to the other provisions of the Act. Thus construed clause 4 of the section must be confined to uncontested cases. The order of discharge in the present case can be set aside on

(1) (1926) I.L.R. 50 Mad. 80.

(2) (1900) 5 C.W.N. 207 (F.B.).

the ground that the District Judge has not considered all the circumstances which have to be considered by him.

K. S. Rajagopalachariar for *K. Rajah Ayyar* for respondent was not called upon.

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The JUDGMENT of the Court was delivered by LEACH C.J.—The petitioners are brothers and constituted an undivided Hindu family. The first petitioner became of age in December 1931. The second petitioner was a minor when the proceedings out of which these petitions arise began. In 1925 the respondent was appointed guardian of the property of the petitioners. His appointment ceased on the first petitioner attaining majority in December 1931. On this event happening, the respondent filed a petition in the Court of the District Judge of Tinnevely asking that he be discharged from his guardianship. Thereupon the petitioners filed two counter-petitions. In one they asked the Court to assign the bond which had been executed as security for the respondent's stewardship and the other was for an order directing his accounts to be audited. The respondent's petition was granted, but the petitioners' applications were both dismissed. This Court is now asked, in the exercise of its powers under section 115 of the Code of Civil Procedure, to set aside the order of the District Judge discharging the respondent and his order refusing to direct the bond to be assigned to the first petitioner. No application has been filed against the order dismissing the petition asking for an audit.

LEACH C.J.

The answer to the question before us depends on the construction to be placed on section 41 (4).

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of the Guardians and Wards Act, 1890. Sub-section (2) of that section states that the powers of a guardian of the property of a minor cease (a) by his death, removal or discharge; (b) by the Court of Wards assuming superintendence of the property of the ward; or (c) by the ward ceasing to be a minor. Sub-section (3) says:

"When for any cause the powers of a guardian cease, the Court may require him, or, if he is dead, his representative, to deliver, as it directs, any property in his possession or control belonging to the ward, or any accounts in his possession or control relating to any past or present property of the ward."

Then comes sub-section (4) which is worded as follows:

"When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered."

It will be observed that a guardian of the property of a minor ceases to be the guardian immediately on the ward coming of age. On this event happening the Court may require the *quondam* guardian to deliver the property of the ward in his possession or control according to its direction and similarly require him to deliver the accounts which he has kept relating to past or present property of the ward. That is as far as the Court can go, both as regards the property and as regards the accounts. When the *quondam* guardian has complied with an order passed under sub-section (3), the Court may in its discretion discharge him from his liability as guardian, save in respect of any fraud which may subsequently be discovered.

In this case it was alleged that the respondent had been guilty of mal-administration and an

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affidavit in support of this charge was filed. After considering this affidavit and giving it the weight which he considered it deserved, the learned District Judge came to the conclusion that the applications for the assignment of the bond and for an order directing an audit were frivolous and, being of the opinion that the respondent was entitled to an order discharging him from liability, granted his petition. It is said that in so doing the District Judge erred in law. It is argued that on a proper construction of sub-section (4) the District Judge should, in view of the charge of mal-administration, have refused the respondent his discharge and should have assigned the bond to the first petitioner. This is reading into sub-section (4) something which is not there. When the *quondam* guardian has complied with the directions of the Court under sub-section (3), the Court has full discretion in the matter and can discharge him, if it thinks fit. The learned District Judge did think that the respondent was entitled to his discharge and accordingly granted it. In so doing he exercised a jurisdiction vested in him, and it is not open to the petitioners to say that this Court in the exercise of its revisional powers can interfere with the order.

In *Subbarami Reddi v. Pattabhirami Reddi* (1) a Division Bench of this Court, consisting of PHILLIPS and MADHAVAN NAIR JJ., held that where a guardian has been discharged and has filed his accounts the Court cannot hold an inquiry under the Act into the correctness of the accounts and determine the amount or the

(1) (1926) I.L.R. 50 Mad. 80.

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property in respect of which the guardian is accountable. The correctness of this decision has not been challenged; nor do we think it can be challenged. The same view was taken by the Calcutta High Court in *Nabu Bepari v. Sheikh Mahomed*(1). This being so, all that the Court which appointed the guardian can do when the minor has come of age is to discharge him or refuse to discharge him. In the latter case the minor will be left to pursue his remedies against the *quondam* guardian by way of a suit. The Act provides no machinery by which an inquiry can be held under the Act once a guardian has ceased to function.

The proper course for a Court which has appointed a guardian of property to adopt on the minor coming of age is to refuse to grant a discharge if it appears that there is sufficient reason to keep open the question of the guardian's liability, and in this case to assign to the *quondam* minor the security bond. Similarly, if it considers that the guardian has acted properly throughout and no reasonable claim can be brought against him, it should exercise the power which it has of discharging the guardian. In this case the learned District Judge has come to the conclusion that the respondent acted properly and has granted him discharge. Consequently the order is not open to question in revision proceedings.

The two petitions before us will be dismissed and the respondent will be granted costs on one petition.

A.S.V.

(1) (1900) 5 C.W.N. 207 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.

SOORA KULASEKHARA CHETTY AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

THOLASINGAM CHETTY (DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 23—Malicious prosecution—Action for—Limitation for—Starting point of—Acquittal—Discharge—Orders of—Revisions to District Magistrate against—Cases of—Criminal Rules of Practice of Madras High Court—Rule 263—Effect of.

A complaint of assault, insult and criminal intimidation was filed against A and B before a Bench of Magistrates. The charges against B were dismissed on 23rd September 1930 and he was accordingly discharged. The case proceeded as against A and resulted in his acquittal on 25th May 1931. The complainant filed two applications in revision before the District Magistrate, one against the discharge of B and the other against the acquittal of A. The applications were dismissed by the District Magistrate on 13th July 1931. On 12th July 1932 A and B filed a suit for damages for malicious prosecution.

Held by the Full Bench that the suit was not barred by article 28 of the Indian Limitation Act.

A complainant may file an application before the District Magistrate for revision of an order of discharge or of acquittal passed by a Subordinate Magistrate and on such a petition being filed it will lead in a proper case to the setting aside of the order of discharge or of acquittal as the case may be. Until the revision petition is dismissed by the District Magistrate the prosecution case is before the Court and cannot be said to have terminated within the meaning of article 23 of the Limitation Act. The words "when the plaintiff is acquitted" in that article cannot be divorced from the words "or the prosecution

* Second Appeal No. 776 of 1933.

KULASEKHARA is otherwise terminated". If the acquittal is followed by other proceedings the prosecution is terminated not by the acquittal but by the order passed in the subsequent proceedings.

Narayana v. Seshayya(1) overruled.

Tanguturi Sriramulu v. Nyapathi Subba Rao Pantulu Garu(2) approved.

Balbhadur Singh v. Badri Sah (3) relied upon.

Rule 263 of the Criminal Rules of Practice and Orders of the High Court (Madras) has been framed for the guidance of District Magistrates in suitable cases, and cannot be read as saying that a District Magistrate shall never refer an acquittal to the High Court.

SECOND APPEAL against the decree of the District Court of Chingleput in Appeal Suit No. 163 of 1932 preferred against the decree of the Court of the District Munsif of Chingleput in Original Suit No. 352 of 1932.

ON THE REFERENCE :

D. Ramaswami Ayyangar for *C. S. Venkatachari* for appellants.—The question turns upon the true construction of article 23 of the Indian Limitation Act. The question is when the prosecution terminated within the meaning of that article. In *Narayana v. Seshayya*(1), which was a case of acquittal, there was a revision petition against the acquittal. The order of acquittal was nevertheless held to be final and limitation under article 23 was held to run from the date of the acquittal. It is submitted that this decision is wrong and that limitation in such a case must be held to run from the date of the dismissal of the revision petition filed against the acquittal. Under the Criminal Procedure Code an order of acquittal may form the subject-matter of revision by the District Magistrate whatever may be his powers in regard to the disposal thereof. [Sections 417 and 435 to 439 of the Code were referred to.] Under section 438 the District Magistrate has power in a case of acquittal to refer the case to the High Court which can deal with it under section 439. In *Sankaralinga Mudaliar v.*

(1) (1899) I.L.R. 23 Mad. 24. (2) A.I.R. 1920 Mad. 151; 57 I.C. 635.
(3) (1926) I.L.R. 1 Luck. 215; 51 M.L.J. 42 (P.C.).

Narayana Mudaliar(1) it was held that a revision against an order of acquittal was competent though instances of interference by the High Court would be very rare. [*Shanker Prasad v. Sheo Narain*(2) was referred to.]

[The CHIEF JUSTICE.—You may take it that we are satisfied that a revision petition does lie to the District Magistrate against an order of acquittal. The only question is as to the correctness of *Narayana v. Seshayya*(3).]

Then there is no termination of the prosecution within the meaning of article 23; see *Tanguturi Sriramulu v. Nyapathi Subba Rao Pantulu Garu*(4).

As regards discharge, the District Magistrate can, under sections 436 and 437 of the Code, straightaway order further inquiry. In *Balbhadur Singh v. Badri Sah*(5) the accused were discharged by the Committing Magistrate. The Sessions Judge, who has the same powers as the District Magistrate, called for the record and after notice to the accused considered whether further inquiry should be ordered into the charge which had been preferred against the accused. He came to the conclusion that the order of discharge was proper and refused to commit the accused for trial. The Privy Council held that the criminal proceedings against the accused terminated when the Sessions Judge finally refused to commit them for trial. *Purshottam Vithaldas v. Ravji Hari*(6) and the observations in *Madan Mohan Singh v. Ram Sundar Singh*(7) must, in so far as they are inconsistent with the above-mentioned decision of the Privy Council, be held to be wrong. The plaintiff in an action for malicious prosecution has to show that the proceedings have terminated in his favour.

Srinivasaraghavan of *Srinivasaraghavan* and *Thyagarajan* for respondent.—As regards acquittal, the language of article 23 is quite definite. It says: "when the plaintiff is acquitted". [VARADACHARIAR J.—You overlook the words "or the prosecution is otherwise terminated".]

In *Madan Mohan Singh v. Ram Sundar Singh*(7) SULAIMAN J. says at page 555 that the expression "or the prosecution is

(1) (1922) I.L.R. 45 Mad. 913 (F.B.). (2) (1935) I.L.R. 11 Luck. 237.
(3) (1899) I.L.R. 23 Mad. 24.
(4) A.I.R. 1920 Mad. 151; 57 I.C. 635.
(5) (1926) I.L.R. 1 Luck. 215; 51 M.L.J. 42 (P.C.).
(6) (1922) I.L.R. 47 Bom. 28. (7) (1930) I.L.R. 52 All. 553.

KULASEKHARA otherwise terminated" has no reference to the case of an acquittal.
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[THE CHIEF JUSTICE.—Take a case in which a revision petition has been filed in the High Court and the High Court has issued notice to the accused; can the accused at that stage file a suit for damages for malicious prosecution? If he does, will he not be met by the plea that the prosecution against him has not terminated?]

Rule 263 of the Criminal Rules of Practice and Orders of this Court says that when a District Magistrate is of opinion that an order of acquittal is wrong, he should request Government to prefer an appeal under section 417 of the Code and should not report the case for the orders of the High Court under section 438 of the Code. In the present case the District Magistrate has been asked only to refer the matter to the High Court. The proceeding was therefore an ineffectual proceeding and cannot prevent limitation from running. There could be said to have been only an attempt to prosecute. It could not be said that there was a prosecution.

[VARADACHARIAR J.—Rule 263 does not deprive the District Magistrate of his power to refer under section 438. It is merely a direction to him not to do so.]

The authority applied to must have power of interference; *Madan Mohan Singh v. Ram Sundar Singh*(1).

[VARADACHARIAR J.—In the petition to refer the matter to the High Court under section 438, the District Magistrate may ask the Government to appeal. Rule 263 does not prohibit the District Magistrate from doing so. Therefore the petition to the District Magistrate could not be said to be an infructuous proceeding. The fact that the petition to him asks the matter to be referred to the High Court under section 438 does not preclude the District Magistrate from advising the Government to appeal. Therefore the proceeding cannot be said to have terminated.]

The petition under section 438 did not contain an alternative prayer asking Government to appeal. A revision against acquittal lies only to the High Court. It does not lie to any Subordinate Court. The District Magistrate can no doubt act under section 438 but rule 263 forbids him to act under that

(1) (1930) I.L.R. 52 All. 553.

section. An application under section 438 is not a continuation of the prosecution even in a case in which notice is issued to the accused; *Sheik Meeran Sahib v. Ratnavelu Mudali*(1). The recommendation of the District Magistrate is not a step in the prosecution but only an attempt to prosecute. The petition to him does not stand on the same footing as a revision to the High Court. It must also be noted that no limitation is prescribed for revision. The contrast in the language of article 23 between the case of an acquittal and the case of termination otherwise is noteworthy. Whatever may be said as regards the case of discharge, the case of acquittal is clear. *Tanguturi Sriramulu v. Nyapathi Subba Rao Pantulu Garu*(2) does not discuss the question at all. The case was treated in the Courts below as a case of discharge and it was only the High Court which construed the order as one of acquittal. *Balbhaddar Singh v. Badri Sah*(3) was a case of discharge and not of acquittal. No question of limitation arose in that case. It only laid down the ingredients of an action for malicious prosecution.

As regards discharge, a revision petition against an order of discharge lies only to the High Court or the Sessions Judge who may refer the matter to the District Magistrate. No revision lies to the District Magistrate; section 436 of the Criminal Procedure Code. In the present case the petition was filed to the District Magistrate.

[VARADACHARIAR J.—Read section 435.]

[THE CHIEF JUSTICE.—Section 435 allows a revision to the District Magistrate against any order of a Subordinate Magistrate and when such a petition is filed the District Magistrate can act under section 438.]

[VARADACHARIAR J.—Section 437 shows that the District Magistrate has power to act even in a case of discharge without any direction by the High Court or the Sessions Judge.]

The JUDGMENT of the Court was delivered by
LEACH C.J.—The respondent filed a complaint

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(1) (1912) I.L.R. 37 Mad. 181.
(2) A.I.R. 1920 Mad. 151; 57 I.C. 635.
(3) (1926) I.L.R. 1 Luck. 215; 51 M.L.J. 42 (P.C.).

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against the appellants before the Bench of Magistrates of Saidapet, in which he accused the appellants of assault, insult and criminal intimidation. The charges against the second appellant were dismissed on 23rd September 1930 and he was accordingly discharged. The case proceeded as against the first appellant and resulted in his acquittal on 25th May 1931. The respondent was not satisfied with the decision of the Magistrates and he filed two applications in revision, one against the discharge of the second appellant and the other against the acquittal of the first appellant. These applications were filed in the Court of the District Magistrate of Chingleput and were heard by him. The hearing resulted in the dismissal of the petitions on 13th July 1931. On 12th July 1932 the appellants filed a suit in the Court of the District Munsif of Chingleput for damages for malicious prosecution. The District Munsif dismissed the suit on the ground that it was barred by the law of limitation and this decision was upheld on appeal by the District Judge of Chingleput. Therefore we are called upon to decide whether the suit was barred by article 23 of the Limitation Act. That article fixes the period of limitation for a suit for malicious prosecution at one year and time begins to run "When the plaintiff is acquitted or the prosecution is otherwise terminated". In dismissing the appeal the learned District Judge relied on the decision of this Court in *Narayya v. Seshayya*(1) and on the decision in *Purshottam Vithaldas v. Ravji Hari*(2) and declined to follow the decision in *Madan Mohan Singh v. Ram Sundar Singh*(3).

(1) (1899) I.L.R. 23 Mad. 24.

(2) (1922) I.L.R. 47 Bom. 28.

(3) (1930) I.L.R. 52 All. 553.

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The case of *Narayya v. Seshayya*(1) was an appeal decided by SUBRAMANIA AYYAR and MOORE JJ. It arose out of a suit for damages for malicious prosecution, which had been instituted more than a year after the date of the acquittal, but within a year from the dismissal of a revision petition filed by the prosecutor against the acquittal. The learned Judges held that the period of limitation began to run when the appellant was acquitted, treating the order of acquittal as being final. In *Purshottam Vithaldas v. Ravji Hari*(2) MACLEOD C.J. and KANGA J. decided that the period of limitation ran from the date of the order of discharge on the ground that the cause of action would not be suspended because further proceedings might be taken either by the Government or by the complainant in order to get the order of discharge set aside. On the other hand, in *Madan Mohan Singh v. Ram Sundar Singh*(3) the Allahabad High Court held that an application for revision of an order discharging an accused person could be deemed to be a continuation of the prosecution, or a fresh prosecution in itself, and therefore when the suit was instituted within one year of the dismissal of the application for revision it was in time, notwithstanding that more than twelve months had elapsed from the date of discharge. The learned Judges, however, remarked that in a case where the prosecution ended in acquittal the language of article 23 left no room for argument with regard to the commencement of limitation, as the article specifically provides that limitation is to run from the date

(1) (1899) I.L.R. 23 Mad. 24.

(2) (1922) I.L.R. 47 Bom. 28.

(3) (1930) I.L.R. 52 All. 553.

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LEACH C.J. of acquittal. We consider that in these cases the real significance of an application for revision has not been realised and we are unable to accept the Allahabad High Court's reading of article 23.

Section 435 of the Code of Criminal Procedure provides that the High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of any proceeding before an inferior Criminal Court for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of an inferior Court. Under section 436 the District Magistrate may himself make, or direct a Subordinate Magistrate to make, further inquiry into a complaint which has been dismissed under section 203 or sub-section 3 of section 204, or into the case of a person accused of an offence who has been discharged. Section 438 provides that the Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of his examination. These sections are very widely drawn. Section 417 states that the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than a High Court, but this section does not limit the powers of a District Magistrate in calling for a record from a Subordinate Magistrate and there is no section in the Code of Criminal Procedure which does limit this right. Therefore it follows that if

a District Magistrate considers that a person has been acquitted who should not have been acquitted he can report the case to the High Court with a view to that Court exercising its powers of revision. KULASEKHARA
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The learned Advocate for the respondent in this connection has laid great stress on rule 263 of the Criminal Rules of Practice and Orders of this Court. That rule states that when a District Magistrate is of opinion that an order of acquittal is wrong, and that such order should be set aside, he should request Government to prefer an appeal under section 417 of the Code of Criminal Procedure and *should* not report the case for the orders of the High Court under section 438 of the Code. But this rule does not say that he *shall* not report such cases to the High Court for its orders. If it did the rule would be *ultra vires* the powers of the Court. The rule has been framed for the guidance of District Magistrates in suitable cases, and cannot be read as saying that a District Magistrate shall never refer an acquittal to this Court. That the Court can revise an order of acquittal was recognised by a Full Bench of this Court consisting of SCHWABE C.J., OLDFIELD and COUTTS TROTTER JJ. in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1). The learned CHIEF JUSTICE in the course of his judgment pointed out that where there is an appeal by the Public Prosecutor or the Crown from an acquittal the Court sets its face against revision; but where a private prosecutor having no power to appeal comes to the Court in revision it certainly is open to the Court to hear him. The fact that in such a case the

(1) (1922) I.L.R. 45 Mad. 913 (F.B.).

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High Court seldom interferes does not mean that it will never interfere and it has interfered in a suitable case, as is shown by the judgment of WALLACE J. in *Venkata Rao v. Padmanabha Raju*(1). The position, therefore, is this: The prosecutor may file an application before the District Magistrate for revision of an order of discharge or of acquittal passed by a Subordinate Magistrate and on such a petition being filed it will lead in a proper case to the setting aside of the order of discharge or of acquittal as the case may be. If the order of discharge is set aside a further inquiry will be ordered and in the case where an order of acquittal is set aside a retrial will be directed.

The judgment of the Privy Council in *Balbhaddar Singh v. Badri Sah*(2) has great bearing on the questions now before us. The appellants in that case were accused with two others of murder. The appellants were discharged by the Magistrate who first dealt with the case, but the Sessions Judge called for the record and after notice to the appellants considered whether further inquiry should be ordered into the charge which had been preferred against them. After hearing the arguments the Sessions Judge came to the conclusion that the order of discharge had been properly passed and refused to commit the appellants for trial. The appeal to the Privy Council arose out of a suit which followed for damages for malicious prosecution. The appellants succeeded in the trial Court, but on appeal to the Court of the Judicial Commissioner of Oudh

(1) (1927) I.L.R. 51 Mad 180.
(2) (1926) I.L.R. 1 Luck. 215; 51 M.L.J. 42 (P.C.).

the judgment of the trial Court was reversed. KULASEKHARA v. THOLASINGAM.
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The appellate Court held that in an action for malicious prosecution the plaintiff has to prove, (i) that he was prosecuted by the defendant; (ii) that he was innocent of the charge upon which he was tried; (iii) that the prosecution was instituted against him without any reasonable and probable cause; and (iv) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect. Dealing with this statement VIS-COUNT DUNEDIN, who delivered the judgment of the Judicial Committee, observed:

"Proposition (ii), as stated, is quite erroneous. It should be 'That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating'. This phraseology may be found in the judgment of MONTAGUE SMITH J. in *Basebe v. Matthews*(1). But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration, if the law were really as the Judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, e.g., whether a *nolle prosequi* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a Magistrate declines to commit. [*Delegal v. Highley*(2), *Weston v. Beeman*(3), *Huntley v. Simson*(4).] Accordingly in Bullen and Leake's Precedents, 8th Edition, at page 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a Magistrate. After narrating

(1) (1867) L.R. 2 C.P. 684, 688.
(2) (1837) 3 Bing. (N.C.) 950; 132 E.R. 677.
(3) (1857) 27 Law. J. Rep. (N.S.) Exch. 57.
(4) (1857) 27 Law. J. Rep. (N.S.) Exch. 134.

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the arrest and the charge, it continues: 'The said Justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated.' In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Ragunath and Teja ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause."

The Sessions Judge finally refused to commit the appellants for trial as the result of proceedings before him following the discharge by the Magistrate who held the inquiry.

The principle which applies here was stated by WILLIAMS, BYLES and KEATING JJ. in *Gilding v. Eyre*(1) in these words:

"It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged."

Now, when did the prosecution proceedings terminate in this case? We consider that the answer must be that they terminated on 13th July 1931 when the District Magistrate dismissed the revision petitions and that this answer is given by the decision in *Balbhaddar Singh v. Badri Sah*(2). Until those petitions were dismissed the prosecution case was before the Court. And it seems to us that it does not lie in the

(1) (1861) 10 C.B. (N.S.) 592, 604; 142 E.R. 584.
(2) (1926) I.L.R. 1 Luck. 215; 51 M.L.J. 42 (P.C.).

mouth of the respondent-prosecutor to say that the proceedings had terminated so far as the second appellant was concerned on his discharge and so far as the first appellant was concerned on his acquittal. The proceedings had not terminated, because he took further steps with a view to securing their conviction.

The learned Advocate for the respondent says that in any event the suit is barred so far as the first appellant is concerned, as he was acquitted and article 23 provides that time shall run from the date of the acquittal. This argument ignores the wording of the article and the reason for the rule that so long as proceedings are pending the accused shall not be allowed to sue. The wording "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated". In our opinion the article provides that time shall run when the plaintiff is acquitted or when the prosecution comes to an end in some other manner. If the acquittal is followed by other proceedings the prosecution is terminated not by the acquittal, but by the order passed in the subsequent proceedings and this construction was placed on the article by a Bench of this Court consisting of BAKEWELL and PHILLIPS JJ. in *Tanguturi Srimululu v. Nyapathi Subba Rao Pantulu Garu*(1). It follows from what we have said that the case of *Narayya v. Seshayya*(2) was wrongly decided.

The appeal will be allowed and the case remanded to the trial Court for a decision on the

(1) A.J.R. 1920 Mad. 151; 57 I.C. 635.
(2) (1899) I.L.R. 23 Mad. 24.

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KULASEKHARA
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THOLASINGAM. merits. The appellants will be entitled to their costs in this Court and in the District Court. There will be a direction for the refund of court-fee both here and in the District Court.

A.S.V.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and,
Mr. Justice Pandrang Row.

1937,
November 22.

CHEMBROLU RAMAMURTY (PLAINTIFF), APPELLANT,

v.

CHEMBROLU BHIMASANKARARAO AND FIFTY-THREE
OTHERS (DEFENDANTS 1, 2, 6, 7, 9 TO 13, 18 TO 50, 52, 53,
56 TO 61, 63 TO 65 AND NIL), RESPONDENTS.*

*Hindu law—Widow—Alienation by—Presumptive reversioner
—Consent of—Presumption arising from—Actual rever-
sioner, son of presumptive reversioner—Right of, to rebut
presumption.*

The consent of the presumptive reversioners to an alienation made by a Hindu widow of her deceased husband's estate merely gives rise to a presumption that the transaction was one which was occasioned by necessity even though the actual reversioners happen to be the sons of the presumptive reversioners. It is open to the actual reversioners to rebut the presumption if they can.

Case law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 54 of 1930.

P. Somasundaram and K. Bhimasankaran for appellant.

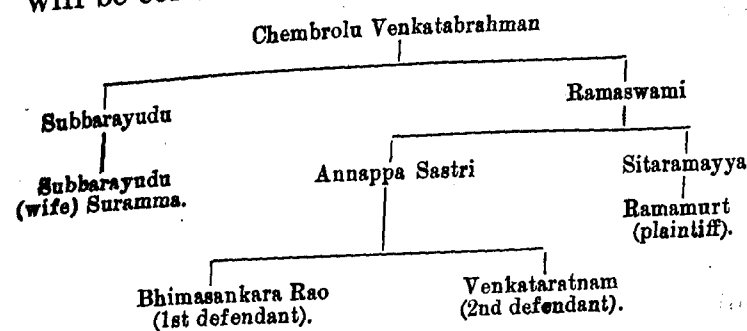
* Appeal No. 39 of 1933.

A. Venkatachelum for first respondent. C. Rama Rao for respondents 7, 8 and 9. K. Kameswara Rao for respondents 13, 15 to 19, 28 to 31, 34, 35, 37 and 38. T. Satyanarayana for respondents 3, 5, 6, 10-12, 43, 46 and 51.

RAMAMURTY
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The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of a suit filed in the Court of the Subordinate Judge of Rajahmundry by the appellant for the partition of the estate of his uncle, Subbarayudu. He claimed that he and the first and second respondents (the first and second defendants) were entitled to the estate as reversioners. There were sixty-five defendants, the other defendants being sued as alienees.

Subbarayudu died about sixty years ago leaving a widow, Suramma, but no children. Suramma died on 3rd July 1928. The judgment of the lower Court contains a genealogical tree showing the relationship between the appellant, the first and second respondents and Subbarayudu, and it will be convenient to reproduce it here.



On 6th April 1904 Annappa Sastri and Sitaramayya entered into an arrangement with Suramma under which they were to divide between them the estate as it then existed, the widow

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taking one half and Annappa Sastri and Sitaramayya taking the other half absolutely. The arrangement was embodied in two deeds which were duly executed and registered. At the same time Annappa Sastri and Sitaramayya agreed to divide equally the properties which fell to their share under this arrangement. Before her death the widow disposed of the properties which she had obtained as the result of the settlement of the dispute and Annappa Sastri and Sitaramayya did the same. The appellant seeks to set aside all the alienations. The learned Subordinate Judge considered that the sons of Annappa Sastri and Sitaramayya were estopped from attacking the validity of the deeds under which their fathers had acquired property from which they had also benefited. He accordingly dismissed the suit without going into the merits.

We do not share the opinion of the learned Subordinate Judge that the doctrine of estoppel applies in this case. In holding that it did apply the learned Subordinate Judge relied on the decision of the Privy Council in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(1) and on the decision of a Full Bench of this Court in *Rangappa Naik v. Kamti Naik*(2) which was based on the judgment in the former case. But these cases require to be read in the light of later cases and this was not appreciated by the lower Court. In *Bajrangi Singh v. Manokarnika Bakhsh Singh*(1) the Judicial Committee had to consider the conflicting opinions expressed by the Allahabad and the Calcutta High Courts on the question of the effect of the consent of presumptive reversioners to an alienation by a

(1) (1907) I.L.R. 30 All. 1 (P.C.). (2) (1908) I.L.R. 31 Mad. 366 (F.B.).

Hindu widow. The Allahabad opinion was that even if all the presumptive reversioners had consented to the widow alienating the property the actual reversioners could, when the succession opened, sue to set aside the alienation and have it set aside unless it were shown that the alienation had taken place as the result of necessity. Whatever consent was given it would not obviate the requirement imposed by Hindu law of proving that there was need for the alienation. The opinion of the Calcutta High Court was that, where the presumptive reversioners had consented to an alienation, a presumption arose that the alienation was the result of necessity. The presumption could be rebutted, but unless it were rebutted the alienation would bind the actual reversioners. Their Lordships decided that the better opinion was that of the Calcutta High Court, but as they concluded their judgment with the words,

"the appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers",

it was also thought that their Lordships intended to hold that a father as a presumptive reversioner could bind his son. This was the reading of the judgment by WHITE C.J. and WALLIS and SANKARAN NAIR JJ. who composed the Full Bench which decided *Rangappa Naik v. Kamti Naik*(1). The learned Chief Justice in the course of his judgment did point out that there might be a difficulty in reconciling this decision of the Privy Council with the decision of their Lordships in *Bahadur Singh v. Mohar Singh*(2),

(1) (1908) I.L.R. 31 Mad. 366 (F.B.).

(2) (1901) I.L.R. 24 All. 94 (P.C.).

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but, in view of the words used in the concluding portion of the judgment in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(1), the Full Bench felt constrained to hold that, where a widow and her nearest reversioners had executed a document by which such reversioners, *bona fide* and in consideration of the widow conveying to them a portion of the property inherited by her from her husband, gave up all their rights to the remaining properties and consented to the widow dealing with such properties as she chose, the actual reversioners after the widow's death were bound by such consent and were estopped from questioning the alienations made by the widow after the agreement had been entered into.

The same difficulty presented itself to the Calcutta High Court in *Debi Prosad Chowdhury v. Golap Bhagat*(2), but, as the Privy Council had said in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(1) that they would be unwilling to extend the widow's power of alienation beyond its present limit, it was thought that their Lordships had not intended to lay down any new doctrine. After a discussion of all the authorities JENKINS C.J. observed :

"The result then of the authorities binding on us appears to me to be this. To uphold an alienation by a widow of her deceased husband's estate, where she is his heir, it should be shown (i) that there was legal necessity, or (ii) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption either of the existence of necessity or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to

(1) (1907) I.L.R. 30 All. 1 (P.C.).

(2) (1913) I.L.R. 40 Cal. 721 (F.B.).

an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and the consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved, then the alienation must be of the whole."

The Calcutta High Court accordingly answered the reference made to it in this sense.

Their Lordships of the Privy Council were called upon in *Rangasami Gounden v. Nachiappa Gounden*(1) to reconsider the question and they explained their decision in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(2). They observed that, while it was true that the concluding words of the judgment in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(2) as to the sons being bound by the consent of the fathers could be read as indicating that consent operated *proprio vigore*, two remarks fell to be made. First, the idea of an eventual reversioner claiming through any one who went before him was opposed both to principle and authority. It was opposed to principle because there is no vested right until death. It was opposed to the authority of *Bahadur Singh v. Mohar Singh*(3). Secondly, there was no hint in the judgment in *Bajrangi Singh v. Manokarnika Bakhsh Singh*(2) that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. They here added :

"It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue, viz., the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a

(1) (1918) I.L.R. 42 Mad. 523 (P.C.). (2) (1907) I.L.R. 30 All. 1 (P.C.).
(3) (1901) I.L.R. 24 All. 94 (P.C.).

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RAMAMURTY v. BHIMA-SANKARARAO. LEACH C.J. new and illogical extension of the law was introduced, and to find consolation in the fact, as stated by SADASIVA AYYAR J., that Lord HALSBURY once said that law was not a logical science."

Having made these observations their Lordships proceeded to state the law in the following terms :

"The result of the consideration of the decided cases may be summarised thus: (i) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (ii) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested in quarrelling with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by JENKINS C.J. and MOOKERJEE J. in the case of *Debi Prasad Chowdhury v. Golap Bhagat*(1). It follows that their Lordships cannot agree with a good deal of what was said in the case of *Rangappa Naik v. Kamti Naik*(2)."

There is a further decision of the Judicial Committee which has a bearing on the question of law under consideration. It is the case of *Binda Kuer v. Lalita Prasad*(3), where it was pointed out that the presumptive reversioner, although the paternal ancestor of the actual reversioner, is not a person from whom the actual reversioner takes his title to the estate. He takes his title direct from

(1) (1913) I.L.R. 40 Cal. 721 (F.B.). (2) (1908) I.L.R. 31 Mad. 366 (F.B.).
(3) (1936) 44 L.W. 546 (P.C.).

the last full owner. In this case their Lordships also held that, even if the presumptive reversioner were the guardian of the actual reversioner, he could not bind the latter under transactions entered into by the widow in respect of the estate properties. They consequently rejected the plea that the actual reversioner was estopped from disputing alienations made by the widow.

These decisions make it quite clear that the actual reversioners are not bound absolutely by the action of the presumptive reversioners. The consent of the presumptive reversioners to an alienation merely gives rise to a presumption that the transaction was one which was occasioned by necessity; but it is open to the actual reversioners to rebut the presumption if they can. To adopt the wording of the headnote of *Rames v. Sasi*(1), a conveyance of a portion of an estate by a Hindu widow jointly with the nearest reversioner does not in itself create an indefeasible title. The decision was followed by a Bench of this Court (CURGENVEN and SUNDARAM CHETTI JJ.) in *Satyanarayana v. Venkanna*(2).

In the present case, no opportunity was given to the appellant to prove that the transactions in question were contrary to Hindu law. The learned Judge held that the appellant was governed by the actions of his father, Sitaramayya, and therefore he was not in law entitled to institute the present suit. This decision is clearly wrong on the authorities. The appeal will be allowed and the case will be remitted to the Subordinate Judge to try and decide according to law. The appellant is entitled to costs which will be

(1) (1919) 30 C.L.J. 56.

(2) (1933) 65 M.L.J. 282.

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paid by the opposing respondents in proportion to the value of their interests in the estate properties.

The appellant has appealed as a pauper. As there is a remand for retrial he would have been entitled to a refund of the court-fee had he paid it. In the circumstances there is no necessity to make any order for payment by the appellant to Government of the court-fee on the memorandum of appeal.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice King.

C. V. VYTHIANATHA IYER (FIRST DEFENDANT),
APPELLANT,

v.

C. V. VARADARAJA IYER AND SIX OTHERS (PLAINTIFF
AND DEFENDANTS 2 TO 6 AND LEGAL REPRESENTATIVE OF
SECOND DEFENDANT), RESPONDENTS.*

*Hindu law—Joint family—Member of—Acquisitions of—
Self-acquisitions or joint family property—Presumption—
Onus of proof—Shifting of—Proof of existence of ancestral
nucleus if and when has effect of—Blending of self-
acquisition with joint family property—Presumption—Onus
of proof—Joint family—Maintenance of—Utilisation of
self-acquisitions or joint family funds for purpose of—
Presumption as to.*

A party alleging that property held by an individual member of a joint Hindu family is joint family property must show that the family was possessed of some nucleus with the aid of which the property in question could have been acquired.

* Appeal No. 548 of 1931.

Mere existence of a nucleus, however small or insignificant, is not enough. It should be shown that the nucleus was of such value as could have reasonably formed the basis of the acquisition of the property in question. If this is shown, and only then, 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.

The presumption is against blending and the onus lies upon the person who pleads that what was at any particular moment the separate property of a member of a joint Hindu family ceased at some later stage to be so, to establish that it has been so dealt with as to have lost its separate character.

It being natural for a member of a joint Hindu family to keep his self-acquired property separate from the joint family property meeting the expenses of the joint family from the joint family property, it ought not to be presumed that the separate earnings of the member were spent on the maintenance of the joint family and that the income from the joint family was utilised in whole or in part towards acquisitions made by him.

Case-law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No. 50 of 1928.

T. M. Krishnaswami Ayyar and P. S. Ramachandra Ayyar for appellant.

B. Sitarama Rao for *P. S. Narayanaswami Ayyar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—One Varadaraja Ayyar died on 7th February 1925 leaving movable and immovable properties worth about Rs. 20,000. The first defendant-appellant is his son, and the plaintiff is the son of the first defendant. Varadaraja Ayyar executed two wills, Exhibit LX in 1912 and Exhibit B in 1922. By the second will he revoked the first one. Under the

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first will his properties, described as his self-acquisitions and additions therefrom, were given to the first defendant. Under the second, a life interest in half the estate was given to the first defendant while the bulk of his estate was bequeathed to the plaintiff. The suit out of which this appeal arises was instituted by the plaintiff to declare that the plaintiff and the first defendant are entitled to a life interest in two equal shares over the suit properties with a remainder over to the plaintiff and his sons, to call upon the first defendant to render a full account of the entire estate left by the testator and in the exclusive possession of the first defendant and pass a general administration decree against him. These declarations are asked for on the basis of the second will which dealt with the suit properties as the self-acquired properties of Varadaraja Ayyar. The plaintiff has also an alternative claim. He stated that if the will is not valid he may be given his half share of the properties free from encumbrances and with mesne profits. The first defendant attacked the validity of the second will. He stated that the will is not valid, that the properties are joint family properties and not the self-acquisitions of Varadaraja Ayyar, that Varadaraja Ayyar had no right to make the will, that he is not liable to render accounts, that he has spent large sums on litigation and that he has no objection to a partition. The second defendant is the mother of the first defendant. She is a legatee under the will. The third defendant is the daughter of the first defendant. She is also a legatee, and defendants 4 to 6 are tenants in possession.

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The main question for decision is whether the second will is valid, and this in its turn depends on the question whether the plaintiff properties are the self-acquisitions of the deceased Varadaraja Ayyar or are to be treated as joint family properties over which he has no disposing power. The case of the first defendant-appellant is that all the properties standing in the name of Varadaraja Ayyar were acquired by him with a nucleus of family funds, that his "earnings were freely thrown into the common stock and they all became by mingling with other joint family funds part and parcel of the joint family properties"; or, in other words, that the suit properties were acquired by a blending of his own earnings and the amount which he got as ancestral property. The case of the plaintiff is that the properties are the self-acquisitions of Varadaraja Ayyar and that no portion which he got from his family was utilised by him in acquiring them. The question is which view is the right one.

The learned Subordinate Judge on a careful consideration of the circumstances came to the conclusion that it cannot be said that the properties acquired by Varadaraja Ayyar are joint family properties, that though there was a nucleus of ancestral property, it was not proved that the properties which he acquired can be traced to the nucleus and that there is nothing in the evidence to show that Varadaraja Ayyar blended his private earnings with the ancestral property which came into his possession. In the circumstances he held that the suit properties were the self-acquired properties of Varadaraja Ayyar and on that basis gave the plaintiff the

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main declaration asked for by him. It is not necessary for the purposes of this appeal to refer in detail to the various other subsidiary reliefs as the findings on them were not seriously attacked before us. We may also state that the first defendant challenged the will on the ground that it was obtained by fraud and undue influence exercised by the plaintiff on Varadaraja Ayyar, but the Subordinate Judge held that this plea was not made out and it has not been pressed before us in appeal. Another plea raised by the first defendant, that the stridhanam funds of his mother were also used in the acquisition of the properties, was negatived by the Subordinate Judge as there was not any evidence to support the allegation that she had any stridhanam funds and this also has not been pressed before us.

The main argument in appeal is that a nucleus of joint family property came into the hands of Varadaraja Ayyar, that he did not keep separate accounts of the income he derived from the family properties and his own private income, that once a nucleus has been proved, the presumption of law is that all the properties standing in the name of Varadaraja Ayyar are joint family properties, that if the plaintiff claimed these as separate properties the burden of proving the same was on him and that the lower Court went wrong in the circumstances disclosed in the case in thinking that the burden of proof lay on the defendant and not on the plaintiff. It may be stated here that the judgment makes it clear that, in the opinion of the Subordinate Judge, in the circumstances of the case the initial burden of

proving that the suit properties are not the self-acquired properties of Varadaraja Ayyar lay on the defendant. It is argued that there is no foundation for any such presumption.

The evidence in the case lies within a brief compass. We will first refer to the nucleus of ancestral property that came into the hands of Varadaraja Ayyar. Varadaraja Ayyar had an elder brother named Venkateswara Pattar. They were members of an undivided Hindu Brahmin family governed by the Mitakshara law. Varadaraja Ayyar was born in 1843. He was in Government service for about twelve or fifteen years. He himself stated in a deposition given by him in Original Suit No. 64 of 1892, Exhibit XII, that he was in the employ of the Government for about fourteen years. He worked as an overseer from 1870 to 1880; see service register Exhibit II. The evidence does not show when he left the Government service. He was drawing a salary of Rs. 60 per month. In 1875 Varadaraja Ayyar and his brother effected a partition. A sum of Rs. 400 due from one Vellaya Moothan was given to Varadaraja Ayyar. He was allowed to appropriate a further sum of Rs. 300 belonging to the family which was in his hands. He was also paid some cash. On the whole the total amount that came into the hands of Varadaraja Ayyar under the partition was Rs. 2,630. A portion of the house had been set apart to the mother of the parties according to the partition deed and it recited that after her death Varadaraja Ayyar should be given a sum of Rs. 500 for his share of the house. This sum of Rs. 500 also came into the hands of Varadaraja

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Ayyar after the death of his mother but long after the acquisition of the suit properties. Thus it will be seen that at the material period the nucleus of ancestral property which Varadaraja Ayyar had in his hands was a bare sum of Rs. 2,630 and nothing more. It may be mentioned here that the original family house which went to the share of Varadaraja Ayyar's elder brother Venkateswara Pattar who died issueless came into the possession of Varadaraja Ayyar as reversioner after the death of his widow.

We will now briefly refer to the properties which were acquired by Varadaraja Ayyar and how he acquired them. The partition, as already stated, was in 1875. On 7th June 1877 Varadaraja Ayyar advanced Rs. 2,000 to one Raman Nair under a simple mortgage bond Exhibit IV. The bond was satisfied as may be seen from an endorsement on it. This bond was secured from Raman Nair's nephew by the first defendant. He says the money got under the partition was invested by his father under Exhibit IV. Beyond the fact that a sum of Rs. 2,000 was given to Raman Nair there is no evidence to show what became of the money. It is not clear from the evidence who made the endorsement or when it was made. There is no evidence to show whether any portion of this money was utilised by Varadaraja Ayyar in buying the properties which will be referred to presently. If Varadaraja Ayyar had no personal income or if the private properties were acquired more or less at the time when this money was got back, it may be said that the nucleus of ancestral property was used in the acquisition of some portion of the suit

properties. As will be seen presently, the suit properties were acquired from time to time during various years, and the connection between the nucleus of ancestral property and the new properties acquired has not been, nor can it be, established by the evidence in the case. On 11th June 1879 Varadaraja Ayyar advanced Rs. 1,500 to one Puthiyedath Mana Narayanan Namboodri; see Exhibit V. On 24th March 1881 he increased this sum to Rs. 4,500. On 17th November 1881 he paid another Rs. 500. A sum of Rs. 2,570 more was paid in cash and the jenm properties belonging to the Mana were sold to Varadaraja Ayyar under the jenm deed, dated 1884, Exhibit X. Thus between the years 1879 to 1884 Varadaraja Ayyar acquired jenm property worth Rs. 9,000. This is one of the properties dealt with under the will. Next year, on 30th October 1885, Varadaraja Ayyar bought a house for Rs. 2,000. This was afterwards sold and with the sale proceeds a kanom property known as Pallatheri Nilom was acquired. In 1895 Varadaraja Ayyar purchased another kanom property known as Payyathan-kunnu estate for Rs. 2,750. Out of this a sum of Rs. 1,500 was advanced before 1885. Both these kanom properties were redeemed and the monies are now lying in Court. Before 1892 Varadaraja Ayyar owned a shop in the bazaar of Palghat and he had advanced a sum of Rs. 4,000 to one Kandappa Tharakan. His own deposition already referred to shows that in 1892 he was worth about Rs. 20,000. The properties dealt with by Varadaraja Ayyar as his self-acquisitions in his will consisted of what have been enumerated above, these being : (i) the jenm property bought for

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Rs. 9,000 from Puthuyedath Mana, (ii) Payyathankunnu kanom property, (iii) Pallatheri kanom property and (iv) the house which he got on the death of his brother's wife ; and also some movables and cash. The question is whether the properties acquired by him can be treated as his self-acquisitions or whether they should be treated as family properties.

Now, the position is this. It is clear that Varadaraja Ayyar had a nucleus of ancestral property of Rs. 2,630. He was in the employ of the Government for about fifteen years drawing a salary of Rs. 60 a month. He acquired the properties already referred to in the course of a few years. There is no evidence that any portion of the ancestral money which he had with him went towards the purchase of any of these properties. Admittedly Varadaraja Ayyar did not keep any separate accounts of the income from the ancestral property or of his own private income. The appellant says that according to the decisions it must be held that the presumption is that Varadaraja Ayyar combined his private earnings and the ancestral property which he got and blended the income arising from both and that he purchased the properties with the same. If this position is true, the defendant can rely on this presumption and the burden of proving that the properties were acquired with the private earnings will be on the plaintiff. The Subordinate Judge held that there is no presumption in favour of blending of the two properties ; that it should be held that the ancestral property was used for the maintenance of the family and for other family expenses and that the private

earnings went towards the purchase of the properties which must therefore be treated as self-acquisitions of the testator.

First, we will deal with the presumption of law arising in the above circumstances. A large number of decisions of this Court as well as of other Courts including a few of the Privy Council were brought to our notice in this connection. The decisions relied on in support of the lower Court's position are these. In *Narayana Rao v. Venkatakrishna Rao*(1) it was held by WALLIS and SESHAGIRI AYYAR JJ. as follows :

"Under the Hindu law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilised for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them."

Then the learned Judges quoted the following two observations of CHAMIER J. in *Ram Kishan Das v. Tunda Mal*(2) :

(i) "There is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property."

(ii) "It is only when a person alleging that the property is ancestral property proves that there was a nucleus of ancestral property by means of which other property might have been acquired, it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate";

and stated that they agreed with these propositions. The learned Judges also referred to the decision in *Dhurim Das Pandey v. Mussumat*

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(1) (1914) 27 M.L.J. 677.

(2) (1911) I.L.R. 33 All. 677.

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Shama Soondri Dibiah(1). Both these decisions, *Ram Kishan Das v. Tunda Mal*(2) and *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*(1), were relied upon by the appellant's learned Counsel, and we will deal with them separately. For the present we will only observe that *Narayana Rao v. Venkatakrishna Rao*(3) is authority for the position that it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on to the party alleging self-acquisition to prove that the property was acquired without any aid from the family estate. In *Vadamalai Pillai v. Subramania Chettiar*(4) it was held by SPENCER and DEVADOSS JJ. that where a father who obtained on partition with his brothers lands valued at Rs. 200 and burdened with debts to the extent of Rs. 500 subsequently acquired with his income as dubash property worth Rs. 40,000, the nucleus was not sufficient to impress the subsequently-acquired property with the character of joint family property. It was pointed out that the nucleus required for impressing a joint family character on the acquisitions of a member of the joint family must be of such value as could have reasonably formed the basis of such subsequent acquisitions. In *Kannammal v. Ramathilakammal*(5) KRISHNAN and VENKATASUBBA RAO JJ. observed as follows :

"While there is a presumption that a Hindu family is joint until the contrary is proved, there is no presumption that a Hindu family is possessed of property. The party

(1) (1843) 3 M.I.A. 229.

(3) (1914) 27 M.L.J. 677.

(2) (1911) I.L.R. 33 All. 677.

(4) (1922) 16 L.W. 936.

(5) A.I.R. 1927 Mad. 88.

alleging that the property held by any individual member of a joint family is joint 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. If this is shown, and only then, 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."

In *Sankaranarayana v. Tangaratna*(1) ANANTAKRISHNA AYYAR J. discussed most of the relevant cases bearing on the question and pointed out as follows :

"In some cases it is mentioned that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a coparcener is joint family property. I should like to observe that the above position would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If, having regard to the nature of the income from the admitted joint family property or otherwise, the same could not have possibly helped in or led to the acquisition of subsequent property, then there is no presumption that the subsequent property is joint family property."

In *Satchidanandam v. Subbarazu*(2) the question of onus in cases like the present was thus dealt with by SUNDARAM CHETTI J. :

"Where the question is, whether an item of property in the name and in the possession of a member of a joint family is his own self-acquisition or the family property, there is the initial burden of proof on the party setting up that it is family property, to show the existence of ancestral or joint family nucleus by means of which the property in question may have been acquired. Where the existence of ancestral or joint family nucleus is proved and it is such as would reasonably be taken to have contributed to the acquisition in question, or the acquisition is ordinarily traceable to such nucleus, to some extent at least, it would be presumed to be joint family property, unless it is affirmatively shown by the other side

(1) A.I.R. 1930 Mad. 662.

(2) 1930 M.W.N. 1016.

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that the source of the purchase money was altogether different and quite independent of the family nucleus, or that such nucleus was incapable of contributing anything to the purchase."

In *Ramiah v. Mahalakshamma*(1) the following observations were made by VENKATASUBBA RAO and PAKENHAM WALSH JJ. :

"The plaintiff puts his case thus. Some properties fell to the share of Subbiah at the partition; it must be therefore assumed that he purchased the items in question from the income of these properties. In other words, the contention is, that when it is shown that a Hindu father was possessed of some ancestral property, all his subsequent acquisitions must be presumed to be joint family property. With this contention we cannot agree."

And the learned Judges referred to the cases we have already mentioned. *Narayanaswami Mudaliar v. Ratnasabapathy Mudali* (2). *Sandanam Pillai v. Somasundaram Chettiar*(3) and *Venkatramayya v. Seshamma*(4) are recent pronouncements by this Court on this question. The facts of the first of these decisions are somewhat like those of the present case and the question of the burden of proof is discussed by VARADACHARIAR and HORWILL JJ. at considerable length. In that case, one S was making a very substantial income from his profession as a native medical practitioner. At the partition between S and his coparceners he obtained only certain immovable properties the annual income from which was below Rs. 200. He had a large family to maintain and the maintenance of the family alone must have cost a great deal, more than the income derived from the ancestral properties. His income from the

(1) (1931) 35 L.W. 30.
(3) (1937) 1 M.L.J. 364.

(2) (1937) 2 M.L.J. 906.
(4) (1937) 45 L.W. 422.

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profession must have contributed largely to the accumulation of wealth. S maintained no accounts. In these circumstances it was held : (i) that the onus lay upon the person who pleaded that what was at any particular moment the separate property of a member of a joint Hindu family had at some later stage ceased to be so to establish that it has been so dealt with as to have lost its separate character ; (ii) that plaintiffs could not succeed upon the mere circumstance that S kept no accounts and that it was not known how he dealt with the two sets of income ; (iii) that there was no reason to presume that S's separate earnings were spent on the maintenance of the joint family and that the income from the joint family went in whole or in part into the investments. There is no presumption in favour of blending. The presumption, if any, can only be one of fact to be drawn in the light of all the surrounding circumstances and in accordance with what is described in section 114 of the Evidence Act as the common course of human conduct. In *Sandanam Pillai v. Somasundaram Chettiar*(1) VARADACHARIAR J. followed his previous decision in *Narayanaswami Mudaliar v. Ratnasabapathy Mudali*(2) and the proposition was repeated that it is only after it is shown that the family was possessed of some property with the aid of which the property in question could have been acquired, 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. In *Venkatramayya v. Seshamma*(3)

(1) (1937) 1 M.L.J. 364.

(2) (1937) 2 M.L.J. 906.
(3) (1937) 45 L.W. 422.

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the same principle was once again asserted. In *Kanshi Ram v. Shankar Das*(1) it was held that there is no presumption that the members of a joint Hindu family possess their self-acquisitions as joint coparcenary property and that all acquisitions by members of a joint Hindu family are *prima facie* partible and that the burden of proof lies on those who assert to the contrary. In *Suraj Kumar v. Jagannath*(2) it was held that there is no presumption that a particular property is joint family property having been acquired with the aid of family funds. The question of presumption in cases like the present is thus dealt with :

"Where it is proved or admitted that a joint family possessed such nucleus as could lead to the acquisition in question, it may be presumed that the later-acquired property belongs to the joint family, having been acquired with the aid of the nucleus. Mere existence of a nucleus, however small or insignificant, is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be a part of the joint family property."

The learned Counsel for the appellant relied mainly on the decisions in *Anandrao v. Vasant-rao*(3), *Ram Kishan Das v. Tunda Mal*(4) and *Rajangam Ayyar v. Rajangam Ayyar*(5) in support of his contention that when the existence of a nucleus of ancestral property is proved, all the subsequent acquisitions must be presumed to be joint family property and that the burden of proving that they were self-acquired and not acquired with the family funds lies on the person who makes such an assertion. On examination it will be found that these cases do not support

(1) A.I.R. 1928 Lah. 397.

(2) A.I.R. 1935 All. 67.

(3) (1907) 17 M.L.J. 184 (P.C.).

(4) (1911) I.L.R. 33 All. 677.

(5) (1922) I.L.R. 46 Mad. 373 (P.C.).

him. In *Anandrao v. Vasant-rao*(1) [the same case is reported as a footnote in I.L.R. 34 Mad. 262] the two salient features were that the family lived joint in one house and there was a nucleus of joint family property. The character of the Worli property (that is, the nucleus of the joint property) was undisputed in the Bombay Court. The following observations of the Privy Council with respect to this property explain the nature of the decision :

"The effort of the appellants in the present appeal has been to disparage the importance of the Worli property in comparison with the existing estate. This argument, however, is deprived of much of its force by the fact that the comparison is with the enhanced value of the more recent acquisitions and their Lordships find sufficient evidence that the Worli property was of substantial value and when it was sold some of the proceeds were used in defraying the cost of rebuilding the new house in which the joint family lived. This being so a nucleus exists and the family is joint. The onus is therefore on the party setting up a case of separate estate."

The meaning of their Lordships' statement is clear. The ancestral nucleus was of such substantial value that it may well have contributed to the acquisition of the property in question. As their Lordships say, as just stated, some of the proceeds of its sale was used in defraying the cost of rebuilding the new building in which the joint family lived. In such circumstances the burden of proving that the property is separate will be on the party setting it up according to the decisions noted above. It also appears in that case that the evidence of the tenor of family life proved the use of all the property as joint family property. *Ram Kishan Das v.*

(1) (1907) 17 M.L.J. 184 (P.C.).

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Tunda Mal(1), as already mentioned, is referred to in *Narayana Rao v. Venkatakrishna Rao*(2) and the two propositions laid down by CHAMIER J. have been accepted by this Court. The second proposition amplifies the first and lays down the law which has been accepted by this Court not only in *Narayana Rao v. Venkatakrishna Rao*(2) but also in the subsequent decisions. In *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*(3) the passage relied on is:

"It is allowed that this was a family who lived in commensality, eating together and possessing joint property."

As pointed out in *Narayana Rao v. Venkatakrishna Rao*(2):

"The Judicial Committee laid down that under these circumstances the mere fact that purchases were made in the names of individual members of the family was not evidence of separate ownership."

Evidently the joint property must have been substantial in value. Neither *Ram Kishan Das v. Tunda Mal*(1) nor *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*(3), in the opinion of the learned Judges, ran counter to the proposition which they laid down in that case, namely, that it is only when there is ancestral property by means of which other property may have been acquired that the burden is shifted on to the party alleging self-acquisition to prove that the property was acquired without any aid from the family estate. The observations of their Lordships of the Privy Council in *Rajangam Ayyar v. Rajangam Ayyar*(4) that

"the learned Judges of the High Court were, however, perfectly right in the view that the onus was on the defendant

(1) (1911) I.L.R. 33 All. 677.

(3) (1843) 3 M.L.A. 229.

(2) (1914) 27 M.L.J. 677.

(4) (1922) I.L.R. 46 Mad. 373, 381 (P.C.).

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to establish that the properties he claimed as the self-acquired properties of his father, Krishnier, bore that character" must be understood in the light of the special facts of the case. Having regard to the principles laid down in the above decisions, the mere proof by the defendant that his father had with him ancestral property of Rs. 2,630 will not by itself shift the burden on to the plaintiff of proving that the subsequently-acquired properties were acquired with his private earnings. The defendant, to shift the burden on to the plaintiff, will have also to prove that the ancestral property was such that by its means his grandfather may have acquired the subsequently-acquired properties. In the light of the decisions the presumption is against blending. As pointed out in *Akkanna v. Venkayya*(1) with respect to income derived by a Hindu widow from her husband's estate, the reasonable presumption to make in respect of any person having income at his or her disposal is that he or she had the income at his or her absolute disposal unless there is evidence to the contrary.

The question in the present case therefore is, has the defendant succeeded in showing whether this sum of Rs. 2,630 could have contributed towards the purchase of the suit properties. The Subordinate Judge is emphatically of the opinion that the circumstances of the case show that after meeting all the expenses of the family, ordinary and extraordinary, nothing would have been left in the hands of Varadaraja Ayyar to purchase the suit properties, and we agree with him in that view. The joint family of which

(1) (1901) I.L.R. 25 Mad. 351.

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Varadaraja Ayyar was the head consisted of himself, his wife and his two children. His elder son died early. The second child Ammu was born in 1870 and was married in 1886 (*See P.W. 3*). The marriage expenses including the stridhanam and the making of jewels would undoubtedly have cost him some money. Varadaraja Ayyar had also to perform the upanayanam of the first defendant and also his marriage. It is easy to conceive that large amounts must have been spent by him for the ordinary expenses of the family and also for the extraordinary expenses in connection with the marriage, upanayanam, etc. It appears from the evidence that Varadaraja Ayyar has spent a large amount for the education of the first defendant who appeared thrice for the Matriculation Examination and failed, and he had to maintain him also. Assuming that the sum of Rs. 2,630 would yield an interest of Rs. 260 a year, the learned Judge has shown in paragraphs 36 and 37 of his judgment that there would hardly be any sum left in the hands of Varadaraja Ayyar to buy the suit properties. After all, he had only a sum of Rs. 2,630 and he had to meet the ordinary as well as the extraordinary expenses of the household from 1874 up to the date of the execution of the will. It is a pertinent question to ask, why should we assume that this amount was not spent away in meeting these expenses and it was reserved for the acquisition of family properties while the monthly pay which he was getting was utilised by him for the ordinary and extraordinary expenses of the family? The presumption, as we have already stated, is against blending and it is only natural for a person to

keep his self-acquired property separate from the joint family property meeting the expenses of the joint family from the joint family property. The learned Judge says :

"If a calculation should be made of the amounts spent by him for the ordinary as well as the extraordinary expenses incurred from 1874 up to the date of the execution of the will, it would be seen that these amounts far exceed this sum of Rs. 2,630 and a further sum of Rs. 500 which Varadaraja Ayyar got from his brother after the death of his mother and the income that could be derived from this sum of Rs. 3,130 annually."

We accept this opinion having regard to the circumstances of this case. In both the wills it is stated that the properties are the self-acquired properties of Varadaraja Ayyar. The first defendant was his only son and was living with him at the time of the first will. He was then evidently very fond of him as he left the main bulk of the property to him. His subsequent conduct and his marriage with a Nair lady must evidently have prejudiced him in his eyes and this obviously led to the revocation of the first will and the execution of the second one. The quarrels in the family to which a mass of evidence relates has very little bearing on the question we have to decide and it is not necessary to refer to that evidence. On the whole, having regard to the presumptions of law and the evidence in the case, we cannot say that the learned Judge's conclusion that the suit properties have not been proved to be joint family properties and that they must be held to be the self-acquired properties of Varadaraja Ayyar is not borne out by the evidence.

The other findings of the learned Judge have not been seriously disputed before us. In the result the appeal fails and is dismissed with costs.

A.S.V.

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APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and
Mr. Justice Abdur Rahman.

1937,
December 10.

IKKASSINTAKATH ABDURAHMAN AND ANOTHER,
PETITIONERS,

v.

NADAKKAVU MALIKKAL BEERAN KOYA,
RESPONDENT.*

*Workmen's Compensation Act (VIII of 1923), sec. 8, cl. 7—
Claim for compensation by a dependant of a workman
against his employer—Assessment of compensation by Com-
missioner—Deposit of compensation money by employer—
Allotment of same by Commissioner to the dependant and
investing same on latter's behalf—Nature of right of latter
in the investment—Death of dependant—Competition
between dependant's heirs and employer—Right of the heirs.*

* On the death of a workman a claim for compensation under the Workmen's Compensation Act was made against his employer by the workman's mother as his only dependant. The Commissioner assessed the compensation at a certain figure and under section 8 of the Act the employer deposited the sum and the Commissioner allotted the entire sum to the mother. The Commissioner paid a small sum out of the same to her and had the balance invested on her behalf under section 8, clause 7, of the Act. Subsequently she died. Her sons on the one hand and the employer on the other laid claim to the invested amount.

On a reference by the Commissioner under section 27 of the Act,

held: (i) Once an allotment of compensation to a dependant or a distribution of compensation money among several dependants is made, compensation so allotted or distributed becomes the property of the dependant and, if the dependant dies, the said sum being his property will devolve on his or her heirs. Further it had been recognised to be her property by

* Referred Case No. 5 of 1937.

the said compensation money being invested in her name ABDURAHMAN v. BEERAN KOYA.
by the order of the Commissioner.

(ii) The sons were entitled to be paid the said amount.

CASE stated under section 27 of the Workmen's Compensation Act by the Commissioner for Workmen's Compensation, Madras, in Workmen's Compensation Case No. 133 of 1934, by letter No. C-2-4985 of 1936 dated 21st January 1937.

K. N. Kumaran for petitioners.

K. Kuttikrishna Menon for respondent.

VENKATARAMANA RAO J. — This is a reference under section 27 of the Workmen's Compensation Act (VIII of 1923) made by the Commissioner for Workmen's Compensation in the following circumstances. A workman by name, Saban, employed under the respondent died in or about July 1934. A claim for compensation was preferred by his mother, Pathumma, under the Act. A question was raised whether the employer was liable to pay compensation to her. The matter was carried to the High Court and by an order dated 1st September 1936 it was decided by BURN and LAKSHMANA RAO JJ. that the employer was liable to pay compensation to the said Pathumma. Thereupon the Commissioner by his order dated 26th September 1936 decided that the only dependant of the deceased workman was the applicant, Pathumma, and he therefore allotted the entire compensation to her. The entire compensation referred to was a lump sum of Rs. 552 paid by the employer in pursuance of section 8 of the Workmen's Compensation Act. The Act obliges every employer who is liable to pay compensation

ABDURAHIMAN to deposit the amount which he is liable to pay
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 ——— that he may get full satisfaction of the claim.
 VENKATA- On such deposit being made, the Commissioner
 RAMANA RAO J. has to find out who the dependants are so that he
 may effect a distribution among them. Under
 clause 7 of section 8, if the dependant happens to
 be a woman or a person under a legal disability,
 the Commissioner is enjoined to invest the
 compensation money for the benefit of the woman
 or of such person during his disability. It is
 therefore clear that once an allotment of compen-
 sation to a dependant or a distribution of
 compensation money among several dependants
 is made, the compensation so allotted or distribu-
 ted becomes the property of the dependant and, if
 the dependant dies, the said sum being his or her
 property will devolve on his or her heirs. The
 Commissioner in pursuance of clause 7 of section
 8 of the Act directed an immediate payment of
 Rs. 50 out of the said sum of Rs. 552 to Pathumma
 and ordered that the balance be invested on her
 behalf in the Post Office Savings Bank and paid
 to her at the rate of Rs. 21 a quarter in advance
 beginning from October 1936. Before she could
 receive any sum, the said Pathumma died and an
 application was put in by her sons who are admit-
 tedly her legal heirs claiming the said amount.
 This claim was resisted by the employer (the
 respondent) who contended that as Pathumma
 died the compensation money was liable to be
 refunded to him. The Commissioner was inclined
 to the view that, by the operation of clause 4 of
 section 8 and section 9, the amount is liable to be
 refunded to the employer, but, however, as he was

not quite sure about that view, he has made this
 reference under section 27 of the Act.

It seems to us that the view of the Commis-
 sioner is not sound. Under clause 4 of section 8,
 the right of the employer to get a refund only
 arises when a workman dies without any
 dependant and the Commissioner at the time of
 the distribution knows that he has left no depen-
 dant within the meaning of the Act. But, if the
 workman leaves a dependant and the claim of
 that dependant is recognised by the Commissioner
 as the person entitled to receive the compensation,
 any claim on the part of the employer for a
 refund can no longer arise under that clause.
 Section 9 also has no bearing on the facts of this
 particular case. The first part of that section
 provides that no lump sum or half-monthly
 payment payable under the Act is capable of
 being alienated or subjected to attachment.
 This is for the purpose of securing the benefit
 which the Workmen's Compensation Act is inten-
 ded to provide for the workman or the dependants
 of the workman. This part of the section has
 therefore no application to the present case. The
 other part of the section is that no lump sum
 or half-yearly payment shall pass to any
 person other than the workman. This contem-
 plates that the compensation is payable to a
 workman and cannot be claimed by any person
 by operation of law. Therefore, before that clause
 can come into operation, there must be a workman
 living to whom it is payable and it has no
 application to a case where the workman died
 before the award of compensation. In the case
 of a workman who is alive and to whom the

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ABDURAHIMAN compensation is payable, the Act says that it must be paid to him and it should not go to any other person; for example, if he becomes an insolvent, his trustee in bankruptcy cannot claim the sum for the benefit of his creditors. This section, therefore, has no application to this case where the money has been allotted to Pathumma, the mother of the workman, who is a dependant under the Act. It has become her property, it has been recognised to be her property by the said compensation money being invested in the Post Office Savings Bank by the order dated 26th September 1936.

We are therefore of the opinion that the sons of Pathumma are entitled to be paid the amount due and payable under the order dated 26th September 1936 and we answer the reference accordingly. We see no reason to make any order as to costs.

G.R.

APPELLATE CRIMINAL.

1938,
February 4.

Before Mr. Justice Burn and Mr. Justice Venkataramana Rao.

IN RE PERNE MAILA RAI (COUNTER-PETITIONER),
PETITIONER.*

Code of Criminal Procedure (Act V of 1898), sec. 110—General reputation—Evidence of police witnesses—Admissibility of.

In proceedings under section 110 of the Criminal Procedure Code the evidence of police witnesses with regard to general repute is made admissible by section 117 of that Code.

* Criminal Revision Case No. 466 of 1937 (Criminal Revision Petition No. 434 of 1937).

The nature of the evidence of reputation, the mode of proof and the admissibility of the same discussed. MAILA RAI, In re.

Per BURN J. (VENKATARAMANA RAO J. leaving the points open) (i) A stranger can find out what the general reputation of a person is and he is competent to testify to that fact. (ii) It is not necessary that a person against whom proceedings under section 110, Criminal Procedure Code, are taken must be an ex-convict.

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 South Kanara Division dated 30th March 1937 and passed in Criminal Appeal No. 47 of 1936 preferred against the order dated 19th November 1936 and made in Miscellaneous Case No. 10 of 1936 on the file of the Court of Joint Magistrate, Coondapoor Division.

K. S. Jayarama Ayyar for B. Lakkappa Rai for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

Cur. adv. vult.

ORDER.

BURN J.—In my opinion there was evidence upon which the learned Joint Magistrate and the learned Sessions Judge could properly rely in order to hold that the petitioner was habitually committing or attempting to commit or abetting the commission of offences involving a breach of the peace and is so desperate and dangerous as to render his being at large without security hazardous to the community. I cannot accept the contention of Mr. Jayarama Ayyar that the evidence of the police witnesses with regard to general repute should be excluded as inadmissible.

BURN J.

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The question what is a person's reputation is a question of fact. It can be spoken to by any one who knows what his general reputation is. The police officer who goes to the place where a particular person lives and who makes enquiries to find out what his reputation is, is perfectly competent to speak in the witness box about the result of his enquiries. His evidence that the reputation of such and such a person is so and so is evidence of a fact and it is not to be excluded as mere hearsay evidence. In one sense the evidence of general repute is of course hearsay but it is hearsay of a particular kind which is made admissible in a case like this by section 117, Criminal Procedure Code. It is not in my opinion necessary—I say it with all respect to the learned Judges who have held otherwise—that the witness who speaks to the general reputation of a person must be resident in the same place. A stranger can find out what the general repute of a person is and he is competent to testify to that fact. For this reason I would dismiss this petition holding that there is no ground for interference in revision.

The case was brought before this Bench apparently because of a conflict of rulings in Criminal Revision Cases Nos. 228 of 1937 and 474 of 1937. In the former case NEWSAM J. is reported to have said:

“There is another and I think an even stronger ground for quashing the present proceedings. Neither of the petitioners has ever been convicted of any crime. A mere perusal of section 110 is sufficient to show that it is intended to deal with ex-convicts or habitual criminals and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of

condign punishment for crime are not sufficient deterrents or adequate safeguards for the public.”

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In the latter case HORWILL J. stated as follows:

“It is further contended that before a person can be bound over under section 110 it is necessary that a certain number of previous convictions should have been proved. I can see no necessity for this if the fact that a person is an habitual robber or house-breaker or thief can be proved otherwise. If there are no previous convictions, the quantum of proof necessary would naturally be greater.”

The conflict appears to be that NEWSAM J. is thought to have held that section 110 can only apply against habitual criminals if there are previous convictions, while HORWILL J. has held that it is not necessary to prove previous convictions. The point does not arise in the present case because it has not been contended by Mr. Jayarama Ayyar on behalf of the petitioner that the absence of any previous conviction renders the order of the lower Court invalid. I do not myself think that NEWSAM J. meant to say that the only habitual criminals who can be dealt with under section 110, Criminal Procedure Code, are ex-convicts. He says, “ex-convicts or habitual criminals and dangerous and desperate outlaws . . .” and I do not think that the word “or” is equivalent in this context to “namely”. The supposed conflict only arises if NEWSAM J.'s words are read as if he had said: “Ex-convicts, viz., habitual criminals and dangerous and desperate outlaws . . .” If it were necessary, I would agree with HORWILL J. and differ (with all respect) from the interpretation put upon the words of NEWSAM J. In section 117, Criminal Procedure Code, it is expressly laid down that the fact that a person is a habitual

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offender may be proved by evidence of general repute. This is by itself inconsistent with the idea that a person against whom proceedings under section 110, Criminal Procedure Code, are taken must be an ex-convict.

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RAMANA RAO J.

VENKATARAMANA RAO J.—This is an application to revise the order of the learned Sessions Judge of South Kanara confirming the order of the Joint Magistrate of Coondapoor binding over the petitioner under section 110 (e) and (f), Criminal Procedure Code. There are two concurrent findings of the lower Court, viz., (i) that the petitioner is a person given to habitually committing or attempting to commit or abetting the commission of offences involving a breach of the peace and (ii) that the petitioner is so desperate and dangerous as to render his being at large without security hazardous to the community. So far as the first finding is concerned, it is mainly based on three criminal cases which were the subject of judicial proceedings, and which ended in the discharge of the petitioner. Apart from the said proceedings, there is no other reliable evidence in the case. It seems to me that the lower Courts were not warranted in basing their finding on the evidence gathered from the proceedings in those cases, when the petitioner was exonerated in respect of the charges laid against him in those proceedings. I am therefore of the opinion that this finding is not sustainable.

With regard to the other finding, Mr. Jayarama Ayyar contends that it is based upon certain inadmissible evidence and therefore the finding must be set aside. His contention may be outlined thus: both the lower Courts have taken into

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consideration the evidence of certain police officers who have made investigation regarding certain offences, namely, those which formed the subject of the above criminal proceedings, and their evidence is purely hearsay and therefore the finding based on such evidence cannot be sustained. To appreciate this contention, one has to see what is necessary to sustain a finding with reference to a charge under section 110 (f), Criminal Procedure Code. Proviso (4) to section 117 says that

“the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise”.

Therefore a finding in regard to a charge under section 110 (f) can be based on evidence of general repute of the person who is sought to be bound over. The section does not say in what manner evidence is to be given. The evidence as to reputation is always recognized as an exception to the rule as to the non-admissibility of hearsay evidence. Phipson in his book on “Evidence”, 7th Edition, observes thus at page 372:

“Stephen states that oral evidence must in all cases whatever be direct; that is, if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. But though this is generally true, it is not invariably so, witnesses being in some cases allowed to testify to the opinions of third persons who were not upon oath, e.g., when the opinion is that of the community (reputation).”

Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly

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conversant or the circle in which he moves ; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the "place" or "community" with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but, having regard to modern conditions, it is impossible to define "neighbourhood" or "community" with any degree of accuracy. Though the evidence of reputation is, in one sense, hearsay evidence, yet what a man learns of a man's reputation is a fact. Taylor in his book on "Evidence", 12th Edition, states thus in section 1472 :

"It is not however enough that the impeaching witness should profess merely to state what he has heard 'others' say, for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant, for it is this only which constitutes his general reputation. In ordinary cases, the witness should himself come from the neighbourhood of the individual whose character is in question, for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his enquiries. The impeaching witness may however be asked in cross-examination the names of the persons whom he has heard speak against the character for veracity of the witness impeached."

One of the cases to which he makes reference is *Kimmel v. Kimmel* (1), which gives a fairly good exposition of what reputation evidence consists of and how it is to be proved. In that case GIBSON J. observes thus at page 656 :

"The witness shall not be permitted to say he was told that the person had either a good or bad character in his own

neighbourhood. But that is a very different thing from a knowledge of common report, acquired, as in this case, from common report itself . . . A personal acquaintance with the individual to be affected, is unnecessary . . . The witness is to give, not his own judgment of the matter, but the aggregate result of at least a majority of the voices he has heard ; or in other words, for after all there is perhaps, no more plain or practical exposition of the matter, he must state what the common report is among those who have the best opportunity of judging of the habits and integrity of the person whose character is under consideration . . . The reputation of the neighbourhood is the only thing that is competent ; and if the witness has acquired a knowledge of it by the report of the neighbourhood, he is exactly qualified to be heard."

In the same case DUNCAN J. observes thus at pages 657 and 658 :

"How often does the inquiry end in the very question put to this witness : 'What is the general reputation of the witness examined as to truth in the county in which he lives ?' If a witness was not permitted to state the general reputation, there must be an end of all enquiry into character. Particular facts cannot be given in evidence. Opinion will not be evidence, for if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another ; few men live whom some do not think ill of. But it is said the witness must speak of his own knowledge. So he must. But what is this knowledge ? Not a personal individual knowledge of facts. He knows by reputation what is the character of the man."

Thus it will be seen that reputation evidence is not what A, B or C state about one's character but what the general opinion concerning him is because reputation is not the same thing as character. The witness who speaks to reputation must have opportunity to acquire knowledge of it. I do not wish to deal with the question as to what the extent of the opportunity should be and what the extent of knowledge should be, because,

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In re.
VENKATA-
RAMANA RAO J

(1) (1817) 3 Serg. & R. 336, 338 ; 8 Am. Dec. 655.

MAILA RAI,
*In re.*VENKATA-
RAMANA RAO J.

in this case on a reading of the depositions of the witnesses to whom Mr. Jayarama Ayyar objects, I find that they are persons who are qualified to speak about the general repute. Most of them are officers within whose jurisdiction the petitioner resides and some of them are persons who have held offices in or about that locality. I also find that they do not merely say that a particular person told them about the petitioner's character but they also speak from the knowledge they have acquired of the common report about the petitioner. Even excluding that evidence, I agree with the learned Sessions Judge that there is sufficient and satisfactory evidence in the case to come to the conclusion that the petitioner is a person of desperate and dangerous character within the meaning of section 110 (f). I therefore agree with my learned brother in dismissing this revision petition.

In this view, it is unnecessary to consider how far a mere stranger, who goes out to find out what the general repute of a person is, is competent to testify to that fact; nor do I think it necessary for the purpose of this case to express an opinion on the difference of view held by HORWILL J. and NEWSAM J. about the interpretation of section 110, Criminal Procedure Code, namely, whether it is intended to deal only with ex-convicts or habitual criminals and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient.

V.V.C.

APPELLATE CRIMINAL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

M. BULTEEL (COMPLAINANT), PETITIONER,

v.

R. C. BULTEEL (RESPONDENT), RESPONDENT*

1938,
March 9.

Code of Criminal Procedure (Act V of 1898), sec. 488—Application by wife for maintenance for herself and daughter—Direction to husband to pay Rs. 100 for wife and Rs. 100 for daughter per month—Power of Court.

Where a husband had neglected to provide for the maintenance of his wife and daughter and the wife filed an application for an order directing the husband to pay monthly a sum of Rs. 350 for their maintenance, and the Magistrate awarded only a sum of Rs. 100 for the maintenance of both,

held, that the Court had power to pass an order directing the husband to pay Rs. 100 per mensem for the maintenance of the wife and Rs. 100 per mensem for the maintenance of the daughter. Under section 488 (1) of the Code of Criminal Procedure power is given to make an order for the maintenance of the wife "or such child". There is nothing in the section which says that if an application is made on behalf of the wife an application shall not lie on behalf of the child. The application before the Court could be treated as an application for an order in favour of the wife and also for an order in favour of the daughter.

The view of NEWSAM J. that the Magistrate has no power to pass an order for more than Rs. 100 for the maintenance of both the wife and the daughter *disapproved*.

Kent v. Kent (1) approved.

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

* Criminal Revision Case No. 67 of 1938 (Criminal Revision Petition No. 66 of 1938).

(1) (1925) I.L.R. 49 Mad. 891.

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v.
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District Magistrate of the Nilgiris dated 13th November 1937 and made in Miscellaneous Criminal Petition No. 9 of 1937.

C. Krishnaswami Ayyar for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The petitioner was married to the respondent in the Nilgiris on 23rd April 1932 and lived with him as his wife until February 1936. A daughter was born of the marriage. In February 1936 the respondent left India for England and has not returned to India. He has neglected to provide for the maintenance of his wife and child and on 6th July 1937 the petitioner was compelled to file an application in the Court of the District Magistrate of the Nilgiris at Ootacamund for an order directing the respondent to pay a monthly sum for their maintenance. The amount asked for was Rs. 350 per mensem. The petitioner also asked that steps be taken under the Maintenance Orders Enforcements Act, 1921, with a view to the Magistrate's order being confirmed by the proper authority in England.

The application was dealt with by the Magistrate on the date of filing. He held that inasmuch as the petitioner had asked for an order for a sum of Rs. 350 he had no jurisdiction to hear the application, and dismissed it, notwithstanding that the prayer in the petition was for a sum of Rs. 350 per mensem, or such other sum as the Court might deem fit. It is not surprising that an application for revision of this order was filed in this Court. The revision application came

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before NEWSAM J. on 15th October 1937. The learned Judge granted it and directed the Magistrate to dispose of the application on its merits. In the course of his order the learned Judge expressed the opinion that the Magistrate had no power to pass an order for more than Rs. 100 for the maintenance of both the mother and the daughter. He refused to accept the decision of DEVADOSS J. in *Kent v. Kent*(1) and that of the Calcutta High Court in *Tulsi Das Burman v. Sm. Saraju Dei Devi*(2). The order of NEWSAM J. having been transmitted to the District Magistrate, an order for the payment of Rs. 100 per mensem for the maintenance of the wife and daughter was passed against the respondent on 13th November 1937. The petitioner now asks for revision of that order.

The petitioner says that NEWSAM J. misinterpreted the section and should have held that the District Magistrate had power to pass an order directing the respondent to pay Rs. 100 per mensem for the maintenance of the petitioner and Rs. 100 for the maintenance of the daughter. We consider that this contention is well founded. Section 488(1) of the Code of Criminal Procedure reads as follows:

"If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such

(1) (1925) I.L.R. 49 Mad. 891.

(2) (1933) 37 C.W.N. 655.

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Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

It will be observed that the word "or" is used. Power is given to make an order for the maintenance of the wife "or such child". Therefore an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the section which says that if an application is made on behalf of the wife an application shall not lie on behalf of the child. The application now before us can be treated as an application for an order in favour of the petitioner and also for an order in favour of the daughter.

In *Kent v. Kent*(1) DEVADOSS J. rightly pointed out that to contend that when a woman makes an application for herself and for her children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number, is opposed to the clear wording of the section, and added :

"If the petitioner's construction of the section is correct it would amount to this; if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and the legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain."

In *Tulsi Das Burman v. Sm. Saraju Dei Devi* (2) PANCKRIDGE and PATTERSON JJ. quoted with approval the decision of DEVADOSS J. and refused to follow a previous unreported decision of

(1) (1925) I.L.R. 49 Mad. 891.

(2) (1933) 37 C.W.N. 655.

JACK J. to a contrary effect. In *Palmerino v. Palmerino*(1) a Bench of the Bombay High Court did interpret the section in the way it was interpreted by NEWSAM J. but this was an *ex parte* application, and it was not fully argued.

We have no hesitation in accepting the decision of DEVADOSS J. as being correct. I may mention that the learned Public Prosecutor who appears on behalf of the Crown supports the application for revision of the District Magistrate's order.

For the reasons indicated, the application will be allowed and the order of the Magistrate will be varied by directing the respondent to pay Rs. 100 per mensem for the maintenance of the petitioner and Rs. 100 per mensem for the maintenance of the child. The case will be remitted to the District Magistrate in order that he may pass all necessary orders under the Maintenance Orders Enforcement Act, 1921.

v.v.c.

(1) (1926) 28 Bom. L.R. 1299.

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LEACH C.J.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan
Nair, Mr. Justice Varadachariar, Mr. Justice
Lakshmana Rao and Mr. Justice Stodart.

1938,
January 17.

BADEMIAN SAHEB AND ANOTHER (PETITIONER AND NIL),
PETITIONERS,

v.

P. M. JANKAN SAHEB (RESPONDENT), RESPONDENT.*

Civil Rules of Practice—Civil Procedure Code of 1882—Rules made under, but not re-enacted and published in accordance with procedure prescribed in Part X of the Code of 1908—Validity of—Code of Civil Procedure (Act V of 1908), sec. 157—Effect of.

The Civil Rules of Practice made under the Civil Procedure Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Civil Procedure Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules of the First Schedule of the latter Code.

Re The District Munsif of Tiruvallur(1) overruled.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Dharmapuri dated 10th February 1934 and passed in Interlocutory Application No. 71 of 1934 in Original Suit No. 117 of 1933.

This petition originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH :—

The order of the learned District Munsif is in accordance with Rules 114 to 120 of the Civil Rules of Practice but it is contended by Mr. C. S. Swaminathan that the said rules are

* Civil Revision Petition No. 1192 of 1934.
(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

ultra vires as being in conflict with Order XX, rule 17, Civil Procedure Code, and as not having been framed in the manner and by the authority prescribed by the new Code for making valid new rules and for altering existing rules. When a question arose with reference to Rules 179 and 180 of the previous Rules of Practice, SADASIVA AYYAR J. in *Visvanadhan Chetty v. Arunachelam Chetti*(1) took the view that they were *ultra vires* under similar circumstances. As the question involved in this case affects the practice to be followed in the whole Presidency, I think it is desirable that this matter should be disposed of by a Bench. I accordingly refer this case to a Bench.

Pursuant to the aforesaid order of reference the petition came on for hearing before BEASLEY C.J. and VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The question raised in this revision petition relates to the validity of certain Civil Rules of Practice made under the Code of Civil Procedure, 1882, but not re-enacted in accordance with the procedure laid down in Chapter X of the Code of 1908, and which are inconsistent with the rules in the First Schedule of the latter Code. The relevant provision on this matter is section 157 of the Code of 1908 in and by which the rules framed under the Code of 1882, "so far as they are consistent with this Code (1908), have the same force and effect as if they had been made under this Code and by the authority empowered thereby in such behalf". In *Re The District Munsif of Tiruvallur*(2) a Full Bench had to consider this question. The particular matter for consideration before them was whether the rules made by the Local Government under section 269 of the Code of 1882, though inconsistent with Order XXI, rule 43, of the Code of 1908, had any legal effect. They were of the opinion that the said rules not being inconsistent with the Code, as distinguished from the Orders in the First Schedule to the Code, were in force. The learned Judges seem to interpret "the Code" in section 157 as meaning "the

(1) (1920) I.L.R. 44 Mad. 100, 110 (F.B.).
(2) (1911) I.L.R. 37 Mad. 17 (F.B.).

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body of the Code". It is desirable to point out that "Code" has been defined in section 2 as including rules; and section 121 enacts "that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of this Part" (Part X). The Legislature, when it desires to draw a distinction between the body of the Code and the rules in the First Schedule expressly makes mention of the "body of the Code". (See sections 121 and 128.) In the Full Bench decision there is no discussion of the provisions of the new Code here adverted to by us, and the learned Chief Justice who delivered the leading judgment observed that the point was not free from doubt. Since this decision, whenever the question came up for decision, learned Judges who had to deal with it expressed a contrary view. In *Visvanadhan Chetty v. Arunachalam Chetti*(1) SADASIVA AYYAR J. observed that Rules 179 and 180 of the Civil Rules of Practice which were found inconsistent with the rules of the First Schedule were *ultra vires* "as not having been framed in the manner and by the authority prescribed by the new Code for the making of valid new rules and for altering existing rules". These have been since re-enacted in accordance with the procedure prescribed by the new Code. In *Dhanaraju v. Balakissendas Motilal*(2) TIRUVENKATACHARIAR J. held that Rule 184 of the Civil Rules of Practice was *ultra vires* as being inconsistent with Order XXI, rule 53, Civil Procedure Code. We may here mention that in *Venkataswami v. Venkataramana Rao*(3) a Division Bench (MADHAVAN NAIR and CORNISH JJ.) was of the opinion that Rule 184 would be *ultra vires* but for section 51 of the Code. In a recent decision reported as *Murugappa Chettiar v. Ramasami Chettiar*(4) VENKATASUBBA RAO J. held that Rule 199 of the Civil Rules of Practice, to the extent to which it is opposed to and inconsistent with the provisions of the First Schedule, cannot take effect. He was of the opinion that *Re The District Munsif of Tiruvallur*(5) did not lay down any general rule. It seems doubtful if *Re The District Munsif of Tiruvallur*(5) can be distinguished on this ground. As the matter is one of considerable importance, affecting as it does the practice in the Presidency, and we feel doubt as to the

(1) (1920) I.L.R. 44 Mad. 100, 110 (F.B.).
(2) (1929) I.L.R. 52 Mad. 563 (F.B.).

(4) (1935) 42 L.W. 564.

(5) (1934) I.L.R. 58 Mad. 285.

(5) (1911) I.L.R. 37 Mad. 17 (F.B.).

correctness of the decision in *Re The District Munsif of Tiruvallur*(1) we refer for the decision of a Full Bench the following question :—

Are the Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 and inconsistent with any of the rules of the First Schedule of the latter Code valid and have they any legal effect?

Pursuant to the aforesaid order of reference the petition came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

C. S. Swaminadhan for petitioners.—The petitioners filed a suit for the dissolution of a partnership and the taking of accounts. A preliminary decree was passed and a commissioner was appointed to take the accounts. At that stage the petitioners requested that the commissioner should inquire into certain transactions which were suppressed by the other side. This procedure is permitted by Order XX, rule 17, Civil Procedure Code. Rules 114 to 121 of the Civil Rules of Practice which deal with partnership suits do not permit of such a course being followed. Those rules were made under the Civil Procedure Code of 1882. According to section 157 of the present Code, rules framed under the old Code have the same force and effect as if they had been framed under the new Code provided they are consistent with the new Code. The word "Code" as defined in section 2 (1), Civil Procedure Code, includes rules. [Section 2 (16) of the Civil Procedure Code was also referred to.] Section 121, Civil Procedure Code, says that "the rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part". The other sections in that Part state how the rules may be annulled or altered. Rules 114 to 121 of the Civil Rules of Practice being inconsistent with Order XX, rule 17, Civil Procedure Code, are *ultra vires* and invalid. *Re The District Munsif of Tiruvallur*(1) was wrongly decided. [*Murugappa Chettiar v. Ramasami Chettiar*(2), *Venkataswami*

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

(2) (1935) 42 L.W. 564.

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v. Venkataramana Rao(1) and Dhanaraju v. Balakissendas Motilal(2) were referred to.]

N. C. Vijayaraghavachari for respondent.—Rules 114 to 121 of the Civil Rules of Practice were made under section 562 of the old Code. By section 157 of the new Code, the rules framed under the old Code continue to be in force if they are consistent with the new Code. The word "Code" refers to the body of the Code and not to the rules in the First Schedule of the Civil Procedure Code; *Re The District Munsif of Tiruvallur*(3).

[THE CHIEF JUSTICE.—In that case the Judges obviously overlooked section 2 (1), Civil Procedure Code.]

Cur. adv. vult.

LEACH C.J.—The OPINION of the Court was delivered by LEACH C.J.—The petitioner filed a suit in the Court of the District Munsif of Dharmapuri for the taking of accounts of a partnership. A preliminary decree was passed on 9th October 1933 and the District Munsif appointed a commissioner to take the accounts. The plaintiff contained no allegation of irregularity or fraud, but during the taking of the accounts the petitioner wished to urge that certain transactions had been suppressed by the respondent and consequently asked that these matters should be inquired into. On objection being raised to this course, the petitioner applied to the Court for an order directing the commissioner to inquire into the alleged irregularities. By an order dated 10th February 1934 the District Munsif held that it was beyond the province of the commissioner or the Court to embark on an inquiry into these allegations. He considered that it was then too late. The petitioner had had an opportunity of inspecting

(1) (1934) I.L.R. 58 Mad. 285. (2) (1929) I.L.R. 52 Mad. 563 (F.B.).
(3) (1911) I.L.R. 37 Mad. 17 (F.B.).

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the accounts and as no objection had been raised before the passing of the preliminary decree the petitioner must be deemed to have waived all objections. The petitioner thereupon applied to this Court for revision of the order. The matter came before BEASLEY C.J. and VENKATARAMANA RAO J. on 8th February 1937. Feeling some doubt as to the correctness of the decision of the Full Bench of this Court in *Re The District Munsif of Tiruvallur*(1) the following question was referred to a Full Bench of five Judges:—

"Are the Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 and inconsistent with any of the rules of the First Schedule of the latter Code valid and have they any legal effect?"
The Court as now constituted is called upon to give the answer.

The Civil Rules of Practice relating to suits for the dissolution of partnership and the taking of accounts are inconsistent with Order XX, rule 17, of the Code of Civil Procedure and it is this fact which has given rise to the question now under discussion. The Civil Rules of Practice require questions of irregularity or fraud to be raised and determined before the case is remitted to the commissioner for the taking of the accounts. Order XX, rule 17, of the Code of Civil Procedure, however, states that the Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken and in particular may direct that in taking the account the books of account in which

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

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the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised. Therefore the Code allows questions of irregularity and fraud to be raised before the commissioner if the Court considers that this should be done. It is to be observed that the Civil Rules of Practice were framed under the Code of 1882 which did not contemplate a preliminary decree in a partnership suit.

In order to answer the question referred it is necessary to examine certain provisions of the Code of 1908. Section 2 (1) makes it clear that the "Code" includes the rules in the First Schedule. Therefore Order XX, rule 17, is as much a part of the Code as the sections forming the body of the Act. Section 121 states that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X, which comprises sections 121 to 131. Under section 122 High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may, from time to time, after previous publication, make rules regulating their own procedure, and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule. Section 123 gives power to constitute a Rule Committee of the High Court and states how the Committee shall be composed. Section 124 requires the Committee to report to the High Court on any proposal to annul, alter or add to

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the rules in the First Schedule or to make new rules and states that before making any rules under section 122 the High Court shall take such report into consideration. Section 126 says that the rules made under Part X shall be subject to the previous approval of the authority prescribed by the proviso to section 107 of the Government of India Act, 1915. So far as this Court is concerned the authority is the Local Government. Section 127 provides that the rules so made and approved shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Section 157 stipulates that the rules made under the Code of 1882 shall, so far as they are consistent with the Code of 1908, have the same force and effect as if they had been made under the new Code, but such rules must not be inconsistent with the new Code. If they are inconsistent the old rules cease to have validity. When the Code of 1908 was enacted the Civil Rules of Practice then in force were not re-enacted and published in accordance with the provisions of Part X. No steps were taken under this Part and the validity of the present rules therefore depends entirely on the provisions of section 157. As that section limits the validity of the old rules to such rules as are consistent with the present Code, it follows that rules which insist on questions of irregularity and fraud being

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decided before the preliminary decree is passed in a partnership suit are invalid.

As I have indicated, this reference has been necessitated as the result of the decision in *Re The District Munsif of Tiruvallur*(1). That case was decided by WHITE C. J., MUNRO and SANKARAN NAIR JJ. The question there was whether the rules made by Government under section 269 of the Code of 1882 remained in force until rules were framed by the High Court under the new Code, though they might be inconsistent with Order XXI, rule 43, of the new Code. The Court held that they did remain in force; and the reasoning given can be gathered from the following passage in the judgment of the learned CHIEF JUSTICE at page 20 of the report:

"There is nothing in the Code of 1908, as distinguished from the Orders in the First Schedule to the Code, which is inconsistent with the rules issued under section 269, though there is an inconsistency between the rules and Order XXI, rule 43. But the High Court has power to alter the rules in the First Schedule. This being so, I do not think it follows that, because the rules made under the old section are inconsistent with the rules in the schedule they are not consistent with this Code within the meaning of section 157.

"The point is not free from doubt, but until rules are made by the High Court, I think the rules made by Government under section 269 of the old Code are in force.

"Section 157 is an enabling, not a repealing section. The rules have never been expressly repealed and I do not think we are bound to hold they are implicitly repealed by virtue of the words 'so far as they are consistent with this Code,' which occur in section 157."

The learned Judges obviously overlooked the fact that by virtue of section 2 (1) the rules in the First Schedule of the Code of 1908 are as much a

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

part of the Code as the sections themselves and it follows that if there is inconsistency between the old rules and the rules of the new Code the old rules must go.

It is not necessary to refer in detail to the other cases mentioned in the order of reference. They have been sufficiently dealt with there. It is quite clear that *Re The District Munsif of Tiruvallur*(1) was wrongly decided and must be overruled. We accordingly answer the question referred in this way: The Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules of the First Schedule of the latter Code.

[The civil revision petition came on for final hearing before the CHIEF JUSTICE and LAKSHMANA RAO J. after the expression of the aforesaid opinion of the Full Bench when the application for revision was allowed and the case remitted to the District Munsif to be dealt with in the light of the judgment of the Full Bench in the case.]

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APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.

1937,
December 16.

MANIKKAM CHETTIAR (RESPONDENT-PLAINTIFF),
PETITIONER,

v.

THE INCOME-TAX OFFICER, MADURA SOUTH, MADURA,
AND ANOTHER (PETITIONER AND DEFENDANT), RESPONDENTS.*

Crown debt—Priority in respect of—Crown's right of—Enforcement of right by application under sec. 151, Civil Procedure Code (Act V of 1908)—Permissibility—Income-tax—Arrears of—Sale proceeds realised at sale of property of assessee in execution of decree obtained against him by a private party—Application by Income-tax Officer under sec. 151 of Code for payment of income-tax arrears out of—Maintainability of—Indian Income-tax Act (XI of 1922), sec. 46—Effect of.

The petitioner obtained a money decree against one G and in execution thereof attached and brought to sale some movable properties of G. Income-tax due by G being in arrear, the Income-tax Officer applied to the executing Court under section 151 of the Code of Civil Procedure for an order directing the payment out to him from the sale proceeds when the sale took place of the amount due by G for arrears of income-tax. The execution sale was held in due course but only realised a sum less than that due for arrears of income-tax. After reserving the amount required for the costs of execution the executing Court ordered the balance to be paid out to the Income-tax Officer.

Held by the Full Bench that section 46 of the Indian Income-tax Act of 1922 was no bar to the application made by the Income-tax Officer and that the executing Court had power to order the payment out of the amount due to Government on mere application.

* Civil Revision Petition No. 1238 of 1935.

If the Crown is entitled to prior payment over all unsecured creditors, there is no reason why the Crown should not be entitled to apply to the Court for an order directing its debt to be paid out of monies in Court belonging to the debtor without having to file a suit. It must no doubt be a debt which is not disputed or is indisputable. The Crown is entitled to priority in respect of arrears of income-tax due to it and the demand of the Income-tax Officer is not open to question.

The petitioner was not in the position of a secured creditor by reason of his having attached the properties.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Madura Town dated 2nd May 1935 and made in Miscellaneous Petition No. 523 of 1935 in Execution Petition No. 1482 of 1934 in Small Cause Suit No. 2116 of 1934.

The petition originally came on for hearing before VARADACHARIAR J. when his Lordship made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Mr. Balasubramania Ayyar raised two questions before me in support of this revision petition. On one of them I feel little doubt; but the other point is one of some importance and, notwithstanding the reliance placed on behalf of the Government on the decisions in *Deputy Commissioner of Police v. Vedantam*(1) and *Soniram Ramesh v. Mary Pinto*(2), I think that it should be considered by a Division Bench or even by a Full Bench if the Chief Justice so directs.

This revision petition arises out of an application made by the Income-tax Officer of Madura South to the District Munsif of Madura Town, purporting to be under section 151, Civil Procedure Code, and praying that out of some monies in

(1) (1935) I.L.R. 59 Mad. 428. (2) (1933) I.L.R. 11 Ran. 467.

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the custody of that Court in the course of the execution of a decree obtained by the present petitioner against the assessee, the arrears of income-tax due by the assessee might be paid in the first instance. Two questions were raised before the lower Court on behalf of the present petitioner, viz., (i) whether the Government's claim was entitled to priority and (ii) whether, as a matter of procedure, the petition by the Income-tax Officer to the Civil Court was sustainable. On both those points the lower Court held against the present petitioner and directed payment to the Government in the first instance. Hence this revision petition by the decree-holder.

So far as the priority of the Government's claim is concerned, I see no reason to differ from the view taken by the lower Court. Mr. Balasubramania Ayyar relied on an expression of doubt in *Ramachandra v. Pitchaikanni*(1) as to the applicability in this country of the English doctrine relating to the priority of Crown debts; but I think the weight of authority in favour of the recognition of that priority even in this country is so strong that this expression of doubt cannot help the petitioner to any material degree; cf. *Deputy Commissioner of Police v. Vedantam*(2), *Varadachari v. Secretary of State for India*(3), *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(4), *Soniram Rameshur v. Mary Pinto*(5) and the provisions in the Insolvency Acts relating to the priority of Crown debts.

It is on the question of procedure that I have felt some difficulty. Some of the cases above referred to arose out of applications on behalf of the Government to recover court-fees payable to Government in pauper suits. There is no difficulty in supporting the maintainability of the petition by Government in that class of cases, because the Civil Procedure Code treats the Government as a decree-holder to the extent of the court-fee payable and the ordinary procedure under the Code is available for the enforcement of that claim. In *Soniram Rameshur v. Mary Pinto*(5) the petition related to the recovery of income-tax, and in that sense the case is directly in point; but though the learned Judge gave a ruling

(1) (1884) I.L.R. 7 Mad. 434.

(3) (1935) I.L.R. 59 Mad. 872.

(5) (1933) I.L.R. 11 Ban. 467.

(2) (1935) I.L.R. 59 Mad. 428.

(4) (1906) I.L.R. 33 Cal. 1040.

in favour of the maintainability of the petition, he also states that the application was not opposed on behalf of the respondents and that they consented to the payment. I am therefore unable to treat that decision as concluding the point. In *Deputy Commissioner of Police v. Vedantam*(1) CORNISH J. was dealing with a claim for arrears of motor tax; and, relying upon *In re Henley & Co.*(2) and on the decision in *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(3), the learned Judge held that an application like the present must be treated as maintainable. *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(3) is not strictly analogous, because it related to a claim for court-fee payable to Government in respect of which, as already observed, Government is in the position of a decree-holder. The proposition that the declaration of a first charge on the subject-matter of the suit does not preclude the Government from enforcing its claim as a decree-holder in other ways does not throw much light upon the question now raised before me. *In re Henley & Co.*(2) no doubt recognised the right of the Crown to proceed otherwise than in the manner pointed out by the Income-tax Act; but, in that case, the application was made in the course of liquidation proceedings and in liquidation proceedings, an application would be the proper form. The Indian Income-tax Act of 1922 makes detailed provisions in section 46 for the recovery of income-tax. Certain powers are given to the Collector and certain powers are given to the Income-tax Officer. I make no further reference to the provision relating to the Collector's powers because no application has been made in the present case by the Collector and the Act does not expect him to make an application but to exercise certain powers of his own. The Income-tax Officer is authorized under certain conditions to adopt the procedure available for the collection of arrears of municipal tax or local rate. Provision is also made in sub-clause 5 for a requisition to persons paying salaries to assesseees. It is a matter requiring consideration whether, in view of these detailed provisions having been made by the statute itself for the recovery of assessment, it is permissible to recognise in addition an application to the ordinary Civil Court which must *prima facie* be regarded as dealing only with the rights of litigants in the ordinary Civil Court. It may be that arrears of income-tax

(1) (1935) I.L.R. 59 Mad. 428.

(3) (1906) I.L.R. 33 Cal. 1040.

(2) (1878) 9 Ch. D. 469.

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can be made the subject-matter of a regular suit as a Crown debt; but whether an application under section 151, Civil Procedure Code, or under any general principle of law was at all contemplated by the Income-tax Act or by the provisions of the Civil Procedure Code is a matter about which I entertain grave doubts, notwithstanding the respectful attention that I have given to the cases to which I have already referred. It is this point that I should like to be heard and decided authoritatively by a Bench subject to the order of the Chief Justice. The decision in Civil Miscellaneous Petition No. 2088 of 1938 affords me no guidance because there was in that case a distraint order issued by the Tahsildar under the provisions of the Revenue Recovery Act.

Pursuant to the aforesaid order of reference the petition came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE:

K. Balasubramania Ayyar for Watrap S. Subramania Ayyar for petitioner.—The Crown really asks for two prerogatives in the present case: (i) priority and (ii) a special procedure for enforcing that priority. *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(1) and other cases are relevant to the first point. They do not consider, and are not authority as regards, the second. Government must proceed by way of suit to enforce its right of priority and cannot enforce its right by an application under section 151, Civil Procedure Code. Ordinarily no debt can be enforced before a decree is obtained for it. Where property is seized in execution of a decree, that property cannot be got at by the Crown by means of a simple application. It must obtain a decree for its debt and then enforce the decree. Priority does not mean that the provisions of the Civil Procedure Code can be disregarded. Order XXI, rule 64, of the Code says that the Court shall pay to the party entitled to the money under the decree and the party entitled is the decree-holder. The Court has no option left to it. The prerogative of the Crown has been held not to apply to cases where execution is finished. If the money is paid to the decree-holder, then the Crown has no remedy even as regards its prerogative

(1) (1906) I.L.R. 33 Cal. 1040.

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right of priority. The Civil Procedure Code has to be applied even to the Crown in the absence of express provisions to the contrary. When the Crown seeks to avail itself of the ordinary remedies under the Civil Procedure Code, it is bound by the provisions of the Code just like a subject.

[VARADACHARIAR J.—The real question is whether a specific disabling provision or a specific enabling provision is necessary. The language of clause 3 of section 73 of the Civil Procedure Code rather shows that a specific enabling provision is not necessary.]

There are other provisions in the Code showing that they apply to the Crown also.

[VARADACHARIAR J.—Those are cases in which the Crown comes as a suitor. In such cases it will no doubt be bound by the provisions of the Code. But does the Code compel the Crown to come as a suitor to enforce its right of priority?] If the Crown was entitled to enforce its right of priority regardless of the provisions of the Code, then a provision like that in section 73 (3) would not be necessary.

[VARADACHARIAR J.—Section 73 is also a case where the Crown comes as a suitor.]

Cases relating to court-fees payable to Government in pauper suits are distinguishable, because the Civil Procedure Code treats the Government as a decree-holder to the extent of the court-fee payable and the fee payable to it has been made a first charge. Therefore an attaching decree-holder will be postponed. The Indian Income-tax Act of 1922 has in section 46 made detailed provisions for the recovery of income-tax. In view of these detailed provisions it is not permissible to recognise in addition an application to the ordinary Civil Court for the recovery of the tax. Income-tax is different from land revenue because in the case of income-tax the Crown cannot take the property of the assessee free from existing incumbrances. In *Soniram Rameshur v. Mary Pinto*(1) there was no contest and the point was not argued. Attachment having taken place, the petitioner must be treated as being in the position of a secured creditor. The Full Bench decision in *Kristnasawmy Mudaliar v. Official Assignee of Madras*(2) must be held to have been overruled by the decision

(1) (1933) I.L.R. 11 Ran. 467.

(2) (1903) I.L.R. 26 Mad. 673 (F.B.).

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of the Judicial Committee in *Anantapadmanabhaswami v. Official Receiver, Secunderabad*(1).

N. Srinivasa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for first respondent.—The Crown's right of priority is not confined to decree debts alone. The right of priority can be recognised by the Court even where an application is made. [The words "or otherwise" in Order XXI, rule 52, of the Civil Procedure Code were relied upon.] The present case can be held to come under that rule or under section 151 of the Code. *Soniram Rameshur v. Mary Pinto*(2) was followed in *Secretary of State v. Ma Nyein Me*(3).

JUDGMENT.

LEACH C.J.

LEACH C.J.—The petitioner obtained a money decree against one Govinda Rao and in execution thereof attached certain movable properties belonging to the judgment-debtor and brought them to sale. Govinda Rao under an order of assessment dated 28th August 1934 was required to pay a sum of Rs. 301-13-0 by way of income-tax. He did not comply with the notice of demand for payment and on 12th November 1934 a penalty of Rs. 10 was imposed by the Income-tax Officer because of the default, thus increasing the total amount due by the assessee to Rs. 311-13-0. Before the sale, the Income-tax Officer filed an application in Court asking for an order directing the payment out to him from the sale proceeds when the sale took place of the amount due to Government by Govinda Rao. The sale in execution was in due course carried out, but only realised Rs. 227-9-0. After reserving the amount required for the costs of execution the District Munsif ordered the balance to be paid out to the Income-tax Officer. The question which we are called

(1) (1933) I.L.R. 56 Mad. 405 (P.C.).

(2) (1933) I.L.R. 11 Ran. 467.

(3) A.I.R. 1937 Ran. 380.

upon to decide is whether the Court had power to order the payment out of monies due to Government on mere application.

I had occasion to consider this question in the case of *Soniram Rameshur v. Mary Pinto*(1) when sitting as a Judge of the Rangoon High Court, and, following the decision of SALE J. in *Gayanoda Bala Dassee v. Butto Kristo Bairagee*(2), held that inasmuch as the Crown has priority over unsecured creditors in the payment of debts the Court can, on application and without a formal attachment being issued, order the payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. The District Munsif referred to this decision in his order. The order which I passed in that case was passed by consent, and the only arguments were those addressed to the Court on behalf of the Crown, but the question has been fully argued before us to-day and I see no reason for changing the opinion there expressed.

It has been suggested that inasmuch as section 46 of the Indian Income-tax Act provides modes for the recovery of arrears of income-tax the Crown is not entitled to adopt any different method. Sub-section 2 states that the Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from the assessee the amount specified as if it were an arrear of land revenue. Without prejudice to any powers of the Collector in this behalf he shall for the purpose of recovering the

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(1) (1933) I.L.R. 11 Ran. 467.

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amount have in respect of the attachment and sale of debts due to the assessee the powers which under the Code of Civil Procedure a Civil Court has in respect of attachment and sale of debts due to a judgment-debtor for the purpose of the recovery of an amount due under a decree. By sub-section 3 it is provided that in any area in respect of which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process. Under sub-section 5 if any assessee is in receipt of income chargeable under the head "Salaries" the Income-tax Officer may require the employer to deduct from his salary what is due by way of income-tax. This section, however, does not profess to be exhaustive and it cannot without express words to that effect take away from the Crown the right of enforcing payment by any other method open to it. Therefore I do not regard section 46 as imposing a bar to an application of the nature of the one we are now concerned with.

The learned Advocate for the petitioner then contends that as a private person cannot enforce payment without first obtaining a decree the Crown is in the same position. The argument is that a private person is governed by the provisions of the Code of Civil Procedure and as there is nothing in the Code which places the Crown in a different position the procedure there contemplated must be followed. I am unable to

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agree. This argument ignores the special position of the Crown, the special circumstances and the Court's inherent powers. It cannot be denied that the Crown has the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India. If the Crown is entitled, as it is, to prior payment over all unsecured creditors—the position of secured creditors does not arise—I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of monies in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is indisputable. In this case the debt represents money due to the Crown under the Income-tax Act and the demand of the Income-tax Officer is not open to question.

What would be the effect if the Crown were not able to apply to the Court for the withdrawal of the money in a case like this? According to the argument it would mean that the Crown would have to file a suit against the debtor and the opposing creditor and then obtain an interim injunction preventing the money from being withdrawn from Court pending the decision of the suit. When the suit came on for hearing the Court would be bound to decree it. Therefore, there would be, not only a great waste of the time of the parties and of the Court, but the opposing creditor would run the danger of being mulcted in costs.

The Court must pay money in its hands out to the person entitled to it. If the Court were asked to pay out money to A with the certain knowledge that the money belonged to B it would

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naturally decline to do so and would make sure that B got it. Here, the Crown is entitled to the money in Court—there is no question about this—and asks the Court to pay it out. The right to payment being indisputable justice requires that it should be paid out to the Crown and formal application for payment has been made. It seems to me that both right and convenience demand that the Court should exercise its inherent power.

At one stage the learned Advocate for the petitioner suggested that the attachment having taken place the petitioner was in the position of a secured creditor. This argument is not open to him in view of the decision of a Full Bench of this Court in *Kristnasawmy Mudaliar v. Official Assignee of Madras* (1). He did suggest that this decision had been overruled by the Judicial Committee in *Anantapadmanabhaswami v. Official Receiver, Secunderabad* (2) but it is clear from a perusal of the report that their Lordships there refused to go into the question and reserved their decision for a future occasion. Consequently we have got to accept the decision in *Kristnasawmy Mudaliar v. Official Assignee of Madras* (1) as stating the law correctly and the petitioner is not in the position of a secured creditor.

The learned Advocate for the petitioner has also argued that unless there is some statute which expressly authorises a petition of this nature the petition cannot be maintained. I have in effect already dealt with this question and it follows from what I have said that I do not consider that a special Act of the Legislature is

(1) (1903) I.L.R. 26 Mad. 673 (F.B.). (2) (1933) I.L.R. 56 Mad. 405 (P.C.).

required to enable the Crown to apply to the Court for payment out of money to which it has an undoubted right.

In the case of *Deputy Commissioner of Police v. Vedantam* (1) CORNISH J. took the same view. There, money was due to the Crown as arrears of tax under the Madras Motor Vehicles Taxation Act. The learned Judge also relied on the judgment of SALE J. in *Gayanoda Bala Dassee v. Butto Kristo Bairagee* (2).

For these reasons I am of the opinion that the District Munsif came to the correct conclusion and his order should not be disturbed. The petition will be dismissed with costs.

VARADACHARIAR J.—My doubts have been indicated in the order of reference. I am not able to say that they have been wholly dispelled. They are, however, not serious enough to warrant my dissenting from the conclusion which my Lord and my learned brother have reached on what is after all a question of procedure; even when making the reference, I felt no doubt as to the right of the Crown to priority. I may add that the balance of convenience certainly seems to be in favour of the view indicated in the judgment just delivered. I, therefore, agree with the order dismissing the petition with costs.

MOCKETT J.—I agree with my Lord the CHIEF JUSTICE. It must be remembered that the Court holds the money for the purpose of paying it to the person entitled to it, and in this Presidency, so long as the decision in *Kristnasawmy Mudaliar v. Official Assignee of Madras* (3) is law, as it

(1) (1935) I.L.R. 59 Mad. 428.
(2) (1906) I.L.R. 33 Cal. 1040. (3) (1903) I.L.R. 26 Mad. 673 (F.B.).

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undoubtedly still is, there is no difficulty with regard to third parties claiming prior rights by way of attachment. The position being so, this case does not seem to present any difficulty. As a matter of expediency it is obvious that the course adopted here is the better one. The alternative seems to be this, as has been pointed out by my Lord the CHIEF JUSTICE: a suit is filed with regard to a matter which the defendant cannot contest and the only result is that there is delay and unnecessary expenditure for the parties. What happens under the present procedure? Here is this money lying in Court for the purpose of being paid out to the person who is entitled to receive it. The Crown goes to the Court and says, "Here is a debt which is due to me about which there can be no dispute." I consider that under those circumstances the Court can rightly invoke its power under section 151 of the Code of Civil Procedure in making the payment to the person entitled to it. CORNISH J. in the case to which my Lord has referred, *Deputy Commissioner of Police v. Vedantam*(1), draws attention to a decision from which I have derived assistance, *In re Henley & Co.*(2). In that case, a Bench consisting of JAMES, BRETT and COTTON L.JJ. emphasised that the fact that a remedy is given by a statute for the recovery of a debt due to the Crown in no way takes away the right of the Crown to invoke other methods if it thinks fit.

I agree that the decision of the Court below is right and that this petition should be dismissed with costs.

A.B.V.

(1) (1935) I.L.R. 59 Mad. 428.

(2) (1878) 9 Ch. D. 469.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Lakshmana Rao.

AMIRTHAVALLIAMMAL (MINOR) BY HER NEXT FRIEND
T. A. ARUMUGAHAM PILLAI AND TWO OTHERS (NIL AND
RESPONDENTS 2 AND 3), APPELLANTS,

1938,
January .

v.

SIRONMANI AMMAL AND THREE OTHERS (PETITIONER—FIRST
RESPONDENT AND NIL), RESPONDENTS.*

*Guardians and Wards Act (VIII of 1890), sec. 7—Minor—
Existence of testamentary guardian—Appointment of
guardian under section—Absence of power of Court—Sec.
12—Temporary custody of minor under—Power of Court—
Principles governing the exercise of—Indian Succession Act
(XXXIX of 1925), sec. 213 (1)—Relevancy of, to proceed-
ings for appointment of guardian—Will unprobated—
Procedure to be adopted.*

In a case where a Hindu father had appointed testamentary guardian for his minor sons and died, his widow (the mother of the minor) filed a petition under the Guardians and Wards Act, praying that she be declared the natural guardian of the minor. Probate proceedings were also pending.

Held: When there is a testamentary guardian the Court has no power under section 7 of the Guardians and Wards Act to appoint another person to be the guardian or give another person the custody of the minor (unless it be temporary custody under section 12 of the Act) until the testamentary guardian has been removed from his office. If the Court feels any doubt as to the validity of the will, the proper course for the Court seized of the guardianship proceedings would be to give some person temporary custody of the minor, if it considers it necessary in the interests of the minor so to do, until probate proceedings are terminated.

* Original Side Appeal No. 39 of 1937.

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APPEAL against the order of GENTLE J. dated 29th April 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 53 of 1937.

K. Krishnaswami Ayyangar for *V. S. Rangachari* for first appellant.

N. K. Mohanarangam Pillai for first respondent.

V. Radhakrishnayya and *C. Madhavaroya Mudaliar* for third and fourth respondents (transposed as second and third appellants).

Second respondent was unrepresented.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of an application filed under the Guardians and Wards Act by the first respondent on the Original Side of this Court. The first respondent is the mother of the first appellant who was born on 30th October 1922. The first appellant's father was one C. Manicka Mudaliar. He died on 19th January 1936, having left a will dated 22nd January 1935, under which he appointed the second and third appellants guardians of the first appellant. The second respondent in the appeal is the senior widow of the testator. The testator, his wives and his children all lived together in the family house, 2/49, Acharappan Street, George Town, Madras. The second and third appellants who are his nephews also lived in the same house with their families. After the death of the testator it would appear that the two widows did not get on well together and the first respondent left the family house in August 1936. She filed the petition out of which this appeal arises on 23rd February 1937. In it the first respondent asked

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that she be declared the natural guardian of the first appellant and her two minor sons, Govindarajulu and Madhava Rao, born respectively on 22nd October 1925 and 29th January 1929. When the first respondent left the house the first appellant remained with her step-mother. The first respondent took her sons away when she left the family house. The petition is really concerned with the guardianship of the first appellant. The first respondent alleges in paragraph 18 of her petition that the second and third appellants are not fit and proper persons to be in charge of a minor unmarried girl and in paragraph 22 she alleges that the girl is living in an atmosphere not conducive to her moral welfare. There is no evidence tendered in support of these allegations. It is not suggested in what way the second and third appellants are unfit to be guardians and it was not stated why the atmosphere of the family house where she lived for fifteen years is not conducive to her moral welfare. The first respondent did not ask for the removal of the second and third appellants from their positions as testamentary guardians. She merely wishes the Court to declare that she is entitled to the custody of the girl and asks the Court to give her custody.

On 29th April 1937 GENTLE J. who heard the application passed an order declaring that the first respondent was entitled to the custody of her three minor children. He added that this order was to be without prejudice to the rights of the second and third appellants under the will of the deceased father. The appeal is against this order. The appeal was filed by the first appellant alone, but subsequently an application was made by the

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second and third appellants, who were then respondents, to be transposed as appellants, and this application was ordered by us.

Section 7 (1) of the Guardians and Wards Act provides that where the Court is satisfied that it is for the welfare of a minor that an order should be made (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly. Sub-section 2 says that an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. Sub-section 3 then provides that, where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian so appointed or declared have ceased under the provisions of this Act. Therefore, where there is a testamentary guardian the Court has no power to appoint another person to be the guardian or give another person the custody of the minor (unless it be temporary custody under section 12 of the Act) until the testamentary guardian has been removed from his office. In passing the order which he did the learned Judge overlooked the provisions of this section. It is common ground that a Hindu father has the absolute right of appointing by will the guardian of his minor child and the will, so far as the appointment of the guardian is concerned, speaks from the date of death. It is true that under section 213 (1) of the Indian Succession Act no right as executor or legatee can be established in any Court of Justice,

unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed. The exception which is contained in sub-section 2 does not apply to wills of Hindus resident in Presidency-towns.

In *Sayad Shahu v. Hapija Begam*(1) a Bench of the Bombay High Court held that, where a person claims that he has been appointed guardian of a minor under a will, the Court has no power to appoint any one else guardian under section 7 of the Guardians and Wards Act until it has been ascertained that there is in fact no valid will. In *Sarala Sundari Debi v. Hazari Dasi Debi*(2) a Bench of the Calcutta High Court, consisting of JENKINS C.J. and WOODROFFE J., held that the fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but the Court cannot say that it will refuse to take notice of the will. In the course of the judgment the Court observed:

"In our opinion the Judge had jurisdiction and was bound to consider that there was a will although probate had not been granted; and that appears to us to be the result of several authorities: *Sayad Shahu v. Hapija Begam*(1), *Chinnasami v. Hariharabadra*(3) and *Pathan Alikhan Badlukhan v. Bai Panibai*(4). The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the will."

In the case before us an application had been filed on the Original Side of this Court for the

(1) (1892) I.L.R. 17 Bom. 560.
(3) (1893) I.L.R. 16 Mad. 380.

(2) (1915) I.L.R. 42 Cal. 953.
(4) (1894) I.L.R. 19 Bom. 832.

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grant of probate of the will of the testator and was then pending. If the learned Judge had felt any doubt as to the validity of the will, the proper course would have been to have given some person, the mother or the step-mother or the testamentary guardians, temporary custody of the minor, if he considered it was necessary in the interests of the minor so to do, and postpone the hearing of the application until probate had been granted. We consider that in declaring the mother to be entitled to the custody of the minor the learned Judge erred and his order must be set aside.

The second and third appellants as testamentary guardians of the minor will have custody of the first appellant and will be entitled to remain in custody until the minor becomes of age, unless the Court removes them in the meantime. The minor has appeared before us and we have questioned her. She appears to be very intelligent and expressed her desire to remain with her step-mother and the second and third appellants.

The appeal will accordingly be allowed. The appellants will be entitled to one set of costs which will come out of the estate.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Horwill.

S. H. BADSHA SAHIB & Co. (THIRTY-SIXTH DEFENDANT),
APPELLANT,

1937,
October 6.

v.

THALIYIL VEETAH LAKSHMI KUTTY KOVILAMMA
AND NINETEEN OTHERS (PLAINTIFFS 1 TO 4 AND DEFENDANTS
1 TO 12, 42 AND NIL), RESPONDENTS.*

*Malabar Compensation for Tenants Improvements Act, Madras
(I of 1900)—Tenant of buildings—Benefit of the Act, if
extended to.*

In a suit by a lessor against a lessee of a shop for the recovery of the same and for arrears of rent, the latter put forward a claim under the Malabar Compensation for Tenants Improvements Act (I of 1900) for improvements alleged to have been effected by him.

Held that the benefit conferred upon tenants by the Act cannot be extended to tenants of buildings.

Chathukutty v. Kunhappu(1), approved.

Paredath Chori George v. Thithi Umma(2), *Avaru v. Asi Bai*(3) and *Pathumma Umma v. A. Mohideen*(4) considered.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Original Suit No. 35 of 1932.

K. Kuttikrishna Menon for C. Unnikanda Menon and *K. Kunhikrishnan Nair* for appellant.

P. Govinda Menon and *T. N. Ravivarman Tirumalpad* for respondents one to four.

Other respondents were unrepresented.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—There was a mortgage

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*Appeal No. 367 of 1933.

(1) (1927) I.L.R. 50 Mad. 813.

(3) (1931) I.L.R. 55 Mad. 151.

(2) (1930) 60 M.L.J. 214.

(4) A.I.R. 1928 Mad. 929.

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granted on 1st July 1923 by the first defendant and his deceased brother in favour of plaintiffs 1 to 3 and another, which comprised twenty-seven items. The transaction, we understand, was one of simple mortgage in respect of twenty-three out of them, and, in regard to the remaining four items, what was created was a usufructuary mortgage which was to subsist for nine years. On the same date the aforesaid four items were taken back by the mortgagors on lease for a period of five years. This suit has been brought to recover the items comprised in the lease with arrears of rent. The appellant before us is the thirty-sixth defendant, claiming under an alleged lease from the mortgagors, who complains that the lower Court has wrongly disallowed his claim to improvements.

Turning first to the pleadings, it is noticeable that in the written statement filed by the appellant no such claim was made. There it is stated that he lent large sums to the mortgagors, who further caused him to expend monies for improving or altering the property, that it was found upon a settlement with them, that Rs. 3,000 was due to him and that provision was made for its repayment in the rental agreement executed by the first defendant in his favour on 16th May 1931. Then he goes on to describe how by means of some kind of adjustment spread over six years, the period of the lease, the full amount was to be paid back to him. It is impossible to read into this written statement a claim for improvements.

Then, at the trial no serious attempt seems to have been made to adduce evidence on the question of improvements. Indeed, it has not

even been proved that the thirty-sixth defendant was a lessee for six years or that he was in possession even previous to the date of the mortgage as suggested. Neither the original lease deed nor the rental agreement of 1931 was produced or filed. Apart from these matters, there is an objection which in our opinion is fatal to his claim. In the written statement it is alleged (there is no reason why he should not be held bound by his own admission) that the lease was in respect of a shop and not, as now suggested, a shop and a paramba.

On the footing then that what was leased to the thirty-sixth defendant was a shop pure and simple, the question arises whether he can claim the benefit conferred upon tenants by The Malabar Compensation for Tenants Improvements Act (I of 1900). The word "tenant" is defined as including a person, who, as lessee, etc., "of land is in possession thereof". Here is a clear indication that the Legislature did not intend that buildings or houses or shops should come within the purview of the Act, and the argument is fanciful that, because a building must necessarily stand upon land, therefore, it comes within the scope of the Act. The expression in the Act must receive its natural meaning and we are not prepared to hold that the benefit conferred by it extends to tenants of buildings. In *Chathukutty v. Kunhappu*(1), a judgment of JACKSON J., this view has been taken, and with that we respectfully agree. It was held that, whereas the Act applies to agricultural holdings and kudiyruppus (vacant sites available for buildings), it does not apply to houses or shops. In subsequent decisions this

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case has been referred to, but never dissented from. In *Pathumma Umma v. A. Mohideen*(1) the facts are these. What was "entrusted" to the defendants was a hut, but the new house which they built covered a considerably larger area than the site of the hut. REILLY J. held that, even if the defendants were tenants of the hut, they were not tenants of the area outside the site of the hut, and from this, it followed that the new house did not constitute a tenant's improvement. But SRINIVASA AYYANGAR J. bases his decision expressly on the ground, following the case just cited, that the lease was of a building. The suggestion that REILLY J. in this case casts a doubt on the correctness of *Chathukutty v. Kunhappu*(2) is not well-founded. Nor had it been called in question in either of the two later decisions, *Paredath Chori George v. Thithi Umma*(3) or *Avaru v. Asi Bai*(4), to which our attention has been called, although in the former case there are observations to the effect that it was unnecessary to express any opinion on the question whether the Act applies to leases of buildings or shops. Now turning to the actual decisions in these two cases: in *Paredath Chori George v. Thithi Umma*(3) "what was let was a compound or paramba or kudiyruppu" (see page 216) and it was held that the lessee was entitled to compensation in respect of the house which he constructed on the vacant site; in *Avaru v. Asi Bai*(4) "the appellant obtained the property, which was a vacant site, on lease for erecting a house for residential purposes" (page 252) and he

(1) A.I.R. 1928 Mad. 929.
(3) (1930) 60 M.L.J. 214.

(2) (1927) I.L.R. 50 Mad. 813.
(4) (1931) I.L.R. 55 Mad. 151.

was held entitled to the value of the house which he built. The present case differs from them and resembles *Chathukutty v. Kunhappu*(1) where, as here, the lease was of a building, which case, we may note, has been followed without discussion by a Bench of this Court (WALLACE and TIRUVENKATACHARIAR JJ.) in Letters Patent Appeals Nos. 17 to 22 of 1925. This lends support to our view of the section.

In the result, the appeal fails and is dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

[ON A DIFFERENCE OF OPINION BETWEEN BURN AND
ABDUR RAHMAN JJ.]

SUNDARARAJULU NAIDU AND TWO OTHERS
(DEFENDANTS 5 TO 7), APPELLANTS,

v.

B. PAPIAH NAIDU (PLAINTIFF), RESPONDENT.*

Grant—Crown—Heritable grant providing for a succession of limited interests, each grantee taking the estate for life—Competency of Crown to make—Crown Grants Act (XV of 1895)—Applicability and effect of—Grant by East India Company, if and when amounts to such heritable grant—Construction of grant—Heir of grantee—Execution of money decree against—Sale in—Sale of corpus of property granted—Sale of judgment-debtor's right to enjoy rents and profits of property for his life—Permissibility—Receiver—Appointment of, to work out rights of decree-holder—Proper order, if and when.

By a deed of grant dated 31st August 1802 a village was granted on shrotriem tenure to a poligar by Lord Clive on

(1) (1927) I.L.R. 50 Mad. 813.
* Appeals Against Orders Nos. 101 of 1935 and 220 of 1936.

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behalf of the East India Company. The object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office. Paragraph 2 of the deed stated that the grant was made in pursuance of the policy enunciated by the then Government of abolishing all emoluments granted in support of the police establishments. Paragraph 3 described the nature of the interest conferred on the grantee and his heirs thus: "You are entitled to collect those Russooms and Marahs at the rate entered in the Dowle of Fasli 1210 and to appropriate the amount to your own use." Paragraph 4 stated that the grant was to the grantee and his heirs. Paragraph 5 ran thus: "In confirming to you and your heirs as Shrotriem the village of Eroongaud Cottah" (the village granted) "you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Honourable Company." At the time of the Inam Settlement it was proposed to enfranchise the inam but that was not done.

The appellants were the heirs of the original grantee. The respondent obtained a decree against them on foot of a promissory note executed by the first appellant (the father of appellants 2 and 3), the fourth appellant and the father, since deceased, of appellants 5 to 7. In execution of that decree the question arose whether the village granted by the deed of 1802 could be attached and sold. BURN J., agreeing with the Court below, held that it could be attached and sold while ABDUR RAHMAN J. held that by reason of the prohibition against alienation in paragraph 5 of the deed of grant the corpus of the property could not be sold. On the appeal being referred to a third Judge in consequence of that difference of opinion,

held by VENKATARAMANA RAO J. (agreeing with ABDUR RAHMAN J.): The village itself could not be attached and sold. The only interest which the heirs of the original grantee had in the village was the right to enjoy its rents and profits during their lives and that right could be attached and sold. The only interest which could therefore be made available to the respondent for the satisfaction of his decree was the said interest of appellants 1 and 4 in the village, the father of appellants 5 to 7 having died. The appropriate order to be made in the circumstances of the case was however to direct the appointment of a receiver of the village for the purpose of

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collecting its rents and profits and paying the share of the net profits of appellants 1 and 4 in satisfaction of the respondent's decree and the share of the net profits appertaining to the deceased father of appellants 5 to 7 to their guardian.

The intention of the East India Company in conferring the said grant was not to make an absolute grant to the grantee but to confer on him a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who would succeed him. It is competent to the Crown to make such a heritable grant providing for a succession of limited interests, each grantee taking the estate for life, and the prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant.

APPEALS against the orders of the Court of the Subordinate Judge of Chingleput (i) dated 5th October 1934 and made in Miscellaneous Petition No. 444 of 1933 in Original Suit No. 63 of 1933 and (ii) dated 12th December 1935 and made in Execution Petition No. 150 of 1934 in Original Suit No. 63 of 1933.

The appeals originally came on for hearing before BURN and ABDUR RAHMAN JJ. who delivered the following

JUDGMENT:—

BURN J.—This (Civil Miscellaneous Appeal No. 220 of 1936) is an appeal from an order in execution passed by the learned Subordinate Judge of Chingleput.

The appellants were sued by the respondent in Original Suit No. 63 of 1933 on the file of the Subordinate Judge of Chingleput on foot of a promissory note executed by the first appellant, the fourth appellant and the father, since deceased, of appellants 5, 6 and 7. Appellants 2 and 3 are minor sons of the first. In execution of the decree granted to him in the suit, the respondent prayed for attachment and sale of the entire shrotriem rights of the defendants in the village of Irungattukottai. The learned Subordinate Judge overruled the objections of the defendants and ordered attachment and sale. This appeal is by the judgment-debtors.

Irungattukottai is a jagir granted by order of Lord Clive to the predecessors of the defendants in 1802. It was granted in order to compensate the "Moccassahdar" of that date for the loss to which he would be subjected by reason of the abolition of the previous system of policing the country. The compensation took the form of confirming the villages formerly held on mocassah tenure to the holders and their heirs on shrotriem tenure. The deed of grant concludes with the following stipulation: "You are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs the said village shall revert to the Honourable Company." At the time of the Inam Settlement it was proposed to enfranchise this inam, imposing one-eighth quit-rent, but this was not done, because the inamdar at the time was a minor, and the Collector of the district desired the Inam Commissioner to leave it on the existing tenure till the minor should attain his majority. This is therefore an unenfranchised inam.

The contention of the appellants is that the jagir cannot be sold in execution because of the prohibition against alienation in the original grant, the terms of which, as the learned Subordinate Judge observes, are still in force. The learned Advocate for the appellants relies on section 3 of the Crown Grants Act (XV of 1895), the terms of which are: "All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid, and take effect according to their tenor, any rule of law, statute, or enactment of the Legislature to the contrary notwithstanding." The respondent on the other hand relies on the terms of section 60 (1) of the Code of Civil Procedure, where it is enacted: "The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, . . . and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which he has a disposing power which he may exercise for his own benefit. . . ."

There can be no doubt about the fact that this jagir comes within the terms of section 60 of the Code of Civil Procedure. It is certainly saleable property over the profits of which the judgment-debtors have a disposing power which they may exercise for their own benefit. This is clear from the terms of the grant. Paragraph 3 of the Purwanah runs as follows: "The Governor-in-Council having commuted the

Russooms and Marahs cessable on the village of Eroongaud Cottah for money rent, you are entitled to collect those Russooms and Marahs at the rate entered in the Dowle of Fasli 1210 and to appropriate the amount to your own use." No words could have given the grantee a fuller power of disposing of the profits of the village for his own benefit than is given by these words. Hence it is clear that the village is saleable in execution under the terms of the Civil Procedure Code. The only question is whether the restriction on alienation, made valid by section 3 of the Crown Grants Act, renders it unsaleable.

This jagir is neither more nor less than a personal inam granted to a particular person as compensation in lieu of payment for services which had become unnecessary. The grantor undoubtedly intended it to descend to the heirs of the grantee, and it was probably with that object in view that the prohibition against alienation was inserted. I do not accept Mr. Narasimhaachari's argument that the prohibition was inserted solely in the Government's interest, i.e., in order to enable the Government to resume the inam if the condition should be violated. The penalty for violation of the condition is not stated in the deed of grant. I am even prepared to assume that the prohibition against alienation was made in the interest of the grantee and of his heirs. But the form of the prohibition itself shows that the prohibition, like the grant, was addressed to a particular person: "You are to understand that the said village is not alienable by gift, sale or otherwise. . . ." This is in terms a warning to the grantee that he could not alienate the village by gift, sale or otherwise. It needs no argument to show that the Governor-in-Council could not issue a declaration having the force of law to the effect that the village could never be transferred by the operation of law. In the *Murshidabad* case, *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Limited* (1), relied on by the learned Advocate for the appellants, the corpus of the property was made inalienable for ever, not by the terms of the indenture between the Secretary of State and the Nawab Bahadur of Murshidabad, but by the *Murshidabad Act* (XV of 1891). A special Act of the Legislature was necessary to effect that purpose. The *Murshidabad* case (1) gives no support to the appellants' claim.

(1) (1931) I.L.R. 59 Cal. 1 (P.C.).

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Mr. Viswanatha Sastri for the appellants quoted *Anjaneyalu v. Sri Venugopala Rice Mill, Ltd.*(1) but that case is quite irrelevant to the question now under discussion; the land in that case was burdened with the performance of a service of a public nature. Nor can the appellants get any assistance from the case of *Basangowda v. Irgowdatti*(2). That was a case of a dispute between a Hindu widow and a reversioner, in which it was held that the widow's interest in the property could not be attached in execution of a decree. There was a compromise between the widow and the reversioner by which the widow agreed to keep the property for her lifetime, and undertook not to sell or mortgage the same. It was held that the compromise was a family arrangement not amounting to a transfer of property within the meaning of section 10 of the Transfer of Property Act, and that the widow only retained an interest in the property restricted in its enjoyment to herself personally. FAWCETT J. held that the widow consequently "had no power of disposal of the usufructuary interest of the lands". Mr. Viswanatha Sastri has quoted also the case of *Rajindra Narain Singh v. Sundara Bibi*(3) but in that case the Privy Council held expressly that the judgment-debtor had no more than a right of maintenance, which was not attachable and saleable by reason of section 60 (1) (n) of the Code of Civil Procedure.

There is authority in this Court for the view that this jagir can be attached and sold in execution. This case is precisely similar to *Rama Rao v. Srinivasiah*(4) and the learned Subordinate Judge was in my opinion right in following the decision of CURGENVEN J. in that case. I would also refer to *Vaidyanatha Aiyar v. Yogambal Ammal*(5), where it was held that unenfranchised personal inams can be alienated in spite of the prohibition against alienation in the Inam Settlement Rules. Such an alienation, RAMESAM J. observes, is not void, though prohibited. It may be ignored by the Government, but, so long as the Government do not step in to enforce their rights, it is not open to question by others. The same principle, I think, is applicable in the present case. Whether the Government can or cannot resume the grant in case the jagir is sold away from the jagirdar's family is a

(1) (1922) I.L.R. 45 Mad. 620.

(2) (1922) I.L.R. 47 Bom. 597.

(3) (1925) I.L.R. 47 All. 385 (P.C.).

(4) (1932) 35 L.W. 395.

(5) (1926) I.L.R. 50 Mad. 441.

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question which has not arisen, and the learned Subordinate Judge has very properly not decided it; what is certain is that no party other than the Government can have any right to avoid the transfer which may follow on the Court sale.

Mr. Narasimhachari for the respondent contended that the judgment-debtors were estopped from alleging that the jagir could not be sold. This contention is based partly on the fact that some of the judgment-debtors signed a memorandum consenting to execution against their immovable properties, and partly on the fact that in 1884 the then jagirdar mortgaged with possession some portion of the jagir. I see no reason to discuss this matter at length, because (a) it is unnecessary to do so and (b) there are no pleadings in the case on which an issue of estoppel could have been framed.

In my opinion the decision of the learned Subordinate Judge is correct and this appeal should be dismissed with costs.

ABDUR RAHMAN J.—The village of Eroongaud Cottah in the Zamindari of Sriperambudur, now known as Irungattu-kottai, was granted under a Purwanah, dated 31st August 1802, by Lord Clive, then a Governor of Madras, to one Sreeram Singama Naick and was chargeable with an annual rent of fifty pagodas (amounting approximately to Rs. 175) including Russooms and Marahs. The following are the important conditions of this Purwanah:—

"Second.—In consequence of the foregoing resolution the Governor-in-Council confers on you the village of Eroongaud Cottah in the Zamindari of Sriperambudur on shrotriem tenure, chargeable with an annual rent of fifty pagodas including Russooms and Marahs.

Third.—The Governor-in-Council having commuted the Russooms and Marahs cessable on the village of Eroongaud Cottah for money rent, you are entitled to collect these Russooms and Marahs at the rate entered in the Dowle of Fasli 1210 and to appropriate the amount to your own use.

Fourth.—The Governor-in-Council confirms to you and your heirs the village of Eroongaud Cottah as shrotriem so long as you discharge the rent and are obedient to the laws and regulations, established or to be established, under the authority of the Governor-in-Council (torn) time being.

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Fifth.—In confirming to you and your heirs as shrotriem the village of Eroongaud Cottah you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Honourable Company."

In execution of a decree obtained by the respondent against the present holders of that village (presumably the heirs of the original grantee) the decree-holder applied for attachment of the jagir and desired the Court to sell it to satisfy his judgment debt. On behalf of the jagirdars, it was contended that the village was not saleable in execution. This contention did not find favour with the Subordinate Judge and the judgment-debtors have now come to us in appeal. In his arguments the learned Counsel for the appellants has mainly relied on section 60, Civil Procedure Code, and section 3 of the Crown Grants Act (XV of 1895) and contended that inasmuch as the judgment-debtors did not have a disposing power over the village covered by the grant, which they could exercise for their own benefit, and as the conditions in the grant have been declared to be valid under section 3 of the Crown Grants Act, the jagir falls within the exception to section 60, Civil Procedure Code, and could not be sold at the instance of the decree-holder.

During the course of arguments it was admitted, and indeed it is clear from the terms of the Purwanah itself granted by Lord Clive, that the aforesaid grant and other similar grants were nothing short of gifts granted by way of compensation to the police employees who held lands or villages under mocassah tenures to start with but which were subsequently changed by the Government into shrotriem tenures. It will be clear from the terms of this grant that the gift was not made for any services of a public nature, but was made purely out of a consideration to compensate the police employee for the loss which he was expected to suffer on account of a change in the nature of his tenure.

It has been contended on behalf of the decree-holder that, having regard to the fact that the grantee was only entitled to recover certain rents and land revenue, the land being in possession of persons holding permanent rights, the grant should be held to consist of the right of collecting rents and profits merely and not of the corpus of the village. It was also urged that paragraph 5 of the grant should be so construed

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as to have been inserted for the benefit of the Government alone. It was further argued that the judgment-debtors should not be allowed to take advantage of it as against their own creditors, particularly when they have been alienating the property by way of hypotheca themselves and consented even in the decree under execution, which was based on a compromise, that the decree-holder would have the liberty to proceed against immovables. A plea of estoppel was thus being raised for the first time in this Court. In any case it was alleged that the property which has now been attached does not fall within the exceptions of section 60, Civil Procedure Code, and is therefore saleable. It was also argued on behalf of the decree-holder that this provision in the grant was of a purely personal character and did not run with the land.

Having read the terms of the grant as a whole, I am of the opinion that the last contention of the decree-holder is not correct and the provisions contained in clauses 4 and 5 of the grant were not meant to be personal in character but were intended to run with the land. Having regard to the various clauses of the Purwanah, I would also repel the contention that the jagir consisted of rents and profits only or that the village did not form the subject-matter of the grant. The construction which has been attempted to be placed on them is incorrect. They are quite clear and admit of no doubt both as to their intention and meaning.

As to the plea of estoppel, even if it is permitted to be raised in this Court for the first time, there is no force in the decree-holder's contention. The compromise was entered into between the decree-holder in Original Suit No. 63 of 1933 and appellants 5 to 7 alone who were judgment-debtors in that case, while the decree was *ex parte* as against the other defendants. This means that appellants 1 to 4 did not agree to the terms of the compromise and, out of the defendants who did so, defendants 6 and 7 were minors. The attention of the Court does not appear to have been directed to the question whether a compromise of this nature was advantageous to the minors (defendants 6 and 7) and no leave appears to have been granted by the Subordinate Judge who passed an *ex parte* decree. This means that the salutary provisions contained in Order XXXII, rule 7, Civil Procedure Code, were not observed by the Court at the time when the compromise was being recorded. It may be contended that this decree was passed

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not on account of a compromise which was arrived at between the guardian for the minors and the plaintiff, but on account of the fact that the guardian *ad litem* had merely abandoned his defence and the sanction of the Court was not therefore requisite for the purpose. In view of the following term in the statement of Counsel for the parties, which is being relied upon by the decree-holder now, that the "plaintiff will have liberty to proceed against immovables in the meanwhile", the contention would have no force. Moreover, defendants 2 and 3 were also minors, and there is no mention of this fact in the order of the Court which passed the decree. In the circumstances, I do not think any question of estoppel really arises as against defendants 1 to 4 or 6 and 7. In my opinion no useful purpose would be served by going into this question even as regards the fifth defendant, as the question whether the village is attachable and saleable would have to be decided on its own merits, even if raised by one of the defendants. The second ground of estoppel which was pleaded on behalf of the decree-holder was based on the jagirdar's conduct in mortgaging a portion of the village with some one else in 1884 (Exhibit D) and in mortgaging a portion of this very village with possession with the decree-holder himself in 1921 (Exhibit B). No evidence has been led to show that the decree-holder did not know the real state of affairs, i.e., the terms of Lord Clive's grant, and was induced to act merely on the representations of the judgment-debtors. In the absence of any such evidence, which it was the decree-holder's duty to adduce, this ground of estoppel must also be decided against the decree-holder.

The next contention is as regards the right of the decree-holder to attach and sell the village. Under section 60, Civil Procedure Code, the property to be attached must be

- (i) saleable property belonging to the judgment-debtor or
- (ii) property over which or the profits of which he has a disposing power which he may exercise for his benefit.

The question therefore is, is the village saleable? Under the terms of the Sanad or Purwanah, the grantee and his heirs are restrained from alienating the village by "gift, sale or otherwise". That this restriction on alienation is valid and binding on the holder of the village for the time being cannot be doubted in view of section 3 of the Crown Grants Act. I need only refer to the decision of the Division Bench in

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Secretary of State for India v. Raja Parthasarathy Appa Rao(1), where a similar restriction on alienation in a grant by the East India Company was held to be valid. Once the said restriction is held to be valid, the village must be held to be property which is neither saleable nor one over which the judgment-debtor has any disposing power within the meaning of section 60, Civil Procedure Code. The Counsel for the respondent placed a great deal of reliance on *Rama Rao v. Srinivasiah*(2). But the ruling has no application to the facts of the present case. First of all, the terms of the grant under which the jagir was created in that case are not known. Moreover, it was admitted in that case that the jagir consisted of a grant of land revenue. In this case, as pointed out above, a reference to the Purwanah by Lord Clive points clearly to the conclusion that the corpus of the village was granted and that the grant was not that of land revenue merely. Basing his decision on the fact that the jagir consisted of a grant of land revenue, CUNNINGHAM J. held that the jagir—not being a pension—did not fall within the exceptions contained in section 60, Civil Procedure Code, and was saleable. The other authority relied upon by Mr. Narasimhachari, Counsel for the respondent, was *Vaidyanatha Aiyar v. Yogambal Ammal*(3). A reference to that authority would show that the question whether the property involved in that case was saleable or not did not arise in that case. There is no reference to section 60, Civil Procedure Code, in the whole of the judgment. The only two questions which arose in that case were firstly, whether, in view of section 4 of the Pensions Act, the suit was maintainable in Civil Courts and secondly, whether the devise by will to the widow contravened certain provisions of the Inam Rules of 11th October 1859. In this particular case, the Inam Rules passed in 1859 or their interpretation are not relevant, and I would therefore hold that this authority also has no application to the facts of the present case.

In view of what I have said above, I would hold that the condition imposed by Lord Clive on behalf of the East India Company in clause 5 was valid and binding, and was not inserted in the interest of the Government alone. I would therefore hold that the corpus of the property could not be sold.

(1) (1926) I.L.R. 49 Mad. 349. (2) (1932) 35 L.W. 395.
(3) (1926) I.L.R. 50 Mad. 441.

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But, under the terms of the grant, the right to enjoy the rents and profits during the time of their natural lives has been given to the grantee and his heirs and the judgment-debtors have a disposing power over the rents and profits of the village which they may exercise during their lifetime for their own benefit. Not having the power of disposal over the corpus of the property, they cannot be held to have any power to deal with its income beyond the period of their natural lives. Their Lordships of the Privy Council, while construing similar terms contained in the Murshidabad Act (XV of 1891), which was enacted only with the object of confirming and giving effect to an indenture between the Secretary of State for India and the then Nawab Bahadur of Murshidabad, arrived at the same conclusion; *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Limited*(1). Following the principles laid down in this case, I hold that although the corpus of the village now proposed to be sold is neither attachable nor saleable, yet its profits and income are so during the principal judgment-debtors' lifetime. The next question then is as to what order would be most appropriate in these circumstances. In another case which was brought to our notice by the Counsel for the appellants, *Rajindra Narain Singh v. Sundara Bibi*(2), the Judicial Committee of the Privy Council took the view that although the appellant's interest in the villages, being a right to future maintenance, was exempted under section 60 (1), Civil Procedure Code, from attachment and sale, yet a receiver could be appointed to realise the rents and profits with a direction to pay a sufficient and adequate sum for the maintenance of the appellant and his family and to apply the balance to the liquidation of the decree. It is true that the rents and profits of the village over which the judgment-debtors are held to have a disposing power could be sold for the period during which the judgment-debtors are alive. But the better relief in the circumstances of this case appears to be that a receiver be appointed in this case for the purpose of collecting the rents and profits of the village until such time as the debt is paid off or the judgment-debtors are alive.

For the reasons given above I would accept the appeal and order the appointment of a receiver of the village, now desired to be sold, with the object of collecting its rents and profits,

(1) (1931) I.L.R. 59 Cal. 1 (P.C.). (2) (1925) I.L.R. 47 All. 385 (P.C.).

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and direct that after defraying the cost of collection, the balance be paid to the decree-holder towards the satisfaction of his decree. In the event of the decree having been satisfied or in the event of the death of the principal judgment-debtors, appellants 1 and 4, whichever event happens earlier, the receiver will be removed by the Court and the corpus of the property covered by the Purwanah will be handed over to the judgment-debtors or their legal heirs as the case may be.

The appointment of a receiver is being left to the lower Court which is directed to appoint one after listening to the suggestions of the parties and their objections, if any.

In view of the fact that the appeal has partially succeeded, I would leave the parties to bear their own costs incurred by them in this and the lower Court.

As my learned brother takes a different view the appeal must be laid before a third Judge.

* * *

The appeals having been referred to a third Judge owing to the difference of opinion between BURN and ABDUR RAHMAN JJ., they came on for hearing before VENKATARAMANA RAO J.

ON THE REFERENCE :

A. V. Visvanatha Sastri for appellants.

C. Narasimhachari and M. E. Rajagopalachari for respondent.

Cur. adv. vult.

JUDGMENT.

This Civil Miscellaneous Appeal (No. 220 of 1936) has been referred to me in consequence of a difference of opinion between my learned brothers, BURN and ABDUR RAHMAN JJ. The point in controversy in the appeal is whether the plaintiff is entitled to attach and sell the village of Eroongaud Cottah in execution of the decree in Original Suit No. 63 of 1933 obtained against the defendants. The suit which resulted in the decree was laid on a promissory note executed by defendants 1 and 4

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and the father of defendants 5 to 7. Defendants 2 and 3 were impleaded in the suit as the sons of the first defendant. In execution of the said decree an application was made to attach the suit property under Order XXI, rule 54, and have the same sold under Order XXI, rule 66. The defendants preferred objections both to the attachment and sale on the ground that the property is inalienable and therefore not liable to be attached and sold. The said village was granted to one Sreeram Singama Naick, a poligar of the district of Tripassore, on 31st August 1802 by Lord Clive on behalf of the East India Company by a deed of grant bearing the said date. The object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office which was carried out in consequence of a policy enunciated by the then Government of abolishing all emoluments granted in support of the police establishments (*vide* clause 5 of the Permanent Settlement Regulation XXV of 1802). After stating in paragraph 2 that the grant was made to the grantee in pursuance of that policy, it proceeds to indicate the nature of the interest conferred on the grantee and his heirs, and in paragraph 3 the nature of the interest is described thus :

"You are entitled to collect those Russooms and Marahs at the rate entered in the Dowle of Fasli 1210 and to appropriate the amount to your own use."

In paragraph 4 it is distinctly stated that the grant was to the grantee and his heirs. Paragraph 5 is important and it runs thus :

"In confirming to you and your heirs as shrotriem the village of Eroongaude Cottah you are to understand that the

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said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Honourable Company."

The word "you" in the sentence "you are to understand" will, having regard to the context, include both Singama Naick and his heirs referred to in the previous passage. The confirmation of the grant to the grantee and his heirs is repeated in paragraph 5 so as to emphasize that the restriction on alienation is imposed on both the grantee and his heirs. It appears to me that the intention of the East India Company in conferring this grant was not to make an absolute grant to Singama Naick but to confer on him a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him. It cannot be doubted that it is competent to the Crown to make such a heritable grant providing for a succession of limited interests, each grantee taking the estate for life. In *Gulabdas Juggivandas v. The Collector of Surat* (1) a similar grant came up for consideration before their Lordships of the Privy Council. In that case, the grant was made by the East India Company in 1800 to one Najamooddin, who was the Commander-in-Chief of the forces of the Nawab, and was called the Buckshee. As the administration of the city of Surat was taken over by the East India Company, it was thought incumbent and proper that some suitable provision should be made for the said Buckshee and his descendants. In pursuance of this object they made a grant of a jagir to the said Najamooddin and his children. The grant clearly stated that Najamooddin with his children

(1) (1878) I.L.B. 3 Bom. 186 (P.C.).

or descendants should, after the deduction of the income of the jagir according to the particulars given at the foot of the sanad, receive from the Government a certain sum and the mehals which were provided as jagir were mentioned in the schedule to the sanad. In that case, one of the descendants, Moinooddin, executed a mortgage of some of the mehals and a suit was filed on the mortgage and a question arose what was the nature of the interest possessed by the said Moinooddin and whether he could bind his descendants or his co-heirs. The Collector who was then in possession of the property denied the right of the mortgagee to claim any payment of the income of the said property after the death of Moinooddin on the ground that he had only a life interest in the property. Their Lordships upheld the contention. After stating that it was the intention of the East India Company to make a permanent provision for the family of the said Buckshee, their Lordships observed thus :

"Their Lordships, having regard to the peculiar character of this grant from the Government under the circumstances which have been related, and with the object which it expresses, have come to the conclusion that the Court of Bombay was right in treating it as conferring upon the descendants of Najamooddin, who would be entitled under it, an estate for life and for life only."

In answer to an argument whether it is open to the East India Company to create such an estate, their Lordships made the following observation :

"Their Lordships may observe that they are not prepared to affirm that all the considerations applicable to grants from private persons apply to grants from the State."

In *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Limited*(1) a grant of a similar

(1) (1931) I.L.R. 59 Cal. 1 (P.C.).

description came up again for consideration before the Privy Council. The grantee in that case was the eldest son of the Nawab Nazim of Bengal, Bihar and Orissa. He agreed to relinquish this title with its appurtenant rights in consideration of his receiving the titles of Nawab Bahadur of Murshidabad and Amir-ul-omrah and also in consideration of provision being made for the maintenance of the said dignity. There was a contract entered into between the Government and the grantee which was evidenced by an indenture dated 12th March 1891. The Secretary of State on behalf of the Government covenanted for the due maintenance and support of the said titles to pay to the grantee and his lineal heirs male in perpetuity a particular sum and agreed that the immovable properties mentioned in the schedule to the indenture should be held and enjoyed by the grantee and such one among his lineal heirs male as may be successively entitled to hold the said titles in perpetuity with and subject to the incidents, powers, limitations and conditions as to inalienability and otherwise. The conditions as to inalienability ran thus :

"The said Nawab Bahadur shall not, nor shall any of his successors in the said titles, sell, mortgage, devise or alienate the said properties respectively or any of them otherwise than by lease or demise for a term not exceeding twenty-one years and under a rent without bonus or *selami*."

This indenture was later confirmed by an Act called the Murshidabad Act XV of 1891. Their Lordships held that the Act rendered the property inalienable and observed that the Nawab for the time being was only a limited owner with power to draw the rents in question during the period of his life. Though they held the property to be

inalienable, they observed that a receiver could be appointed to appropriate the rents and profits for discharging the debts of the creditors as the Nawab was given disposing power over the income. After referring to section 60 of the Civil Procedure Code, they remarked thus :

"While the Murshidabad Act renders the immovable properties, to which it relates, inalienable except to the limited extent permitted, it imposes no restriction on the enjoyment of the rents by the Nawab Bahadur for the time being. So long as he is entitled to draw the rents, he may dispose of them as he pleases. . . . The Nawab therefore has a disposing power over the income. Once this is established, no question of public policy is involved and their Lordships are unable to see that either the terms of the statute or the indenture are contravened by aiding the creditors of the appellant to effect payment out of his income of the debts which he has incurred."

It will be seen that this case is an authority for the view that it is open to the Crown to create successive life estates or limited interests and the prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. And by virtue of the limited nature of the grant, if the immovable property is such as it is not saleable, the rents and profits may be appropriated for the use of the creditors. My learned brother, BURN J., distinguished the case of *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Limited*(1) on the ground that a special Act of the Legislature was passed to effectuate the purpose intended by the Government and remarked thus :

"It needs no argument to show that the Governor-in-Council could not issue a declaration, having the force of law, to the effect that the village could never be transferred by the operation of law."

(1) (1931) I.L.R. 59 Cal. 1 (P.C.).

With great respect I am unable to agree with him in this view and the difficulty which he felt is sufficiently met by the decision of the Privy Council reported as *Sheo Singh v. Raghubans Kunwar*(1). That was a case in which the taluka of Mahewa was granted in 1859 to one Gajraj Singh and his heirs. On his death the property was inherited by his elder son, Girwar Singh, who was recognised by the Government as talukdar. In 1861 the Government proposed, in the case of any talukdar whose eldest son by custom succeeded him, to change the ordinary form of sanad for a sanad stating that primogeniture would be the line of inheritance. Girwar Singh was willing to have the sanad of the nature proposed granted to him and accordingly he received a sanad in 1861. A question arose after the death of the adopted son of Girwar Singh as to the succession to the said taluka. The contention advanced was that the Government having granted the estate in 1859 to Gajraj and his heirs nothing was left to grant to Girwar at a later date, but this objection their Lordships met by saying that it would not apply to a transaction by which Girwar, the person absolutely entitled by inheritance to everything that passed under the earlier grant, surrendered it in consideration of a re-grant of the same estate on new terms. On this a further contention was advanced that the Government had no power by an executive act to change the line of succession and the contention is thus put :

"It was suggested that though in the earlier troublous times many things were effectively done by Government as

(1) (1905) I.L.R. 27 All. 634 (P.C.).

acts of State, still, in or after 1861, no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law and the law in the present case would be the Hindu law."

Their Lordships met this contention by observing as follows :

"Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, Act No. XV of 1895 (The Crown Grants Act, 1895)."

Therefore this case is a distinct authority for the position that it is open to the Crown to create a heritable grant like the one in question, each grantee taking a life interest. Section 3 of the Crown Grants Act is clear on the point. In this case the grantee Singama Naick had only a life interest to enjoy the rents and profits and each of his successive heirs had the same tenure. The only interest which can be made available to the plaintiff for the satisfaction of his debt is the interest of defendants 1 and 4 in the property, the father of defendants 5 to 7 having died.

I shall now proceed to deal with some of the cases cited at the Bar in support of the contention raised by the respondent. Emphasis was laid on the decision in *Rama Rao v. Srinivasiah*(1) by CURGENVEN J. and the decision of RAMESAM J. in *Vaidyanatha Aiyar v. Yogambal Ammal*(2) both of which cases were referred to by my learned brother, BURN J., in his judgment. In the course of the judgment, CURGENVEN J. makes the following remarks :

"It can hardly be disputed that the jagir is the personal property of the jagirdar and accordingly there is nothing in the section (section 60, Civil Procedure Code) which

(1) (1932) 35 L.W. 395.

(2) (1926) I.L.R. 50 Mad. 441.

will render it exempt from being proceeded against under a decree."

The terms of the jagir are not given and if, as observed by him, the jagir is the personal property of the jagirdar, there can be no question that it is attachable and saleable. The learned Judge makes the following further observation on which much reliance is placed :

"Reference has then been made to the Crown Grants Act which provides by section 2 that the Transfer of Property Act shall not apply to grants from the Crown, including, I suppose, a jagir of this character. But that is not to say that the operation of the Civil Procedure Code is also rendered inapplicable."

With great respect to the learned Judge, I am not able to follow this observation. If under the terms of the grant the jagirdar takes only a limited interest and is incapable of alienating the property, it is not possible to understand how the operation of the Civil Procedure Code would be rendered inapplicable. The learned Judge omitted to notice section 3 which expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature which would take in section 60, Civil Procedure Code. As regards the decision in *Vaidyanatha Aiyar v. Yogambal Ammal*(1), in my opinion, it has no bearing on the facts of the present case. The question in that case was, what is the effect of the prohibition indicated under rule 5, clause 3, of the Inam Rules? RAMESAM J. observed that the object was only to protect the interests of the Government and the prohibition indicated therein can

(1) (1926) I.L.R. 50 Mad. 441.

only mean that as against the Government all alienations are inoperative; but it was not the intention of RAMESAM J. to lay down that where under the terms of a particular grant a limited interest is conferred on a grantee the property could still be alienated. As pointed out in *Venkatarama Ayyar v. Chandrasegara Ayyar* (1), it is open to the Government, in spite of the prohibition, to recognize the title of the alienee and SADASIVA AYYAR J. observed thus in that connection:

"The so-called prohibition is therefore not based on any grounds of public policy except the protection of the rights of the Government, and so long as such protection is carried out there is no reason to consider the prohibition as an absolute prohibition even if it has the force of law which is very doubtful."

It cannot be said that the prohibition against alienation under the grant in question was intended for the protection of the Government. It was made in pursuance of a policy of preserving intact the property in the family and of preventing its being lost by improvident alienations.

I am therefore of the opinion that the interest possessed by defendants 1 and 4 in the property is only the right to enjoy the rents and profits during their lives and they are attachable and saleable; but the proper order in such cases is that passed by my learned brother ABDUR RAHMAN J. I accordingly agree with him and hold that the appropriate order to be passed in this case is to direct the appointment of a receiver to be in possession and management of the property who will collect the rents and profits thereof and pay

(1) (1921) I.L.R. 44 Mad. 632, 665.

the share of the net profits of defendants 1 and 4 in satisfaction of the decree and the share of the net profits appertaining to the deceased father of defendants 5 to 7 to the guardian of defendants 5 to 7.

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ORIGINAL CIVIL.

Before Mr. Justice Wadsworth.

GANGAMMA ALIAS CHINNAKEMPAMMAL, PLAINTIFF,

1937,
October 21.

v.

CUDDAPAH KUPPAMMAL AND FOUR OTHERS, DEFENDANTS.*

Hindu law—Dancing girl—Devadasi—Adoption of daughters by, based on custom and not on religious benefit—Adoption without ceremonies—Validity of—Adoption by a unilateral act, without giving and taking—Validity of—Adoption of two daughters—Validity of—Adoption for purposes of prostitution—Invalidity of—Joint family composed of mother and daughter in that community—Coparcenary between—Non-existence of—Right of daughter to inherit her mother's property based on custom or contract and not on status—Non-existence of right by birth of daughters in that community.

In a suit by an alleged adopted daughter against her adoptive mother, who was a dancing girl by caste and profession, and others, claiming a share of immovable property, jewels and cash on the basis that she and her adoptive mother constituted a joint family possessed of property in which she was entitled to claim a share on partition,

held: (i) The practice of adoption amongst devadasis has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of this class to have a daughter to look after them in their old age and receive

* Civil Suit No. 407 of 1934.

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their property on their death. There is no text of Hindu law which recognizes the acquisition by birth by the daughter of a dancing girl of a right in the ancestral property of her mother. The right to a share can only be the creature of a custom or contract, express or implied, and not the result of status.

(ii) Though it is well established in Madras that an adopted daughter of a dancing girl of the devadasi community inherits to her adoptive mother, the property passing from mother to daughter, yet there is no such thing as a coparcenary strictly speaking between a mother and her daughter in the devadasi community.

Sudarsanam Maistri v. Narasimhulu Maistri(1) referred to. *Chalakonda Alasani v. Chalakonda Ratnachalam*(2), *Kamakshi v. Nagarathnam*(3) and *Kokilambal v. Sundarammal*(4) distinguished.

(iii) There is no legal objection to the adoption of two daughters by a dancing girl provided such a practice is sanctioned by the custom of the community.

(iv) The adoption of a daughter by a dancing girl for purposes of prostitution is invalid and would not create any status in the adoptee.

K. K. Sridharan for plaintiff.

T. G. Raghavachari for first defendant.

P. Srinivasa Ayyangar for second defendant.

N. K. Kumaraswami for third defendant.

S. P. Duraiswami for *S. Ramanujachari* and

K. C. Duraiswami for other defendants.

Cur. adv. vult.

JUDGMENT.

The plaintiff sues as the adopted daughter of the first defendant, who is a dancing girl by caste and profession, claiming a share in immovable property, jewels and cash on the basis that she and her adoptive mother constituted a joint

(1) (1901) I.L.R. 25 Mad. 149, 154.

(3) (1870) 5 M.H.C.R. 161.

(2) (1864) 2 M.H.C.R. 56.

(4) (1924) 21 L.W. 259.

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family possessed of property in which she is entitled to claim a share by partition. The plaint is drafted just as if it were an ordinary partition suit under the Hindu law, and there is even an allegation that the sale of one item of property to defendants 4 and 5 is not for family necessity but for immoral purposes and not binding on the plaintiff. Throughout the plaint it is assumed that the adopted daughter of a devadasi living jointly with her mother has a right to claim partition, the suit not being expressly based on any plea of special custom or contract to that effect. Defendants 2 and 3 are impleaded on the ground that they have joined in the sale deed in favour of the fourth defendant and because the first defendant alleged that the second defendant was a member of the joint family. The third defendant is the daughter of the second defendant and defendants 4 and 5 are stranger-purchasers of one item of property. The questions arising in this suit relate to the fact and validity of the plaintiff's adoption, the existence of a joint family, the right of the plaintiff by virtue of the adoption or by virtue of the existence of a joint family to claim partition, the contribution by the plaintiff of her earnings to the family funds, and the legality of a claim based on the contribution of moneys, presumably the result of immoral earnings. There are also the usual contentions regarding the alienation of a house to defendants 4 and 5. I will deal firstly with the question of fact.

The first defendant is an elderly woman who admittedly had practised the calling of a dancing girl in her youth. It is well established that she adopted the second defendant many years ago.

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The documents relating to the dedication of the second defendant are not available, but there is no doubt that she was dedicated to a temple by her adoptive mother. The first defendant in 1917 (Exhibit IV) applied to a Fund for a mortgage, giving a genealogical tree in which she shows the second defendant as her daughter. There was also a similar application in 1924 (Exhibit V), after the plaintiff had come to live with the first defendant, to which also she appended another genealogical tree showing the second defendant as a daughter and the third defendant as a grand-daughter and ignoring the plaintiff. The plaintiff herself was born a Vanniya. Her parents died in her infancy and she was in the custody of her brother-in-law, third witness for the plaintiff, Rangaswami Nayakar. There is considerable diversity of evidence as to how she came to live with the first defendant. It is common ground that she did join the first defendant when she was six or seven years old. She herself has no recollection of the alleged adoption. Her brother-in-law, the third witness for the plaintiff, states that he was a poor man and found difficulty in maintaining the plaintiff after her mother died, that Rajammal (the second witness for the defendant, the wife of the first defendant's brother and a native of Tirupporur where plaintiff's third witness lives) approached him on behalf of the first defendant and he agreed to give the plaintiff in adoption to the first defendant, that there was a feast to which the members of his community were invited and that on that occasion the first defendant and defendant's second witness came and took the plaintiff. He also states that the first defendant

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had previously approached the plaintiff's mother during her lifetime with a view to the adoption and that the latter had agreed to it.

I have no hesitation in finding that this story of the circumstances in which the plaintiff went to live with the first defendant is not the whole truth. The most significant fact is the existence of a document (Exhibit VIII), dated 29th December 1922, admittedly executed by the third witness for the plaintiff and his wife, which recites that the plaintiff has been given by them to one Chinnappa Nayakar, who is authorised to maintain the plaintiff and to arrange for her marriage after she attained puberty or dedicate her to a temple in accordance with custom. This Chinnappa Nayakar is dead. He is alleged to have been a relative of the third witness for the plaintiff and also a relative of the second witness for the defendant. This is difficult to believe, for the former is a Vanniya while the latter, though she married into the dancing girl caste, is by birth a Baliya. The latter herself says that she first saw the plaintiff in the house of this Chinnappa Nayakar who told her that the child had been left with him by the former owing to his poverty. According to the latter, the child wanted to go to Madras and she took her without any formal transfer of guardianship and the child lived for a while with the latter in the ground-floor of the house, the upper storey of which was occupied by the first defendant. There, she made friends with the first defendant's grand-daughter, the third defendant, a child of the same age, and gradually she came to live upstairs with the first defendant instead of downstairs with

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KUPPAMMAL. the latter. It seems to me that this evidence is probably much more true than the story of the former that he himself, in pursuance of the wishes of the plaintiff's mother, formally gave the child in adoption to the first defendant.

It is of course well settled that no particular ceremony is necessary for an adoption by a devadasi. There is therefore not the legal necessity for a giving and taking such as is required to constitute a valid adoption of a boy under the ordinary Hindu law. When dealing with the adoption of a girl by a devadasi all that need be proved is the fact of adoption by the adoptive mother, which may be by a unilateral act. We have good evidence that the plaintiff was taken into the family of the first defendant in her childhood and brought up along with the first defendant's grand-daughter. The genealogical tree in Exhibit V appears to indicate that up to 1924, at any rate, no formal decision had been made by the first defendant to adopt the plaintiff. The first defendant did, however, give to the plaintiff the sort of education which a woman of the dancing girl community ordinarily gives to a daughter. She was taught to dance and at a comparatively early age she gave performances in public. The only documentary evidence indicating an actual adoption is comprised in two documents connected with the dedication of the plaintiff to the temple as a dancing girl. This dedication of the plaintiff took place in 1931 and the documents concerned are a doctor's certificate dated 27th May 1931 in which the plaintiff is described as the daughter of the first defendant, aged 17, and a Magistrate's certificate dated

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KUPPAMMAL. 16th June 1931 in which the plaintiff is described as the daughter of the first defendant and is alleged to have stated that she is hereditarily connected with the devadasi community. According to the plaintiff these statements are based on information supplied by the first defendant to the officials concerned. According to the first defendant, the statements are based on information supplied by the plaintiff herself. It is admitted that the first defendant accompanied the plaintiff when these certificates were obtained and that she did dedicate the plaintiff to the temple of which the second witness for the plaintiff, Raghava Bhattachari, is the archaka and it is he who produces these documents. These facts, if they stood alone, would raise a strong presumption that the first defendant had actually adopted the plaintiff as her daughter; but there are other circumstances tending to rebut this presumption and to confirm the inference which arises from the genealogical trees appended to Exhibits IV and V. The plaintiff after her dedication was taken by the first defendant to Karaikudi. According to the first defendant and the second witness for the defendants this was merely a short visit connected with the illness of a relation but according to the plaintiff she was taken there in order that she might earn large sums by dancing and prostitution and she would say that she was there for nearly two years. Probably the truth lies between the two stories. The situation of Karaikudi in close proximity to the Chettinad provides great facilities for the profitable exercise of the plaintiff's profession and it seems to me probable that she did practise her trade there,

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though I am quite unable to believe her evidence that she earned Rs. 10,000 during this visit. She is probably exaggerating the duration of her visit and almost certainly she has grossly exaggerated the amount of her earnings.

[His Lordship discussed the evidence and proceeded:]

Every other circumstance in the case points to the conclusion that the plaintiff was an orphan girl not adopted but fostered and trained merely that she might be exploited as a prostitute and, in view of the palpably false nature of the evidence of the third witness for the plaintiff, which is the positive evidence of the act of adoption, I must hold that the story of adoption is untrue.

This finding is of itself sufficient to conclude the case, for it seems to me apparent that, unless the case is somehow based on a family relationship, it can be nothing more than a claim for an account of the profits of organised prostitution, which the Courts would not entertain. But it is desirable, in view of the possibility that the case may be taken further, that I should discuss the legal aspects of this case which have been argued very fully before me. For the purpose of this discussion I will assume that my finding regarding the adoption is erroneous and that the plaintiff was in fact the adopted daughter of the first defendant. Assuming so much, can the plaintiff claim a share in her mother's property merely on the ground that she and her mother were living jointly and that her earnings were handed over to her mother? There is in my opinion no reliable evidence that the plaintiff's earnings contributed

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substantially to the acquisition of the immovable properties in which a share is claimed; and, seeing that the plaintiff was allowed to remove all the jewels which she claimed as her own, it is not very likely that anything in which she has an interest was left in the possession of the first defendant, unless it can be said that the plaintiff has, whether by status, custom or contract, a right to claim a partition of the joint family property.

It is well established in Madras at any rate that the adopted daughter of a dancing girl of the devadasi community inherits to her adoptive mother, the property passing from mother to daughter. The plaintiff's claim, however, is based either on the existence of a coparcenary similar to that which the Hindu law recognises amongst men of ordinary castes, or at least on the existence of some custom or contract whereby the property of the family of these women is treated as if it were joint family property divisible amongst the members thereof. I may say at once that there is no specific pleading of any custom or contract. The plaintiff appears to proceed on the basis of the acquisition by the plaintiff of a status as an adopted daughter which gives her a right automatically to claim partition. There is, it is true, an averment that the plaintiff has contributed substantially to the acquisition of the properties which she claims, but the plaintiff does not proceed on the basis of a claim for either a return of her contributions or a share proportionate to those contributions. Essentially the claim is one based on the existence of a joint family in which the plaintiff has a share by her status as a member of that family.

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It seems to me doubtful whether such a thing as a coparcenary strictly speaking can be said to exist between mother and daughter in the devadasi community. The essence of a coparcenary consists in the acquisition of rights in property by birth, rights which are a creature of the law, based on the theory of religious benefit and incapable of being created by act of parties otherwise than by adoption; vide *Sudarsanam Maistri v. Narasimhulu Maistri*(1). Can it be said that the law has created a coparcenary between a mother and a daughter in the devadasi community? I do not think it can. Nor do I think it can be said that there is any custom having the force of law which has ever been recognised by the Courts as establishing the existence of a true coparcenary amongst the female members of this community. There are three reported cases which come near to the recognition of such a coparcenary. The first is a very old case, *Chalakonda Alasani v. Chalakonda Ratnachalam*(2). That was a case in which the plaintiff claimed the jewels, etc., in the possession of her daughter and grand-daughter on the ground that they were the result of joint earnings and that she, as the senior member of the joint family, had the right to hold those properties. The defence was that they were the self-acquisitions of the daughter and the grand-daughter. No other objection was raised and no claim for partition was considered. The lower Court held that these properties represented the gains of learning and were the self-acquisitions of the defendants, and on appeal, it was held that they

(1) (1901) I.L.R. 25 Mad. 149, 154.

(2) (1864) 2 M.H.C.R. 56.

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were joint properties and that the plaintiff, the senior member of the joint family, had the right to their custody. In this case it was assumed that the rules applicable in a Hindu coparcenary to the custody of the properties and the separate ownership of self-acquisitions, applied in the case of the female members of the devadasi caste living jointly. But there was no real consideration of the question whether such a female member acquires a right by birth or can claim during the lifetime of her mother a partition as against her. In *Kamakshi v. Nagarathnam*(1) the plaintiff sued to establish her right as a coparcener with her deceased mother's sister to a share in a hereditary dancing girl office. It was held that in this community a daughter must be regarded as a son and must take an estate of inheritance from her mother and that the first defendant did not as a coparcener acquire the right of succession to her deceased sister to the exclusion of the latter's daughter. Here again, there appears to have been no consideration of the question whether any true coparcenary exists in which a daughter acquires a right by birth. All that is decided is that, as between two sisters, the joint right of one does not pass on her death to the other but to the daughter of the deceased. Besides these two old cases, there is a modern case which appears to recognise the existence of a coparcenary between the female members of a dancing girl's family, viz., the decision of KUMARASWAMI SASTRI J. in *Kokilambal v. Sundarammal*(2). That was really a case in which the mother and daughters joined together in an attempt to defeat an alienee by

(1) (1870) 5 M.H.C.R. 161.

(2) (1924) 21 L.W. 259.

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asserting that the property alienated formed part of the joint family property, that the alienation was not binding on the joint family and that the property was liable to be partitioned. The learned Judge recognised the existence of joint family property as between the mother and daughters, held that the alienation was binding only in part and directed a partition. Referring to the old cases which I have just quoted, he holds it established that there can be a coparcenary of dancing girls with rights of survivorship but remarks that there is no case which goes to the length of saying that daughters of dancing girls acquire by birth an interest in the ancestral property. He leaves this question open and decides the case on the basis that the mother and daughter and grand-daughter were in fact living together as members of a joint family, pooling their earnings and meeting their expenses out of the joint funds and treating the property as coparcenary property, so that it became coparcenary property by conduct. With very great respect to this distinguished and learned Judge, it seems to me that in this decision the term "coparcenary" is used in a somewhat unprecise manner. If we restrict the term to its ordinary connotation of the relationship created by law, the basis of which is religious and the essence of which is the acquisition of an interest by a coparcener by birth or by adoption, I do not see how it can be said that any such thing as a coparcenary exists amongst the females of the dancing girl community. As has been observed by SADASIYA AYYAR J. in *Guddati Reddi Obala*

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v. *Ganapati Kandanna*(1), no spiritual benefit can accrue to a prostitute mother by the spiritual ministrations of her prostitute adopted daughter. It seems to me quite clear that the practice of adoption amongst devadasis has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of this class to have a daughter to look after them in their old age and receive their property on their death. There is, so far as I am aware, no text of Hindu law which recognises the acquisition by birth by the daughter of a dancing girl of a right in the ancestral property of her mother and it seems to me apparent that, if the joint ownership of the family property is to be spelt out of the conduct of the members of the family, no question of the acquisition of a right by birth can arise and that the right to a share must really be the creature of a contract, express or implied, and not the result of status. It might of course be argued that there is a universal and legally binding custom in the community that daughters should have a right to claim partition against their mother. But such a custom would have to be asserted and proved and certainly cannot be inferred by a mere analogy with the special rules of Hindu law, based on religion and on the texts, regarding coparcenary relationships amongst men. Actually, however, the decision of KUMARASWAMI SASTRI J. in the case referred to is not based on the assumption of any true coparcenary relationship between the mother and the daughters. It is expressly based on conduct from which can be implied a family arrangement

(1) (1912) 23 M.L.J. 493.

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that the property should be treated as if it were ordinary Hindu joint family property ; i.e., the decision is based on an implied contract, and I do not think it can be treated as an authority for the contention that any dancing girl living jointly with her mother can claim as against her mother a partition of the family property merely on the basis of their joint living and the absence of any indication of separation in food or status. I am fortified in this view by indications in other decisions. One of the cases quoted by KUMARASWAMI SASTRI J. himself is *Boologam v. Swornam*(1) in which it was held that property acquired by two dancing girls, sisters, from the earnings of prostitution was the self-acquired property of the two sisters which they held as co-owners and in which the other members of their family had no rights. I have examined the original judgment from which this appellate decision arises and I find that the trial Judge held that the property in question was in fact acquired out of the joint assets of the family but that there was no law or custom by which a dancing girl could compel partition of the family property. The reported appellate decision proceeds on a different finding of fact and it has not considered the question whether a right to demand partition exists. There is a Bombay case, *Mathura Naikin v. Esu Naikin*(2), in which it was held that the Madras view recognising the validity of an adoption by a prostitute could not be accepted in Bombay and it is remarked at page 572 that, even if a right of inheritance were recognised, that is distinct from a right to call for partition and that

(1) (1881) I.L.R. 4 Mad. 330.

(2) (1880) I.L.R. 4 Bom. 545.

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such a right could not be based on the analogy of the position of an ordinary daughter-heir, nor could it be based on the analogy of the position of an adopted son whose right accrues by the fact of adoption just as the right of a natural-born son accrues by birth. It seems to me that this reasoning is sound. The right to claim partition may be based on contract, or law, or on custom having the force of law. If it is based on contract, the contract must be asserted and proved, as it certainly has not been in the present case. If the right is a creature of the law, authority must be found for it either in the ancient texts or in the statutes or in the body of law expounded and affirmed in the reported decisions of the Indian Courts. I can find no such basis for the right as claimed by the plaintiff. If it is based on custom, here again there must be a specific plea of such a custom and evidence in support of it. The evidence must satisfy the usual requirements for the proof of a customary right ; it must be ancient, certain, notorious and continuous. There is no such averment and no such evidence in the present case. I find therefore that, even assuming that the plaintiff's adoption be good, no basis has been established for a right to claim partition as a member of the joint family.

I have already indicated that, in my opinion, no suit would lie for an account or a share in the profits of an immoral and illegal partnership. It seems to me unnecessary to go in detail into the further question whether the adoption of the plaintiff by the first defendant is itself an illegal adoption by virtue of which no claim could be preferred. There is no legal objection to the

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adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community as it appears to be in this case. On my findings of fact it must be taken as established that the plaintiff was taken when a minor into the first defendant's household in circumstances which justify the inference that she was taken with a view to being trained as a prostitute, i.e., the first defendant obtained possession of her in such circumstances as would constitute an offence under section 373 of the Indian Penal Code. Such an adoption, being prohibited by law, cannot give rise to a status which would form the basis of legal rights. As was observed by a Bench of this Court in *Kandaiya Pillai v. Chokkammal*(1), such an adoption is prohibited by law though the law recognises the possibility of adoption by a dancing girl when the purpose is not prostitution. But, as the learned Judges say, the adoption of a minor for the purpose of prostitution is not really an adoption at all; it is a mere use of certain forms which, when gone through by persons with an untainted purpose, would result in an adoption; as actually gone through, they result in nothing and affect the status of no one. On the basis of this reasoning, it would follow that, even if the first defendant had intended to adopt the plaintiff, it being shown that the adoption is one which offends against the law as laid down in section 373 of the Indian Penal Code, that adoption is invalid and confers no status upon the plaintiff, nor can there be any question of an estoppel against the provisions of a statute.

(1) (1920) 59 I.C. 214; 12 L.W. 7.

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Turning to the issues in the case, I must hold on the first issue that the adoption set out in the plaint is not true and, even if true, would not be valid; on the second issue that there is no joint family properly speaking and that the plaintiff has no claim to partition; on the third issue that there is no proof that any of the properties in which the plaintiff claims a share were acquired out of her earnings; and on the fourth issue, even if it were proved that the plaintiff's immoral earnings contributed to the acquisition of the properties claimed, that a suit based on such an immoral association would not lie. No decision seems necessary on the fifth issue. On issues 6, 7 and 8 I find that the plaintiff cannot question the alienation in favour of defendants 4 and 5. In the result, the suit is dismissed with costs, one set for defendants 1 and 2 and one set for defendants 4 and 5. The plaintiff will pay the court-fee due to Government.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE KANNEGANTI CHOWDARAYYA
(ACCUSED), APPELLANT.*

1938,
February 22.

*Indian Penal Code (XLV of 1860), sec. 361—Hindu boy—
Mother's custody from birth—Acquiescence by father—
Later, father enticing away the child—If an offence.*

A boy born of Hindu parents had been brought up by his mother and was in her keeping from the date of his birth. The

* Criminal Appeals Nos. 456 and 465 of 1937.

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father who was living separately did not object to the mother having the custody of the child. Some time later, the father, by deceitful means, took the child away from the mother and kept the boy with him. He was convicted of an offence under section 363, Indian Penal Code.

Held that the conviction of the father under section 363, Indian Penal Code, was wrong.

The parties being Hindus, the father was the lawful guardian whose rights of guardianship, until they were taken away by a decree of a competent Court or surrendered by himself, were paramount to those of any other person. The father having acquiesced in the retention by the mother of the custody of the child from the date of his birth for over three years and three months, the mother was a lawful guardian within the meaning of the explanation to section 361, Indian Penal Code, and the child was taken or enticed away out of her keeping. But the father being entitled to the lawful custody of the child, his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship by virtue of the exception to that section.

APPEALS against the sentences of the Court of Session of the Guntur Division in Case No. 22 of the Calendar for 1937.

S. Vepa, N. V. B. Sankara Rao and T. Krishna-murti for appellant.

Public Prosecutor (V. L. Ethiraj) for the Crown.
Cur. adv. vult.

JUDGMENT.

This is a case of an unusual kind. In fact I am informed that it is the first case of its kind. The appellant in Criminal Appeal No. 456 of 1937 was the first accused, and the appellant in Criminal Appeal No. 465 of 1937 was the second accused, in Sessions Case No. 22 of 1937 on the file of the learned Sessions Judge of Guntur. Along with them two Muhammadans were tried and the charges upon which they were put up for

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trial were that the first accused kidnapped a minor boy from lawful guardianship with intent that he should be murdered (section 364, Indian Penal Code). The second, third and fourth accused were charged with abetment of this offence. The learned Sessions Judge found the first accused guilty of an offence under section 363, Indian Penal Code, holding it not proved that the kidnapping was in order that the little boy might be murdered. The first accused has been sentenced to seven years' rigorous imprisonment. The second accused was convicted of abetment of the offence under section 363, Indian Penal Code, and sentenced to five years' rigorous imprisonment. The third and fourth accused were acquitted.

The remarkable feature of this case is that the first accused is the father of the boy, whom he is said to have kidnapped from the keeping of the boy's mother (P.W. 1). P.W. 1 and the first accused were married several years ago and according to P.W. 1 her husband deserted her. She filed a suit for maintenance and this was compromised on terms by which the first accused gave her some land to defray her costs and some additional land for her maintenance. This compromise took place on 19th July 1933, and in 1936 P.W. 1 put the decree in execution and got delivery of the lands. In the meanwhile in 1935 the first accused had filed a suit in the Court of the District Munsif, Guntur, to set aside the compromise entered into in July 1933, on the ground that it had been obtained by fraud. A copy of the plaint has been filed as Exhibit L and it shows that the first accused alleged that his marriage with P.W. 1 had never been consummated, that her child was

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illegitimate, and that she was actually pregnant as the result of adulterous intercourse at the time the compromise took place. The plaint was dated 22nd November 1935. In that it is alleged that P.W. 1's son was born on 2nd January 1934.

In these circumstances, it was alleged that on 11th April 1937 the first accused with the help of the other three kidnapped his own son from the guardianship of the little boy's mother. Learned Counsel for the appellants has argued that the evidence of P.Ws. 1 to 5, who speak to the kidnapping, ought not to be accepted. P.W. 1 is the mother of the child: P.W. 2 is a woman with whom P.W. 1 was lodging while she was in Guntur for the purposes of her litigation: P.W. 3 is another woman who was lodging in the same house: and P.Ws. 4 and 5 are boys, aged 13 and 11 respectively, who were employed in sweet-meat shops in Guntur. The boys described how the second accused picked up the child in front of their shops, took him down a side lane and handed him over to the first accused. These two boys picked out the first and second accused at an identification parade which was held on 12th April, and there is really no reason for rejecting their evidence. In addition to this there was a confession (Exhibit C) made by the second accused to the Taluk Magistrate, Guntur, on 17th April. The learned Sessions Judge discarded this confession on the ground that the Taluk Magistrate had not in spirit observed the proper precautions to ensure that the confession should be voluntary. Mr. Vepa who appears for the appellants contends that the learned Sessions Judge was right. The learned Public Prosecutor

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on the other hand contends that the learned Sessions Judge was wrong, and that there are no proper reasons for supposing the second accused's confession to have been anything but voluntary. I do not see any necessity to discuss this question at length, because I am satisfied, as the learned Sessions Judge was, that the other evidence in the case is sufficient to establish the fact.

The facts proved therefore are that the little boy (the son of the first accused and P.W. 1), who had been brought up by his mother from the date of his birth and who was in her keeping on 11th April 1937, was taken from her keeping by the second accused who handed him over to the first accused, and who must of course have been acting under instructions from the first accused. The first accused does not now deny the paternity of the child. He alleges that he was ill-advised when he filed his suit against his wife. He says that the plaint was not drafted on his own instructions but on the advice of his pleader's clerk. This is not of course true. The pleader was examined as P.W. 12 and he testified that the plaint (Exhibit L) was prepared in accordance with the instructions of the first accused. His evidence is no doubt true. The interesting question which arises is whether in these circumstances the first accused can be held guilty of an offence under section 363, Indian Penal Code. I am told that there is as yet no record of any case in which a father has been convicted of kidnapping his own child from the guardianship of the child's mother. I have therefore to decide the matter as well as I can without the assistance of any reported cases.

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There is no doubt of course that P.W. 1, the mother of the child, was on 11th April 1937 the lawful guardian of the child for the purposes of section 361, Indian Penal Code. The parties being Hindus, the father is *the* lawful guardian, whose rights of guardianship, until they are taken away by a decree of a competent Court or surrendered by himself, are paramount to those of any other person. The father having acquiesced in the retention by the mother of the custody of this child from the date of his birth for over three years and three months, the mother clearly comes within the meaning of the explanation to section 361, Indian Penal Code. It was observed by RANKIN C.J. in *Saharali Mahammad v. Kamizuddin Mahammad*(1):

"I do not doubt at all that the explanation to section 361 was intended to extend the meaning of the words 'lawful guardian' beyond their ordinary scope. It is extended to include any person lawfully entrusted with the care or custody of such minor or other person. I do not doubt either that, where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the definition given by the section will be satisfied. In such a case, there may be no definite transaction of entrustment, but the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship."

Therefore what we have proved in this case is that the child was in the keeping of his mother who was a lawful guardian within the meaning of section 361, Indian Penal Code, and that the child was taken or enticed away out of her keeping. Section 361 says that "whoever takes or entices . . . is said to kidnap" and there can be no doubt that the word "whoever" will include

(1) (1930) I.L.R. 58 Cal. 897.

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P.W. 1's husband. But this is not quite sufficient. The exception to section 361 states as follows:

"This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

Now, if a person who in good faith believes himself to be entitled to the lawful custody of a child cannot commit an offence under section 361, Indian Penal Code, it seems to follow *a fortiori* that a person, who is in fact the father of the child and therefore in law entitled to the lawful custody of the child, cannot come within the scope of section 361, Indian Penal Code. In this case it can be said on behalf of the first accused that he did not merely in good faith believe himself to be entitled to the lawful custody of his child, but he was beyond the possibility of any challenge entitled to the lawful custody of the child, and that therefore his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship.

I think this contention is correct. The learned Public Prosecutor has drawn my attention to the final words of the exception to section 361, Indian Penal Code,

"unless such act is committed for an immoral or unlawful purpose".

He points out that, according to the finding of the learned Sessions Judge, the first accused had a strong motive to get the child away from his mother in order to stifle any suit for partition on behalf of the child. The learned Public Prosecutor suggests that this is an immoral or unlawful purpose and invites my attention to the case

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reported as *Mahendranath Chakrabarti v. Emperor*(1). That was a case in which the father of an illegitimate child was said to have taken the child away from its mother at the age of ten days in order to hush up a scandal. It was held that in such circumstances the father of the illegitimate child might not be protected by the exception to section 361, Indian Penal Code. There was however no decision in the case, the appeal being remanded for re-hearing, but I notice that in the judgment of HENDERSON J. it is observed that it is for the prosecution to show that the act was committed for an immoral or unlawful purpose. By section 105 of the Evidence Act it is of course the duty of the accused to show that his offence falls within any of the exceptions in the Indian Penal Code; but where it appears from the prosecution evidence itself that the act falls within the exception, the accused will clearly be relieved of that burden. In this case, the exception itself states that section 361 does not extend to the act of a person who in good faith believes himself to be entitled to the lawful custody of the child, unless such act is committed for an immoral or unlawful purpose; and that, as HENDERSON J. observes, lays upon the prosecution the burden of proving that the act was committed for an immoral or unlawful purpose. In the present case, it cannot be said that the prosecution has established that the act of the first accused was committed for an immoral or unlawful purpose. The charge against the first accused was that he had caused this child to be kidnapped in order that he might be murdered

(1) (1934) I.L.R. 62 Cal. 629.

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but the learned Sessions Judge has expressly found that that charge was not established. No other object was attributed to the first accused and it is not in my opinion justifiable to say that even though he has not been proved to have intended to murder the child, yet he must have had some other unlawful or immoral purpose.

In the absence of proof of the purpose for which the accused caused the child to be taken away from the keeping of his mother, all that we have proved is that the father of the child by deceitful means got the child from the keeping of his mother to his own. This in my judgment is not an offence under section 361, Indian Penal Code, and I am fortified in this opinion by the reasoning of RANKIN C.J. in the case of *Saharali Mahammad v. Kamizuddin Mahammad*(1). The learned Chief Justice quoted with approval the decision in *Emperor v. Sital Prasad*(2) as authority for the proposition that

"the explanation (to section 361) cannot be used to mean that, as against a person who, in fact, is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil guardian of an offence under section 361".

I therefore find that the appellant in Criminal Appeal No. 456 of 1937 has been wrongly convicted of an offence under section 363, Indian Penal Code. I set aside the conviction and acquit him. The conviction of the appellant in Criminal Appeal No. 465 of 1937 for abetment also must be set aside for the same reason. He also is acquitted. The appellants have been released on bail and I direct that their bail bonds be cancelled.

V.V.C.

(1) (1930) I.L.R. 58 Cal. 897.

(2) (1919) I.L.R. 42 All. 146.

APPELLATE CRIMINAL.

*Before Mr. Justice Burn.*1938,
April 14.

IN RE K. V. VENKATA RAMANIAM AND THREE OTHERS
(ACCUSED IN CALENDAR CASES NOS. 836 AND 837 OF 1937
ON THE FILE OF THE STATIONARY SUB-MAGISTRATE
OF OMALUR), PETITIONERS.*

*Code of Criminal Procedure (Act V of 1898), ss. 190 (1) (c),
242 and 252—Sec. 190 (1) (c)—Scope of—Magistrate
begins a trial as summons case—Finds that an offence
triable only under warrant case procedure has been com-
mitted—Procedure to be followed.*

Section 190 (1) (c) of the Criminal Procedure Code is con-
cerned with extra-judicial information, knowledge or suspicion
and it has nothing to do with knowledge gathered by a Magis-
trate in open Court from the evidence of witnesses given
during a trial.

If a Magistrate begins a trial as a summons case and then
finds that an offence triable only under warrant case procedure
has been committed, he is bound to apply warrant case pro-
cedure thenceforward and he is not in any way disqualified
from proceeding with the trial.

Rajaratnam Pillai, In re(1) dissented from.

CASE REFERRED for the orders of the High
Court, under section 438 of the Criminal Proce-
dure Code, by the District Magistrate, Salem, in
his letter dated 9th December 1937.

PETITION under sections 435 and 439 of the
Code of Criminal Procedure, 1898, praying the
High Court to revise the order of the Court of the
Stationary Sub-Magistrate, Omalur, dated 12th
October 1937 framing charges against the accused
in Calendar Case No. 836 of 1937 on its file and to

* Criminal Revision Case No. 994 of 1937 (Case Referred No. 55 of 1937).
Criminal Revision Case No. 3 of 1938 (Criminal Revision Petition
No. 3 of 1938).

(1) (1936) I.L.R. 59 Mad. 442.

quash the said charges and proceedings connected
therewith.

Public Prosecutor (V. L. Ethiraj) for the Crown.

T. Krishnaswami Ayyangar for petitioners.

R. Narasimha Ayyangar for complainant.

ORDER.

I am unable to accept this reference. With
all respect to KING J. I am unable to follow the
reasoning in *Rajaratnam Pillai, In re(1)*. Section
190 (1) (c), Criminal Procedure Code, is concerned
with extra-judicial information, knowledge or sus-
picion and it has nothing (in my opinion) to do
with knowledge gathered by a Magistrate in open
Court from the evidence of witnesses given during
a trial. If a Magistrate begins a trial as a sum-
mons case and then finds that an offence triable
only under warrant case procedure has been com-
mitted, he is, I think, bound to apply warrant case
procedure thenceforward and he is not in any way
disqualified from proceeding with the trial. Let
the papers be returned and the case proceed.

v.v.c.

(1) (1936) I.L.R. 59 Mad. 442.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Madhavan Nair.*

1938,
April 4.

RYOTS OF GARABANDHA, SARIAPALLI, AND RAMACHANDRA-
PURAM VILLAGES, GARABANDHA GROUP, PARLAKIMEDI ESTATE,
REPRESENTED BY PEDDINI RAMALINGAM SUBUDHI AND
FIVE OTHERS (PETITIONERS), PETITIONERS,

v.

THE ZAMINDAR OF PARLAKIMEDI (RESPONDENT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 109 (b)—Order passed by High Court in exercise of its original civil jurisdiction—Writ of certiorari to Board of Revenue to quash its decision in a revenue case—Order of High Court refusing to issue—Order passed in exercise of its original civil jurisdiction, if.

As the result of proceedings under Chapter XI of the Madras Estates Land Act the Board of Revenue enhanced the rents of three villages in a zamindari by thirty-seven and a half per cent, overruling the contention of the ryots that, by reason of section 168 (2) read with section 30 (i) b) of the Act, the power of the Board of Revenue was limited to an enhancement of twelve and a half per cent. The ryots applied to the High Court for a writ of *certiorari* to the Board of Revenue with a view to an order being passed quashing the Board's order. The High Court held that the Board of Revenue had power to enhance the rents in the case by thirty-seven and a half per cent and made an order refusing to issue the writ.

Held that the order of the High Court was passed in the exercise of its original civil jurisdiction within the meaning of section 109 (b) of the Code of Civil Procedure and that the ryots had the right to appeal to His Majesty in Council from the same.

* Civil Miscellaneous Petition No. 1119 of 1938.

PETITION under sections 109 and 110 and Order XLV, rules 5 and 8, of the Code of Civil Procedure praying that the High Court will be pleased to grant a certificate enabling the petitioners therein to appeal to His Majesty in Council against the order of the High Court in Civil Miscellaneous Petition No. 1832 of 1937 [see page 858 *infra*] presented to the High Court for the issue of a writ of *certiorari* to the Board of Revenue, Madras, to submit the records relating to Revision Petition No. 79 of 1936 on its file and to quash the proceedings of the Board of Revenue in B.P. Mis. No. 3523 dated 9th October 1936 in the said Revision Petition No. 79 of 1936.

B. Jagannadha Das for petitioners.

N. Srinivasa Ayyangar for Government Pleader
(*K. S. Krishnaswami Ayyangar*) for the Board of Revenue, Madras.

L. S. Veeraraghava Ayyar for respondent.

The ORDER of the Court was delivered by LEACH C.J.—The petitioners ask for a certificate permitting an appeal to His Majesty in Council. They claim to be entitled to a certificate under clause (b), or, failing that, under clause (c), of section 109 of the Code of Civil Procedure. The petitioners desire to appeal from an order of this Court refusing to issue a writ of *certiorari* to the Madras Board of Revenue. Proceedings were taken under Chapter XI of the Madras Estates Land Act and as the result of those proceedings the Board of Revenue enhanced the rents of three villages by thirty-seven and a half per cent. The petitioners contended that, by reason of section 168 (2) read with section 30 (i) (b) of the Act, the power of the Board of Revenue was limited to an enhancement of twelve and a half per cent. This Court

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refused to order a writ to issue as it considered that the argument advanced was a fallacious one and had previously been rejected by this Court in *Valluri Narasimha Rao v. The Ryots of Peddamamidipalli*(1). If the present application were made merely under section 109 (c) of the Code of Civil Procedure, we should not be prepared to grant the certificate; but as we consider that the case does fall within clause (b) of the section, the certificate will issue.

Under clause (b) a litigant has the right of appeal to His Majesty from any decree or final order passed by a High Court in the exercise of its original civil jurisdiction. It is conceded by the learned Advocate for the respondent that the issue of a writ of *certiorari* means the exercise of original jurisdiction, but he says that it does not mean the exercise of "original civil jurisdiction" within the meaning of the clause. The distinction here is between "civil" and "criminal". The order complained of referred to a civil matter as opposed to a criminal matter, namely, a decision of a Revenue Court in a revenue case. It was admittedly passed in the exercise of original jurisdiction and in the circumstances it could only have been passed in the exercise of civil jurisdiction. Therefore it was an order passed in the exercise of original civil jurisdiction.

I might add that the order of the Board of Revenue which these applicants wished to have set aside directs the payment of large sums by way of increased rents. The order affects the applicants to the extent of Rs. 31,503-12-0 and it is not disputed that it is the intention of the Board of

(1) (1925) I.L.R. 49 Mad. 499.

Revenue to extend the enhancement to the other villages of the zamindari, which when carried out will mean an annual increase in the rents of the tenants by over Rs. 1,50,000 annually. The amount involved is, therefore, very considerable.

The certificate will issue on the usual conditions.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Varadachariar and Mr. Justice Lakshmana Rao.

KATNENI VENKATAKRISHNAYYA AND ANOTHER
(RESPONDENTS), APPELLANTS,

1938,
January 24.

v.

GARAPATI CHINA KANAKAYYA (RESPONDENT),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XXXII, r. 7—
Decree in favour of minors—Transfer by mother as the
guardian of their property—Leave of Court—Necessary if.*

In a suit instituted by two minors through their mother, acting as their next friend, a decree was passed in favour of the minors. That decree was subsequently transferred to a third party by the mother, acting as the guardian of the property of the minors.

Held by the Full Bench: The transfer of the decree by the mother of the minors was something entirely outside the suit, and she had full power to effect the transfer without the leave of the Court under Order XXXII, rule 7, Civil Procedure Code.

Govindarajulu Naidoo v. Ranga Rao(1) approved.

* Appeal Against Order No. 82 of 1937.
(1) (1920) 40 M.L.J. 124.

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Kancherla Kanakayya v. Mulpuru Kotayya(1) overruled.
Scope and effect of Clause (1-A) added to rule 7 of Order XXXII by the Madras High Court in 1910 considered.

APPEAL against the order of the District Court of West Godavari at Ellore, dated 30th January 1937 and made in Execution Petition No. 36 of 1936 in Original Suit No. 27 of 1932.

The appeal came on for hearing before BURN and VENKATARAMANA RAO JJ. who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The ORDER of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal against the order of the learned District Judge of Ellore allowing execution to proceed at the instance of a transferee-decree-holder. One of the objections to the recognition of the transfer that was urged before him was that the original decree-holders in the case being two minors and the transfer having been taken from the next friend of those minors without the sanction of the Court under Order XXXII, rule 7, Civil Procedure Code, the learned Judge ought not to recognise the transfer and allow execution. But the learned Judge overruled the objection following the decision of a Division Bench of this Court reported as *Govindarajulu Naidoo v. Ranga Rao*(2). That was a decision of ABDUR RAHIM and ODGERS JJ. and the view taken by those learned Judges in that case was that a decree being property, any transfer of a decree by a next friend of a minor would not come within the plain language of Order XXXII, rule 7, which relates to an agreement or a compromise with reference to a suit. The learned Judges also considered the effect of the rule made by our High Court, namely, Order XXXII, rule 7 (1-A) which added the words "for taking any other action on behalf of a minor". These words were construed to refer to an action taken in the course of the suit in the nature of a compromise or withdrawal or any agreement of that nature in favour of a minor and not to relate to any transfer of a decree. This decision was expressly dissented

(1) (1921) 41 M.L.J. 75.

(2) (1920) 40 M.L.J. 124.

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from in *Kancherla Kanakayya v. Mulpuru Kotayya*(1) by another Division Bench consisting of SPENCER and RAMESAM JJ. The reason given by the learned Judges in that case was that a transfer involves an agreement between the transferor and the transferee and therefore sanction of the Court under Order XXXII, rule 7, Civil Procedure Code, must be obtained and the word "suit" should not be understood as meaning only a suit in which a decree has not been passed. As this is a matter of frequent recurrence, we think that this matter should be set at rest, in view of conflicting decisions, by the decision of a Full Bench. We accordingly direct that the papers be placed before the Honourable the Chief Justice for constituting a Full Bench.

The appeal came on for hearing pursuant to the aforesaid order of Reference before the Full Bench constituted as above.

ON THE REFERENCE :

Y. Satyanarayana and V. Dharmasuri for appellants.—The case of *Govindarajulu Naidoo v. Ranga Rao*(2) decides (i) that Order XXXII, rule 7, Civil Procedure Code, does not apply to proceedings after a decree is passed and (ii) that it has not the effect of curtailing the power of the natural guardian to alienate the property of the minor which he otherwise possesses. *Muthalakkammal v. Narappa Reddiar*(3) has overruled that case on the first point. As regards the second point, viz., the power of the natural guardian to alienate property of the minor, it depends upon the construction of the words "agreement" in Order XXXII, rule 7 (1), and "for taking any other action on behalf of the minor" in Order XXXII, rule 7, sub-rule (1-A) (Madras amendment). In this connection rules 6 and 7 must be read together as they are intended to safeguard the interests of the minor against the acts of a person who acts as the next friend. Rule 6 prohibits the guardian from receiving money under the decree without the leave of the Court. [Vide *Ganesha Row v. Tuljaram Row*(4).] The object of the Legislature is to give complete power to the Court regarding the interests of the minor litigant. There is no reason why the word "agreement" in Order XXXII, rule 7 (1), should be construed as meaning only an

(1) (1921) 41 M.L.J. 75.

(3) (1933) I.L.R. 56 Mad. 430 (F.B.).

(2) (1920) 40 M.L.J. 124.

(4) (1913) I.L.R. 36 Mad. 295 (P.C.).

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agreement between the parties to the suit and regarding the procedure—a construction which is likely to circumvent the other provisions of the Act and defeat the object of the Statute. To read such a restriction into rule 7 (1) would enable a person, who is prevented from coming into possession of funds under rule 6, to achieve that end by alienating the decree. He would be able to defeat the provisions of rule 7 (1) also. So the words “agreement” and “with reference to the suit” in rule 7 (1) should be construed liberally, viz., any agreement whether with third parties or with the other party to the suit regarding the procedure, prosecution or the subject-matter of the suit. According to the Madras amendment, sub-rule (1-A) to rule 7, leave of the Court is necessary “for taking any other action on behalf of a minor”.

[THE CHIEF JUSTICE.—Can the Rule Committee say that a guardian under the Hindu law has no right to transfer the property of the minor?]

A minor becomes a ward of the Court, so far as the subject-matter of the suit is concerned, the moment he is a party litigant. So the chief guardian would be the Court, and the guardian for the suit would be an officer of the Court. [Vide Halsbury's Laws of England, Vol. XVII, paragraph 1452.] So the Rule Committee would not be interfering with the powers of the natural guardian since the power of dealing with the subject-matter of the suit mainly rests with the Court. The construction put in *Kancherla Kanakayya v. Mulpuru Kotayya*(1), upon the word “agreement” in Order XXXII, rule 7 (1), Civil Procedure Code, is correct. So the transfer of the decree standing in favour of the minors by the mother to a third party requires the sanction of the Court.

T. V. Ramanatha Ayyar for respondent.—The decision in *Govindarajulu Naidoo v. Ranga Rao*(2) is correct. Here the mother who is the natural guardian according to the Hindu law can transfer the decree of the minors to a third party without the leave of the Court.

JUDGMENT.

LEACH C.J.

LEACH C.J.—The appellants were the defendants in Original Suit No. 27 of 1932 of the District Court of West Godavari, instituted by

(1) (1921) 41 M.L.J. 75.

(2) (1920) 40 M.L.J. 124.

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two minors through their mother, acting as their next friend. A decree was passed against them and this was subsequently transferred to the respondent by the mother, acting as the guardian of the property of the minors. The respondent then applied to be brought on the record in the place of the decree-holders and to be allowed to execute the decree. The learned District Judge allowed the application, and the appeal is from that order. The question for decision is whether a guardian of the property of a minor can transfer a decree passed in favour of the minor without first obtaining the sanction of the Court. In allowing the application the learned Judge relied on the decision in *Govindarajulu Naidoo v. Ranga Rao*(1). The appeal has been placed before a Full Bench as that decision was dissented from in *Kancherla Kanakayya v. Mulpuru Kotayya*(2).

Order XXXII, rule 7, of the Code of Civil Procedure provides that no next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. The Rule Committee of this Court has added to rule 7 this further rule :

“(1-A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall

(1) (1920) 40 M.L.J. 124.

(2) (1921) 41 M.L.J. 75.

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file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this schedule."

It is said on behalf of the appellants that the words "for taking any other action on behalf of a minor or other person under disability" prohibit the lawful guardian of a Hindu minor transferring a decree obtained by the minor without the sanction of the Court. In *Govindarajulu Naidoo v. Ranga Rao*(1) ABDUR RAHIM and ODGERS JJ. held that these words did not take away the right of a guardian under Hindu law to transfer a decree in favour of the minor, as the transfer did not constitute a proceeding in the suit. A decree is property and there is no reason why the guardian of a Hindu minor should not exercise the same powers with respect of it as he is allowed to do with regard to other assets of the minor. Hindu law permits the guardian to alienate property under proper circumstances, but the minor can challenge the alienation on attaining majority if the power has been improperly exercised. It was on this reasoning that the learned Judges held that the sanction of the Court was not required to a transfer. The same question came before SPENCER and RAMESAM JJ. in *Kancherla Kanakayya v. Mulpuru Kotayya*(2). The learned Judges expressed their dissent from the decision in *Govindarajulu Naidoo v. Ranga Rao*(1) and regarded the decision in *Shaik Davud Rowther*

(1) (1920) 40 M.L.J. 124.

(2) (1921) 41 M.L.J. 75.

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v. Paramasami Pillai(1) as being in conflict with *Govindarajulu Naidoo v. Ranga Rao*(2). With great respect we can see no conflict. In our opinion *Shaik Davud Rowther v. Paramasami Pillai*(1) has no bearing on the question. This was a case of an agreement adjusting a decree, the agreement which required to be recorded in Court being between the parties to the suit. We are here merely concerned with the transfer of a decree to a third party by a person who has in law the power to make the transfer. We consider that *Govindarajulu Naidoo v. Ranga Rao*(2) was rightly decided and consequently the decision in *Kancherla Kanakayya v. Mulpuru Kotayya*(3) must be overruled.

When a transfer of a decree has been made in accordance with law the Court is required to bring the name of the transferee on the record in the place of the decree-holder. When this has been done the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree-holder (Order XXI, rule 16). The appellants object to the order placing the respondent on the record as the transferee of the decree on the ground that the minors when they come of age may challenge the validity of the action of the guardian. It is possible that they may do so, but if they do, it does not mean that the appellants will be compelled to pay twice over. Payment made in accordance with the Court's order will protect them.

It is also said that the acceptance of the opinion expressed in *Govindarajulu Naidoo v. Ranga Rao*(2) will have the effect of allowing a next

(1) (1916) 31 M.L.J. 207.

(3) (1921) 41 M.L.J. 75.

(2) (1920) 40 M.L.J. 124.

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friend or guardian *ad litem* when he happens to be the guardian under Hindu law to evade rules 6 and 7 of Order XXXII which have been framed for the protection of the minor. Rule 6 prohibits a next friend or guardian for the suit receiving without the leave of the Court any money or other movable property on behalf of a minor by way of compromise before decree or order, or under a decree or order in favour of the minor. This may be the effect of holding that rule 7 (1-A) only applies to matters in a suit or proceeding, but this is not a matter with which the Court is now concerned. We are here to interpret the law and not to make it. If it is considered that a transfer of a decree of this nature should be subject to the sanction of the Court the Legislature may say so; but as the law stands at present it is not subject to such sanction. The transfer of this decree by the mother of the minors was something entirely outside the suit, and in our opinion she had full power to effect the transfer without the leave of the Court.

It follows that in our opinion the order of the learned District Judge is correct and the appeal consequently fails and must be dismissed with costs.

VARADA-
CHARIAR J.

VARADACHARIAR J.—I agree that the leave of the Court is not necessary before a decree passed in favour of a minor plaintiff can be assigned; but I wish to add a few words indicating my reasons. In *Kancherla Kanakayya v. Mulpuru Kotayya*(1) it seems to have been assumed by the learned Judges that the decision in *Govindarajulu Naidoo v. Ranga Rao*(2) proceeded on a distinction

(1) (1921) 41 M.L.J. 75

(2) (1920) 40 M.L.J. 124.

between what happened before decree and what happened after decree. With due respect, I do not so read the judgment in that case. I understand the learned Judges to have emphasised the distinction between matters in dispute between the parties and matters outside the scope of the suit. Clause 1 (b) of rule 6 of Order XXXII makes it clear that the Order as a whole is not restricted to proceedings prior to decree; and in view of the fact that the Code contemplates agreements or adjustments between parties either under Order XXIII, rule 3, which applies to the stage prior to decree, or under Order XXI, rule 2, which applies to the stage after decree, it does not seem to me right to read the decision in *Govindarajulu Naidoo v. Ranga Rao*(1) as turning on that distinction.

The real question, as indicated in the opinion delivered by my Lord, is whether there is sufficient in the provisions of Order XXXII to interfere with the rights of a natural guardian or a legal guardian who also happens to be the next friend, in the matter of dealing with a decree as part of the property belonging to the minor. It does not seem to me that there is much force in the argument based upon clause 1-A added to rule 7 by the rules made by this Court in 1910. That clause does not prescribe that the leave of the Court is necessary in any particular matter; it only prescribes the course to be adopted when an application is made to the Court for leave to do certain things. It assumes that under other provisions of Order XXXII or of some other law, an application for leave has to be made. Such

(1) (1920) 40 M.L.J. 124.

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applications are contemplated by rule 6 as well as the proviso added to it by this Court and also by rule 7. It does not, therefore, seem to me right to infer from clause 1-A of rule 7 that the scope of rule 7 has been extended. As regards rule 7 itself, the natural construction of the words used there, namely, "agreement or compromise", appears to be that the agreement or compromise is one between the parties to the suit as contemplated by Order XXIII, rule 3, or Order XXI, rule 2.

It is no doubt possible that this view restricting rule 7 in the above sense may enable a next friend to evade the restrictions imposed by rule 6; but, as pointed out by my Lord, this is not a matter which the Court can take into account in interpreting rule 7. Rule 7 deals with the conduct of a "next friend" as such who, as pointed out in *Rhodes v. Swithenbank*(1), is an officer of the Court to conduct the suit; and the principle underlying rule 7 is that whenever he proposes to do anything beyond the normal conduct of the suit, he has to obtain the leave of the Court to do so. But when a decree passed in favour of a minor is sought to be assigned, the person making the transfer acts not in the capacity of next friend but in his capacity as the guardian of the minor's estate. It is true that in *Ganesha Row v. Tuljaram Row*(2) the Privy Council have laid down that to the extent to which the Code has imposed limitations upon the powers of a guardian under the Hindu law, those powers must be exercised in conformity with the provisions of the Code; but except to the extent to

(1) (1889) 22 Q.B.D. 577.

(2) (1913) I.L.R. 36 Mad. 295 (P.C.).

which the Code has expressly limited those powers, there is no reason to curtail them.

LAKSHMANA RAO J.—I agree with my Lord the CHIEF JUSTICE and have nothing to add.
V.V.C.

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APPELLATE CIVIL—FULL BENCH.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.*

RAMACHANDRA NAIDU AND THREE OTHERS (APPELLANTS
1 TO 4), APPELLANTS,

1937,
December 15.

v.

VENGAMA NAIDU (DEAD) AND EIGHTY-TWO OTHERS (RESPONDENTS 1 TO 8, 11, 13, 14, 16 TO 47, 49 TO 58, 60 TO 86, 88 TO 90 AND 94 AND LEGAL REPRESENTATIVES OF RESPONDENTS 1, 34 AND 35), RESPONDENTS.*

Part performance—Doctrine of Applicability—Maintenance decree—Charge on properties created by—Alienees of portion of properties charged—Agreement between them and decree-holder widow for release of properties in their possession on happening of certain events—Events contemplated not happening but widow receiving a portion of amount payable to her under agreement—Applicability of doctrine of part performance in such a case so as to debar assignee of decree from widow from executing decree against properties in hands of alienees—Alienees taking with notice of agreement—Civil Procedure Code (Act V of 1908), O. XLI, r. 2 proviso—Appellate Court deciding case upon a point taken by itself—Opportunity to party affected to meet the point—Necessity.

In 1890 a Hindu widow obtained a decree against her stepsons, R and another, for maintenance then due and for future maintenance. The maintenance was made a charge on

* Letters Patent Appeal No. 292 of 1927.

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the family properties. In 1894 the widow entered into an agreement with V and P, purchasers of R's half share in 393 acres of the family lands from one K who had himself purchased the same from R and was a defendant in the widow's suit. Under the agreement V and P were to pay the widow a sum of Rs. 1,400 in satisfaction of her claim for future maintenance against the properties in their hands. Of the Rs. 1,400 a sum of Rs. 1,000 had already been paid. The agreement provided that when the balance of Rs. 400 had been received and the widow had realised the amount representing the arrears of maintenance at the date of the agreement, she was to execute a formal release of the charge created by the decree on R's half share in the family properties. The arrears were not realised and consequently the agreement was renewed in 1903 and again in 1906. The effect of each of those documents was that if V and P paid the balance of Rs. 400 with interest and the widow was able to realise from other properties the amount due to her as arrears of maintenance at the date of the document, she would execute the contemplated release and that in the meantime, she would not take steps in execution of the decree against the properties in the possession of V and P. The agreements were not recorded under the provisions of Order XXI, rule 2, of the Code of Civil Procedure and the events contemplated by the agreement never happened. In 1908 the widow assigned her decree to the plaintiffs. A few days prior to the said assignment V sued for a decree for specific performance of the agreement of 1906, the last renewal of the agreement of 1894. His suit was dismissed by the trial Court and its dismissal was affirmed in appeal. Pending a second appeal to the High Court the widow died and the plaintiffs were added as parties. The High Court held that the plaintiffs as assignees of the maintenance decree were not the legal representatives of the widow, and being assignees an action for specific performance did not lie. The plaintiffs, as assignees of the maintenance decree, instituted proceedings in execution, obtained an order for the sale of R's interest and purchased the same at the Court auction. They then instituted the suit out of which the Letters Patent Appeal arose against, *inter alia*, transferees from V and P, for partition of the properties and for possession of their half share. The trial Court dismissed the suit. On appeal to the High Court the learned Judges who heard the appeal concurred in the view that the

doctrine of *lis pendens* applied to the alienations and that the agreement of 1894 and its subsequent renewals did not operate to bar the execution of the widow's decree. But while one of them held that the suit could be maintained as framed, the other learned Judge considered that, as the plaintiffs had taken an assignment of the decree with full knowledge of the agreement of 1894 and its subsequent renewals, it was a fraud on the alienees to enforce the maintenance decree and held that the doctrine of part performance applied and on that basis refused the plaintiffs the reliefs they sought, but instead granted them a money decree for Rs. 400 with interest from 1894. The Letters Patent Appeal was preferred against the judgment of the latter learned Judge.

Held by the Full Bench:—(i) The doctrine of part performance had no application to the case.

All that had happened was that an agreement was entered into by the widow with the original alienees under which she undertook to release the properties with which they were concerned on certain events happening. Until they happened—and they never did happen—the properties remained charged. The fact that the widow received Rs. 1,000 out of the Rs. 1,400 did not entitle V and P to a release.

(ii) The fact that the plaintiffs took with notice of the agreement of 1894 did not disentitle them to execute the decree.

The plaintiffs were the assignees in law of the widow's decree and they were entitled to execute it against the family properties, notwithstanding that they had passed into the hands of the defendants. They did execute the decree and in the execution proceedings they bought in the half share of R. Consequently they possessed R's half interest in the family estate.

While it is open to an appellate Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it.

APPEAL under Clause 15 of the Letters Patent preferred against the judgment of VENKATASUBBA RAO J. in Appeal Suit No. 110 of 1923 (Original Suit No. 45 of 1917, Sub-Court, Trichinopoly).

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The Letters Patent Appeal arose out of a difference of opinion between KRISHNAN and VENKATASUBBA RAO JJ. who heard and disposed of Appeal Suit No. 110 of 1923.

The facts of the case, the points on which there was difference of opinion between KRISHNAN and VENKATASUBBA RAO JJ. and the arguments of Counsel in the Letters Patent Appeal appear from the judgment in the Letters Patent Appeal.

T. M. Krishnaswami Ayyar and *M. S. Vaidyanatha Ayyar* for appellants.

K. S. Krishnaswami Ayyangar and *K. V. Sessa Ayyangar* for respondents.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In Original Suit No. 1 of 1889 of the District Court of Trichinopoly a Hindu widow, one Venkalakshmi Ammal, sued her step-sons, Venkatarama Ayyar and Ramarathnam Ayyar, for maintenance, and on 2nd September 1890 obtained a decree which applied to the maintenance then due and to future maintenance. The maintenance was made a charge on the family properties. The decree was not expressed in precise terms, but it was held in subsequent execution proceedings that the decree did in fact give a charge on the family properties and this question must be regarded as having been finally decided. On 13th November 1888 Ramarathnam sold his half share in 393 acres of the family lands to one Krishna Ayyar, who was the twenty-first defendant in the widow's suit. On 27th November 1888 Krishna Ayyar sold his interest in these properties to Vengama Naidu and Perumal Naidu.

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Between 7th December 1888 and 2nd June 1890 Vengama Naidu and Perumal Naidu under thirteen deeds disposed of their interest in the properties to various people. On 27th September 1908 the widow assigned her decree to the plaintiffs in the suit out of which this appeal arises. As assignees of the decree the plaintiffs instituted proceedings in execution and obtained an order for the sale of Ramarathnam's interest. At the Court auction they purchased Ramarathnam's interest. On 14th September 1915 the plaintiffs filed a suit in the Court of the District Munsif of Kulittalai for partition of the properties and for possession of their half-share. The District Munsif's Court had no jurisdiction to try the suit because of its value and the plaint had to be returned for filing in the Court of the Subordinate Judge. This was done and the suit was numbered as Original Suit No. 45 of 1917. There were 101 defendants, of whom 98 were sued as alienees under transfers executed after 7th December 1888.

In 1894 the widow entered into an agreement with Vengama Naidu and Perumal Naidu under which they were to pay her a sum of Rs. 1,400 in satisfaction of her claim for future maintenance against the properties in their hands. Of the Rs. 1,400 a sum of Rs. 1,000 had already been paid. The agreement provided that when the balance of Rs. 400 had been received and the widow had realised the amount representing the arrears of maintenance at the date of the agreement she was to execute a formal release of the charge created by the decree on Ramarathnam's half share in the family properties. The arrears were not realised and consequently the agreement was renewed in

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1903 and again in 1906. The original agreement has not been put in evidence, but the agreements of 1903 and 1906 have been and are marked as Exhibits XVIII and XVIII (a) respectively. The agreement of 1903 reads as follows :—

“ If according to what you have executed and given, you pay with interest the sum of Rs. 400 which is the balance due after deducting the amount of Rs. 1,000 received from you, I shall, as soon as the whole of the decree amount due up to this day is realised, cause the plaintiff in the said suit to execute and deliver a memorandum of release in your favour to the effect that the liability for the decree of the lands purchased by you from Krishna Ayyar has been given up. I shall not attach the said lands and proceed in execution for the amounts due under the said decree.”

This document was signed by one P. Ramaswami Ayyar as the agent of the widow. That he had the authority to sign is not in question. The agreement of 1906 is in similar terms, but instead of the words “as soon as the whole of the decree amount due up to this day is realised”, we have the words “after the realization of the entire balance of the decree”. There can be no doubt that the effect of each of these documents was this : If Vengama Naidu and Perumal Naidu paid the balance of Rs. 400 with interest and the widow was able to realise from other properties the amount due to her as arrears of maintenance at the date of the document she would execute the contemplated release ; in the meantime she would not take steps in execution of the decree against the properties in the possession of Vengama Naidu and Perumal. These agreements were not recorded under the provisions of Order XXI, rule 2, of the Code of Civil Procedure, and, therefore, cannot be regarded as adjustments of the decree.

On 17th September 1908, that is, two days before the assignment by the widow of her decree in favour of the present plaintiffs, Vengama Naidu instituted Original Suit No. 406 of 1908 in the Court of the District Munsif of Kulittalai for a decree for specific performance of the agreement of 1906, the last renewal of the agreement of 1894. On 14th August 1911 the District Munsif dismissed the suit. An appeal followed to the Subordinate Judge of Trichinopoly, who held that the suit was premature and accordingly dismissed the appeal. A second appeal was then filed in this Court. The widow died during the pendency of the appeal and the present plaintiffs were added as parties. This Court held that the plaintiffs, as assignees of the maintenance decree, were not the legal representatives of the widow, and being assignees an action for specific performance did not lie. This judgment was delivered on 12th March 1915.

Returning now to the suit out of which this appeal arises, the Subordinate Judge accepted the contention that the doctrine of *lis pendens* applied to the alienations and therefore regarded them as being subject to the charge in favour of the widow. But he dismissed the suit on the broad ground that there were enough equities with the alienee defendants to override all consequences arising from the operation of the doctrine of *lis pendens*. This judgment was delivered on 21st August 1922. An appeal was filed against this decision in this Court and it came before KRISHNAN and VENKATASUBBA RAO JJ. on the 6th and the 14th of September and on the 1st and the 8th October 1926. After the arguments had closed

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judgment was reserved and was delivered on 5th November 1926. VENKATASUBBA RAO J. agreed that the doctrine of *lis pendens* did apply and accepted the contention that the agreement of 1894 and its subsequent renewals did not operate to bar the execution of the widow's decree. The learned Judge, however, laid great stress on the fact that the plaintiffs had taken the assignment of the decree with full knowledge of the agreement, and considered that in these circumstances it was a fraud on the alienees to enforce the maintenance decree. He also held that the doctrine of part performance applied and on this basis refused the plaintiffs the reliefs they sought, but instead granted them a money decree for Rs. 400 with interest from 1894. KRISHNAN J. considered that the suit could be maintained as framed and relied on the decision of this Court in *Krishna Aiyar v. Savurimuthu Pillai*(1). In that case, a Full Bench consisting of ABDUR RAHIM, OLDFIELD and SESHAGIRI AYYAR JJ. held that a decree which had been satisfied was still capable of execution so long as the satisfaction was not reported to and certified by the Court. The only remedy for a judgment-debtor who is called upon to pay in execution proceedings, having already paid out of Court, is an action for damages against the decree-holder, but when the decree has been executed by an assignee no action for damages will lie against the assignee, notwithstanding that he has taken the assignment with notice of the fact that the decree has been satisfied. KRISHNAN J. also accepted the application of the doctrine of *lis pendens*.

(1) (1918) I.L.R. 42 Mad. 338.

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It falls to be observed that the doctrine of part performance on which VENKATASUBBA RAO J. relied was not raised in the pleadings, was not made the subject of an issue and was not raised in the course of the arguments. KRISHNAN J. added a note to his judgment, after he had perused that of VENKATASUBBA RAO J., and there pointed out that this was an entirely new question which was not raised by the parties and not argued at the Bar. While it is open to the Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. Order XLI, rule 2, of the Code of Civil Procedure says that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appellate Court in deciding the appeal shall not be confined to the ground of objection set forth in the memorandum of appeal or taken by leave of the Court under the rule. There is, however, this important proviso. The Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. With great respect, I consider that before VENKATASUBBA RAO J. based his decision on the doctrine of part performance he should have given the plaintiff's Advocate an opportunity of stating his views on the question.

As the doctrine of part performance was relied on by VENKATASUBBA RAO J. and has been made the subject of argument before us, I will express

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my views on the question. The widow had obtained a decree for maintenance and the amount she was entitled to receive by way of maintenance was made a charge on the family properties. If her step-sons did not pay what was due as maintenance she was entitled to proceed against those properties, notwithstanding that they had passed or that some of them had passed into other hands. It was open to her to agree with the alienees to release the properties in their hands from the charge, but until there was a release by her, valid in law, the properties remained charged. In this case all that had happened was that an agreement was entered into by the widow with the original alienees under which she undertook to release the properties with which they were concerned on certain events happening. Until they happened—and they never did happen—the properties remained charged. The fact that the widow received Rs. 1,000 out of the Rs. 1,400 did not entitle Vengama Naidu and Perumal Naidu to a release. Therefore I fail to see how the doctrine of part performance can have any application whatsoever. VENKATASUBBA RAO J. also considered that the present action constituted a fraud on the alienees. There was here clearly no fraud. The plaintiffs took with notice of the agreement of 1894, but that did not disentitle them to execute the decree. They were at full liberty to do so.

I have already mentioned that it was accepted by the trial Court and by KRISHNAN and VENKATASUBBA RAO JJ. on appeal that the doctrine of *lis pendens* applied. It was suggested at one stage in the arguments before us that this view

was wrong, but when it was pointed out to the learned Advocate for the respondents that the question had been raised in the execution proceedings to which the present parties or their representatives were parties and there decided, he very properly did not press the point. It is clear that it was raised in the execution proceedings and there finally decided and consequently the argument is not open to the defendants in this Court. The same remarks apply to a suggestion which has been made that the agreement of 1894 and its subsequent renewals operated to prevent the widow proceeding in execution against the properties in the possession of the alienees. This question was also raised in the execution proceedings and there also decided. Therefore the position is this. The plaintiffs are the assignees in law of the widow's decree and they were entitled to execute it against the family properties, notwithstanding that they had passed into the hands of the defendants. They did execute the decree and in the execution proceedings they bought in the half-share of Ramarathnam. Consequently they now possess Ramarathnam's half interest in the family estate. It has been suggested that section 91 of the Indian Trusts Act applies, but it is clear that it does not. The decision in the suit for specific performance entirely disposes of this argument.

The appeal will be allowed and the case remanded to the trial Court for disposal on the merits. The appellant will be entitled to costs here and before the Division Bench. He will also be entitled to a refund of the court-fee paid on the appeal as well as on the Letters Patent Appeal.

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A regrettable feature of this case is the tremendous delay which has taken place. The suit was filed as long ago as 1915 and an appeal lay direct to this Court. As I have pointed out, the learned trial Judge delivered judgment on 21st August 1922. An appeal was filed in that year to this Court and it came before KRISHNAN and VENKATASUBBA RAO JJ. in September and October 1926. The learned Judges disagreed and in accordance with the practice of this Court which then ruled it was necessary that the appeal should be heard by a Full Bench. It has taken eleven years for this to happen. The appeal has been in this Court from 1922 until now, a total period of fifteen years. But for the fact that these dates appear on the record I should not have believed it possible that there could be such delay. The fact that the number of parties is large and that some of them died and their legal representatives have had to be brought on the record can be no justification for this great delay. The delay is so great that it would appear to amount to a scandal, and I have directed that a full inquiry be made into the matter.

VARADACHARIAR J.—I agree.

MOCKETT J.—I agree.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
Mr. Justice Varadachariar and Mr. Justice Mockett.

MANUBOLU RANGA REDDI (SECOND DEFENDANT),
APPELLANT,

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December 16.

v.

MARAM REDDI DASARADHARAMI REDDI AND ANOTHER,
(PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Madras Hereditary Village Offices Act (III of 1895), sec. 6(1)—Right of family under—Sec. 21—Meaning of "succeed" in—Suit for declaration that a person is the rightful holder of the office of headman, if barred by ss. 13 and 21 of Act—Insertion of sub-sec. 3 to sec. 6 of Act by Amending Act of 1930—If retrospective—Minor—Ineligibility of, for registration before Amending Act of 1930—Registration of minor under sec. 10 (5) of Act—Effect of—Collector—Duty of, under Act—Statutes—Faulty drafting of.

Originally village G consisted of G proper and five hamlets. The headman of G had jurisdiction over G proper and two of the five hamlets and an assistant headman over the remaining three hamlets. In 1903 the father of M.D. was appointed headman of the former group of villages and held this office until 1912 when he resigned. The name of M.D. who was a minor was then registered with the Collector with a view to his being appointed in his father's place on coming of age and the father of M.R. was appointed to discharge the duties of the office in the meantime. In 1905 the father of P.V. was appointed headman with jurisdiction over the latter group of villages. In 1918 G and the five hamlets were formed into two villages, G.E. and G.W. Then P.V.'s father was appointed headman of G.E. and M.R.'s father was appointed headman of G.W. There was then no provision in the Madras Hereditary Village Offices Act corresponding to the present sub-section 8 of section 6. In 1930 M.D. filed a suit against P.V. and M.R., who were then the headmen of G.E. and G.W. respectively, for a declaration

* Second Appeal No. 208 of 1933.

RANGA REDDI that he was the rightful holder of the office of the headman of
MARAM REDDI either G.E. or G.W., and that he was entitled to be appointed to one of the offices. The District Munsif held that M.D. had the right to hold the office of the headman of G.W. and was entitled to be recognised in the place of M.R. On appeal the District Judge held that the declaration should merely be that the appointment of M.R. was illegal and that M.D.'s family had the right to claim that the selection should be from their family. Before the Full Bench it was contended on behalf of M.R.:

(a) The failure of the Revenue Authorities to appoint M.D. as headman of one of the two villages did not give rise to a cause of action;

(b) if the failure did constitute a cause of action the Civil Court had no jurisdiction in the matter;

and (c) M.D. was rightly passed over.

Held by the Full Bench:—(i) Section 6 (1) of the Madras Hereditary Village Offices Act, 1895, creates a right in the family of M.D. which can be enforced by suit.

Ramakrishnayya v. Venkataranga Rao(1) followed.

(ii) In section 21 of the Act the word "succeed" should be given its ordinary meaning, and sections 13 and 21 do not bar the Civil Courts from entertaining suits of this nature.

Kodandaramayya v. Ramalingayya(2) followed.

(iii) Sub-section 3 to section 6 of the Act was inserted in the statute only in 1930 and it is not retrospective. M.D. who was a minor in 1918 was ineligible for the appointment by reason of section 10 (1). The fact that his name was registered under section 10 (5) carried with it no right. It was the duty of the Collector to select a person from the family of M.D.'s father who was qualified to hold the office if there was such a person. Since there was no person qualified, the Collector had to go outside the family. In doing so he committed no breach of duty; in fact it was the only course open to him. Therefore the appointment of M.R. was properly made and the Court had no power to interfere with it.

APPEAL against the decree of the District Court of Nellore in Appeal Suit No. 177 of 1931 preferred against the decree of the Court of the District

(1) (1932) I.L.R. 56 Mad. 134.

(2) (1920) 12 L.W. 663.

Munsif of Nellore in Original Suit No. 276 of 1930. **RANGA REDDI**
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Ch. Raghava Rao and *S. Rajaraman* for appellant.—The first respondent is the plaintiff; the second respondent is the first defendant and the appellant is the second defendant. The suit was filed by the plaintiff for a declaration that under the Madras Hereditary Village Offices Act of 1895, he is the rightful holder of the office of the village headman of either of the villages G.E. or G.W. and that he is entitled to be appointed as the headman of either of the villages. The trial Court gave a decree in favour of the plaintiff against the second defendant who was the headman of G.W. The first appellate Court reversed the same and held that the appointment of the second defendant as the headman of G.W. was illegal and that the plaintiff's family had the rightful claim to the office. The decree of the lower appellate Court cannot be sustained since the plaintiff did not file the suit under Order I, rule 8, of the Code of Civil Procedure as a representative of his family. Moreover, there cannot be a right to the office of the headman in a family. The suit should be dismissed for the following reasons: (i) There is no cause of action in favour of the plaintiff and, if there is, then the Civil Court is incompetent to give the declaration prayed for; (ii) after the bifurcation of the village G into G.E. and G.W. in 1918, the original hereditary character, if any, of the office became non-existent; and (iii) the Madras Village Offices Amendment Act (VII of 1930) is not retrospective and is therefore inapplicable to the present case. The result is that the plaintiff was rightly passed over by the revenue authorities.

The Madras Hereditary Village Offices Act (III of 1895) applies to Ryotwari villages. This Act incorporated some provisions of the Madras Regulation VI of 1931 and certain Standing Orders of the Board of Revenue. The Madras Proprietary Estates' Village-service Act, 1894, applies to zamindari villages. Certain provisions of the former Act are analogous to the latter Act.

Section 6 of Act III of 1895 states that, when a hereditary village is divided or several such villages are grouped, the old offices are abolished and new offices are created. In 1930 the Amending Act introduced certain provisions which are inapplicable to the present case since the Act is not retrospective.

RANGA REDDI v. MARAM REDDI. Under the old section there was no provision for registering the office in favour of a minor. Minority was a bar to the appointment to a village office. Section 10 deals with cases when a vacancy in the office arises. Section 10 (5) deals with a case of succession to an office by a minor.

[The CHIEF JUSTICE.—Do you say that section 10 has nothing to do with section 6?]

I submit that section 10 (1) alone would apply. Section 10 (2) cannot apply because it speaks of succession and there cannot be a succession to an office until it had been once filled. For the same reason the other sub-sections 3, 4 and 5 of 10, cannot apply.

The Board's Standing Order No. 148 stated that a minor had no right to have his name registered when an office ceased to exist. After 1930 this provision has also been amended. Section 20 deals with the rule-making power of the Board of Revenue.

[The CHIEF JUSTICE.—The preamble to the Amending Act, 1930, states that it was enacted for removing certain doubts that existed about the applicability of section 10 to section 6 of Act III of 1895.]

Section 13 deals with the right of suit of a person before the Collector and section 21 bars the jurisdiction of the Civil Courts.

[VARADACHARIAR J.—Unless you say that the bar under section 21 is wider than the bar under section 13 the jurisdiction of the Civil Courts is not taken away.]

I submit to that effect: In *Krishnaswami Naidu v. Akkulammal*(1), which arose under the Madras Proprietary Estates' Village-service Act, 1894 (which, so far as the point under consideration is concerned, is on all fours with the Madras Hereditary Village Offices Act, 1895), NAPIER J. held that the provisions of the Act merely gave a direction to choose the best person from out of the family and that no right of suit in any individual of the family existed. This was followed in *Kanthavadivelu Mudaliar v. Ramaswamy Mudaliar*(2) where the distinction between a person's individual right and that claimed on behalf of the family is pointed out. In *Alagiasundaram Pillai v. Midnapore Zamindary Co., Ltd.*(3) it was held that a minor, under circumstances similar to the present case, was

(1) (1918) 9 L.W. 90.

(2) (1927) 27 L.W. 606.
(3) (1920) 12 L.W. 767.

not entitled to have his name registered. BAKEWELL J. held that the word "succession" in the Act need not necessarily refer to a case of vacancy arising on the death of an incumbent to an office and that the suit was barred under section 21.

[VARADACHARIAR J.—The further limitation on section 21 was not urged before BAKEWELL J. The learned Judge thought that the bar under section 21 was wider.]

In *Kodandaramayya v. Ramalingayya*(1) it was held that the Civil Court had jurisdiction on the ground that the word "succession" should be understood in the restricted sense. Vacancy is predicable in both senses of the word "succession" but the cause of the vacancy is different in the wider than in the restricted sense. *Ramakrishnayya v. Venkataranga Rao*(2) dissented from *Kanthavadivelu Mudaliar v. Ramaswamy Mudaliar*(3). The former case has failed to appreciate the fact that the hereditary character of the new office will come into existence only after the vacancy is filled up and it ignores a hiatus between the abolition of the old office and the creation of the new one. The learned Judges also erred in holding that the old right is preserved when the new office is created and that the old remedy by suit was not taken away by section 23. No doubt when a vacancy is filled up, the person becomes a fresh stock for the application of the hereditary right. How far statements of objects and reasons could be looked into for interpreting a statute is dealt with at page 118 of *Craies on Statutes*. The passage at page 649 of *Venkata Jagannadha v. Veerabhadrayya*(4) supports my submission.

[VARADACHARIAR J.—Right to the office was in the family at the moment of appointment and after the appointment the property belonged to the incumbent and not to the family. That was the distinction which the Privy Council had in view.]

The link between the old and the new offices does not preserve the old right in all its integrity in the old family but the remedy under section 23 is pointed out. It seems to be clear that some link was intended to be preserved.

[MOCKETT J.—According to your contention when the members of the family are rejected on one ground or another and nobody qualified is found to exist in the family, under what provision can the Collector go out of the family?]

(1) (1920) 12 L.W. 663.
(3) (1927) 27 L.W. 606.

(2) (1932) I.L.R. 56 Mad. 134.
(4) (1921) I.L.R. 44 Mad. 643 (P.C.).

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MARAM REDDI. Either section 10 (1) has to be imported into section 6 or the view in *Kanthavadi v. Mudaliar v. Ramaswamy Mudaliar*(1) should be adopted, viz., that no legal right is created in the family. This is what *Venkata Jagannadha v. Veerabhadrayya*(2) decides. Section 23 prescribes a remedy and the finality of the same.

[VARADACHARIAR J.—Does section 23 apply to a case when a person is aggrieved by an order under section 10 (3) ?]

Section 13 would have to be invoked and a case arising under section 6, apart from section 10 (3), would be covered by *Venkata Jagannadha v. Veerabhadrayya*(2).

M. S. Ramachandra Rao for B. Somayya and S. Sitarama Ayyar for respondents.—The preamble to the Amending Act of 1930 clearly shows what was intended by Act III of 1895 and what it meant.

[VARADACHARIAR J.—What Act III of 1895 meant has to be gathered from the provisions of that Act. Can you point out any provision in that Act which shows that it meant in the case of a minor what it said by the Amending Act of 1930 ?]

The Amending Act of 1930 is retrospective in character; see Craies on Statutes, 1936 Edition, pages 60, 61 and 340. Declaratory Acts are retrospective; *In re Lovell and Collard's contract*(3). The use of the word "amend" does not take an Act out of the category of retrospective Acts. If an Act is passed to construe the meaning of an earlier Act, it is retrospective; *Pitchamma v. Official Receiver, Cuddapah*(4). The word "deemed" in the Amending Act makes it retrospective; *The King v. Dursley*(5). See *Veerappa Chettiar v. Subramania Ayyar*(6) and *Parthasarathi Naicker v. Krishnaswami Aiyar*(7).

Between 1895 and 1930 the Board of Revenue was under the impression that section 10 (1) will apply and not section 10 (5) and so they did not register the names of minors. Board's Standing Order No. 148 is *ultra vires* because under section 20 they could frame rules only for enquiry.

(1) (1927) 27 L.W. 606.

(3) [1907] 1 Ch. 249

(2) (1921) I.L.R. 44 Mad. 643 (P.C.).

(4) (1930) I.L.R. 54 Mad. 12 (F.B.).

(5) (1832) 3 B. & Ad. 465; 110 E.R. 168.

(6) (1928) I.L.R. 52 Mad. 123 (F.B.).

(7) (1927) 54 M.L.J. 641.

Section 10 (1) applies only to an existing office and not to a newly created office.

Ch. Raghava Rao replied.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The first respondent instituted a suit in the Court of the District Munsif of Gudur for a declaration that he is the rightful holder of the office of headman either of the village of Gudur East or of Gudur West and that he is entitled to be appointed to one of these offices. These villages originally formed one village, but were converted into two in 1918. Before the division took place Gudur consisted of Gudur proper and five hamlets, namely, Vemulapalem, Veerareddipallem, Purittipallem, Puthupallem and Devipalem. The headman of Gudur had jurisdiction over Gudur itself and the hamlets of Vemulapalem and Veerareddipallem, but there was an assistant headman appointed in respect of Purittipallem, Puthupallem and Devipalem. In 1903 the first respondent's father was appointed headman of Gudur, Vemulapalem and Veerareddipallem and held this office until 1912, when he resigned. The first respondent's name was then registered with the Collector with a view to first respondent being appointed in his father's place on coming of age and the appellant's father was appointed to discharge the duties of the office in the meantime. In 1905 the second respondent's father was appointed headman with jurisdiction over Puthupallem, Purittipallem and Devipalem. This was the position in 1918 when Gudur and the adjoining hamlets were formed into two villages and called Gudur East and Gudur

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West respectively. When this happened the second respondent's father was appointed headman of Gudur East and the appellant's father headman of Gudur West. The second respondent was the headman of Gudur East and the appellant was the headman of Gudur West at the time of the suit. The District Munsif held that the first respondent had the right to hold the office of headman of Gudur West and therefore was entitled to be recognised in the place of the appellant. A declaration to this effect was accordingly granted. On appeal to the District Court of Nellore it was held that the declaration should merely be that the appointment of the appellant is illegal and that the first respondent's family has a right to claim that the selection should be from the family.

The appellant contends that the first respondent is not entitled to any declaration and that the suit should be dismissed for the following reasons:—(1) The failure of the revenue authorities to appoint the first respondent headman of one of the villages did not give rise to a cause of action; (2) if the failure did constitute a cause of action, the Civil Court had no jurisdiction in the matter; and (3) the first respondent was rightly passed over.

Before discussing the questions involved in the appeal, it is necessary to examine the relevant sections in the Madras Hereditary Village Offices Act, 1895. Section 6 gives the Board of Revenue power to group or divide villages and provides that when this takes place the existing offices shall cease to exist and new offices which shall also be hereditary shall be created for the new

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village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. By the Madras Village Offices Amendment Act of 1930, sub-section (3) was added. This sub-section reads as follows:—

"Notwithstanding anything contained in sub-section (1) or sub-section (2), no person shall be deemed to be ineligible for selection under sub-section (1) or retention under sub-section (2) by reason only of his being a minor. If a minor is selected under sub-section (1) or retained under sub-section (2) he shall be registered as the holder of the office and thereafter the procedure laid down in sub-section (5) of section 10 shall be adopted."

The addition of this sub-section was made long after the appellant and the second respondent had received their orders of appointment.

Section 10 states the rules to be observed by the Collector when filling a vacancy in any village office. Sub-section (1) provides:

"No person shall be eligible for appointment who

- (a) is not of the male sex;
- (b) has not attained the age of majority;
- (c) is not physically and mentally capable of discharging the duties of the office;
- (d) has not qualified according to the educational test prescribed for the office in question by the Board of Revenue by rules made under section 20;
- (e) has been convicted by a Criminal Court of any offence which, in the opinion of the Collector, disqualifies him for holding the office."

Sub-section (2) declares that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindari in

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Southern India. Sub-section (3) states that, where the next heir is not qualified under sub-section (1), the Collector shall appoint the person next in order of succession who is so qualified, and, in the absence of any such person in the line of succession, may appoint any person duly qualified under sub-section (1). Sub-section (4) says that, where an office has become vacant by the dismissal or suspension of the last holder, the Collector may direct that until the death or return to duty of such last holder the duties of the office shall be performed by some person who is not an undivided member of the family of the dismissed or suspended officer. Sub-section (5) states the procedure to be adopted where the heir of the last holder is a minor. He is required to register the heir and to appoint a person to discharge the duties of the office until the heir comes of age. This procedure was followed when the first respondent's father resigned in 1912. Sub-section (6) provides that if a vacancy is caused by the resignation, dismissal, removal or suspension of the holder of an office and the Collector does not give the direction referred to in sub-section (4), he shall fill up the vacancy in accordance with the provision of the section as if it had been caused by the death of the holder of the office.

It is common ground that in making appointments under section 6 the revenue authorities have always regarded sub-section (1) of section 10 as being applicable and they are right in so doing. Section 10 deals with filling up of vacancies, but the word vacancy does not necessarily imply that there has been a previous incumbent in the office. On the amalgamation or division of villages new

offices are automatically created and until they are filled up they are vacant. It is also common ground that the Revenue authorities have never regarded sub-section (5) as applying in such cases, and here again the practice is in accordance with the wording of the sub-section. In sub-section (5) the governing word is "succeed" and there can be no succession to an office until it has once been filled.

Section 13 states that any person may sue before the Collector for any of the village offices specified in section 3 or for the recovery of the emoluments of any such office on the ground that he is entitled under sub-section (2) or (3) of section 10 of the Madras Proprietary Estates' Village-service Act, 1894, or under sub-section (2) or (3) of section 10 or sub-section (2) or (3) of section 11 or section 12 of this Act as the case may be, to hold such office and enjoy such emoluments; or, being a minor, may sue before the Collector to be registered as heir of the last holder of any such office. Section 13 stops here and therefore only deals with certain suits. The only other section dealing with jurisdiction, apart from section 23 which has reference to appeals against orders and decrees of the Collector, is section 21 which reads as follows:—

"No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office or, except as provided in proviso (ii) to sub-section (1) of section 13, any claim to recover the emoluments of any such office."

It will be observed that the effect of this section is to take away the jurisdiction of the Civil Court in certain cases only. I will return

RANGA REDDI to the effect of this section later and will now refer to certain of the cases quoted in argument.
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In *Krishnaswami Naidu v. Akkulammal*(1) NAPIER J. was of the opinion that no right of suit exists in a case of this nature. The reasoning was this. What the plaintiff seeks to do is to have it declared that he is the person eligible under the Act and therefore the appointment of any person who is not eligible under the Act is bad. The fact that a man is eligible does not confer upon him the right of appointment. This was a case for a declaration that the appointment of the defendant as a headman where two villages had been amalgamated under the Madras Proprietary Estates' Village-service Act, 1894, was illegal. That Act, so far as the present appeal is concerned, is on all fours with the Madras Hereditary Village Offices Act, 1895. The plaintiff there also sued for the recovery of the emoluments of the office. SADASIVA AYYAR J., who with NAPIER J. formed the Bench which heard the appeal, did not decide whether a suit would lie to enforce a claim based on section 6 (1). Both the learned Judges were of the opinion that the third defendant in the suit had been properly appointed. In *Alagiasundaram Pillai v. Midnapore Zamindary Co., Ltd.*(2) ODGERS J. agreed with the opinion of NAPIER J. as did SRINIVASA AYYANGAR and JACKSON JJ. in *Kanthavadivelu Mudaliar v. Ramaswamy Mudaliar*(3).

We consider that there is here a failure to give full weight to the words in section 6 (1) :—

"In choosing persons to fill such new offices the Collector shall select the persons whom he may consider the best qualified

(1) (1918) 9 L.W. 90.

(3) (1927) 27 L.W. 606

(2) (1920) 12 L.W. 767

from among the families of the last holders of the offices which have been abolished."

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This direction is mandatory. The Collector shall select the person best qualified from among the members of the family and if there is a person in the family who does not suffer from any of the disqualifications referred to in section 10 (1), he is bound to select that person. If there are several persons he is bound to choose the one he considers most suitable. The office of a village headman has always been regarded as a hereditary office and one of the objects of the Act is to preserve the hereditary character of such office. Therefore, when the Legislature says that when an old office is abolished and a new one is created in its place the new office shall be filled from the family connected with the old office, it is difficult to understand the reasoning which says there is no enforceable right. Of course there must be a member of the family possessing the necessary qualifications.

Great stress has been laid by the learned Advocate for the appellant on *Venkata Jagannadha v. Veerabhadrayya*(1), a decision of the Privy Council. In that appeal the Judicial Committee was concerned with the question whether the village lands which had been allocated to the karnam became his family property. At page 650 of the report their Lordships observe :

"It is accordingly clear that since that time in Madras (passing of the Acts of 1894 and 1895) the karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a

(1) (1921) I.L.R. 44 Mad. 643 (P.C.).

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member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible."

At page 655 appears this passage :

"A hereditary right in a karnam or his family can only, at the utmost, be said to constitute a certain *spes* among persons within the area of selection of those eligible for the office. But it is not, as has already been observed, even so limited. The power of selection rests with the administrative officials who alone are judges of the eligibility of the karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands follow the office, *ex necessitate*."

Their Lordships were far from considering the question whether on the creation of a new office under section 6 (1) the members of the family of the last holder of the abolished office had the right to compel the Collector to carry out the duty cast upon him by the section and consequently we are unable to regard *Venkata Jagannadha v. Veerabhadrayya*(1) as confirming the opinion of NAPIER J.

In *Ramakrishnayya v. Venkataranga Rao*(2) REILLY and ANANTAKRISHNA AYYAR JJ. held that section 6 (1) does create a legal right in the family. The facts of that case were shortly these : In 1901 a village was made into two villages and in 1912 the two villages were converted into three villages. When the three villages were created in 1912, each of the two then incumbents received appointments, but as regards the third village the Collector selected a person who belonged to another family. ANANTAKRISHNA AYYAR J. expressly held that section 6 (1) was of a mandatory character and in the course of his judgment observed :

(1) (1921) I.L.R. 44 Mad. 643 (P.C.).

(2) (1932) I.L.R. 56 Mad. 134.

"Hereditary rights were well known to law as administered in this Presidency. The Legislature enacted that the new offices to be created for the new villages by that very Act should also be hereditary. As I read the section, what has been done by the Legislature is this—hereditary rights existing in the family of the last holder have been recognised and preserved by the Legislature by section 6. In my view, it is not a case of any right being 'created' for the first time in the family, but the case is one of recognition and preservation by the Legislature of a pre-existing legal right existing in the family. The law is familiar with (a) rights vested in an individual; (b) rights vested in a family; and (c) rights vested in the public. The present is a case of a 'right vested in a family'—which was a well known right before the Act—being recognised and provided for by the Legislature. If the Legislature intended that such pre-existing rights should cease once for all and be no longer entitled to any sort of legal recognition or enforcement, it would surely have chosen other words than those that exist in the section to express its intention. It is a principle of law that existing legal rights should not be intended to be interfered with or taken away, except to the extent to which it is reasonably clear under the terms of a statute that they have been."

With these remarks we are in entire agreement and consequently hold that section 6 (1) does create a right in the family which can be enforced by suit.

This brings me to the question whether sections 13 and 21 close the doors of the Civil Court. I have already referred to the wording of these sections. It is quite clear that section 13 merely says that certain suits may be instituted in the Collector's Court and the suit out of which this appeal arises is not in the categories mentioned in that section. In section 21 the important word is "succeed". This is not a case of succession. It is true that in *Alagiasundaram Pillai v. Midnapore Zamindary Co., Ltd.*(1) BAKEWELL J.

(1) (1920) 12 L.W. 767.

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RANGA REDDI expressed the opinion that the word "succeed" in section 21 is not used in the strict sense, but means a right to be appointed upon a vacancy in an office. We do not agree with this view. The word "succeed" is used in section 10 (5) which admittedly does not apply to the filling of new posts under section 6 (1). Here the word "succeed" is given its ordinary meaning. The word must be given the same meaning throughout and we can only give it its ordinary meaning in section 21. Giving it its ordinary meaning this section does not debar the present suit and this was the opinion of AYLING and COUTTS TROTTER JJ. in *Kodandaramayya v. Ramalingayya*(1).

The learned Advocate for the appellant has here again relied on *Venkata Jagannadha v. Veerabhadrayya*(2) because of this passage at page 649 :

"Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the decision of the Revenue authorities to remove a karnam from office and to appoint another, were not open to question in Courts of Law."

The remarks applied to the other passages quoted from this judgment apply here. Their Lordships were not considering whether the effect of sections 13 and 21 was to exclude Civil Courts entertaining suits of this nature. For the reasons indicated we consider that such suits are not excluded and that the District Munsif's Court and the District Court had jurisdiction in the matter.

But the learned Advocate for the appellant is on a firmer ground when dealing with his third point. His argument here is that inasmuch as section 10 (5) does not apply to appointments

(1) (1920) 12 L.W. 663.

(2) (1921) I.L.R. 44 Mad. 643 (P.C.).

under section 6 (1) and as sub-section (3) to section 6 was not inserted in the statute till 1930, the Collector was right in appointing the appellant as the headman of Gudur West. It appears that at the time the appointment was made the first respondent's father was an invalid and the first respondent who was the eldest son was still a minor and therefore was not eligible for appointment by reason of section 10 (1). The fact that his name had been registered under section 10 (5) carried with it no right. It was the duty of the Collector to select a person from the family of the first respondent's father who was qualified to hold the office, if there was such a person. There was no person qualified and the Collector had to go outside the family. In doing so he committed no breach of duty; in fact it was the only course open to him. Therefore the appointment of the appellant was properly made and the lower Courts had no power to interfere with it. Consequently the suit should have been dismissed.

In conclusion I desire to state that, if the Act under discussion had been drafted better, there would have been a great saving of money and judicial time, not only in this case but in others. The Courts in India have frequently had occasion to draw attention to faulty drafting in statutes. The principles which the Legislature had in mind may be apparent; but the Courts can only interpret statutes as they find them and cannot read into them provisions which have been omitted by faulty drafting. In this case it has been suggested that the Act of 1930 which inserted section 6 (3) in the Madras Hereditary Village Offices Act, 1895, was a declaratory Act passed to clear up doubts

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LEACH C.J. and that the main Act should be read as if the sub-section had always been there. The answer is that the preamble does not govern plain provisions in the body of the Act, and where it is clear that the amending act is more than declaratory it cannot be given retrospective effect.

The appeal will be allowed and the suit dismissed with costs in this Court and in the Courts below. These costs will be payable by the first respondent.

G.R.

APPELLATE CIVIL.

*Before the Hon'ble Mr. A. H. L. Leach, Chief Justice,
and Mr. Justice Burn.*

1937,
November 5.

RYOTS OF GARABANDHA, SARIAPALLI AND RAMACHANDRAPURAM VILLAGES, GARABANDHA GROUP, PARLAKIMEDI ESTATE, REPRESENTED BY PEDDINI RAMALINGAM SASHUDHI AND FIVE OTHERS, PETITIONERS,

v.

ZAMINDAR OF PARLAKIMEDI, RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 168—Settlement of fair and equitable rent under—Enhancement of rent—Power of Board of Revenue as to—Limited to the twelve and a half per cent provided by sec. 30 (i), proviso (b), if.

In settling a fair and equitable rent under section 168 of the Madras Estates Land Act, the power of the Board of Revenue to enhance the rent is not limited to the twelve and a half per cent provided by proviso (b) to section 30 (i) of that Act.

Proviso (b) to section 30 (i) only applies to an enhancement made in pursuance of an application under that clause, that is,

* Civil Miscellaneous Petition No. 1832 of 1937.

an application by the landholder seeking enhancement of rent on the ground that there has been a rise in the average local prices of staple food-crops. The words "and shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot" in sub-section (2) of section 168 can only apply to the provisions of the Act which have general application.

Decision in *Valluri Narasimha Rao v. The Ryots of Peddamamidipalli*(1) with regard to the scope of section 30 approved.

PETITION praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* to the Board of Revenue, Madras, calling for records relating to Revision Petition No. 79 of 1936 on its file and to quash the proceedings of the Board in B.P. Mis. No. 3523, dated 9th October 1936, in Revision Petition No. 79 of 1936.

B. Jagannadha Das for petitioners.

L. S. Veeraraghava Ayyar for respondent.

Government Pleader (K. S. Krishnaswami Ayyangar) for the Board of Revenue.

Cur. adv. vult.

The ORDER of the Court was delivered by LEACH C.J.—In 1925 the Zamindar of Parlakimedi applied to Government under Chapter XI of the Madras Estates Land Act for a settlement of rents in respect of all the ryoti villages in his estate, and Government acceded to his request. A Special Revenue Officer was thereupon appointed to conduct the inquiry and after a lengthy investigation he announced his findings. The ryots contended that the rates fixed in the year 1868

(1) (1925) I.L.R. 49 Mad. 499.

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were permanent and were not liable to be altered. They further contended that in the event of this question being decided against them, section 30 of the Act limited any enhancement of rents to twelve and a half per cent. The Special Revenue Officer decided both these questions against the ryots and directed that the rents should be enhanced cent per cent. An appeal followed to a single Member of the Board of Revenue under section 171 of the Act. By an order dated 30th March 1936, the Member of the Board who heard the appeal upheld the contention of the ryots that the prevailing rates of money rent could not under the law be enhanced by over twelve and a half per cent in settlement proceedings. The zamindar then applied under section 172 to the Board for revision of this order. On 9th October 1936 the Board, by a majority, decided that the twelve and a half per cent limit was not applicable to proceedings under Chapter XI, but they disagreed with the Special Revenue Officer's finding that the rents should be enhanced cent per cent. They decided that the enhancement should not exceed thirty-seven and a half per cent. The ryots then applied to this Court for a writ of *certiorari* with a view to an order being passed quashing the Board's order of 9th October 1936. This application is now before us.

One of the grounds for asking for the issue of a writ of *certiorari* was that the Board of Revenue had no power to revise the order of the single member passed on 30th March 1936, but when it was pointed out that the ryots had appeared before the full Board and had submitted to its jurisdiction, this contention was dropped. The

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learned Advocate for the ryots, however, contended that if the Board had no power to increase the rents beyond twelve and a half per cent, it acted illegally, and, therefore, had no jurisdiction to increase them by thirty-seven and a half per cent. The learned Government Pleader very properly conceded that if the Act did not allow an increase beyond twelve and a half per cent the ryots would be entitled to the issue of the writ. He, however, denied the contention that the Act did limit enhancement to twelve and a half per cent and this is the question which we are called upon to decide. In order to do so, it is necessary to examine certain of the provisions contained in Chapters III and XI of the Act.

Chapter III, as amended by the Madras Act VIII of 1934, consists of sections 24 to 44 which are headed "General provisions relating to the rates of rent payable by ryots". The sections must speak for themselves without reference to the heading, but in passing it may be remarked that some of the sections obviously do not have general application and only apply in special cases. Section 24 states that the rent of a ryot shall not be enhanced except as provided by the Act. Section 27 provides that if a question arises as to the amount of rent payable by a ryot or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate and under the same conditions as in the last preceding revenue year. Section 28 says that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is proved.

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Section 29 provides that the "waram" (that is the established rate of the village for dividing the crop between the landholder and the ryot) is not liable to enhancement. In view of the importance of section 30 so far as this case is concerned, it is advisable to set it out in full. It reads as follows:

"Where for any land in his holding, a ryot pays a money rent, the landholder may apply to the Collector to enhance the rent on one or more of the following grounds and no others—

(i) that during the currency of the existing rent there has been a rise in the average local prices of staple food-crops in the taluk or zamindari division;

(a) Provided that if the rent be permanently payable at a fixed rate or rates, it shall not be liable to be enhanced under this clause on the ground of a rise in prices;

(b) Provided also that no enhancement under this clause shall raise the rent by more than two annas in the rupee of the rent previously payable for the land;

(ii) that during the currency of the existing rent the productive powers of the land held by the ryot have been increased by an improvement effected by, or at the expense of, the landholder;

(iii) that a work of irrigation or other improvement has been executed at the expense of Government, and the landholder has been lawfully required to pay in respect of the holding an additional revenue or rate to Government in consequence thereof;

(iv) that the productive powers of the land held by the ryot have been increased by fluvial action.

Explanation.—'Fluvial action' includes a change in the course of a river rendering irrigation from the river practicable where it was not previously practicable."

It will be observed that proviso (b) of clause (i) limits any enhancement made in pursuance of an application *under this clause* to two annas in the rupee of the rent previously payable for the land, that is, twelve and a half per cent.

Section 31 contains rules with regard to the enhancement of rent on the ground of a rise in prices when the enhancement is claimed under section 30 (i). Section 32 states the rules to be observed when an enhancement is claimed under section 30 (ii). Sections 33 and 34 relate respectively to applications made under clauses (iii) and (iv) of section 30. Section 35 provides that notwithstanding anything contained in sections 31 to 34, the Collector shall not in any case order any enhancement which is under the circumstances of the case unfair or inequitable, or which would operate so as to raise the rent beyond the value of the established waram of the village in which the holding is situated, commuted in accordance with the provisions of section 40. Section 36 confers upon the Collector the power to order the enhancement to be gradual. It is not necessary to refer to the remaining sections in the chapter.

I will now turn to Chapter XI which is headed "Survey, Record of Rights, and Settlement of Rents". This chapter consists of sections 164 to 180. It will be sufficient for the purposes of this case if I refer to sections 164, 166 and 168. Section 164 gives power to the Local Government to make an order directing that a survey be made and a record-of-rights be prepared by the Collector in respect of an estate or portion of an estate. Section 166 (1) provides that when the Collector has, after making such inquiry as he sees fit, completed a preliminary record for the estate or part of the estate, he shall publish a draft thereof in the prescribed manner and for the prescribed period, and shall receive and consider any objection to any entry therein or to any omission

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therefrom, which may be made during the period of publication. When such objections have been considered and disposed of according to such rules as the Local Government shall prescribe, the Collector shall finally frame the record and shall cause it to be published locally in the prescribed manner, and the publication shall be conclusive evidence that the record has been duly made under Chapter XI. Sub-section 2-A states that the Collector shall, along with the final record, cause to be published the name or official designation of the person to whom and the date on or before which the Local Government direct that applications for settlement of rent under sub-section 1 of section 168 should be made. The relevant parts of section 168 are sub-sections 1 and 2 which are in the following terms :

(1) "If on or before the date fixed under sub-section (2-A) of section 166 in respect of any village or any area for which a record-of-rights is published where such area is less than a village or within such further period, if any, as the Local Government may, in their discretion, from time to time, think fit to allow, either the landholder or the ryots apply for a settlement of the rent, provided that in the case of ryots the application is made by holders of not less than one-eighth of the total extent of the holdings in such village or area, the Collector shall, if the Local Government so direct, settle a fair and equitable rent in respect of the land situated in such village or area."

(2) "In settling rents under this section, the Collector shall presume, until the contrary is proved, that the existing rent or rate of rent is fair and equitable and shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot."

It is on the strength of sub-section 2 that the petitioners contend that the powers of the Board of Revenue in enhancing rents is limited to twelve and a half per cent. It is said that

proviso (b) to section 30 (i) absolutely prohibits any further enhancement.

I consider this argument to be entirely fallacious. Proviso (b) to section 30 (i) only applies to an enhancement made in the case of an application under that clause and the application which led to enhancement of rents in this case was not under section 30 (i) but under section 168. Section 30 does not set out all the occasions on which it may be fair and equitable to revise rents. It deals with special circumstances, four in number, under which the landholder can apply for enhancement under that section. Chapter XI is designed to give authority to Government to step in at the instance either of the landholder or the ryots to settle what is a fair and equitable rent so far as the holding generally is concerned. The words "and shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot" in sub-section 2 of section 168 can only apply to the provisions of the Act which have general application. Proviso (b) to section 30 (i) merely applies when the landholder seeks enhancement of rent on the ground that there has been a rise in the average local prices of staple food-crops.

This very question was raised in *Valluri Narasimha Rao v. The Ryots of Peddamamidi-palli*(1) where DEVADOSS and WALLER JJ. held that in settling a fair and equitable rent under section 168 the Revenue Officer is not bound by the limitations of section 30. In that case, it was also held that in proceedings under Chapter XI the Court had revisional powers over the orders

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of the Board of Revenue passed on appeals under section 171 of the Act from the orders of the Revenue Officer in such proceedings, but in *Rajah of Mandasa v. Jagannayakulu*(1) a Full Bench disagreed with this part of the judgment; though it did not question the validity or the correctness of the decision with regard to the scope of section 30. If section 30 has the effect which the learned Advocate for the petitioners says it has, it would mean that notwithstanding that rents are so unreasonably low that a rise of twelve and a half per cent would not do justice to the landholder there would be no remedy. This could never have been the intention of the Act, and, in my opinion, it is not possible without disregarding all canons of construction and the meaning of the words used to give to sub-section 2 of section 168 the interpretation suggested by the petitioners. It follows that in my opinion the Board of Revenue had full power to enhance the rents in this case by thirty-seven and a half per cent and this being so, the petitioners are not entitled to the issue of a writ of *certiorari*. Consequently the application will be dismissed with costs in favour of Government and those we fix at Rs. 250.

A.S.V.

(1) (1931) 63 M.L.J. 450 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Pandrang Row.

KANNAYALAL (APPELLANT IN APPEAL AGAINST APPELLATE ORDER No. 145 OF 1935 AND PETITIONER IN CIVIL REVISION PETITION No. 1302 OF 1935), PETITIONER,

1937,
November 18.

v.

S. SUBBARAYA CHETTY AND TWO OTHERS (RESPONDENTS IN APPEAL AGAINST APPELLATE ORDER No. 145 OF 1935 AND RESPONDENTS IN CIVIL REVISION PETITION No. 1302 OF 1935), RESPONDENTS.*

Married Women's Property Act (III of 1874), sec. 6—Insurance policy—Money due thereunder to be paid to the assured after fifteen years or to his wife, if assured dies earlier—Assured becomes insolvent—Assignment of the policy in favour of his creditor—Validity of—Trust, if created for the benefit of the wife under the Act.

An application was filed by the creditor of an insolvent for the assignment of a policy of insurance taken out by the insolvent in his favour. The words "the policy is for the benefit of the wife" were not found in the policy, but it was stated therein that the amount due on the policy should be paid to the assured, i.e., to the first respondent on the expiry of the period of fifteen years, or to his wife on the death of the assured if earlier.

Held (i) that there was a trust impressed on the policy in favour of the wife, from the moment the policy was taken out for her benefit, though she would not be entitled to claim anything unless the event referred to in the policy happened;

(ii) that it was not open to the creditor to treat the policy as being the property of his debtor and to require an assignment of it and to compel the Insurance Company to acknowledge such an assignment as valid and binding upon them.

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Once it is found that a policy of insurance effected by a married man on his own life was for the benefit of his wife, then under section 6 of the Married Women's Property Act, it shall be deemed to be a trust and enure as such so long as the wife is alive.

APPEAL against order of the District Court of North Arcot dated 8th March 1935 and made in Civil Miscellaneous Appeal No. 65 of 1934 preferred against the order of the Court of the Subordinate Judge of Vellore dated 2nd November 1934 and made in Interlocutory Application No. 358 of 1934 in Insolvency Petition No. 19 of 1933; and PETITION under Section 115 of Act V of 1908 and section 75 of Act V of 1920 praying the High Court to revise the order of the District Court of North Arcot dated 8th March 1935 and made in Civil Miscellaneous Appeal No. 65 of 1934 preferred against the order of the Court of the Subordinate Judge of Vellore dated 2nd November 1934 and made in Interlocutory Application No. 358 of 1934 in Insolvency Petition No. 19 of 1933.

P. Viswanatha Ayyar and *V. N. Srinivasa Rao* for appellant.

V. S. Rangaswami Ayyangar for second respondent.

Other respondents were unrepresented.

JUDGMENT.

The appellant in this second appeal and the petitioner in the revision petition are one and the same, the appeal and the revision petition being alternative remedies pursued for the same purpose, namely, of getting the order of the District Judge of Vellore in Civil Miscellaneous Appeal No. 65 of 1934 set aside.

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That was an appeal from an order passed in an application by the creditor of an insolvent for the assignment of a policy of insurance taken out by the insolvent in his favour. The second respondent in the petition was the Life Insurance Company and the third respondent was the wife of the insolvent debtor. The only question that had to be decided by the Courts below was whether the life policy in question, Exhibit 1, contains a trust for the benefit of the wife, the third respondent. The *verba ipsissima*, "the policy is for the benefit of the wife", are not to be found in the policy, but it is stated therein that the amount due on the policy should be paid to the assured, i.e., to the first respondent at the expiry of the period of fifteen years, or to his wife on the death of the assured if earlier. In these circumstances the Subordinate Judge was of opinion that there was no trust for the benefit of the wife and allowed the petition. On appeal the District Judge came to the contrary conclusion and allowed the appeal and dismissed the petition. Now the question for me to decide is whether the District Judge's conclusion is right. The Subordinate Judge distinguished the case of *Abhiramavalli v. Official Trustee, Madras*(1) by saying that in that case the question had arisen only after the death of the assured whereas in the case before him the assured was alive. He also distinguished the case in *Dinbai v. Bamanshaji*(2) on the same ground. The District Judge was of opinion however that the Subordinate Judge was not right in distinguishing the present case from the earlier case. It was

(1) (1931) I.L.R. 55 Mad. 171.

(2) (1933) I.L.R. 58 Bom. 513.

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held by MADHAVAN NAIR J. in that case that the actual words "for the benefit of the wife" need not be in the policy in order to attract the provisions of section 6 of the Married Women's Property Act to any particular policy, and that if on a reading of the words used in the policy it appears that the assured intended in the event of his death that the policy should enure for the benefit of his wife, then the policy may be deemed to be for her benefit and brought within the purview of section 6; in the particular case before him the provision regarding payment was similar to the provision in the present case, and it was held that the policy fell within section 6 of the Married Women's Property Act III of 1874 as amended by the subsequent Act XIII of 1923. The only other decision which appears to take the opposite view is *Lalithambal Ammal v. Guardian of India Insurance Co., Ltd.*(1) where the policy contained practically the same provision about payment to the wife in case she survived the insured before the policy became mature and it was held that there was no vested interest of the wife in the policy till the death happened and that the assignment of the policy made by the insured was valid. The decisions however which were relied upon, namely, *In re Ioakimidis' Policy Trusts: Ioakimidis v. Hartcup*(2), *In re Fleetwood's Policy*(3) and *Cousins v. Sun Life Assurance Society*(4), were all cases in which it was held that there was a trust in favour of the wife. Where there is a trust the insured cannot deal with the policy as he likes. This is clear from the

(1) (1937) 1 M.L.J. 735.

(3) [1926] 1 Ch. 48.

(2) [1925] 1 Ch. 403.

(4) [1933] 1 Ch. 126.

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provisions of section 6 of the Married Women's Property Act. Once it is found that a policy of insurance effected by a married man on his own life was for the benefit of his wife, then the section says that it shall be deemed to be a trust and enure for the benefit of the wife according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate. The section also indicates the person to whom in such a case the sum secured by the policy has to be paid, namely, the Official Trustee. The only way in which a policy of this kind can be attacked by a creditor is by proving that it was effected for the purpose of defrauding the creditors. No such attempt has been made in this case. I am of opinion that if the words found in the policy lead to the conclusion that the policy was for the benefit of the assured's wife, then according to section 6 of the Married Women's Property Act it shall be deemed to be a trust and enure as such so long as the wife is alive. This does not mean of course that the wife is entitled to claim anything by virtue of the above trust straightaway. The benefit which accrues to her under the trust will be subject to the other conditions in the policy but the trust is impressed upon the policy from the moment the policy comes into existence, and it cannot in my opinion be said that the trust comes into existence for the first time only after the event which is to determine the payment under the policy takes place. In other words, the wife will not be entitled to claim anything under the policy unless the event referred to in the policy happens, but

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the trust is brought into existence the moment the policy is taken out for the benefit of the wife. That being the case, the trust attaches itself to the policy from the very moment of its birth, and the policy cannot thereafter be looked upon as available to the creditors regardless of the trust imposed upon it. The position therefore in law is that there is a trust impressed on the policy in favour of the wife; at the same time it cannot be said that the insured has no interest in the policy, because in a certain event, namely, after the expiry of fifteen years from the date of the policy the money thereunder is to be paid to him if he is then alive, and it is only in the event of his death within this period that the money could be paid to his widow if she is then alive. The policy thus constitutes property in which both the insured and his wife have an interest. It is not possible to say at present what that interest is because it is entirely dependent on the events above referred to. In these circumstances it is not open to the creditor to treat the policy as being the property of his debtor and to require an assignment of it and to compel the Insurance Company to acknowledge such an assignment as valid and binding upon them. For these reasons, I am of opinion that the order passed by the District Judge was right and that the application of the petitioner was rightly dismissed. The appeal and the revision petition are therefore dismissed with costs in the appeal.

V.V.C.

APPELLATE CIVIL.

*Before Mr. Justice Pandrang Row and
Mr. Justice Abdur Rahman.*

SRIMATHU RAJA MUTHU VIJAYA RAGUNATHA
DORAISINGAM *alias* GOURIVALLABHA THEVAR,
ZAMINDAR OF SIVAGANGA, THROUGH HIS DEWAN AND AUTHORISED
AGENT, MR. R. M. SUNDARAM, I.C.S. (APPELLANT), APPELLANT,

v.

MUTHU K. R. M. MUTHAYYA CHETTIAR AND FIVE
OTHERS (RESPONDENTS), RESPONDENTS.*

*Madras Court of Wards Act (I of 1902), sec. 49—Assignee of
person who gives notice under—Suit by, based on cause of
action and claiming relief referred to in the notice—Fresh
notice under sec. 49—Necessity.*

When after notice is given as required by section 49 of the Madras Court of Wards Act, the person who gives the notice transfers his interest in the subject-matter to another and the latter files a suit on the cause of action stated by his transferor in the notice given by him, no objection can be raised to the suit on the ground that the transferee had not given another notice under that section after the transfer in his favour.

APPEAL under Clause 15 of the Letters Patent preferred against the judgment of VARADACHARIAR J. dated 31st October 1935 and made in Appeal Against Order No. 338 of 1933 preferred against the order of the District Court of Ramnad at Madura dated 23rd January 1933 and passed in Appeal Suit No. 3 of 1932 (Original Suit No. 24 of 1929, Sub-Court of Ramnad at Madura).

[The Judgment of VARADACHARIAR J. is
printed at page 878 *infra*.]

* Letters Patent Appeal No. 4 of 1936.

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S. T. Srinivasagopalachari for appellant.
R. Kesava Ayyangar for respondents 1 to 5.
Sixth respondent was unrepresented.

JUDGMENT.

PANDRANG
ROW J.

PANDRANG ROW J.—The facts of this case have been stated by VARADACHARIAR J. in his judgment and it is needless to repeat them. The only point that has been decided is that the notice given in May 1928 by one Singa Dorai satisfies the conditions embodied in section 49 of the Madras Court of Wards Act. The law on the subject has been fully discussed by VARADACHARIAR J. and there is no need to add to his discussion of the case law. The section of the Court of Wards Act which has to be construed is section 49 which runs as follows :

“(1) No suit relating to the person or property of any ward shall be instituted in any civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the District Collector specified in the notification under section 19 or the Collector appointed under section 46, as the case may be.

(2) Such notice shall state the name and place of the abode of the intending plaintiff, the cause of action and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left.”

The notice given in this case completely complies with all the provisions of the section. The person who gave the notice was one Singa Dorai, the senior proprietor of the village the proprietors of which are the present plaintiffs. He was certainly the intending plaintiff at the time the notice was given. He was the original complainant before the Survey Officer and the respondent before the appellate Survey Officer. The notice was given because the appellate Survey Officer's decision was against Singa Dorai. It is

not pretended that any one else was the intending plaintiff at the time the notice was sent. The cause of action and the relief claimed which are given in the notice are not different from the cause of action and the relief claimed in the present suit. The plaint contains a statement that the notice was delivered or left at the offices referred to in the section and this delivery is not denied. It would thus follow that all the requirements of the section have been really fulfilled.

The main objection urged by the zamindar's Advocate in this appeal is that Singa Dorai who gave the notice is not the actual plaintiff in the present suit in which the plaintiffs are those who derived title from him subsequent to the issue of the notice, Singa Dorai having transferred his interest in the village in August 1928 to certain persons who in turn transferred the same to the plaintiffs in September 1928. In other words, the contention of the learned Advocate for the appellant is that when after notice is given as required by section 49, the person who gives the notice dies or transfers his interest in the subject-matter to another, a fresh notice has to be given under section 49. It is difficult to see how this conclusion can be said to follow necessarily from section 49. It certainly does not follow from the letter of this law ; nor can it be said that the object of this law requires such a conclusion to be drawn. A transfer of the subject-matter does not affect the object for which such notice is required to be given. I may also say that the reasons given by VARADACHARIAR J. in support of his conclusion appear to be sound and that the

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conclusion which he has come to is one in consonance with justice and is not opposed to law. There is no reason therefore why that decision should be interfered with in appeal.

The appeal should accordingly be dismissed with costs.

ABDUR
RAHMAN J.

ABDUR RAHMAN J.—I agree. While our learned brother, VARADACHARIAR J., rejected the appeal on the ground that the notice given by Singa Dorai to the Court of Wards should be held to be available for the benefit of persons claiming under him, I would like to rest my decision on a grammatical construction of section 49 of the Court of Wards Act itself. A close perusal of this section shows that although under sub-clause 2 an intending plaintiff is required to serve the Court of Wards with a notice in which his name, place of his abode, the cause of action and the relief which he claims are to be stated, sub-clause 1 of the section has been so drafted as not to provide that the suit must necessarily be instituted by the very person who had served the Court of Wards with a notice. It merely enacts that no suit relating to the person or property of any ward shall be instituted in any civil Court until the expiration of two months after notice in writing has been delivered. Had the Legislature intended that the person who had served the Court of Wards with a notice would alone be entitled to sue, it could have said so without any difficulty. It is true that when the suit is to be filed on the basis of the cause of action mentioned in the notice, the person serving the notice would ordinarily be the same as the person instituting the suit; but the person, who

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intended to file a suit and who actually served the Court of Wards with a notice, may have died before the suit is instituted, and his sons or heirs may have had to institute the suit instead. In that case it cannot be reasonably argued, in my opinion, that the notice served by the intending plaintiff has spent itself on account of his death and cannot be availed of by his sons or heirs. There is nothing in section 49 of the Act which would make another notice essential as long as the suit is based substantially on the same cause of action which was stated in the notice. Section 49 appears to have been so drafted as to cover cases of this character. The position of an assignee, on whom the interest of the intending plaintiff may devolve by a voluntary act of the latter, would be the same, in my opinion, and no objection can be raised on the ground that he had not served the Court of Wards with another notice after his assignment. It may be that if his title is denied by or on behalf of the Court of Wards, he would be called upon to establish the same before he is held entitled to any relief. But if he chooses to file a suit on the cause of action stated by his assignor in the notice served on the Court of Wards, no legitimate objection can be raised against him on that score. A number of cases either following or decided on the lines adopted in *Bachchu Singh v. The Secretary of State for India in Council*(1) were pressed upon us by the learned Counsel for the appellant in support of his contention. There is no doubt that the language used in section 80 of the Code of Civil Procedure is very similar to that employed in

(1) (1902) I.L.R. 25 All. 187.

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section 49 of the Court of Wards Act but there is, first of all, some difference in the manner in which the two sections were drafted, i.e., while the provisions of section 80 are contained in one paragraph, those contained in section 49 have been subdivided into two. This might have persuaded the learned Judges in placing a different construction on section 80, Civil Procedure Code, and holding that the intending plaintiff who has been referred to in the latter part of the section must necessarily be taken to refer to the same person who had served the notice. Secondly, the word "intending" before the word "plaintiff" has now been taken out and this change appears to me to have been effected with the object of removing a doubt in construing section 80, Civil Procedure Code, to which it was otherwise liable.

For these reasons, I consider that there is no merit in this appeal and it should be dismissed with costs.

A.S.V.

Appeal Against Order No. 338 of 1933.

VARADACHARIAR J.—This is an appeal against an order of remand passed by the District Court of Ramnad, when it reversed the decision of the trial Court on the sixth issue in the case. That issue was in the following terms:

"Has notice of suit been given to the first defendant as required by law?"

The only point for determination now is whether the decision of the lower appellate Court on that issue is not correct.

The question arises in connection with a suit filed by the members of a Nattukottai Chetti family, seeking to set aside the decision of the appellate survey authority in a boundary dispute under the Madras Survey and Boundaries Act. The

plaintiffs are at present the proprietors of a *jivitham* village in the Sivaganga Zamindari known as Kilayur and the dispute related to the boundary between that village and the adjoining ayan village of Elayangudi belonging to the Sivaganga estate. At the time of the institution of this suit, the Sivaganga estate was under the management of the Court of Wards; the zamindar was accordingly impleaded as the first defendant, represented by the Estate Collector. The issue now under consideration was raised in view of the terms of section 49 of the Madras Court of Wards Act which prescribes a two months' notice as a condition precedent to the institution of a suit relating to the person or property of any ward. The second clause of that section provides that "such notice shall state the name and place of abode of the intending plaintiff, the cause of action and the relief which he claims".

The plaint relied upon a notice given by one D. Singa Dorai Tevar on 2nd May 1928 (Exhibit A). From the documentary evidence in the case it appears that this Singa Dorai was the owner of one half of Kilayur, the present plaintiffs being owners of the other half, that Singa Dorai had been registered as landholder under the Estates Land Act under a decree of Court (Exhibit E), that an attempt on the part of the plaintiffs, in 1924, to get a member of their family registered as landholder proved unsuccessful and that Singa Dorai was regarded as the "senior" proprietor of the village, apparently with reference to clause 6 of section 3 of the Survey and Boundaries Act. So far as I am able to gather from the papers filed in the case, the proceedings before the survey authorities were conducted by Singa Dorai alone, though he must presumably have acted on behalf of all the co-owners. Reading Exhibit A in the light of these circumstances, its terms are significant. Singa Dorai there describes himself in paragraph 1 as the "senior proprietor", refers in paragraph 3 to the possession and enjoyment of himself and his *co-sharers* and, when stating the reliefs in paragraph 10, refers to an injunction restraining the zamindar from interfering with the enjoyment of the suit plots by himself and his *co-sharers*. But it will also be noticed that the names and addresses of his *co-sharers* are nowhere stated in the notice. To complete the narrative of events, I may state that, before the institution of this suit, the plaintiffs' family became purchasers of Singa Dorai's interest under Exhibit G dated 24th September 1928 through an intermediate

sale under Exhibit F dated 29th August 1928. That is apparently the reason why Singa Dorai himself is not a party to this suit.

There can be little difficulty in holding that, if Exhibit A could be relied on by the plaintiffs, it sufficiently complies with two of the requirements of section 49 of the Court of Wards Act, namely, statement of the cause of action and statement of the relief. The question for consideration therefore relates to the third requirement under that section, namely, statement of the name and place of abode of the intending plaintiff.

In the first Court, the learned Subordinate Judge was of opinion that Exhibit A could not be availed of by the plaintiffs; he held that a notice of suit could be held to comply with the section only when the person who gave the notice is himself the plaintiff. On appeal, the learned District Judge was of opinion that Exhibit A could be availed of by the plaintiffs because it was a notice given by Singa Dorai "as representing the estate", that is, on behalf of all the co-owners; he thought it immaterial that the names and abodes of the plaintiffs had not been set out in Exhibit A.

The view of the lower appellate Court on the interpretation of section 49 and the construction of Exhibit A has been criticised before me on behalf of the appellant; but, before dealing with this point, it will be convenient to dispose of two contentions urged on behalf of the respondents. It was argued (i) that no notice was necessary in this case and (ii) that, at any rate, the objection on the score of want of notice was no longer available to the appellant whose estate has now ceased to be under the Court of Wards. In support of the first contention, reliance was placed upon the decision in *Raja of Ramnad v. Subramaniam Chettiar*(1). The question there arose in connection with a claim suit under Order XXI, rule 63, Civil Procedure Code; and PHILLIPS J. (with whom ODGERS J. apparently agreed on this point) held that, as the claim suit must be deemed to be a continuation of the earlier claim proceedings, no fresh notice under section 49 of the Court of Wards Act was necessary. This decision has been commented upon by VENKATASUBBA RAO J. in *Rangasami Goundan v.*

(1) (1928) I.L.R. 52 Mad. 465.

Errappa Gounder(1) [see also observations of WALLACE J. in *Subramanyam v. Narasimham*(2)]. If the facts here were the same as in *Raja of Ramnad v. Subramaniam Chettiar*(3), the decision would be binding upon me; but, as pointed out by VENKATASUBBA RAO J., a suit like the present stands on a different footing from a claim suit, at least for one reason, viz., whereas in a claim suit the prior proceedings will ordinarily be in a civil Court, the survey proceedings cannot reasonably be regarded as proceedings in a civil Court. The institution of the suit to set the survey decision aside must therefore be deemed to be the initiation of the proceeding so far as the civil Court is concerned. With respect, I agree with VENKATASUBBA RAO J. that it is difficult to exclude a suit like the present from the scope of section 49. The decision of ANANTAKRISHNA AYYAR J. in Second Appeal No. 1296 of 1926 has also been explained in *Rangasami Goundan v. Errappa Gounder*(1). The learned Judge no doubt refers to the possibility that the suit under section 14 of the Survey and Boundaries Act may be viewed as a continuation of the proceedings before the survey authorities; but, as I read that judgment, he refers to that theory only to reinforce his argument that there was no act of the local authority which was called in question in that suit so as to attract the operation of section 225 of the Madras Local Boards Act. On Letters Patent Appeal, Letters Patent Appeal No. 101 of 1930, the decision of ANANTAKRISHNA AYYAR J. was confirmed only on the ground that the suit was not one of the kind provided for in section 225.

In support of the other contention advanced on behalf of the respondents, their learned Advocate argued that the objection of want of notice was available only to the Court of Wards and must therefore cease to have any force as soon as the Court of Wards gave up management, even though it be during the pendency of the suit. He maintained that the absence of notice will not make the institution of the suit illegal, because it has been held in cases under section 80, Civil Procedure Code, that the objection of want of notice may be waived. I am unable to accept this contention. Cases like *Bhola Nath Roy v. Secretary of State for India*(4) are not

(1) (1934) 67 M.L.J. 426.

(3) (1928) I.L.R. 52 Mad. 465.

(2) (1928) 56 M.L.J. 489, 497.

(4) (1912) I.L.R. 40 Cal. 503.

really analogous, because while in suits contemplated by section 80, Civil Procedure Code, the Secretary of State is a party, the Court of Wards is not the party in suits contemplated by section 49 of the Court of Wards Act. The objection in the latter class of cases is really taken on behalf of the ward and, as long as he continues to be a party, the fact that the management of his estate has changed hands can make no difference. It may be that the cessation of the management by the Court of Wards may release him from certain disabilities [cf. *Atma Ram v. Beni Prasad*(1)], but there is nothing in the Act or in general principles to deprive him on this ground of a plea which the Legislature has enacted for the benefit of his estate. The observation of SADASIVA AYYAR J. in *Jagana Sanyasiah v. Atchanna Naidu*(2), that, when a receiver ceases to be on the record of a suit, the objection as to want of sanction of the Court which appointed him also ceases to be available must be understood in the light of the fact that the receiver himself was a party to the suit (unlike a guardian *ad litem*) and of the reason given by the learned Judge that the sanction is required in such cases only as a matter of respect to the appointing Court. There is no question of waiver in this case, because the first defendant has all along been insisting on the objection to the sufficiency of notice.

On the main question, I am unable to confirm the decision of the lower appellate Court on the particular ground assigned in its judgment. Whether a statement of the names and abodes of all the intending plaintiffs is necessary to enable the Court of Wards to settle the dispute if they so chose, is not a matter that the Court is free to speculate upon. There have been interesting discussions in the Courts as to the sufficiency of the address given in the notice [cf. *Eales v. Municipal Commissioners of Madras*(3), *James v. Swift*(4) and *Osborn v. India in Council v. Perumal Pillai*(6)] has upheld a notice that did not at all contain the names and abodes of some of the intending plaintiffs. In the words of Lord MANSFIELD in *Taylor v. Fenwick* [footnote to *Osborn v. Gough*(5) at page 554; 127

(1) A.I.R. 1935 P.C. 185.

(2) (1921) 42 M.L.J. 339, 343.

(3) (1890) I.L.R. 14 Mad. 386.

(4) (1825) 4 B. & C. 681; 107 E.R. 1214.

(5) (1803) 3 Bos. & Pul. 551; 127 E.R. 297.

(6) (1900) I.L.R. 24 Mad. 279.

E.R. at page 299], "The Legislature has thought fit to prescribe a precise form. Whether right or not, it does not matter." It may be, as pointed out in *Bhola Nath Roy v. Secretary of State for India* (1), that it is not necessary that the notice should be signed by all the intending plaintiffs [cf. *Mohini Mohun Das v. Bungsi Buddan Saha Das* (2)]. Having regard to the joint family system and the co-ownership system prevailing in this country, I am inclined to concur in the opinion of the learned District Judge that a notice of suit may be given by one or some of several joint owners or co-owners on behalf of all. But I see no hardship in insisting that the names of all the owners who, it is intended, should join as plaintiffs in the suit should be specified (with their addresses) in the notice. I can quite realise the extravagance of requiring the names of babies in a joint family being required to be specified but it does not seem to me necessary that such babies or minors should be joined as plaintiffs in the suit. All that section 49 requires is the specification of the name and abode of the "intending plaintiff" which must be taken to mean all the plaintiffs where they are more than one.

It is true that several cases have recognised that provisions like those of section 49 must be held to be satisfied by a substantial compliance and that a notice must be fairly and reasonably construed in respect of its contents. But I cannot hold that the theory of substantial compliance is applicable where the names of co-sharers figuring as plaintiffs in the suit are wholly absent from the notice.

At the time that the decision of the learned District Judge was pronounced in this case, the judgment in *Secretary of State for India in Council v. Perumal Pillai* (3) stood unchallenged and the decision of SUNDARAM CHETTI J. in *Appa Rao v. Secretary of State for India*(4), which certainly departed from *Secretary of State for India in Council v. Perumal Pillai*(3), remained as the judgment of a single Judge. The learned District Judge therefore felt himself at liberty to take what he calls a "common sense" view of the matter in the light of *Secretary of State for India in Council v. Perumal Pillai*(3). I may observe in passing that it is very doubtful if even the judgment in *Secretary of State for India in Council v. Perumal*

(1) (1912) I.L.R. 40 Cal. 503, 509.

(3) (1900) I.L.R. 24 Mad. 279.

(2) (1889) I.L.R. 17 Cal. 580 (P.C.).

(4) (1930) I.L.R. 54 Mad. 416.

Pillai (1) can help a case where the person who gave the notice does not figure as plaintiff at all. The decision in *Appa Rao v. Secretary of State for India* (2) has since been confirmed by a Division Bench on Letters Patent Appeal [vide *Venkata Rangiah v. Secretary of State* (3)]. The view taken in *Appa Rao v. Secretary of State for India* (2) has also been followed by a learned Judge of the Bombay High Court; *Secretary of State v. Hargovandas* (4). The result is *Secretary of State for India in Council v. Perumal Pillai* (1) can no longer be regarded as of unchallenged authority.

It is not for me to comment upon the judgment in *Venkata Rangiah v. Secretary of State* (3). But I may respectfully observe that the consequences of the wide rules there laid down may, in many cases, especially where the claimants are joint owners or co-owners, be evaded, by impleading as *defendants* the co-owners whose names and addresses have not been given in the notice. On the other hand, it will be a regrettable result if in suits on behalf of joint families, for instance, the plaintiff should be *wholly* rejected because some members not born at the date of the notice or who were minors at the time have been omitted from the notice but added as plaintiffs in the suit. It is common knowledge that in this country suits are postponed to the last possible day and in cases of the kind suggested, a new suit after a notice in proper form may be out of time.

I am however of opinion that the lower appellate Court's decision on the sixth issue may be affirmed on another ground. As will appear from the narrative already given, the plaintiffs are purchasers of Singa Dorai's interest under sale deeds subsequent to the date of the notice, Exhibit A, that is, in law they are his representatives in interest. I am of opinion that provisions like those of section 49 of the Court of Wards Act must be construed in the light of well-established general principles of law, and that a notice given by a person, when it otherwise satisfies the requirements of law, must be available for the benefit of persons *claiming under* him. I am aware that the decisions of the Allahabad High Court in *Bachchu Singh v. Secretary of State for India in Council* (5) and *Muhammad*

(1) (1900) I.L.R. 24 Mad. 279.

(3) (1935) 41 L.W. 591.

(2) (1930) I.L.R. 54 Mad. 416.

(4) A.I.R. 1935 Bom. 229.

(5) (1902) I.L.R. 25 All. 187.

Siddiq Ali Khan v. Anwar-ul-Hasan (1) and of the Bombay High Court in *Mahadev v. Secretary of State* (2) are opposed to this view. But, with due respect to the learned Judges, I am unable to follow those decisions. *Mahadev v. Secretary of State* (2) is to some extent distinguishable as laying stress on the omission from section 80 of the Civil Procedure Code of 1908 of the word "intending" from the expression "intending plaintiff" found in section 424 of the old Code; but the decision in *Bachchu Singh v. The Secretary of State for India in Council* (3) was on the same expression as is found in section 49 of the Court of Wards Act. The learned Judges of the Allahabad High Court hold that to permit the successor to rely on a notice given by his predecessor will amount to adding words to the section. This is only a reiteration of the view which in certain well-known classes of cases has been superseded by the enactment of section 146 in the Civil Procedure Code. Very much like the same view was enunciated in certain decisions of this Court which held that on the death of a decree-holder or judgment-debtor, no execution petition pending at the death could be *continued* by or against the legal representatives. This again has been overruled by a Full Bench; *Venkatachalam Chetty v. Ramaswamy Serrai* (4). Cases like *Lalit Mohan Mandal v. Satish Chandra Das* (5) and *Subbiah v. Sundara Boyamma* (6) furnish no true analogy because there is no justification in the present case for the assumption that the right is only a "personal right". I respectfully adopt the view stated in *Ramakrishnama Chetty v. Vuvvati Chengu Aiyar* (7) that legal representatives and assignees must *prima facie* be taken to be included in any reference to a person in a statute, unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property. The observation of SESHAGIRI AYYAR J. in *Ramarayanimgar v. Maharajah of Venkatagiri* (8) about the rule of liability being "too broadly stated" in *Ramakrishnama Chetty v. Vuvvati Chengu Aiyar* (7) does not touch the present question. I see nothing inconsistent with the decision of the Privy Council in *Bhagchand Dagadusa*

(1) (1923) I.L.R. 45 All. 563.

(2) (1930) 32 Bom. L.R. 604.

(3) (1902) I.L.R. 25 All. 187.

(4) (1931) I.L.R. 55 Mad. 352 (F.B.).

(5) (1906) I.L.R. 33 Cal. 1163.

(6) (1927) I.L.R. 51 Mad. 697.

(7) (1914) 27 M.L.J. 494.

(8) (1920) I.L.R. 44 Mad. 301, 318.

v. *Secretary of State for India*(1) in holding that these statutory provisions for notice must be construed in the light of well established general principles. There is no question here of whittling down the statutory requirement or controlling it by extraneous considerations.

SUNDARAM CHETTI J. has no doubt referred to the decisions in *Bachchu Singh v. The Secretary of State for India in Council*(2) and *Mahadev v. Secretary of State* (3), but he refers to them only by way of analogy. As the appellate Bench has not based its decision upon these cases, I think I am at liberty to deal with the question on its own merits. I notice that even in *Appa Rao v. Secretary of State for India*(4) the second plaintiff was a purchaser from the first, but it is not possible to gather from the report whether the purchase was before the date of the notice given by the first plaintiff or after the date of the notice. I have examined the printed papers; they disclose no further information than is contained in the Letters Patent Appeal judgment that there was no formal sale deed but the second plaintiff had been put in possession under an agreement for sale. Nothing is stated as to the date of the agreement or transfer of possession. It is only if the second plaintiff's title had accrued subsequent to the notice that he could be held to claim *under* the first, in the sense in which that expression is used in such context. SUNDARAM CHETTI J. lays stress upon the fact that the suit claimed relief on behalf of *both* the plaintiffs; this leads me to think that the case did not proceed on the footing of one person claiming under another. Before the Letters Patent Appeal Bench the only question canvassed was "whether the suit brought by two plaintiffs is maintainable when the notice required by section 80, Civil Procedure Code, was given by the first plaintiff only". The answer, in the words of the learned Chief Justice, was: "Where there are more plaintiffs than one claiming relief those plaintiffs are required to give the notice". SUNDARAM CHETTI J. no doubt observes that "there should be identity of the person who issued the notice with the person that brings the suit". In a sense, this will be correct, i.e., if legal identity is all that is required as the transferee or heir is *in law* the continuation of the *persona* of the transferor or ancestor. But, I am not, with all respect,

(1) (1927) I.L.R. 51 Bom. 725 (P.C.).

(3) (1930) 32 Bom. L.R. 604.

(2) (1902) I.L.R. 25 All. 187.

(4) (1930) I.L.R. 54 Mad. 416.

prepared to accept the correctness of the statement of the learned Judge, if *physical* identity of the person is to be insisted on. To take a converse illustration, it is well established that, notwithstanding physical identity, a person claiming in his own right is legally different from the same person claiming as a trustee. It seems to me much more consistent with the purpose of provisions like section 80, Civil Procedure Code, or section 49 of the Court of Wards Act to hold that, notwithstanding the physical identity of the person, a notice given in one character will not avail when the claim is made in another character than to hold that the physical identity of the individual is the deciding factor.

It was lastly pointed out that the plaintiffs are now suing as "full" proprietors of the village of Kilayur whereas they could have acquired only one half from Singa Dorai. I do not think this circumstance brings the case within the decision in *Venkata Rangiah v. Secretary of State*(1). If I am right in the view that the plaintiffs are entitled to maintain this suit as "representatives" of Singa Dorai, the nature of the reliefs asked for is such that they can obtain all they want in that capacity and it is immaterial that their interest in the village is larger than that of Singa Dorai.

I accordingly confirm the order of the lower appellate Court though for different reasons and dismiss the appeal. In the circumstances I make no order as to costs.

(1) (1935) 41 L.W. 591.

APPELLATE CIVIL.

*Before Mr. Justice Venkataramana Rao.*1938,
January 27. A. LAKSHMANA REDDIAR (FIRST DEFENDANT), APPELLANT,

v.

THE ELLINGANAICKENPATTY KUMARA KOIL
SRI SUBRAMANIA SWAMI, THROUGH ITS TRUSTEE AND MANAGER
MEENAKSHISUNDARA BHATTAR, AND SIX OTHERS (PLAINTIFF
AND DEFENDANTS 2 TO 7), RESPONDENTS.*

*Inamdar—Ejectment suit by—Burden of proof—Non-existence
of presumption that he is owner of both warams—Proof that
he is owner of both warams—Insufficiency of, to entitle him
to decree in such suit without proof that the tenant was let
in under a terminable tenancy.*

When an inamdar comes to Court alleging that he is the owner of both the warams, no presumption can be made that the grant was of both the warams and it is incumbent on him to prove the affirmative of the issue. Even assuming that he establishes that he is the owner of both the warams, in order to sustain an action in ejectment he must prove that the defendant was let in under a terminable tenancy which entitled him to eject him from the land.

Aiyans v. Periakaruppa Thevan(1) not followed.

Subramania Aiyar v. Onnappa Goundan(2) and *Subbarayudu v. Narasimha Rao*(3) followed.

Case-law reviewed and discussed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Appeal No. 105 of 1929 preferred against the decree of the Court of the District Munsif of Sattur in Original Suit No. 540 of 1926.

R. Desikan for appellant.

* Second Appeal No. 1889 of 1931.

(1) (1929) 30 L.W. 583.

(2) (1920) 39 M.L.J. 629.

(3) (1924) 47 M.L.J. 558.

K. Rajah Ayyar and V. Ramaswami Ayyar for first respondent.

Other respondents were unrepresented.

Cur. adv. vult.

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ORDER.

This second appeal arises out of a suit in ejectment instituted by the trustee of Kumara Koil Sri Subramania Swami temple in Ellinganaickenpatty village, Sattur Taluk. The case for the plaintiff is that the suit land forms part of an inam wherein the temple owns both the warams, that the second defendant was in occupation thereof as a tenant at will, that in execution of a decree obtained by the first defendant against the second defendant the first defendant purchased the said property and was in possession of the same. During the pendency of the execution proceedings a claim was preferred on behalf of the temple alleging that the second defendant had no saleable interest therein and the property belonged to the temple, but the claim was dismissed. Hence the present suit was filed for a declaration of the temple's right to the land and for delivery of possession thereof. The defence is that the temple owned only the melwaram right and the kudi. waram right had always been in the tenant of the inam lands and therefore was in the second defendant, and that in any event the plaintiff was not entitled to eject the second defendant, and therefore the suit would not lie.

The main questions in dispute between the parties therefore are whether the plaintiff temple is the owner of both the warams, and, even assuming it is, is the second defendant liable to be ejected therefrom? The learned District Munsif dismissed

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the plaintiff's suit holding against the temple on both the questions, but the learned Subordinate Judge reversed his decision. In my opinion, the learned Subordinate Judge misdirected himself on questions of law bearing on the said issues in arriving at his conclusions and threw wrongly the onus on defendants 1 and 2. The learned Subordinate Judge in paragraph 6 of his judgment states thus :

" When once it is conceded that a tenant is a kudiwaramdar paying rent or melwaram to the melwaramdar, the relationship of landlord and tenant is established between them and the burden of proving full occupancy rights will be upon the defendant."

Again in paragraph 7 of the judgment he remarks :

" When once it is conceded that they are occupancy tenants, according to their view, the relationship of landlord and tenant is established and the burden of proof is heavily upon the second defendant, and after him, upon the first defendant, to prove such rights. Second defendant and his father, therefore, would have come into possession of the land only under a right derived from these trustees or their predecessors-in-title. They are only tenants at will liable to be ejected at any moment by the trustees."

The learned Subordinate Judge purported to follow the decision in *Aiyanars v. Periakaruppa Thevan*(1) which in a way supports him. It seems to me the view of law enunciated above is fundamentally opposed to the conception underlying the system of tenure which recognises kudiwaram and melwaram as distinct interests in land and is based on a misapprehension of some of the decisions of the Privy Council referred to by both the learned Subordinate Judge and the learned Judges in *Aiyanars v. Periakaruppa Thevan*(1). In *Venkatanarasimha Naidu v. Dandamudi*

(1) (1929) 30 L.W. 583.

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Kotayya(1) SUBRAMANIA AYYAR J. points out that there is no substantial analogy between an English tenant and an Indian ryot and that the English rule embodied in section 106 of the Transfer of Property Act should not be applied, and, after citing the following passage from the proceedings of the Board of Revenue dated 5th January 1818 regarding the nature of the rights of the ryots in the various parts of the Presidency, viz.:

" Whether rendered in service, in money or in kind and whether paid to rajas, jagirdars, zamindars, poligars, mutadars, shrotriyamdars, inamdars or to Government Officers, such as tahsildars, amildars, amins or thanadars, the payments which have always been made are universally deemed the dues of Government",

observed thus :

" To treat such a payment by cultivators to zamindars as 'rent' in the strict sense of the term and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from year to year, would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating classes in this province who have held possession of their lands from generation to generation."

Sivaprakasa Pandara Sannadhi v. Veerama Reddi(2) approved of this view and cited the above passage from the Board of Revenue Proceedings at page 602 as laying down correctly the place of the cultivating ryots in the agricultural economy of Southern India. Therefore the observations of WALLACE J. in *Aiyanars v. Periakaruppa Thevan*(3)

" that a kudiwaram holder is a co-owner with his landlord and is not a tenant is not one that has been advanced or approved by any decision of the Privy Council "

(1) (1897) I.L.R. 20 Mad. 299.

(2) (1922) I.L.R. 45 Mad. 586 (P.C.).
(3) (1929) 30 L.W. 583.

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is not strictly accurate in view of the observations of the Judicial Committee in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(1). When an inamdar comes to Court alleging that he is the owner of both the warams, no presumption can be made that the grant was of both the warams and it is incumbent upon him to prove the affirmative of the issue. Even assuming that he establishes that he is the owner of both the warams, in order to sustain an action in ejectment he must prove that the defendant was let in under a terminable tenancy which entitled him to eject the tenant from the land. There is nothing in the decisions of the Privy Council laying down a different view. In *Aiyans v. Periakaruppa Thevan*(2) WALLACE J., referring to *Nainapillai Marakayar v. Ramanathan Chettiar*(3) and *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(1), observed thus:

"It must be admitted that there is a difficulty in reconciling the two decisions which appear, if we may say so with respect, to speak also with diverse voices on the question whether occupancy right can be obtained by adverse possession and prescription. But *Nainapillai Marakayar v. Ramanathan Chettiar*(3) is the latest decision and is binding on us and we cannot refuse to follow where it leads."

With great respect to the learned Judge, *Nainapillai Marakayar v. Ramanathan Chettiar*(3) does not enunciate any rule which is opposed to the conception which underlies the relationship between a melwaramdar and a kudiwaramdar. In that case, it will be seen that the tenants were let into possession under muchilikas which entitled the landlord to eject the tenants (page 354). That the case proceeded upon this view is clear

(1) (1922) I.L.R. 45 Mad. 586 (P.C.).

(2) (1929) 30 L.W. 583.

(3) (1923) I.L.R. 47 Mad. 337 (P.C.).

from the following passage in the judgment of Sir JOHN EDGE:

"In 1870 SCOTLAND C.J. held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him." (Page 354.)

It was in relation to this conception of landlord and tenant that his Lordship made the following observation a little lower down:

"No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands."

The observations to a similar effect on page 344 must be understood likewise, and in the earlier part of the judgment it was pointed out that it was not disputed that the defendants were tenants of the temple, the landlord, in that case. In *Zamindar of Parlakimedi v. Ramayya*(1) PHILLIPS and MADHAVAN NAIR JJ. examined the scope of the Privy Council decision in *Nainapillai Marakayar v. Ramanathan Chettiar*(2) and understood the said decision as not laying down any rule which is inconsistent with that laid down in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(3). At page 514 PHILLIPS J. observed thus:

"I had to consider this point, sitting as a single Judge, in *Periakaruppa Thevan v. Aiyans and Kaniyalaswamigal Kovil Devasthanam*(4) and there I came to the conclusion that the decision in *Nainapillai Marakayar v. Ramanathan Chettiar*(2), by which the burden of proving occupancy right is thrown on the tenant, is only applicable in cases where the inamdar is proved or admitted to be the owner of the land itself. A closer scrutiny of the judgment in *Nainapillai Marakayar v. Ramanathan Chettiar*(2) confirms me in this view . . . The words 'tenant of lands' must mean 'tenant of lands belonging

(1) (1926) 51 M.L.J. 510.

(3) (1922) I.L.R. 45 Mad. 586 (P.C.).

(2) (1923) I.L.R. 47 Mad. 337 (P.C.).

(4) (1925) 49 M.L.J. 602.

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to his landlord', that is to say, that the landlord has a right not merely to the melwaram but to the land itself."

MADHAVAN NAIR J. at pages 523 and 524 observes thus:

"The dictum of the Privy Council as regards the burden of proof is based upon two decisions referred to by their Lordships . . . The facts of these cases and the observations show that in both of them, as pointed out by my learned brother, it was either admitted or found as a fact that the tenants had been let into possession by the landlord who was the absolute owner and that consequently when the tenant claimed to possess occupancy right it was incumbent on him to prove it. When similar circumstances arose in *Nainapillai Marakayar v. Ramanathan Chettiar*(1) their Lordships affirmed the same principle. When the landlord owns both the melwaram and the kudiwaram interests in the land and the tenant sets up occupancy rights in such land, the burden of proving that he has such rights is on him. If the dictum referred to in *Nainapillai Marakayar v. Ramanathan Chettiar*(1) is thus understood, it is not inconsistent with the decision in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(2)."

The learned Judges in *Aiyanars v. Periakaruppa Thevan*(3) do not notice this decision at all. In *Basiruddin Sarkar v. Sahebulla Pramanik*(4) MUKERJI and MALLIK JJ. observed thus:

"In an action in ejectment one of the things that the plaintiff must prove is his title to immediate possession. This is a proposition as old as the hills. In a case where the defendants' tenancy is admitted—an admission that involves the admission of the defendants' right to be in possession—the plaintiff must necessarily establish as to how he is entitled to possession; in other words, how the tenancy has come to an end."

After referring to the Privy Council decision in *Seturatnam Aiyar v. Venktachela Goundan*(5)

(1) (1923) I.L.R. 47 Mad. 337 (P.C.). (2) (1922) I.L.R. 45 Mad. 586 (P.C.).
(3) (1929) 30 L.W. 583. (4) (1927) 32 C.W.N. 160.
(5) (1919) I.L.R. 43 Mad. 567 (P.C.).

and to *Nainapillai Marakayar v. Ramanathan Chettiar*(1) they remarked thus:

"In my opinion, the decisions of the Judicial Committee do not indicate that their Lordships ever intended to depart from these elementary rules. In both the cases the plaintiff's title to the lands was conceded, and notices by which the defendants' tenancies were terminated were not disputed. In neither case had any grant been alleged, asserted, or admitted on behalf of the plaintiff, but inasmuch as the defendants had been in occupation on payment of rent, a tenancy from year to year terminable on notice was all that was conceded."

In *Subbarayudu v. Narasimha Rao*(2) SPENCER and KUMARASWAMI SASTRI JJ., after referring to the Privy Council decision in *Nainapillai Marakayar v. Ramanathan Chettiar*(1), laid down the law thus:

"When a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant as alleged, if that is denied, but also his right to eject. In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove."

The same view was enunciated by SPENCER J. in *Subramania Aiyar v. Onnappa Goundan*(3) when he stated that the principle of the decision in *Venkatacharlu v. Kandappa*(4) is unaffected by any decision of the Privy Council. The learned Judges in *Aiyanars v. Periakaruppa Thevan*(5) do not advert to either of the above cases. I respectfully agree with the views expressed in these decisions in regard to the inamdar's right to eject and that of PHILLIPS and MADHAVAN NAIR JJ.

(1) (1923) I.L.R. 47 Mad. 337 (P.C.). (3) (1920) 39 M.L.J. 629, 638.
(2) (1924) 47 M.L.J. 558. (4) (1891) I.L.R. 15 Mad. 95.
(5) (1929) 30 L.W. 583.

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in regard to the scope of the Privy Council decision, in *Zamindar of Parlakimedi v. Ramayya*(1) and prefer to follow them.

The judgment of the learned Subordinate Judge is therefore considerably vitiated by his wrong approach of the questions which he had to decide. I have to set aside his findings and call for revised findings in the light of the remarks made in my judgment. The learned Subordinate Judge is therefore directed to submit his revised findings on the evidence on record on the following questions :

1. Whether the plaintiff is the owner of both the warams ?
2. Whether the second defendant has occupancy rights in the suit property ?
3. Whether the plaintiff is entitled to eject the second defendant from the land ?

[In pursuance of the directions contained in the above order the Subordinate Judge of Ramnad submitted his findings in favour of the second defendant.

The second appeal coming on for final hearing after the return of the said findings, his Lordship accepted the findings, set aside the decree of the learned Subordinate Judge and restored that of the District Munsif with costs throughout.]

G.R.

(1) (1926) 51 M.L.J. 510.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and
Mr. Justice Pandrang Row.

E. N. A. S. NARAYANA IYER (PLAINTIFF), APPELLANT,

v.

MOORTHY KENDEN alias NARAYANA NAMBU DRIPAD
AND THREE OTHERS (DEFENDANTS 2 to 5), RESPONDENTS.*

*Presidency-towns Insolvency Act (III of 1909), sec. 17—
Debt provable in insolvency—Personal remedy against
insolvent also available—Proceedings against insolvent to
enforce latter remedy—Leave of Insolvency Court under
sec. 17, if necessary—Hindu law—Pious obligation of
son and grandson to discharge the father's and grand-
father's debt—If applicable to Nambudries.*

Held : Having regard to the principle underlying section 17 of the Presidency-towns Insolvency Act, there is no justification for drawing a distinction between suits or proceedings relating to the property of an insolvent and suits or proceedings against the person of an insolvent, provided they relate to any claim provable in insolvency. Accordingly, leave of the Court is necessary for commencing a suit to enforce even a personal remedy against an insolvent.

Held further : The Hindu law doctrine of the pious obligation of the son and the grandson to pay the father's and grandfather's debt is not applicable to Nambudries.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Original Suit No. 1 of 1930.

K. S. Krishnaswami Ayyangar for C. V. Mahadeva Ayyar for appellant.

P. G. Krishna Ayyar for first respondent.

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K. Kuttikrishna Menon and S. Venkatachala Sastri for respondents 3 and 4.

Second respondent was unrepresented.

VARADA-
CHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit for recovery of money due under a promissory note (Exhibit A) dated 18th November 1926 executed by the first and second defendants. As the second defendant had been adjudicated an insolvent, the Official Assignee in whom the estate of the second defendant had vested was impleaded as the third defendant. Defendants 4 and 5 are the grandsons of the first defendant by a predeceased son of his. The second defendant is the younger son of the first defendant.

The plaintiff prayed for a personal decree against defendants 1 and 2, for a decree directing recovery of the amount from the properties of the mana to which the parties belong and also for recovery of the amount from the estate of the second defendant in the hands of the third defendant. As the first defendant died pending the suit, the lower Court gave a decree against the assets of the first defendant and against the assets of the second defendant in the hands of the third defendant, but it dismissed the suit so far as it sought a personal decree against the second defendant and also to the extent of the prayer against the properties of the mana. The plaintiff has filed this appeal claiming the two reliefs refused to him by the lower Court.

The learned Counsel for the appellant did not press the contention that the debt sought to be recovered was binding upon the mana, it being clear from the evidence discussed in the judgment

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of the lower Court that that claim could not be substantiated. He however contended that as the illom consisted only of the grandfather, his son and his grandsons and there were no collaterals, there was no reason why the illom properties should not be made liable for the first defendant's debt by the application of the Hindu law doctrine of the pious obligation of the son and the grandson to pay the father's and the grandfather's debt. He relied in this connection upon the statement of the law in *Vishnu Nambudri v. Akkamma*(1) to the effect that Nambudries are ordinarily governed by the Hindu law, except to the extent to which that law has been modified by custom, and he contended that the defendants have not pleaded or proved any custom in this case excluding the application of the rule of the pious obligation to pay the debts of the ancestor. In view of the state of the authorities of this Court on this point, we do not think that the general observations in *Vishnu Nambudri v. Akkamma*(1) could reasonably be interpreted in the manner in which the learned Counsel for the appellant seeks to use them. As early as *Nilakandan v. Madhavan*(2) it was laid down that the rule of the Hindu law as to the pious obligation of the descendants to pay their ancestor's debt is not applicable to the Nambudries. The learned Advocate for the appellant invited our attention to the comments on this case in Moore's Malabar Law and by the late Mr. SUNDARA AYYAR in an article in 12 Madras Law Journal. Even assuming that there was no necessity to decide that point in *Nilakandan v. Madhavan*(2)

(1) (1910) I.L.B. 34 Mad. 496.

(2) (1886) I.L.B. 10 Mad. 9.

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it cannot be denied that that view has been adopted and justified by later decisions of this Court; see *Govinda v. Krishnan*(1) and *Kunhu Kutti Ammah v. Mallapratu*(2). We see no reason to differ from the view taken in these cases. We must accordingly hold that the lower Court was right in declining to grant a decree against the properties of the mana.

As regards the claim for a personal decree against the second defendant, the learned Counsel for the appellant raised two contentions. He first urged that under the terms of section 17 of the Presidency-towns Insolvency Act, no leave of the Court was necessary for commencing a suit to enforce a personal remedy against an insolvent and that the section only applied to proceedings against the property of the insolvent. Alternatively, he contended, that the leave which has in fact been obtained from the Insolvency Court must be construed so as to authorize a suit not merely against the Official Assignee but also against the insolvent. The second contention seems to us untenable in view of the terms of the application and the order thereon. Notice of that application was granted only to the Official Assignee and the insolvent was not either made a party thereto or served with notice thereof. It cannot be said that he had no interest to safeguard or that the appearance of the Official Assignee was sufficient to enable the Court to deal with the considerations applicable to the insolvent personally as well as with the application as against the Official Assignee. We are therefore unable to construe the order

(1) (1892) I.L.R. 15 Mad. 333.

(2) (1913) I.L.R. 38 Mad. 527.

granting leave in the manner that the appellant contends for.

As regards the appellant's construction of section 17 of the Presidency-towns Insolvency Act, there is no doubt the distinction that he points out between the language employed in the corresponding sections of the English Bankruptcy Act and the Provincial Insolvency Act of 1907 on the one hand and section 17 of the Presidency-towns Insolvency Act on the other, so far as the first portion relating to *remedy* is concerned, namely, that the former refer to remedy against the property or person of the debtor, whereas, section 17 of the Presidency-towns Insolvency Act, refers only to remedies against the property. On the question whether a remedy against the person of the insolvent can be sought without the leave of Court, appellant's learned Counsel relied upon the observations of the Rangoon High Court in *P. M. Hamid v. P. K. Mohamed Sheriff*(1). But the latter portion of section 17 relating to "suits and proceedings" is quite general; and having regard to the principle underlying that section, we see no justification for drawing a distinction between suits relating to the property of the insolvent and suits against the person of the insolvent, provided of course the suit or proceedings relates to any claim provable in insolvency. The reasoning in *Easwara Iyer v. Govindarajulu Naidu*(2) and *Alamelu Ammal v. Venkatarama Iyer*(3) seems to us to justify the view that, except with the leave of Court, it was not intended that the insolvent should be sued in a

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(1) (1935) I.L.R. 13 Ran. 623.

(2) (1915) I.L.R. 39 Mad. 689.

(3) (1927) I.L.R. 50 Mad. 977.

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Court of law in respect of a claim provable in insolvency.

The appeal accordingly fails and is dismissed with costs—one set of costs to be equally divided between the first respondent on the one hand and respondents 3 and 4 on the other.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

PUBLIC PROSECUTOR, APPELLANT,

v.

B. V. SABAPATHY CHETTY (ACCUSED), RESPONDENT.*

*Madras Local Boards Act (XIV of 1920), sec. 207 (1) (c)—
Offence under—What constitutes.*

The offence under section 207 (1) (c) of the Madras Local Boards Act consists in the failure to comply with any direction lawfully given or any requisition lawfully made and not in the failure to remove the encroachment. If an alleged encroachment is really an encroachment, the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of an earlier notice is not a bar to his being tried for disobedience of a later notice. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice but a different and distinct offence.

Rangachariar v. Venkatasami Chetti(1) and *Ramanuja Chariar v. Kailasam Iyer*(2) disapproved.

Narayana Aiyar v. Rakkupayal(3), *Moidi Beary v. Mangalore Tk. Bd.*(4) and *Velgode Panchayat v. Chinna Venkata*(5) approved.

* Criminal Appeal No. 712 of 1937.

(1) (1934) I.L.R. 58 Mad. 513.

(2) (1925) I.L.R. 48 Mad. 870.

(3) 1927 M.W.N. 645.

(4) A.I.R. 1932 Mad. 535.

(5) A.I.R. 1932 Mad. 537.

Ramachandra Chetti v. Chairman, Municipal Council, Salem(1) relied upon.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the order of the Court of the Sub-Magistrate of Orathanad dated 5th June 1937 and made in Calendar Case No. 118 of 1937 on its file.

Public Prosecutor (V. L. Ethiraj) for appellant.

S. Parthasarathy for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BURN J.—This appeal raises a question of some importance, and of rather frequent occurrence, on which there are conflicting rulings of this Court.

The respondent is a resident in Orathanad in the district of West Tanjore. He is the owner of a shop by the side of a District Board road passing through the village, and he is alleged to have made an encroachment on the road by putting up in front of his shop a tin sunshade eleven feet long and two feet broad. On 6th February 1937 he was served with a notice, dated 21st January 1937, issued by the President of the West Tanjore District Board under section 159 (1) of the Madras Local Boards Act, requiring him to remove the encroachment before 21st February 1937. Alleging that the respondent had failed to remove the encroachment, the District Board Overseer, duly authorized by the President, prosecuted him in Calendar Case No. 118 of 1937 on the file of the Sub-Magistrate of Orathanad for an offence under section 207 (1) of the Local Boards Act. When the case came on

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for trial, the respondent pleaded that he had already been prosecuted in the matter of the same encroachment in Calendar Case No. 295 of 1936 in the same Court, that the prosecution had been withdrawn by the ex-officio President, that he had thereupon been acquitted under section 248 of the Criminal Procedure Code, and that the previous acquittal was a bar to any further proceedings on the same facts. The learned Sub-Magistrate, relying on the decision of PANDRANG ROW J. in *Rangachariar v. Venkatasami Chetti*(1), acquitted the respondent under section 403 of the Criminal Procedure Code. The learned Public Prosecutor has preferred this appeal.

It is quite clear that the order of acquittal is wrong. If section 403 of the Criminal Procedure Code is applicable, the respondent could not have been put on his trial at all in Calendar Case No. 118 of 1937. Section 403 does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all. That however is a minor matter; the important question is whether the previous acquittal in Calendar Case No. 295 of 1936 was a bar to the prosecution in Calendar Case No. 118 of 1937.

The learned Sub-Magistrate is supported by the ruling of PANDRANG ROW J. on which he relied. He is supported also by the decision in *Ramanuja Chariar v. Kailasam Iyer*(2) in which the facts seem to have been exactly the same as in this case. On the other hand, as the

(1) (1934) I.L.R. 58 Mad. 513.

(2) (1925) I.L.R. 48 Mad. 870.

learned Public Prosecutor points out, there are three decisions of single Judges against this view, and one decision of a Bench of two Judges expressly disagreeing with one of the reasons for the decision of SRINIVASA AYYANGAR J. in *Ramanuja Chariar v. Kailasam Iyer*(1). SRINIVASA AYYANGAR J. held that a prosecution under section 207 (1) must be launched within three months after the disobedience of the notice under section 159 (1), and that if this had not been done, the Local Board could not extend that period of three months by the device of issuing a fresh notice in respect of the same encroachment. This view was overruled by DEVADOSS and WALLER JJ. in *Ramachandra Chetti v. Chairman, Municipal Council, Salem*(2), where the learned Judges (dealing with the precisely similar provisions of the District Municipalities Act) pointed out that the offence under section 207 (1) "consists in the failure to obey a requisition issued by the competent authority". This was followed by WALLACE J. in *Narayana Aiyar v. Rakkupayal*(3) and referred to by PAKENHAM WALSH J. in *Moidi Beary v. Mangalore Tk. Bd.*(4) and in *Velgode Pan-chayat v. Chinna Venkata*(5). In both these cases PAKENHAM WALSH J. held that a previous acquittal or conviction does not bar a prosecution for disobedience of a fresh notice under section 159 (1) even if the encroacher and the encroachment remain the same. As PANDRANG ROW J. observes in *Rangachariar v. Venkatasami Chetti*(6), this point was not decided by DEVADOSS

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(1) (1925) I.L.R. 48 Mad. 870.
(3) 1927 M.W.N. 645.
(5) A.I.R. 1932 Mad. 537.

(2) (1926) I.L.R. 49 Mad. 880.
(4) A.I.R. 1932 Mad. 535.
(6) (1934) I.L.R. 58 Mad. 513.

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and WALLER JJ. who expressly reserved it, saying :

" If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but the question does not arise here."

With great respect to PANDRANG ROW J., we think that the correct view is that taken by WALLACE and PAKENHAM WALSH JJ. in the cases quoted. The offence is failure to comply with any direction lawfully given or any requisition lawfully made ; it is not strictly speaking correct to say that the offence consists in failure to remove the encroachment. Nobody commits an offence under the Local Boards Act by mere failure to remove an encroachment. He only commits an offence under section 207 (1) when he fails to comply with a direction lawfully given. As WALLER J. observed in *Ramachandra Chetti v. Chairman, Municipal Council, Salem*(1), if a particular direction or requisition is not enforced, there is nothing in the Act that prevents the President from issuing another, and if a prosecution is then launched, it is for failure to comply with the second requisition and not for failure to comply with the first. If this is borne in mind, it follows, as PAKENHAM WALSH J. held, that it makes no difference whether there has or has not been any previous prosecution. PANDRANG ROW J. fears that there is grave risk of persons being repeatedly harassed for the same offence, but this is, we think, not so. The respondent, when he was prosecuted for failure to obey the requisition issued in 1937, was not in fact or in law being again harassed for the offence which he was alleged to have committed

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in 1936. He was being prosecuted for disobedience of the 1937 requisition, and it was no answer to that charge to say that he had been acquitted of the charge of disobedience of a requisition issued in 1936. We do not know why the prosecution in the case of 1936 was withdrawn ; it might have been for any one of many conceivable reasons having nothing to do with the merits of the case. The learned Public Prosecutor says that according to his instructions it was withdrawn because the Collector, as ex-officio President, had given a licence for the encroachment. If that is correct, and if the Board as at present constituted has decided that the encroachment must be removed, it is obvious that the respondent ought not to be able to avoid a prosecution merely because he was acquitted in the earlier case. If, on the other hand, the former prosecution was withdrawn because the District Board could not prove that an encroachment had been made, the Magistrate could have dealt with the matter under section 250 of the Criminal Procedure Code. The view of SRINIVASA AYYANGAR J. that the real offence in such cases is the encroachment [*Ramanuja Chariar v. Kailasam Iyer*(1)] was expressly dissented from in *Ramachandra Chetti v. Chairman, Municipal Council, Salem*(2), and we are of opinion that the reasoning in the latter case is against the view of PANDRANG ROW J. in *Rangachariar v. Venkatasami Chetti*(3). If it were correct to say that the offence is complete once there is failure to disobey the notice, and that "another separate and distinct offence is not brought into being by the issue of a subsequent

(1) (1925) I.L.R. 48 Mad. 870.

(2) (1926) I.L.R. 49 Mad. 880.

(3) (1934) I.L.R. 58 Mad. 513.

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notice when that notice is by the same authority to the same person and relates to the same encroachment", the learned Judges who decided *Ramachandra Chetti v. Chairman, Municipal Council, Salem*(1) could hardly have held, as they did, that the Municipal Council was entitled to issue a second notice, more than three months after the disobedience of the first. Their decision is clearly based on the point that the offence consists in the failure to obey the requisition. All difficulties vanish, we think, if this is kept in mind. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice but a different and distinct offence. If the encroachment is really an encroachment the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other. The Magistrate to whom such a complaint is made must take the evidence and ascertain whether the direction or requisition has been lawfully given or made, and whether it has been disobeyed. If he finds that the direction has not been lawfully given, the fact that there has been a previous prosecution and acquittal in respect of the same encroachment will be of great assistance to him in deciding whether he will or will not use his powers under section 250 of the Criminal Procedure Code.

We set aside the order of acquittal and direct the Sub-Magistrate to dispose of the case according to law.

V.V.C.

(1) (1926) I.L.R. 49 Mad. 880.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.

V. E. R. M. K. KRISHNAN CHETTIAR BY AGENT RAMA
Ayyangar (PETITIONER), APPELLANT,

1938,
March 15.

v.

VELAYEE AMMAL (RESPONDENT), RESPONDENT.*

Married Women's Property Act (III of 1874), sec. 6—"Policy" in—Meaning of—Document, such as proposal, incorporated in policy, if part thereof—Reference to such document to find out to whom insurance money payable—Permissibility—Trust in favour of wife within meaning of section—Words sufficient to create—Contingent trust—Validity of.

Held by the Full Bench.—The word "policy" in section 6 of the Married Women's Property Act means the document or documents evidencing the contract. If the document known as the policy stands alone and does not incorporate in it any other document, only that document can be looked at, but, if it does expressly incorporate another document, that document must be deemed to be part of "the policy".

A Hindu submitted to an insurance company a proposal for a policy of insurance on his own life, the proposal being for an endowment policy for Rs. 5,000 payable in fifteen years. In clause 12 of the proposal, which was intended to contain the name of the person nominated to receive the sum assured and his or her relation with the proposer, the words entered were, "self or wife Velayeeammal". The proposal was accepted and a policy was issued. There were no words in the policy indicating to whom the money should be paid, but there was a provision in the body of the policy itself and there was a similar provision in the schedule making the proposal part of the policy.

Held that the proposal must be treated as part of the policy of insurance and that the proposal must be looked to to discover to whom the insurance money was payable.

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The statements in the proposal must be read as being incorporated in the policy. The parties to the contract were at liberty to make such a provision.

Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.(1) and *F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society*(2) relied upon.

Bengal Insurance & Real Property Co., Ltd. v. Velayammal(3) approved.

Krishnamurthy v. Anjayya(4) and *Venkatasubramania Sarma v. United Planters' Association of South India*(5) considered.

Held further that the words, "self or wife Velayeammal", in clause 12 of the proposal, which formed part of the policy, created a trust in favour of the wife, Velayeammal, within the meaning of section 6 of the Married Women's Property Act.

The only reasonable interpretation to be placed upon the words in question is that the policy was to be for the benefit of the assured or, in the event of his death before the policy matured, it was to be for the benefit of his wife. There was, therefore, a trust created in favour of the wife in the event of the husband dying before the policy matured, and there can be a contingent trust.

Srinivasa Chariar v. Ranganayaki Ammal(6) and *Abhiramavalli v. Official Trustee, Madras*(7) approved.

APPEAL against the order of Court of the Subordinate Judge of Coimbatore in Execution Petition No. 168 of 1935 in Original Suit No. 175 of 1929.

The appeal originally came on for hearing before BURN and VENKATARAMANA RAO JJ. when their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

BURN J.—In view of the difference of opinion expressed in the decision in *Venkatasubramania Sarma v. United Planters' Association of South India*(5) and in *Bengal Insurance & Real Property Co., Ltd. v. Velayammal*(3) I think this appeal

(1) (1923) I.L.R. 47 Bom. 578 (P.C.).

(2) [1933] A.C. 592.

(4) (1936) 71 M.L.J. 39.

(6) (1915) 3 L.W. 466.

(3) I.L.R. [1937] Mad. 990.

(5) I.L.R. [1938] Mad. 335.

(7) (1931) I.L.R. 55 Mad. 171.

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should be laid before his Lordship the Chief Justice in order that if his Lordship approves a Full Bench may be constituted to consider the matter. This is a matter of frequent occurrence and of general importance and it is desirable that there should be an authoritative interpretation of section 6 of the Married Women's Property Act. In our decision in *Venkatasubramania Sarma v. United Planters' Association of South India*(1) LAKSHMANA RAO J. and I held that the words "on the face of it" occurring in section 6 of the Married Women's Property Act of 1874 mean "on the face of the policy of assurance" strictly so called and that for the purpose of section 6 of the Married Women's Property Act it is not permissible to look into the proposal or declaration or any other document which may for certain purposes be considered to form part of the contract of assurance between the assured and the company. In the present case it is clear that in the policy strictly so called there are no words expressing that the policy was for the benefit of the wife or children of the assured. But in *Bengal Insurance & Real Property Co., Ltd. v. Velayammal*(2) this very policy was considered by CORNISH and KING JJ. and they held that a trust in favour of the wife was created in this case. It is urged on behalf of the appellant that the decision of this point by CORNISH and KING JJ. was *obiter* since the point did not arise in the pleadings in the suit. Without expressing an opinion whether the decision is *obiter* or not I feel that it is not possible to disregard the decision of a Bench relating to this actual policy. The decision is nevertheless in direct conflict with the decision of LAKSHMANA RAO J. and myself.

For these reasons I think the matter should be placed before a Full Bench.

VENKATARAMANA RAO J.—I agree with my learned brother that this matter should be placed before a Full Bench.

The whole question turns upon the meaning to be given to the term "policy of insurance" in section 6 of the Married Women's Property Act and to the words "expressed on the face of it" in the said section. The view taken by my learned brother and LAKSHMANA RAO J. in *Venkatasubramania Sarma v. United Planters' Association of South India*(1) is that the policy of insurance must be construed as meaning

(1) I.L.R. [1938] Mad. 335.

(2) I.L.R. [1937] Mad. 990.

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the particular document in and by which the company agrees to pay a particular sum to the assured on the conditions mentioned therein and it is not permissible to look into the proposal or the declaration for finding out whether a trust has been created in favour of the wife or child. It may be argued that in that case as also in the case reported as *Krishnamurthy v. Anjappa*(1) which my learned brothers purported to follow the policy itself states that the money was to be payable to the persons legally entitled to it. In the present case the policy does not state to whom the money is payable but in the opening paragraph of the policy it is stated that the proposal and declaration are made part of the contract. It is further stated that the conditions and privileges mentioned in the schedule should also form part of the contract. The question then arises whether the declaration, proposal and schedule also, by reason of the provision that they should form part of the contract, should not be taken as part of the policy of insurance itself. In this view, there must be deemed to be a trust for the benefit of the wife within the meaning of section 6 of the Act. The view of *CORNISH and KING JJ. in Bengal Insurance & Real Property Co., Ltd. v. Velayammal*(2) is that by reason of the provision that the proposal and declaration form part of the contract it must be taken that they form part of the policy of insurance itself. They purported to follow the decision in *Re Norwich Equitable Fire Assur. Soc., Claim of Royal Insur. Co.*(3) where a very wide connotation was given to the term "policy of insurance." It will be a question for argument whether the same connotation should be given to the same term "policy of insurance" in section 6 of the Act or not.

This is a matter which arises very frequently and it is not desirable that there should be any doubt in regard to it. I would therefore agree in the order proposed by my learned brother.

The appeal came on for hearing in pursuance of the aforesaid Order of Reference before the Full Bench constituted as above.

ON THE REFERENCE—

V. Rajogopala Ayyar (T. V. Ramiah with him) for appellant.—No trust will be created within the meaning of section 6

(1) (1936) 71 M.L.J. 39.
(2) I.L.R. [1937] Mad. 990.

(3) (1887) 57 L.T. Rep. 241.

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of the Married Women's Property Act of 1874 unless the three conditions specified in that section are fulfilled. In the present case, even if the proposal is taken as part of the contract, no trust is created. The proposal, in the column intended to contain the name of the person nominated to receive the sum assured and his or her relation with the proposer, says, "self or wife Velayeeammal". There are no words of trust at all there. Further, even if it could be held that a trust was created, there would be an uncertainty as to the person in whose favour the trust was created.

[VARADACHARIAR J.—You do not suggest that on this point there is any difference between the English and the Indian law. Under the English law there can be a contingent trust. See *In re Fleetwood's Policy* (1).]

No such trust has been created in the present case. In all the English cases upon that point the wife was specifically stated to be the beneficiary and the question was discussed as to what should happen in the event of her death. In *Abhiramavalli v. Official Trustees, Madras* (2) the creation of a trust was clear from the policy itself. Where the word "self" occurs in the column "to whom payable", section 6 of the Married Women's Property Act will not apply. [Reference was made to *Dinbai v. Bamanshaji*(3).]

[The CHIEF JUSTICE.—That case does not discuss the question. See *Cleaver v. Mutual Reserve Fund Life Association* (4).]

[Reference was made to *In re Engelbach's Estate. Tibbets v. Engelbach* (5).]

[VARADACHARIAR J.—In that case the Court proceeded upon the view that the case was not governed by the Married Women's Property Act of 1882 at all. Look at the policy.]

The beneficiary in the case was the daughter.

[The CHIEF JUSTICE.—But the case did not come within the Married Women's Property Act. The father had taken out an endowment policy on the life of his own daughter and for her benefit.]

The language of section 11 of the English Act is the same as that of the Indian Act.

(1) [1926] 1 Ch. 48.

(2) (1931) I.L.R. 55 Mad. 171.
(3) (1933) I.L.R. 58 Bom. 513, 519.

(4) [1892] 1 Q.B. 147.

(5) [1924] 2 Ch. 348.

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K. V. Ramachandra Ayyar for respondent.—[Reference was made to the definition of "policy" in section 2 (6) of the Indian Life Assurance Companies Act, 1912, and in Smith's book on Mercantile Law.] In clause 8 of the policy in the present case the proposal is also referred to as forming part of the entire contract between the company and the assured. "In the face of the policy" means also on the face of the documents incorporated by reference into the policy; *F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society*(1) and *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*(2). [*Dawsons, Ltd. v. Bonnin*(3) was referred to as to the meaning of "basis of assurance".] In *In re Ioakimidis' Policy Trusts. Ioakimidis v. Hartcup*(4) and *In re Fleetwood's Policy*(5), *In re Engelbach's Estate. Tibbette v. Engelbach*(6) was referred to and distinguished on the ground that that was not a case falling within the English Act.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question of what is meant by the word "policy" in section 6 of the Married Women's Property Act, 1874. The respondent is the widow of one Sengctiah Goundan, who died on 16th August 1928. On 24th August 1927 the deceased submitted to the Bengal Insurance and Real Property Company, Limited, a proposal for a policy of insurance on his own life. The proposal was for an endowment policy for Rs. 5,000 payable in fifteen years.

Clause 12 of the proposal is intended to contain the name of the person nominated to receive the sum assured and his or her relation with the proposer. In this case the words entered were, "self or wife Velayeemmal" (the name of the respondent). The proposal was accepted and a policy

was issued on 5th May 1928. The policy contained *inter alia* the following clause:

"This policy of assurance granted by the Bengal Insurance and Real Property Company, Limited (hereafter called 'the Company') witnesseth that proceeding upon the proposal and declaration subscribed by Subraia Goundar Sengottayya Goundar in and dated 24th August 1927 which is hereby made a part of this contract and in consideration of the payment already made to the Company of the first premium or the first instalment thereof as stated in the subjoined schedule and of the subsequent premiums or instalments of premiums to be paid as therein provided the Company doth hereby agree that upon proof satisfactory to the Directors of the happening of the event or events on which the sum assured is to become payable and or other benefits accrue as described or referred to in the said schedule and of the title of the claimant or claimants under this policy it will pay the sum stated in the schedule as the sum assured and provide the other benefits, if any."

Clause VIII of the schedule also has bearing on the question which falls for decision. It is in these words:

"This policy which together with the schedule and privileges and conditions endorsed thereon, and the proposal and declaration and answers hereto, constitutes the entire contract between the company and the assured shall become indisputable after two years from the date of issue of this policy provided the premiums shall have been regularly paid and the age correctly stated, and provided also that no fraud or wilful misrepresentation has been made by the assured."

On her husband's death the respondent demanded payment from the company of the amount of the policy. The company declined to pay on the ground that there had been a material misrepresentation with regard to the health of the assured. This resulted in the respondent filing Original Suit No. 134 of 1933 of the Court of the Subordinate Judge of Coimbatore against the insurance company and the deceased's brother Ramaswami Goundan, who had set up a claim

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(1) [1933] A.C. 592, 611, 612.

(2) [1923] I L.R. 47 Bom 578, 582 (P.C.).

(3) [1922] 2 A.C. 413, 432.

(4) [1925] 1 Ch. 403.

(5) [1926] 1 Ch 48, 50.

(6) [1924] 2 Ch. 348.

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that the amount due under the policy constituted a part of the joint family estate. The company raised the issue of material misrepresentation and also contended that the Court had no jurisdiction to try the suit. The respondent succeeded and a decree was passed on 24th September 1934 in her favour for the amount stated in the policy. An appeal followed to this Court, but it was dismissed. The present appellant obtained a decree against the estate of Sengotiah for a sum of Rs. 9,707-2-8 with interest and costs on 28th February 1931 and in execution of that decree applied to the Court of the Subordinate Judge of Coimbatore for attachment of the respondent's decree against the insurance company. The Subordinate Judge held that the application did not lie, and the present appeal is from that decision.

The appellant contends in the first place that this case does not fall within the provisions of section 6 of the Married Women's Property Act, because there is nothing on the face of the policy itself which creates a trust in favour of the respondent. The Subordinate Judge held that the proposal must be deemed to form part of the policy. In the second place the appellant says that even if the proposal can be deemed to form part of the policy the words therein "self or Velayeemmal" cannot constitute a trust in her favour. The case has been placed before the Full Bench as there has been a conflict of opinion on the interpretation to be placed on section 6 of the Married Women's Property Act. Clause 1 of that section states :—

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them,

shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate."

When the appeal arising out of the respondent's suit against the insurance company was before this Court (CORNISH and KING JJ.) the question whether the proposal and declaration could be construed as being part of the policy arose and it was held that they formed part of the policy: *Bengal Insurance & Real Property Co., Ltd. v. Velayammal*(1). On the other hand VENKATASUBBA RAO J. in *Krishnamurthy v. Anjappa*(2) and BURN and LAKSHMANA RAO JJ. in *Venkatasubramania Sarma v. United Planters' Association of South India*(3) have held that the word "policy" means the document described as the policy and that it cannot be deemed to include any other document. VENKATASUBBA RAO J. said that the words used must be plain and unambiguous and for the purposes of the section the only document that can be looked into is the policy. I would here point out that that case differed very much from the case we are now concerned with. There was there no clause making the proposal part of the policy. BURN and LAKSHMANA RAO JJ. quoted with approval this decision of VENKATASUBBA RAO J. but here again there was no clause incorporating the proposal in the policy. All that the policy stated was that the proposal and the declaration made by the assured should be the basis of the insurance. On the other hand, the policy contained an express provision that the money should

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(1) I.L.R. [1937] Mad 990, 998.

(2) (1936) 71 M.L.J. 39.

(3) I.L.R. [1938] Mad. 335.

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be paid to the legal heirs of the assured. In the present case, there are no words in the document issued on 5th May 1928 indicating to whom the money shall be paid, but we have, as I have already indicated, a provision in the body of the policy itself and a similar provision in the schedule making the proposal part of the policy, and we have to look to the proposal to discover to whom the insurance money is payable. It seems to us that in these circumstances the Court must read the statements in the proposal as being incorporated in the policy. The parties to the contract were at liberty to make such a provision.

In *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*(1) the Privy Council had to construe what was meant by an error on the face of an award. The question was whether a document referred to in the award could be read as part of the award. Lord DUNEDIN who delivered the judgment of their Lordships observed (page 586 of the report) :

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

The House of Lords considered the same question in *F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society*(2). There the award recited the contract between the parties and referred to the provisions of condition 30 thereof. The House of Lords held that condition 30 was incorporated into and formed part of the award just as if the arbitrator had set it out *verbatim* and had then proceeded to state the construction which he

(1) (1923) I.L.R. 47 Bom. 578 (P.C.).

(2) [1933] A.C. 592.

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placed upon it. The same principle applies here. The policy of insurance stated expressly that the proposal and the declaration were "made part of the contract". That being so the Court must look at them to find out the full terms of the contract. Moreover section 2 (6) of the Indian Life Assurance Companies Act, 1912, defines a "policy of assurance on human life" as meaning

"any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life".

The instruments which evidence the contract between the parties and therefore constitute the policy are the proposal, the declaration and the document which was issued by the insurance company when the proposal was accepted. We wish it to be clearly understood that we are dealing here with a case where the policy does expressly incorporate the proposal. We have no criticism whatever to offer of the decisions in *Krishnamurthy v. Anjayya*(1) and *Venkatasubramania Sarma v. United Planters' Association of South India*(2) on the facts of those cases, but the learned Judges who decided those cases did use words which might be held to apply to a case like this. If that was their intention we must express our dissent. The word "policy" in section 6 of the Married Women's Property Act means the document or documents evidencing the contract. If the document known as the policy stands alone and does not incorporate in it any other document, only that document can be looked at, but if it does expressly incorporate another document,

(1) (1936) 71 M.L.J. 39.

(2) I.L.R. [1938] Mad. 335.

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as in this case, the document must be deemed to be part of "the policy". For the reasons indicated we consider that the learned Subordinate Judge was right in treating the proposal as part of the policy of insurance in this case.

This brings me to the contention of the learned Advocate for the appellant that the words used in answer to question No. 12 of the proposal, "Self or wife Velayeeammal", cannot be construed as constituting a trust in favour of the respondent. He would attach no meaning at all to those words. The answer to the question is certainly not as full as it might have been, but it is an answer, and the words can be construed as meaning that the policy was to be for the benefit of the assured or, in the event of his death before the policy matured, it was to be for the benefit of his wife. It seems to us that this is the only reasonable interpretation to be placed upon the words, and placing this interpretation upon them it means that there was a trust created in favour of the respondent in the event of the husband dying before the policy matured. That there can be a contingent trust is accepted in England, and, as the Married Women's Property Act of 1874 followed similar legislation in England, English decisions are directly applicable. In *In re Fleetwood's Policy*(1) TOMLIN J. had to consider a case where the terms of the policy provided that the money was to be paid to the wife of the insured if she were living at his death or, in the event of her prior death, to his executors, administrators and assigns. The learned Judge observed :

"A number of cases has been cited to me, and my attention has also been called to section 11 of the Married

(1) [1926] 1 Ch. 48.

Women's Property Act, 1882. In my view that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife. It is true it is expressed to be for the benefit of his wife in a certain event only; but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust."

Another case which has a bearing on this question is that of *Cleaver v. Mutual Reserve Fund Life Association*(1). This case followed the conviction of Florence Elizabeth Maybrick for the murder of her husband. Her husband, James Maybrick, effected an insurance on his life in favour of his wife. The policy was made payable to the wife if she was living at the time of his death; otherwise the money was to go to his legal representatives. The Court of Appeal, consisting of LORD ESHER M.R. and FRY L.J. and LOPES L.J., held that there was here a trust created by the policy in favour of the wife under section 11 of the Married Women's Property Act, 1882; but it became incapable of being performed by reason of her crime. No doubt was expressed as to the policy creating a trust in her favour under that section. The same view has been taken in this Court in *Srinivasa Chariar v. Ranganayaki Ammal*(2) and *Abhiramavalli v. Official Trustee, Madras*(3). In the latter case, which was decided by MADHAVAN NAIR J., the policy was payable to the "assured or his wife if he predeceases her" and my learned brother held that these words

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(1) [1892] 1 Q.B. 147. (2) (1915) 3 L.W. 466.
(3) (1931) I.L.R. 55 Mad. 171.

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operated to create a trust in favour of the wife within the meaning of section 6.

The learned Advocate for the appellant has placed great reliance on *Dinbai v. Baman-shaji*(1) and *In re Engelbach's Estate. Tibbetts v. Engelbach*(2). In the former case a Bench of the Bombay High Court had before it an endowment policy of insurance which was payable at the death of the assured or at the age of fifty-five and was made payable to the wife provided she survived him. Failing her it was to be paid to the assured, his executors, administrators or assigns. The Court did not consider the English authorities and came to the decision that there was no trust created in favour of the wife within the meaning of section 6 of the Married Women's Property Act, on the wording of the section. As I have already stated, the Indian Act follows the English Act and the English cases are directly applicable. When these cases are considered there seems to be no doubt that in a case like the present a trust is created. *In re Engelbach's Estate. Tibbetts v. Engelbach*(2) was a case in which a father had taken out an endowment policy on the life of his own daughter and for her benefit. It was held that in such circumstance, no legal estate was created in the daughter and that there was no trust for her benefit. The Court treated this case as being outside the Married Women's Property Act, 1882, as it was, because under that Act, as under the Indian Act, the policy must be on the life of the husband or the father. As there can be a contingent trust and as we construe the words in the proposal,

(1) (1933) I.L.R. 58 Bom. 513.

(2) [1924] 2 Ch. 348.

which forms part of the policy, as creating a contingent trust in favour of the respondent, we must also reject the second contention of the learned Advocate for the appellant.

For these reasons this appeal fails and must be dismissed with costs.

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APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice
Madhavan Nair.

SUKKIRA GOUNDAN AND EIGHT OTHERS (RESPONDENTS
1 TO 3 AND 6 TO 11—DEFENDANTS 1 TO 3 AND 6 TO 11),
PETITIONERS,

1938,
March 2.

PALANI GOUNDAN (APPELLANT—PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 110, cl. 2—Question respecting property worth more than Rs. 10,000—Meaning and test of—Joint Hindu family—Partition—Suit for—Decision of High Court to the effect that the plaintiff was a coparcener and was as such entitled to property of value of Rs. 5,000 odd—Appeal to Privy Council against—Right of—Entire joint family estate of value of more than Rs. 10,000.

The respondent, claiming to be a member of a joint Hindu family, sued for the partition of the estate of the joint family. The petitioners, the defendants in the suit, denied that the respondent was a coparcener, and their defence prevailed in the trial Court. On appeal to the High Court, however, it was held that the respondent was a coparcener and was entitled to have delivered to him property of the value of Rs. 5,000 odd. The petitioners applied for leave to appeal to His Majesty in Council against the judgment of the High Court. The value

* Civil Miscellaneous Petition No. 4682 of 1937.

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of the joint family estate taken as a whole was far more than Rs. 10,000.

Held that the decision of the High Court on appeal did not involve some question respecting property worth more than Rs. 10,000 and therefore the case did not fall within the second clause of section 110 of the Code of Civil Procedure and that, as the case did not admittedly fall within the first clause of that section, the application was unsustainable.

In order to satisfy the conditions of the second clause of section 110 of the Code the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards.

Appala Raja v. Rangappa Naicker(1) followed.

PETITION praying that in the circumstances stated therein and in the affidavit filed with Civil Miscellaneous Petition No. 735 of 1938 on the file of the High Court, the High Court will be pleased to grant leave to the petitioners therein to appeal to His Majesty in Council against the judgment and decree of the High Court dated 28th July 1937 and passed in Appeal No. 263 of 1931, preferred against the decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 40 of 1929.

T. V. Muthukrishna Ayyar and *P. N. Appuswami Ayyar* for petitioners.

K. Periaswami Goundar for respondent.

LEACH C.J. The ORDER of the Court was delivered by LEACH C.J.—This is an application for a certificate for leave to appeal to His Majesty in Council. The suit out of which this petition arises was filed by the respondent in the Court of the Subordinate Judge of Dindigul for the partition of the estate of a joint family of which he claimed to be a member. He valued the estate as a whole

(1) (1917) 33 M.L.J. 481.

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at Rs. 25,987 and his own share at Rs. 8,662-5-4. The petitioners who were defendants denied that the respondent was a coparcener, and their defence prevailed in the trial Court. On appeal to this Court, however, it was held that the respondent was a coparcener and was entitled to have delivered to him property of the value of Rs. 5,162-5-4. The petitioners challenge the correctness of this Court's judgment and wish to appeal to the Privy Council. The only question which falls for decision is whether the case falls within the second clause of section 110 of the Code of Civil Procedure. The section reads as follows :

"In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards and the amount or value of the subject-matter in dispute on a peal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

The learned Advocate for the petitioners rightly concedes that the subject-matter of this suit does not amount to Rs. 10,000, the subject-matter being merely the share of the respondent in the estate. Therefore the case does not fall within the first clause. But he says that the decision of this Court on appeal does involve some question respecting property worth more than Rs. 10,000 and therefore the case comes within the second clause. The value of the estate taken

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as a whole is far more than Rs. 10,000, and the contention is that as the decree has directed a partition of this estate it affects property of the required value.

The learned Advocate relies on the judgment of the Calcutta High Court in *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose*(1) and the judgment of the Allahabad High Court in *Muhammad Asghar v. Abida Begam*(2). *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose*(1) was also a suit for the partition of a joint family estate, and MACLEAN C.J. and MOOKERJEE J. held that it was the whole estate which had to be looked at and not merely a particular share which one of the parties might claim. This construction was accepted by the Allahabad High Court in *Muhammad Asghar v. Abida Begam*(2). The Bombay High Court has, however, interpreted the second clause of section 110 differently and this Court has agreed with it.

The opinion of the Bombay High Court is expressed in the case of *De Silva v. De Silva*(3) which was decided by JENKINS C.J. and RUSSELL J. It was there held that, where the relief is valued at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value. In such circumstances the decree itself does not involve any claim or question to or respecting property of the prescribed value and consequently the case does not fulfil the requirements of the section. The learned Chief Justice pointed out that, if the Court were to give effect to the contention that regard must be had only

(1) (1906) 10 C.W.N. 564.

(2) (1932) I.L.R. 54 All. 858.

(3) (1904) 6 Bom. L.R. 403.

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to the value of the whole estate, it would follow that, if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or more, a right to appeal to the Privy Council would exist, which would be giving to the words of the section a meaning which was not justified. This decision was followed by the Bombay High Court in *Manilal v. Banubai*(1) and in *Nariman Rustomji v. Hasham Ismayal*(2). It has been suggested in the course of the argument that the Bombay High Court gave expression to a contrary opinion in *Appaya v. Lakhamgowda*(3) but we do not regard the judgment there as repudiating the decision in *De Silva v. De Silva*(4), which was again followed in *Nariman Rustomji v. Hasham Ismayal*(2).

This Court considered the question in *Appala Raja v. Rangappa Naicker*(5), which was an application for leave to appeal to His Majesty in Council heard by SADASIYA AYYAR and SPENCER JJ. SADASIYA AYYAR J. expressed the opinion that in order to satisfy the conditions of section 110 the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards, and he quoted with approval the decision in *De Silva v. De Silva*(4). SPENCER J. delivered a judgment to the same effect. This decision is binding on us and disposes of the application. I may add that *De Silva v. De Silva*(4) was also followed by the Patna High Court in *Gosain Bhaunath Gir v. Bihari*

(1) (1920) 23 Bom. L.R. 374.

(3) (1922) 25 Bom. L.R. 77.

(2) (1924) I.L.R. 49 Bom. 149.

(4) (1904) 6 Bom. L.R. 403.

(5) (1917) 33 M.L.J. 481.

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Lal(1). That was a case where a puisne mortgagee whose interest in the property was worth only Rs. 4,000 was applying for leave to appeal to the Privy Council from an order refusing to set aside the sale of the property ordered in a mortgage suit, the property being valued at over Rs. 10,000.

The application for leave to appeal will be dismissed with costs.

A.S.V

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1938,
March 16.

RAGHUNATHAN, MINOR, BY HIS MOTHER AND NEXT FRIEND
ANDALAMMAL (FIRST DEFENDANT), APPELLANT,

v.

P. N. RAVUTHAKANNI AND FIVE OTHERS (PLAINTIFF
AND NIL), RESPONDENTS.*

Minor—Contract of sale of immovable property entered into by his guardian—Amount paid as earnest money in respect of—Return of—Minor, liable if.

A minor is not liable to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by his guardian on his behalf, since the amount can only be treated as having been paid as security for the performance of a contract which in law is no contract at all.

Pathak Kali Charan Ram v. Ram Deni Ram(2) considered.

* Appeal No. 347 of 1933.
(1) (1919) 4 P.L.J. 415. (2) (1917) 2 P.L.J. 627.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 69 of 1931.

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v.
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T. M. Ramaswami Ayyar for appellant.

V. N. Venkatavaradachari for second respondent.

P. Rajagopalan for third to sixth respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question of the liability of a minor to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by the guardian on his behalf. On 20th August 1931 Andalammal, the mother and guardian of the appellant, agreed to sell to the respondent the minor's shares in a village. The price agreed upon was Rs. 7,125, of which Rs. 500 was paid in advance. It is common ground that certain creditors of the estate were pressing for the payment of their debts and the intention was to sell the minor's interest in the village to discharge these liabilities. The sale was not completed, and the property was sold by the mother to a third party, the second defendant in the suit out of which this appeal arises. The suit was for a decree for specific performance of the contract, but before the case came on for hearing it was realized that the Court could not grant this relief. An infant cannot contract in this country and a covenant by his guardian for the sale of immovable property cannot be enforced against him; *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*(1)

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(1) (1911) I.L.R. 39 Cal. 232 (P.C.).

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and *Ramajogayya v. Jagannadhan*(1). An application was then made for leave to amend the plaint by adding a prayer for the return of the earnest money. This application was granted, and at the trial the only question which was raised was whether the respondent was entitled to the return of the Rs. 500. The learned trial Judge held that he was, on the ground that the minor was liable, unless it could be shown that he had not received the benefit of the Rs. 500. On this basis he granted a decree for the return of the amount with interest. The appellant challenges the correctness of the decision. The second defendant is not concerned with this question, and has, therefore, not been made a party to the appeal.

It may be taken that it was necessary to sell this property of the minor for the purpose of paying off pressing creditors. This was alleged in the plaint and it was acknowledged in the appellant's written statement that he had to sell the property to the second defendant "owing to the pressing necessities of the creditors." It would appear that it was out of the money which the mother received from the second defendant that the debts were in fact discharged. What has become of the Rs. 500 paid to the appellant's mother by the respondent has not been disclosed. The learned Advocate for the appellant contends that there can be no decree for the return of earnest money paid under a void contract. On the other hand the learned Advocate for the respondent says that, as the contract was entered into in order to raise money to pay off creditors,

(1) (1918) I.L.R. 42 Mad. 185 (F.B.).

the Rs. 500 must be treated as having been paid to the guardian for necessities or for his benefit. In our opinion, the appellant is entitled to succeed. It is true that the guardian was compelled to sell the property of the minor to pay off debts for which the minor's estate was liable, and if a conveyance had been executed no doubt the respondent would have obtained a valid title to the property, but the Rs. 500 can only be treated as being security for the performance of a contract which in law was no contract at all. Earnest money is paid as a guarantee that the contract will be performed. JAMES L.J. so held in *Ex parte Barrell*. In *re Parnell*(1), where there was a contract for the sale of immovable property with a stipulation that a portion of the purchase money should be paid immediately, and his definition was accepted by the Court of Appeal in *Howe v. Smith*(2) and by the House of Lords in *Soper v. Arnold*(3). In the last-mentioned case Lord MACNAGHTEN observed:

"The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business."

The price to be paid for the land in the present case was Rs. 7,125, and the Rs. 500 was paid as a guarantee that the respondent would pay the balance. It cannot be regarded as a payment to the appellant or to the appellant's guardian for any other purpose. The respondent says that the contract was not carried out because of the default of the appellant's guardian; on the other hand, the appellant puts the blame on to the respondent.

(1) (1875) L.R. 10 Ch. 512.

(2) (1884) 27 Ch. D. 89.
(3) (1889) 14 App. Cas. 4.

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It matters not on whose shoulders the blame must be placed. All that we have to consider is the purpose for which this money was paid. The respondent's Advocate does not contend that a minor can be made liable for the return of earnest money paid under a void contract. He says that the payment must be treated as falling within section 68 of the Contract Act or as being for the benefit of a Hindu minor and therefore repayable under his personal law. We are unable to regard the payment as falling within section 68 or as being repayable under Hindu law on the ground that it was paid for the minor's benefit. We can only regard it as being paid by the respondent as a guarantee that he would fulfil his part of the contract and as far as we know it remained with the guardian for this purpose.

The learned Advocate for the respondent has referred us to *Pathak Kali Charan Ram v. Ram Deni Ram*(1), which was a case in which a minor member of a joint Hindu family had executed an agreement of sale of immovable property and had received an advance of Rs. 125 as earnest money. The object in selling the property was to defray the marriage expenses of the minor's brother. The Court treated the expenses as being necessary expenses and granted a decree for the return of the earnest money as the contract was not fulfilled. The learned Judges regarded the case as falling under section 68 of the Contract Act. They did not consider the question whether the earnest money should be treated as security for the performance of a void contract. We are unable to accept this decision as embodying a

(1) (1917) 2 P.L.J. 627.

correct statement of the law applying to a case like the one before us.

For these reasons the appeal will be allowed and the suit dismissed with costs in favour of the appellant in both the Courts. The costs of the appellant will include the fee paid to the Court-guardian and also the cost of the printed papers supplied to him.

G.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice,
Mr. Justice Madhavan Nair, Mr. Justice Varadachariar,
Mr. Justice Lakshmana Rao and Mr. Justice Stodart.

PERUMAL CHETTIAR (DEFENDANT), PETITIONER,

v.

KAMAKSHI AMMAL (PLAINTIFF), RESPONDENT.*

Promissory note insufficiently stamped—Money lent on—Suit to recover—Maintainability—Sec. 35 of the Stamp Act (II of 1899)—Sec. 91 of the Evidence Act (I of 1872)—Note and loan contemporaneous—Effect.

In regard to the question whether a person who has lent money on a promissory note can sue to recover the debt apart from the note, when the note is inadmissible in evidence owing to a defect in the stamping,

held by the majority of the Full Bench (STODART J. dissenting): Whether a suit lies on the debt apart from the instrument depends on the circumstances under which the instrument is executed. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. Section 91 of the Evidence Act and section 35 of the Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and, where an instrument has been

* Civil Revision Petition No. 883 of 1935.

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February 10

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given as a collateral security or by way of conditional payment, a suit on the debt will lie.

The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment.

There is no presumption that the giving of a promissory note by a debtor to his creditor operates as a conditional payment only. A lender suing on the original consideration on the ground that the instrument was given by way of conditional payment must prove facts which warrant that inference.

Case law reviewed and discussed.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes at Trichinopoly dated 18th July 1935 and passed in Small Cause Suit No. 1378 of 1935.

K. V. Srinivasa Ayyar for petitioner.—A sum of Rs. 400 was lent by the plaintiff to the defendant. One and half hours later a promissory note was executed by the defendant as a consideration for the loan. This was in pursuance of an arrangement made between the parties at the time of the loan. The note embodies all the terms of the contract between the parties. The whole transaction was a contemporaneous one. The promissory note is insufficiently stamped. It is inadmissible in evidence under section 35 of the Stamp Act. When the terms of a contract are reduced to the form of a document, according to section 91 of the Indian Evidence Act, no evidence can be given in proof of the terms of such contract except the document itself. In this case, as the promissory note is inadmissible owing to defective stamping, a suit on the original consideration does not lie. [*Maung Chit v. Roshan N. M. A. Kareem Omer & Co.*(1) and *Ramasami Pillai v. Murugiah Padayachi*(2) were cited.] The earliest case in Madras which decided this question is *Pothi Reddi v. Velayudasivan*(3).

[The CHIEF JUSTICE.—What are the other Madras decisions which followed that case?]

(1) (1934) I.L.R. 12 Ran. 500 (F.B.). (2) (1935) I.L.R. 59 Mad. 268 (F.B.).
(3) (1886, I.L.R. 10 Mad. 94.

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That case has been followed in *Yarlagadda Veera Ragavayya v. Gorantla Ramayya*(1), *Somasundaram v. Krishnamurthi*(2), *Chinnappa Pillai v. Muthuraman Chettiar*(3), *Mallaya v. Ramayya*(4), *Muthu Sastrigal v. Visvanatha Pandarasan-nadhi*(5), *Somaraju v. Venkatasubburayudu* 6), *Chandra-sekaram Pillai v. Srinivasa Pillai*(7), *Alimane Sahiba v. Subbarayudu*(8), *Gura Sahu v. Krishnamma*(9) and *Chocka-lingam Chettiar v. Palaniappa Chettiar*(10). [Reference was made to *Chokkalingam Chetty v. Annamalai Chetty*(11), *Murugappa Chetty v. Nachiappa Chetty*(12) and *Chidambaram Chettiar v. Ayyasawmi Thevan*(13)].

But WALLACE J. in *Gopala Padayachi v. Rajagopal Naidu*(14) and VENKATASUBBA RAO J. in *Chinnayya Naidu v. Srinivasa Naidu*(15) hold the other view that, apart from the promissory note, the debtor can be sued on the original consideration. These two decisions which are in conflict with the other Madras decisions are wrong.

[The following decisions of the other High Courts were also cited: *Nazir Khan v. Ram Mohan*(16) and *Kundan Lal v. Bhikari Das Ishwar Das*(17)].

[VARADACHARIAR J.—Have you got any Full Bench decisions of the Calcutta and Bombay High Courts with regard to this point?] No.

[*Ranendramohan Tagore v. Keshubchandra Chanda*(18), *Firm Tarachand v. Tamijuddin*(19), *Chanda Singh v. The Amritsar Banking Co.*(20), *Sohan Lal v. Raghu Nath*(21) and *Jacob & Co. v. Vicumsey*(22) were referred to.] So far as the Madras High Court is concerned, except in the two decisions mentioned above, it has been uniformly held that in a case like the present one where the transaction is contemporaneous and all the terms of the contract are reduced to writing a suit on the original debt does not lie. If the promissory note is taken as a

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| (1) (1905) I.L.R. 29 Mad. 111. | (2) (1906) 17 M.L.J. 126. |
| (3) (1911) 9 M.L.T. 281. | (4) (1911) 21 M.L.J. 462. |
| (5) (1913) I.L.R. 38 Mad. 660. | (6) (1924) 20 L.W. 943. |
| (7) (1932) 37 L.W. 723. | (8) (1932) 63 M.L.J. 303. |
| (9) (1932) 36 L.W. 432. | (10) (1934) I.L.R. 58 Mad. 261. |
| (11) (1915) 34 I.C. 417. | (12) (1934) 67 M.L.J. 30. |
| (13) (1916) I.L.R. 40 Mad. 585. | (14) A.I.R. 1926 Mad. 1148. |
| (15) (1934) 67 M.L.J. 912. | (16) (1930) I.L.R. 53 All. 114 (F.B.) |
| (17) (1929) I.L.R. 51 All. 530. | (18) (1934) I.L.R. 61 Cal. 433. |
| (19) A.I.R. 1935 Cal. 658. | (20) (1911) I.L.R. 2 Lah. 330. |
| (21) A.I.R. 1934 Lah. 606. | (22) (1926) 29 Bom. L.R. 432. |

collateral or conditional security or if it is for an antecedent debt or if it does not embody all the terms of the contract, then it is a different matter and a suit on the original debt may lie. The English law which allows a suit to be on the debt apart from the note does not hold good in India in this case. If that view is upheld, there will be evasion of the Stamp Act. So the correct view is that laid down in *Pothi Reddi v. Velayudasivan*(1). Section 35 of the Indian Stamp Act and section 91 of the Indian Evidence Act make the promissory note in this case inadmissible in evidence and no suit lies on the original consideration apart from the note.

N. Suryanarayana for respondent.—The cause of action for money lent and the cause of action on the promissory note are different. A suit on the former cause of action is maintainable though the note turns out to be inadmissible; *Krishnasami v. Rangasami*(2), *Golap Chand Marwaree v. Thakurani Mohokoom Kooaree*(3), *Pramatha Nath Sandal v. Dwarka Nath Dey*(4), *Krishnaji v. Rujmal*(5) and *Sadasuk Janki Das v. Sir Kishan Pershad*(6).

The English law recognises the distinction between the cause of action on the negotiable instrument and that on the debt *Farr v. Price*(7), *Tyte v. Jones* reported as footnote to *Farr v. Price*(7), *Sutton v. Oomer*(8), *Brown v. Watts*(9), *Cundy v. Marriott*(10) and *Wilson v. Kennedy*(11).

The test laid down in *Sheikh Akbar v. Sheikh Khan*(12) that there must be a completed cause of action for money lent or goods sold and that the giving of the promissory note must be at a future date in order to entitle the creditor to recover on the original cause of action is not sound. The English law treats money lent though contemporaneously with a promissory-note as affording a distinct cause of action: see *Stedman v. Gooch*(13) where the facts were similar to those in *Sheikh Akbar's* case(12) but the plaintiff was held entitled to recover. In *Sutton v.*

- (1) (1886) I.L.R. 10 ad. 94.
 (2) (1883) I.L.R. 7 Mad. 112. (3) (1878) I.L.R. 3 Cal. 314
 (4) (1896) I.L.R. 23 Cal. 851. (5) (1899) I.L.R. 24 Bom. 360.
 (6) (1918) I.L.R. 46 I.A. 33; I.L.R. 46 Cal. 663.
 (7) (1800) 1 East 55; 102 E.R. 22.
 (8) (1827) 7 B. & C. 416; 108 E.R. 778.
 (9) (1808) 1 Taunt 353; 127 E.R. 870.
 (10) (1831) 1 B. & Ad. 696; 109 E.R. 945.
 (11) (1794) 1 Esp. 245; 170 E.R. 345
 (12) (1881) I.L.R. 7 Cal. 256 (13) (1793) 1 Esp. 3; 170 E.R. 262

Toomer(1) which was a case of a deposit and a contemporaneous promissory note the plaintiff was held entitled to sue on the count for money though the promissory note could not be sued upon on account of material alteration.

A promissory note or negotiable security given for money lent is only a conditional payment. The plaintiff can fall back on the original cause of action; See *In re A Debtor; Ex parte The Debtor*(2), *In re Romer & Haslam*(3), *Chokkalingam Chetty v. Annamalai Chetty*(4) and *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(5) and the cases cited therein.

The onus is on the debtor to allege and prove that the loan is merged in the negotiable security; *In re A Debtor; Ex parte The Debtor*(2). If the negotiable security is unstamped he cannot plead it in bar of the action on the loan.

The rule embodied in section 91 of the Indian Evidence Act is the same as the rule of the English Common Law. The principle that obtains in England that the debt is a different cause of action from the promissory note and that the rule of evidence is no bar to the action on the loan should be held applicable in India.

[The CHIEF JUSTICE.—There is no statutory provision in England as section 91 of the Indian Evidence Act here. In England they strain the Common law rule of evidence to get over the Stamp law in cases of hardship. You cannot do that in India.]

The factum of loan is not a term of the contract and proof of that fact is outside the scope of section 91 of the Indian Evidence Act. *Vide* Stamp Act by Mulla and Pratt, third Edition, page 134.

The lender of money can fall back on the promise to repay implied by law when the note containing the express promise becomes inadmissible. He can sue for money had and received; see *Baij Nath Das v. Salig Ram*(6).

K. V. Srinivasa Ayyar in reply.—The decision of the Full Bench in *Ramasami Pillai v. Murugiah Padayachi*(7) is not shaken and is good law. The decision of *VENKATASUBBA RAO J. in Chinnayya Naidu v. Srinivasa Naidu*(8) is against

- (1) (1827) 7 B. & C. 416; 108 E.R. 778.
 (2) [1908] 1 K.B. 344. (3) [1893] 2 Q.B. 286.
 (4) (1915) 34 I.C. 417. (5) (1934) I.L.R. 12 Ran. 500 (F.B.).
 (6) (1912) 16 I.C. 33. (7) (1935) I.L.R. 59 Mad. 268 (F.B.).
 (8) (1934) 67 M.L.J. 912.

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my contention but it should not be upheld. The learned judge has belittled the principles underlying section 91 of the Evidence Act. Section 35 of the Stamp Act read with section 91 of the Evidence Act makes the promissory note in the case inadmissible in evidence and no suit on the debt will lie apart from the note.

Cur. adv. vult.

JUDGMENT.

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LEACH C.J.—The question which the Court is called upon to decide in this case is whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower but is inadmissible in evidence owing to a defect in the stamping. In England the right to sue on the original consideration is recognised, and the same principle has been applied by some Judges in India, but section 91 of the Indian Evidence Act says that no evidence shall be given in proof of the terms of the contract except the document itself, or secondary evidence where secondary evidence is admissible, and other Judges have held that this section prohibits a suit on the original consideration. This Court, except in two cases to which I shall in due course refer, has held that section 91 of the Evidence Act is a bar to a suit on the debt when the loan and the instrument are contemporaneous. Before turning to examine the decisions of this Court and certain of the other authorities to which reference has been made I should point out that the Court is not considering the case where a promissory note has been given in respect of an antecedent debt. It is well settled, both in England and in this country, that where

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a negotiable instrument is given in respect of an antecedent debt the creditor may sue on the debt and ignore the note. We are merely concerned here with the case where the note has been given at the time of the loan or in pursuance of the arrangement then made and embodies in full the terms of the contract.

The earliest reported case of this Court to which our attention has been drawn is that of *Krishnasami v. Rangasami*(1) where a promissory note had been given by two members of a joint Hindu family in consideration of a loan to the family. The instrument was improperly stamped, but the Court held that this was no bar to the suit because the cause of action for the money lent was complete in itself before the giving of the note. The report does not set out the facts and apparently the Court was of the opinion that the instrument had been given for an antecedent debt. The question was raised before COLLINS C.J. and PARKER J. in *Pothi Reddi v. Velayudasivan*(2). There the loan having been arranged and the money paid a promissory note specifying the terms of the contract was executed later in the day. The note was not duly stamped and the Court held that the suit was not maintainable. It was recognised that there might be circumstances under which the loan could be recovered apart from the note, but the Court was firmly of the opinion that when the contract is reduced to writing the instrument itself is the only evidence of the transaction. This decision was followed by BODDAM and SANKARAN NAIR JJ. in *Yarlagadda Veera Ragavayya v. Goranlla*

(1) (1883) I.L.R. 7 Mad. 112.

(2) (1886) I.L.R. 10 Mad. 94.

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Ramayya(1), by SADASIVA AYYAR and SPENCER JJ. in *Muthu Sastrigal v. Visvanatha Pandarasannadhi*(2) and by VARADACHARIAR and BURN JJ. in *Chockalingam Chettiar v. Palaniappa Chettiar*(3). The same principle was applied by MADHAVAN NAIR J. in *Somaraju v. Venkatasubbarayudu*(4), by REILLY and ANANTAKRISHNA AYYAR JJ. in *Gura Sahu v. Krishnamma*(5), by KRISHNAN PANDALAI J. in *Chandrasekaram Pillai v. Srinivasa Pillai*(6) and again by ANANTAKRISHNA AYYAR J. in *Alimane Sahiba v. Subbarayudu* 7).

In *Ramasami Pillai v. Murugiah Padayachi*(8) a Full Bench consisting of BEASLEY C.J., CORNISH and PANDRANG ROW JJ. had to consider a promissory note which was expressed in these terms:

"We have taken from you on credit this day 10 kalam of Kuruva paddy at Rs. 3 a kalam for Rs. 30 and we have executed this hand letter promising to pay the sum of Rs. 30 with interest thereon at 3 pies per rupee per mensem to you or to your order."

The document was unstamped and it was conceded that it was inadmissible in evidence. It had not been given in respect of an antecedent debt, but was a contemporaneous document executed at the time of the sale of the paddy. The Court held that the suit was maintainable on the debt. In the course of his judgment BEASLEY C.J. recognised that where a promissory note is in consideration of a loan the debt cannot be proved *aliunde*. The learned

(1) (1905) I.L.R. 29 Mad. 111.

(2) (1913) I.L.R. 38 Mad. 660.

(3) (1934) I.L.R. 58 Mad. 261.

(4) (1924) 20 L.W. 943.

(5) (1923) 36 L.W. 432.

(6) (1932) 37 L.W. 723.

(7) (1932) 63 M.L.J. 303.

(8) (1935) I.L.R. 59 Mad. 268 (F.B.).

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Chief Justice and PANDRANG ROW J. were of opinion that in all such cases the Courts must be guided by what appears on the face of the promissory note. If it is expressed in such a way as to leave what was intended by the parties in any way in doubt, then the facts must settle the question. If it is clear on the face of the promissory note that it is the contract, then no further evidence can be permitted. The Court held that the suit was maintainable because it considered that the promissory note was merely given as a conditional payment for the paddy. CORNISH J. reserved his opinion on the question whether the payee of a note given for a contemporaneous loan has or has not a right of action on the debt. In *Chockalingam Chetty v. Annamalai Chetty*(1) COUTTS TROTTER and SRINIVASA AYYANGAR JJ. expressed the opinion that the giving of an instrument in recognition of a pre-existing debt does not extinguish, but merely suspends, the cause of action on the original debt. The giving of an instrument is merely conditional to its discharge. I do not regard this judgment as questioning the correctness of the decision in *Pothi Reddi v. Velayudhasivan*(2). STONE J. in *Murugappa Chetty v. Nachiappa Chetty*(3) held that where the cause of action is complete before the giving of the promissory note the creditor may sue on the debt. This is another case in which the promissory note was given in respect of an antecedent debt.

The two cases which conflict with *Pothi Reddi v. Velayudhasivan*(2) are *Gopala Padayachi v.*

(1) (1915) 34 I.C. 417.

(2) (1886) I.L.R. 10 Mad. 94.

(3) (1934) 67 M.L.J. 30.

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Rajagopal Naidu(1) and *Chinnayya Naidu v. Srinivasa Naidu*(2). In *Gopala Padayachi v. Rajagopal Naidu*(1) WALLACE J. stated that when a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the instrument does not discharge the debt, but only suspends the remedy on the debt. I am unable to agree that this is the balance of judicial opinion in India. The learned Judge made no reference to the decision in *Pothi Reddi v. Velayudasivan*(3) or to that in *Muthu Sastrigal v. Visvanatha Pandarasannadhi*(4). In *Chinnayya Naidu v. Srinivasa Naidu*(2) VENKATASUBBA RAO J. expressly held that where the loan and the giving of the promissory note are contemporaneous the lender may fall back on the original contract. This decision is, therefore, in direct conflict with *Pothi Reddi v. Velayudasivan*(3) and the cases which followed it. The learned Judge, in the course of his judgment, referred to a marked conflict of judicial opinion in this High Court. He regarded the decision of STONE J. in *Murugappa Chetty v. Nachiappa Chetty*(5) as being in conflict with the judgment of VARADACHARIAR and BURN JJ. in *Chockalingam Chettiar v. Palaniappa Chettiar*(6). With great respect I do not look upon these decisions as being in conflict and until the judgment of VENKATASUBBA RAO J. the only previous departure from the general trend of decisions of this Court was to be found in the judgment of WALLACE J. The correctness of the decision in

(1) A.I.R. 1926 Mad. 1148.
(3) (1886) I.L.R. 10 Mad. 94.
(5) (1934) 67 M.L.J. 30.

(2) (1934) 67 M.L.J. 312.
(4) (1913) I.L.R. 38 Mad. 660.
(6) (1934) I.L.R. 58 Mad. 261.

Pothi Reddi v. Velayudasivan(1) has, however now been called in question and in view of the importance of the matter the present case has been placed before a Bench of five Judges.

The question under discussion was considered by a Full Bench of the Rangoon High Court of which I was a member in the case of *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(2), and there all the important decisions, both Indian and English, were discussed in the course of the arguments. The judgment of the Court was delivered by PAGE C.J. who deduced the following propositions of law from the authorities:—(i) When a loan is contracted it is an implied term of the agreement that it shall be repaid. (ii) When a promissory note is given by the borrower either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken is a question of fact and not of law. (iii) The giving of a negotiable security by a debtor to his creditor operates *prima facie* as a conditional payment only, and not as a satisfaction of the debt unless the parties so regard it. (iv) If the promissory note is itself the consideration for the loan or if it is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the instrument. (v) The lender is entitled to sue on the original consideration if the instrument is given merely as a collateral security. (vi) If the terms of the agreement under which the loan was made have been embodied in an instrument no evidence can be adduced in proof of the terms of the contract except the document itself, and if

(1) (1886) I.L.R. 10 Mad. 94. (2) (1934) I.L.R. 12 Ran. 500 (F.B.).

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the document is not admissible in evidence as the result of its being improperly stamped the suit must fail. I concurred in this judgment and subject to one qualification I still consider that it correctly states the law. The qualification which I would now make has reference to the statement that the giving of a negotiable instrument operates *prima facie* as a conditional payment of the debt. On further consideration I have come to the conclusion that this must depend on the facts of the particular case and that there is no presumption that the instrument has been given as conditional payment. Therefore, in my opinion, when the lender wishes to sue on the original contract on the ground that the instrument was given by way of conditional payment he must prove facts which warrant the inference.

I am in agreement with the observations of SULAIMAN and KENDALL JJ. in *Kundan Lal v. Bhikari Das Ishwar Das*(1). The learned Judges there said :

"It is true that in considering this point we cannot be solely guided by the equitable considerations which are given effect to in English cases. The express provisions of section 91 of the Indian Evidence Act cannot be ignored. Under that section, where the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract except the document itself or secondary evidence of its contents where it is admissible. If therefore the *hundis* are the embodiment of the whole contract between the parties and those *hundis* are not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, the plaintiffs cannot be allowed to adduce other evidence to prove the terms of such contract. It is conceivable that in special cases a bill of exchange or a promissory note may be the only document containing the terms of

the contract between the parties, and in such a case if that document cannot be adduced in evidence the creditor may be prevented from recovering the amount. This is clear from illustration (c) to section 91. On the other hand, from the mere fact that a bill of exchange or *hundi* has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. A *hundi* is principally a written promise to pay a fixed amount on or after a certain date. It does not necessarily contain all the terms of the agreement between the parties as a bond, for instance, would do. In many cases a promissory note or a *hundi* may merely be a written security taken for the loan. The promise to pay the amount may be only a part of the whole contract between the parties in which case it cannot be said that that contract has been reduced to the form of a *hundi*. In such cases it would be impossible to hold that the provisions of section 91 would exclude evidence showing the terms of the whole contract which cannot be determined from the *hundi* alone."

A decision to the same effect was given by this Court in *Chidambaram Chettiar v. Ayyasawmi Thevan*(1), an appeal heard by OLDFIELD and KRISHNAN JJ. OLDFIELD J. said :

"The second question referred to us is whether the lender can be given a decree apart from the note for the money lent upon the note. It is not possible to answer this question without further knowledge of the facts."

KRISHNAN J. observed :

"If there is an obligation apart from the one under the note itself it may clearly be enforced. The fact that the 'loan and the note are contemporaneous' is not conclusive of the non-existence of such obligation."

In my opinion the law may be stated shortly in this way. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. Section 91 of the Evidence Act and section 35 of the Stamp Act bar the way. But if it does not

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embody all the terms of the contract the true nature of the transaction can be proved and where an instrument has been given as collateral security or by way of conditional security or by way of conditional payment a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed.

It has been stressed in argument that the English rules of evidence do not run counter to section 91 of the Indian Evidence Act, and therefore it is said that the section cannot be regarded as a bar to the application of the principle accepted in England that a suit lies on the debt apart from the instrument. This argument ignores two important factors. In the first place, the English rules of evidence are not statutory, but Judge-made, and in the second place, the tendency in England has always been to ignore as far as possible stamp objections, as is pointed out in Taylor on Evidence, Volume I, page 276 (12th edition). In India the law is statutory and the Courts are given no latitude in matters of this nature. Section 35 of the Stamp Act absolutely prohibits a negotiable instrument improperly stamped being put in evidence, and section 91 of the Evidence Act insists that where a contract has been reduced to writing the document alone shall be looked at.

The suit out of which the present petition arises was for the recovery of a sum of Rs. 400

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lent on a promissory note on 17th June 1928. The plaintiff's case was that there had been payments to account and that these payments had been endorsed on the instrument. The defences were (i) the promissory note was not supported by consideration; (ii) there had been no payments to account and the endorsements were false; (iii) the suit was barred by limitation; and (iv) it was not maintainable as the promissory note was insufficiently stamped. The promissory note was insufficiently stamped, but the trial Judge found against the defendant on the facts and granted a decree on the ground that the plaintiff was entitled to sue on the original consideration, because the promissory note had been executed one and half hours after the lending of the money. The learned trial Judge did not consider the question whether the promissory note embodied the whole of the terms of the contract between the parties. The case should, therefore, be remanded to the trial Court for further consideration and decision in the light of this judgment. The petitioner is entitled to his costs in this Court.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree. In deference however to the decisions which have laid down a different rule, I feel bound to explain my inability to follow them, especially when that rule has the attraction of avoiding apparent injustice while the conclusion stated in the judgment just delivered has been described as 'needlessly technical' by an eminent Judge [JENKINS C.J. in *Krishna v. Rajmal*(1).]

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As indicated by me in the order of reference, the question for consideration is, what is the purpose and effect of the prohibition contained in section 35 of the Stamp Act? It seems to me there can be little doubt that in enacting that prohibition, the Legislature expected that it would be made *effective* by the combined operation of that section and section 91 of the Indian Evidence Act. The possible hardship to the lender was noted by Sir RICHARD COUCH as early as in *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose*(1). The learned Chief Justice observed that the law has to be so, for the reason that "if the consequence of not stamping a document of this kind was not serious, the stamp laws would very frequently be disregarded". If I am right in my interpretation of these provisions of the Statute law, I venture to think that it is not for the Court to attempt to circumvent the law, even for the laudable purpose of advancing substantial justice.

There has been little or no controversy as to the effect of section 35 of the Stamp Act. The divergence of opinion disclosed in the decided cases relates to the bearing and effect of section 91 of the Evidence Act. Even on this point, the general principle underlying the section hardly admits of any doubt. In the words of Sir RICHARD COUCH in *Kedarnath Dutt v. Shamloll Khettry*(2) [quoted by the Judicial Committee in *Subramonian v. Lutchman*(3)], "the rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing". The

(1) (1873) 21 W.R. 1.

(2) (1873) 11 B.L.R. 405.

(3) (1922) I.L.R. 50 Cal. 338 344 (P.C.).

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question is, how far does this rule or the reason of the rule apply to cases in which a person borrowing money executes as part of the same transaction a promissory note in favour of the lender? That the terms as to rate of interest, date of payment, etc., form part of the contract and cannot be proved except by proof of the note seems to be more or less admitted [see *Ram Bahadur v. Dusuri Ram*(1)]. Is there an *obligation to repay* divorced from these terms and can such obligation be proved independently of the note is the point in controversy. The answer seems to me to depend on whether it is not true even in this case that the writing, namely, the promissory note is "tacitly considered by the parties as the only repository and the appropriate evidence of their agreement" (*per* Sir RICHARD COUCH in the case already quoted from).

The course of decisions in the Indian High Courts may be briefly stated. The Allahabad and Lahore High Courts have after some fluctuation of opinion adopted the stricter view in their latest Full Bench pronouncements. The Madras decisions have been dealt with by my Lord who has also referred to the judgment of the Full Bench of the Rangoon High Court. In Calcutta, the stricter rule was laid down in *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose*(2) but this was virtually departed from in *Golap Chand Marwaree v. Thakurani Mohokoom Kooaree*(3). Judging from the statement of facts, the last-mentioned case seems to have arisen out of a suit by an indorsee of an unstamped promissory note; with all respect, it is difficult to see how the indorsee who

(1) (1912) 17 C.L.J. 399.

(2) (1873) 21 W.R. 1.

(3) (1878) I.L.R. 3 Cal. 314.

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could not even prove the note could sue on the original consideration between the maker and the payee [see *Waynam v. Bend*(1)]. In *Sheikh Akbar v. Sheikh Khan*(2), GARTH C.J. re-affirmed the stricter rule; but in *Pramatha Nath Sandal v. Dwarka Nath Dey*(3) his statement of the law was interpreted in a manner not easily reconcilable with the way that GARTH C.J. had himself applied it in *Radhakant Shaha v. Abhoychurn Mitter*(4). Later decisions of the Calcutta High Court seem to have alternated between the two views [cf. *Ranendramohan Tagore v. Keshabchandra Chanda*(5), *Indra Chandra v. Hiralal Rong*(6), *Ram Bahadur v. Dusuri Ram*(7) and *Firm Tarachand v. Tamijuddin*(8)]; but *Pramatha Nath Sandal v. Dwarka Nath Dey*(3) was followed by the Bombay High Court in *Krishnaji v. Rajmal*(9). In *Jacob & Co. v. Vicumsey*(10) the learned Judge seems to be adopting the view of PAGE C.J. in the Rangoon case. In Patna, the question can scarcely be regarded as settled [cf. *Dhaneswar Sahu v. Ramrup Gir*(11) where MACPHERSON J. concurred only on the ground of *stare decisis*].

As some of the Indian decisions purport to follow the English rule, it is necessary to note the exact terms of the relevant rules of the English law and the basis on which they rest, with a view to see how far they can be followed in this country; for, as pointed out by the Judicial Committee in *Maung Kyin v. Ma Shwe La*(12), Courts in India

- (1) (1808) 1 Camp 175; 170 E.R. 918. (2) (1881) I.L.R. 7 Cal 256.
(3) (1896) I.L.R. 23 Cal 851. (4) (1882) I.L.R. 8 Cal 721.
(5) (1934) I.L.R. 61 Cal 433. (6) A.I.R. 1936 Cal. 17.
(7) (1912) 17 C.L.J. 399. (8) A.I.R. 1935 Cal. 658.
(9) (1899) I.L.R. 24 Bom. 360, 362. (10) (1926) 29 Bom. L.R. 432.
(11) (1928) I.L.R. 7 Pat. 845.
(12) (1917) I.L.R. 45 Cal. 320, 333 (P.C.).

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cannot depart from the provisions of the Indian Evidence Act merely on the ground that the laws of evidence in England, when similar questions come before the English Courts, permit certain facts to be established by proof at large. Though it may generally be true to say that section 91 of the Indian Evidence Act embodies what is known as the "best evidence" rule in the English law, the terms in which the rule has been codified here do not permit to the Courts in India the latitude which English Courts enjoyed at a time when the rule was being developed and administered there substantially as a rule of caution in leaving evidence to the jury. Thus, the same learned CHIEF JUSTICE (Lord TENTERDEN) who in *Vincent v. Cole*(1) said that he had always acted most strictly on the rule that what is in writing shall only be proved by the writing itself, observed in *Reid v. Batte*(2):

"So much injustice has frequently been done by rigid adherence to this rule that I should certainly be reluctant to carry it into strict execution" (see Taylor on Evidence, Vol. I, section 397).

Further, rules of exclusion which had been developed mainly with a view to avoid ignorant injuries being misled or confused were not scrupulously adhered to by Courts of Chancery where the Judge himself adjudicated both on law and on fact, especially when the exclusion of a writing, by reason of the prohibition arising from the Stamp laws, threatened to defeat a just claim. In *Huddleston v. Briscoe*(3), when pressed with an objection based on the Stamp laws, Lord ELDON

- (1) (1828) M & M. 257; 173 F.R. 1151.
(2) (1829) M & M. 413; 173 E.R. 1207.
(3) (1805) 11 Ves. Jun. 583; 32 E.R. 1215, 1220.

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stated that it was his "duty to struggle to support what has been the practice of the Court".

Bearing these considerations in mind, I proceed to deal with the relevant rules of the English law which are thus stated in Roscoe's Treatise on Evidence in Civil Actions (20th Edition, Volume 1, page 226):

"When the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to. Thus (A) where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration . . . (B) If a plaintiff succeeds in making out a case of implied or oral contract and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of non-suiting the plaintiff."

The proposition that I have marked (B) in the above extract need not detain us because I have never found it adopted in those terms in any Indian case and it is scarcely conceivable that the Legislature would have intended to permit an evasion of section 91 in the manner suggested. Some of the English decisions cited in connection with the question now before us seem however to rest on this principle [cf *Magnay v. Knight*(1) and *The King v. Padstow*(2).] The proposition that I have marked (A) in the above extract purports to be based on *Farr v. Price*(3) and *Tyte v. Jones* reported as a footnote to *Farr v. Price*(3).

Farr v. Price(3) will on examination be found to be an action by an indorsee of a promissory note; and in view of what is taken by Lord ELLENBOROUGH in *Waynam v. Bend*(4) to be indisputable,

(1) (1840) 1 M. & G. 94; 13 E.R. 615
(2) (1832) 4 B. & Ad. 208; 110 E.R. 434. (3) (1800) 1 East 55; 102 E.R. 22
(4) (1808) 1 Camp. 175; 170 E.R. 918.

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i.e., that the indorsee cannot recover under any of the money counts "as he was not an original party to the bill and there was no evidence of any value being received by the defendant from him", it is doubtful if the reference in the report of *Farr v. Price*(1) to the general counts in the declaration and to possible evidence of payment of consideration by the plaintiff to the defendant was intended to relate to the original loan between the maker and the payee. If it did, it can perhaps be explained as resting on the principle which had at one time been enunciated in England that an unstamped document was a mere paper which did not amount to an "agreement" and which therefore left the plaintiff's evidence where it stood; *The King v. Padstow*(2). Such a theory is scarcely maintainable in view of later authorities. [See *Alcock v. Delay*(3), Roscoe, Evidence in Civil Actions, page 227; see also *Ram Bahadur v. Dusuri Ram*(4).] If, as held by the Judicial Committee in *Subramonian v. Lutchman* 5), a document which was excluded from evidence under section 49 of the Registration Act was nevertheless a written contract in the sense that its existence precluded oral evidence of the same being given, it is difficult to see how a different principle will apply to cases where the document is excluded by section 35 of the Stamp Act.

Tyte v. Jones [referred to in the footnote to *Farr v. Price*(1)] seems to rest on another principle of the English law which the Indian Legislature

(1) (1800) 1 East 55; 102 E.R. 22.
(2) (1832) 4 B. & Ad. 208; 110 E.R. 434.
(3) (1855) 4 El. & Bl. 660; 119 E.R. 243. (4) (1912) 17 C.L.J. 131
(5) (192-) I.L.R. 50 Cal. 338, 344 (P.C.)

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has deliberately departed from in enacting section 22 of the Evidence Act. The proof that was permitted in *Tyte v. Jones* reported as footnote to *Farr v. Price*(1) was to the effect that when the money for which the unstamped promissory note had been given was demanded of the defendant, he acknowledged the debt. This is explicable in the light of the rule supported by some authority in England that admissions by a party, even when proved by parol evidence, constitute an exception to the "best evidence" rule; see *Singleton v. Barrett*(2). This view has been criticised even in England (see Taylor on Evidence, sections 410 to 412), and section 22 of the Indian Evidence Act adopted the stricter view and relegated "oral" admissions as to the contents of a document to the category of "secondary evidence". The result, in India, is that if by reason of the document being unstamped, no evidence of its contents whether primary or secondary is admissible, evidence of admissions by the defendant is equally inadmissible. The position may be different where admissions are made in the pleadings themselves; [cf. *Huddleston v. Briscoe*(3) and *Thynne v. Protheroe*(4)] because by reason of section 58 of the Evidence Act, it may not be necessary to prove admitted facts and the objection under section 91 will not arise unless the plaintiff is called upon to go into evidence; *Mallappa v. Matum Nagu Chetty*(5). This was the position in *Pramatha Nath Sandal v. Dwarka Nath Dey*(6)

(1) (1800) 1 East. 55; 102 E.R. 22.

(2) (1832) 2 C. & J. 368; 149 E.R. 157.

(3) (1805) 11 Ves. Jun. 583, 596; 32 E.R. 1215, 1220.

(4) (1814) 2 M. & S. 553; 105 E.R. 488.

(5) (1918) I.L.R. 42 Mad. 41 (F.B.).

(6) (1896) I.L.R. 23 Cal. 851

[cf. however *Chenbasapa v. Lakshman Ramchandra*(1)], where it was suggested that in a suit on an unstamped promissory note, even an admission in the written statement may not avail the plaintiff, as the Court when giving a decree on such admission may be "acting on" the document within the meaning of section 35 of the Stamp Act [see also *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose*(2)].

It seems to me that the other English authorities which have been referred to in this connection by text writers or in the Indian decisions do not really bear on the objection arising under section 91 of the Evidence Act. *Gompertz v. Bartlett*(3) turned on the rights and obligations of vendor and vendee, though an unstamped bill came into the picture. The defendant had sold a bill as a "foreign" bill when in fact it was not. If it were a foreign bill, it could have been subsequently stamped; but not being a foreign bill it became worthless on account of the absence of a stamp. The claim of the vendee for money had and received was sustained on the ground that the vendor had sold as a foreign bill what in fact was not a foreign bill. It seems to me that this decision does not warrant the conclusion that a person lending money on an unstamped note can maintain an action for money had and received. I shall recur to this point later.

Sutton v. Toomer(4) proceeded on the footing that though, by reason of the alteration, the promissory note had become unenforceable,

(1) (1893) I.L.R. 18 Bom. 369.

(2) (1873) 21 W.R. 1.

(3) (1853) 2 El. & Bl. 849; 118 E.R. 985.

(4) (1827) 7 B. & C. 416; 108 E.R. 778.

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the alteration did not extinguish the debt "and that it was competent to the plaintiff to give the paper in evidence to prove the terms on which the money was deposited". It is noteworthy that BAYLEY J instanced the case of a usurious security being taken for a pre-existing debt. *Wilson v. Kennedy*(1) was a case of an unstamped note given for a pre-existing debt (in lieu of an acceptance of the defendant which was due when the note was given) and the language of Lord KENYON is almost identical in terms with the first rule stated by GARTH C.J. in *Sheikh Akbar v. Sheikh Khan*(2). The same remark applies to *Brown v. Watts*(3) and to *Cundy v. Marriott*(4) which was a case of a bill given for goods sold; see also *Plimley v. Westley*(5).

It may be convenient to refer next to those of the Indian decisions which when dealing with claims for money lent under unstamped notes invoke the principle that the giving of a negotiable instrument only operates as a "conditional discharge" or merely suspends the plaintiff's remedy and that the plaintiff's right to sue is revived if the instrument turns out to be worthless or is not discharged by payment in due course. I see no difficulty in applying this principle to cases where money is *already* due to a person—as for goods sold or for a pre-existing debt—and the debtor gives his own note to the creditor or draws a bill or cheque in his favour. It is legitimate to presume in such cases that the

(1) (1794) 1 Esp. 245; 170 E.R. 345. (2) (1881) I.L.R. 7 Cal. 256.
(3) (1808) 1 Taunt. 353; 127 E.R. 870.
(4) (1831) 1 B. & Ad. 696; 109 E.R. 945.
(5) (1835) 2 Bing. (N.C.) 249; 132 E.R. 98.

creditor is not accepting the instrument in *satisfaction* of his existing claim but only as a security or as a means of obtaining satisfaction from the drawee of the bill or cheque. Even in cases where money is lent contemporaneously with the giving of a cheque by the borrower or the drawing of a bill on a *third* party, it may be reasonable to treat the bill or cheque as an attempt *at payment* and to presume that it was only a "conditional" payment. The difficulty created by section 91 of the Evidence Act will not arise in this case because the cheque, bill or hundi does not embody a *promise* to pay by the *promisor* but only a direction to another person and the lender can fall back on the "implied" promise in the absence of a *promise* "in writing". But where the borrower gives his own *promissory note* as part of the loan transaction, it seems to me artificial to treat that very "promise to pay" obtained in that note as amounting to a *payment* and then to seek to import the theory of "conditional" payment.

So far as I have been able to examine the English cases which enunciate the doctrine of "conditional" payment, I do not find that any of them relates to a promissory note executed as part of the loan transaction itself. I am therefore with all respect unable to concur in the proposition stated by PAGE C.J. as proposition No. 3 in *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*(1) and statements to the same effect in other reported decisions [see for instance *Maung Kyi v. Ma Ma Gale*(2)]. With the like respect I must add that my experience does not coincide with what the

(1) (1934) I.L.R. 12 Ran. 500, 504 (F.B.).
(2) (1919) 54 I.C. 84, 91 (F.B.).

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learned CHIEF JUSTICE states (on page 508) to be his experience that "it rarely, if ever, happens that the whole of the terms of the agreement under which a loan is made are embodied in a promissory note given to the lender by the borrower except in cases in which the parties contract that the negotiable instrument shall itself be the consideration for the loan", if, as later observations in the judgment imply, a promissory note cannot, according to the learned Judge, be reasonably presumed to have been taken as "consideration" for the loan. I am free to confess to some difficulty in understanding what the learned CHIEF JUSTICE had in mind when he postulated the possibility of a promissory note by the borrower being "consideration" for the loan as distinguished from the "contract" of loan. I can understand the position taken in *Kundan Lal v. Bhikari Das Ishwar Das*(1) that from the mere execution of a note it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document [see *Chidambaram Chettiar v. Ayyasawmi Thevan* (2)] and I respectfully agree that in this sense it will be a question of fact in each case whether or not the note represents the whole contract between the parties. I am unable to hold that there is any presumption that a promissory note taken from the borrower as part of the loan transaction is taken merely as "collateral security; but in particular cases the evidence may lead to that conclusion; see per PRATT J. in *Maung Kyi v. Ma Ma Gale*(3).

(1) (1929) I.L.R. 51 All. 530.

(2) (1916) I.L.R. 40 Mad. 585.

(3) (1919) 54 I.C. 84, 91 (F.B.).

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The theory propounded by ORMOND J. in *Maung Kyi v. Ma Ma Gale*(1), at page 92, that in every case of a promissory note loan "there are two distinct promises made by the borrower (i) that he will pay the amount borrowed to the lender and (ii) that he will pay the amount due on the promissory note to the holder of the note", that each promise is a distinct cause of action and that section 91 applies only to the second promise, seems to me, with all respect, equally artificial, if the learned Judge meant to hold that even promise No. (i) was an express promise. If, on the other hand, it is only an implied promise, the question arises, whether the principle enunciated by Lord CAIRNS in *Shaw v. Foster*(2) and applied by the Judicial Committee in *Subramonian v. Lutchman*(3) would not preclude the lender from falling back on the implied promise when the contract between the parties had been reduced to writing.

It has been asked why a man should be put in a worse position when he takes a worthless document than when he does not take any. Lord CAIRNS said :

"Any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed." This principle was applied by Sir RICHARD COUCH to a claim for money due under an unstamped note. The learned CHIEF JUSTICE observed :

"The plaintiff cannot . . . say that from the deposit there arose a contract on the part of the defendant to repay it, because here the parties have made an express contract which has been put in writing. The plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the

(1) (1919) 54 I.C. 84 (F.B.).

(2) (1872) L.R. 5 H.L. 321, 341.

(3) (1922) I.L.R. 50 Cal. 338 (P.C.).

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contract actually made and he must prove that, if it is denied. And he must do it by the production of the writing, which not being stamped, cannot be seen in evidence"; *Ankur Chunder Roy Choudhry v. Madhub Chunder Ghouse*(1).

This case has sometimes been explained away on the ground that the suit was there laid on the note and not on the consideration; see *Golap Chand Marwaree v. Thakurani Mohokoom Kooaree* (2) and *Krishnaji v. Rajmal*(3). This distinction wholly ignores the principle on which the decision was avowedly based.

It has been suggested that this principle of the "implied" promise being superseded by the "express" promise in writing should be limited to cases where the writing can be proved and enforced but where it is not admissible in evidence, the paper may be treated as non-existent and the objection based on section 91 will not arise (see Mulla and Pratt Commentaries on the Stamp Act, 3rd Edition, page 134). The decision in *Subramonian v. Lutchman*(4) furnishes the answer even to this suggestion. In the absence of a document embodying the terms of the security created by the deposit of title deeds, the lender could have proved the deposit by oral evidence and obtained the benefit of the security; but when the transaction was accompanied by an unregistered document their Lordships held that the creditor could not establish his security by oral evidence as to the deposit, even though the document was inadmissible by reason of non-registration; see also *Ram Bahadur v. Dusuri Ram* (5). The same decision of the Judicial Committee

(1) (1873) 21 W R. 1.

(2) (1878) I.L.R. 3 Cal. 314.

(3) (1899) I.L.R. 24 Bom. 360.

(4) (1922) I.L.R. 50 Cal. 338 (P.C.).

(5) (1912) 17 C.L.J. 399.

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answers the argument that though the *contract* between the lender and the borrower cannot be proved without the the document, the *fact* of the loan could be proved. Under the law, the mere deposit of title deeds (with intent to create a security) would suffice but in the case referred to their Lordships declined to allow even the fact of such deposit to be proved when the document turned out to be inadmissible. It is obvious that when the creditor is asking for permission to prove the *fact* of the loan, he is only seeking to invoke the theory of an *implied* promise to repay. In *Krishnasami v. Rangasami*(1) the learned Judges held that

"the defendant's request and the payment by plaintiff which constitute the cause of action can be proved independently of the note."

With great respect, I cannot help thinking that this is merely the theory of "implied" promise stated in other words.

The theory of "failure of consideration" has sometimes been invoked as also the formula of "money had and received" [cf. *Baij Nath Das v. Salig Ram*(2).] The appeal to the theory of failure of consideration in a case like the present seems to me, with all respect, to ignore the distinction between the "contract" and the "consideration" for the contract. We only fall back on the question whether the promissory note represents the *contract* or the *consideration* for some other contract. In view of the judgments delivered in *Sinclair v. Brougham*(3) it seems to me that neither the theory of failure of consideration nor the formula of money had and received is available in the case

(1) (1883) I.L.R. 7 Mad. 112

(2) (1912) 16 I.C. 33.

(3) [1914] A.C. 398, 440, 452.

before us. Both these causes of action rest on a "notional or imputed promise to repay" [See *Sinclair v. Brougham*(1) at pages 452 and 440] and the considerations above adverted to in connection with the theory of "implied" promise equally apply to this way of supporting the lender's claim. In the case of a *loan* transaction, the *principal* contract itself consists of the promise to repay and it cannot be said that "the implied promise on which the action for money had and received depends" forms no part of but is merely collateral to the main contract [*per* Lord PARKER in *Sinclair v. Brougham*(1)]. The claim for "failure of consideration" can arise only when the contract had been *proved* and the very question for decision is whether or not section 91 of the Evidence Act prevents the contract being proved without the production of the note.

The observations of BOWEN L.J. in *In re Guardian Permanent Benefit Building Society*(2) quoted by Lord SUMNER in *Sinclair v. Brougham*(1) seem equally to apply to the argument of "failure of consideration" in the present case. The unstamped promissory note has *all along* been unenforceable and inadmissible and both parties must be presumed to have known the law on the point. It is sometimes assumed that it is the debtor's duty to affix the proper stamp; but the statute, with a view to safeguard the interests of the revenue, expects the creditor also to make sure that the document is duly stamped—though, according to several decisions, he may not incur the *penalty* prescribed by section 62 of the Stamp Act by taking an

(1) [1914] A.C. 398, 440.

(2) (1882) 23 Ch. D. 440, 470.

unstamped document. It only remains to add that section 70 of the Indian Contract Act, which has sometimes been appealed to, is scarcely appropriate to a case of money *lent* to the defendant. There is no possibility in such a case or even a contemplation of the "thing delivered *being restored*"—which obviously means in *specie*; and lending money to the defendant cannot be described as something *done for* the defendant.

LAKSHMANA RAO J.—I agree with my Lord and have nothing to add.

STODART J.—Section 91 of the Indian Evidence Act so far as material is:

"When the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself." The document now in question is a promissory note which is inadmissible in evidence because it is improperly stamped. Assuming that the promissory note contains a recital of the consideration for which it was executed, is the promisee debarred from proving the fact that consideration passed and must he therefore fail in a suit to recover the consideration? All the High Courts in India appear to be agreed that when the consideration passed prior to the execution of the note—as when the note is executed for money due on account—or when the consideration arises out of a transaction which can be separated from the execution of the promissory note—as when the note is executed for the price of goods sold—then a separate cause of action arises on the consideration and the consideration can be proved. But in cases where the note is executed for money or other consideration which passes at the time of the execution of the note,

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there is a conflict of decisions. For my part, I must confess that I see no difference in principle between the two cases. The promissory note may be in the form, "For money which I owe you on account I promise to pay you, etc.," or "for money received from you to-day I promise to pay you, etc." Then, if the recital of consideration is a term of the contract it cannot on a strict interpretation of section 91 be proved at all except by proof of the promissory note. See the similar opinions expressed by PHILLIPS and REILLY JJ. in *Venkatachalapati v. Ramakrishnaya*(1).

The question for decision as formulated by my Lord is:

"Whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrowers but is inadmissible in evidence owing to a defect in the stamping."

My answer to this question is first that the existence of the debt is not a term of the contract, and even if it is recited in the promissory note it can be proved by other evidence: and secondly that the terms of the contract between the promisor and the promisee can never be wholly embodied in the promissory note. One of the terms of the contract is that the promisee agrees to accept the promissory note in satisfaction of the debt due to him by the promisor. What he agrees to accept is a valuable security and not a worthless piece of paper—which is all that the note is if it is not properly stamped. If then the note is valueless the promisor has not done that which he contracted to do. The promisee has not

(1) A.I.R. 1930 Mad. 168.

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got what he bargained for. The promisor therefore is bound to restore to the promisee the advantage which he, the promisor, has obtained from the transaction. To me it appears that when a man gives another a promissory note in satisfaction of a debt or for other consideration, he gives at the same time a warranty that the note is a good and enforceable instrument. If the note is bad for want of a proper stamp it is difficult to see how it can operate as a discharge of the debt any more than the giving of a counterfeit currency note could so operate. This implied warranty is in my opinion a term of the contract and such a warranty is in my experience not generally embodied in a promissory note or other negotiable instrument.

Reverting to the first proposition which I have stated, namely, that the recital in a promissory note of the existence of the debt is not a term of the contract, it is permissible, I think, to refer to the opinion of the learned and distinguished authors of the Commentary on the Indian Stamp Act (Mulla and Pratt, third Edition, 1935, page 134):

"The fact of the loan is not a term of the contract and proof of that fact is outside the scope of section 91 of the Indian Evidence Act."

And again:

"If the loan was made at the debtor's request, the request implies a promise to repay. If the express provision in the promissory note could be proved it would exclude the implied promise. But as the express promise cannot be proved the lender may rely on the implied promise. If the loan was not made at the request of the debtor, there is a liability to make compensation under section 70 of the Contract Act."

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In spite of the conflict of decisions in Indian Courts on the question whether a separate cause of action arises on the consideration in the case where consideration passes at the same time as the promissory note, I think that it is possible to interpret the decision of the Judicial Committee in *Sadasuk Janki Das v. Sir Kishan Pershad*(1) as answering that question in the affirmative.

Sadasuk Janki Das v. Sir Kishan Pershad(1) was a case where the consideration passed at the same time as the execution of the hundis on which the suit was brought. It was sought to make the Maharajah liable on the hundis which were drawn and accepted by an officer of his Treasury on the ground that the money was borrowed on his behalf. The Judicial Committee held that the Maharajah could not be made liable on the hundis but that the plaintiffs could in the alternative have based their suit on the consideration:

"It would have been open to the plaintiffs had they thought fit to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration."

In *Venkatachalapati v. Ramakrishnayya*(2), already cited in another connection, the principle of this decision was applied to the case of a claim on a promissory note executed by one partner in a firm on which it was sought to make the other partners liable. It was held that the plaintiff's suit as framed must fail but that he might be allowed to amend his plaint so as to make it clear that he was alternatively suing all the defendants

(1) (1918) L.R. 46 I.A. 33; I.L.R. 46 Cal. 663.
(2) A.I.R. 1930 Mad. 168.

as members of a firm on loans made to that firm. REILLY J., as he then was, said:

"If the firm is to be made liable the lender must not only allege and prove that the loan was really taken for his firm by the partner who made the promissory note but must base the suit on the loan to the firm."

Sadasuk Janki Das v. Sir Kishan Pershad(1) makes it clear in my opinion that when money or other valuable consideration passes and a negotiable instrument is given in exchange for that consideration, a cause of action arises on the consideration apart from the engagements evidenced by the instrument. I am not able to subscribe to the view that because the consideration is recited in the instrument no evidence can be given of it except the instrument itself. The consideration, that is to say, the loan for which the promissory note is given, is the subject-matter of the contract and not a term of the contract within the meaning of section 91 of the Indian Evidence Act. In the matter of the loan the lender consents to it only on condition that the borrower gives him a negotiable instrument in the shape of a promissory note containing certain stipulations; and the borrower for his part consents to execute the promissory note. If in the promissory note the borrower embodies a recital that he has received the money that in my opinion is not a "term of the contract" but merely a statement of the actual circumstance which has given rise to the contract.

In this view, I hold that the decision of the learned District Munsif may be allowed to stand.

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(1) (1918) L.R. 46 I.A. 33; I.L.R. 46 Cal. 663.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and
Mr. Justice Stodart.

PANGUDAYA PILLAI AND ANOTHER (DEFENDANTS 2 AND 3),
APPELLANTS,

1938,
February 15.

v.

UTHANDIYA PILLAI AND THREE OTHERS (PLAINTIFFS AND
FIRST DEFENDANT), RESPONDENTS.*

Indian Limitation Act (IX of 1908), ss. 20 and 21—Hindu joint family—Manager of—Promissory note by—Payments towards loan made by executant after partition between him and his brothers and endorsed on promissory note—Debt if kept alive against brothers by reason of—Effect of ss. 20 and 21 read together.

The first defendant, the manager of a joint Hindu family consisting of himself and his brothers, defendants 2 and 3, executed a promissory note in favour of the plaintiff in 1919. In 1920 the defendants became divided. After the partition, the first defendant made four payments of interest on 27th April 1921, 12th April 1924, 16th March 1927 and 5th March 1930 towards the loan and endorsed the payments on the promissory note. In a suit filed in 1931 on the promissory note,

held that, even if the loan was contracted for the benefit of the family, after partition the first defendant could not by making payments towards the loan and placing them on record as required by section 20 of the Indian Limitation Act keep the debt alive against the other members of the family and that the suit was therefore barred by limitation against defendants 2 and 3.

The effect of sections 20 and 21 of the Limitation Act read together is that the members of a joint Hindu family are not for the purposes of section 20 "persons liable to pay the debt" when the debt in question cannot be levied from them personally, but is merely recoverable by the sale of the joint

* Second Appeal No. 573 of 1933.

family property on foot of a decree made to that effect. Much less are the said members "persons liable to pay the debt" when by reason of partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it.

Civil Revision Petition No. 623 of 1933 and *Rama Vadhyar v. Manian Vadhyar*(1) approved.

APPEAL against the decree of the District Court of Trichinopoly in Appeal Suit No. 92 of 1932 preferred against the decree of the Court of the District Munsif of Srirangam in Original Suit No. 108 of 1931.

T. V. Muthukrishna Ayyar and *A. V. Narayana-swamy Ayyar* for appellants.

B. Sitarama Rao for *K. Bhashyam Ayyangar* and *T. R. Srinivasan* for respondents 1 to 3.

Fourth respondent was unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by STODART J.—The suit out of which this second appeal arises was based on a promissory note executed by the first defendant. The second and third defendants—the present appellants—are the younger brothers of the first defendant. The plaintiff alleged that they were present when the money was lent and the note executed but this was not believed in the trial Court. The plaintiff further alleged that the first defendant was the manager of the joint family consisting of himself and his brothers, the second and third defendants, that the note was to secure a loan which was contracted for the benefit of the family and that

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(1) (1937) 45 L.W. 767.

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the three brothers continued undivided up to the date of suit. It was found however at the trial that the family had become divided in 1920, the year after the execution of the note, and further that the plaintiff had become aware of this change of status at least as early as 1924. Two main questions arose for decision :

(i) Was the loan contracted for the benefit of the family ?

(ii) Do the endorsements of part payment made on the note by the first defendant avail to save the bar of limitation against the second and third defendants ?

The learned District Munsif found that out of the consideration of Rs. 700, Rs. 300 was expended on purchasing a small piece of land and Rs. 100 in discharging the balance of the price of a house site previously purchased. He did not find that these transactions were *prima facie* advantageous to the family but held that, since the land, which was purchased by the first defendant alone for Rs. 300, was brought into hotchpot at the partition and divided amongst the brothers, the second and third defendants were also liable to discharge the debt. On the point of limitation he held that the suit was barred against the second and third defendants. On appeal the learned District Judge agreed with the trial Court that the second and third defendants were liable for the debt and on the point of limitation he reversed the decision of the District Munsif holding that the payments made by the first defendant after partition operated to extend the time for a suit as against the second and third defendants. Both of these

adverse findings are now attacked and on both grounds we think this appeal should succeed.

The promissory note is as follows :—

"Promissory note executed on 23rd April 1919 by Arunachallam Pillai in favour of Sappania Pillai. Amount borrowed by me from you this day in cash on account of my urgency for purchasing land is Rs. 700. I shall pay this sum, etc."

There is nothing here to indicate that the land was originally purchased for the family. On the contrary the first defendant, Arunachallam, declares that he purchased it for himself and he does not describe himself as acting as the manager of the family. Nor, as we have observed, is there anything to show that the purchase was beneficial to the family. On the contrary, if the only profit which the family, as such, derived from the loan was this small piece of land for which Rs. 300 was paid, then the whole transaction was imprudent. For the annual profit from twenty-two cents, even of wet land as this was, would not suffice to meet the interest of Rs. 84 on the loan of Rs. 700. Apart from that, even if we assume for the sake of argument that the land was a profitable investment, there is no indication at all that in order to buy it, it was necessary to borrow money and that the price could not have been met out of the annual profits of the family property or out of accumulated savings.

As for the lower Court's reasoning that the second and third defendants would be liable for the debt because the land was shared with them at partition, that we think is unsound. For the first defendant, the actual purchaser, may have thrown the land into hotchpot to compensate for some advantage contributed by the second and

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third defendants. The first defendant had his own separate business and presumably some assets of his own and some liabilities which he alone was bound to discharge. It is quite possible that the second and third defendants contributed something at the partition of 1920, to counter balance which, each got seven cents out of the land purchased in 1919. The fact therefore that the land, purchased in the sole name of the first defendant, was subsequently divided amongst all the defendants, does not by itself show that the purchase was intended for the benefit of the family or that, in point of fact, it resulted in a benefit to the family as such. The appellants are we think bound to succeed on this ground alone.

Coming to the question of limitation, a very interesting argument has been advanced for the respondents by Mr. Sitarama Rao who has brought to the question at issue his extensive knowledge of the case law bearing on this somewhat difficult subject. The facts as found we have already stated. In more detail they are as follows:—The promissory note was executed in 1919. In 1921 the defendants became divided. Neither at the time of the execution of the promissory note, nor at the time of the partition is there anything to show that these appellants were aware of the loan. After the partition, if the endorsements on the note are to be accepted, the first defendant made four payments of interest, namely, on 27th April 1921, Rs. 100; on 12th April 1924, Rs. 5; on 16th March 1927, Rs. 10 and on 5th March 1931, Rs. 5. At no time, so far as the evidence goes, did the second and third defendants become

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aware of the loan. The suit was filed on 11th June 1931. The result is somewhat astonishing, namely, that eleven years after partition the junior members of the family should find themselves called upon to meet a claim founded on a pre-partition debt, of which until that moment they may not have had the slightest knowledge. The learned District Judge was of the opinion that it would be unjust if the right of a creditor to recover a family debt out of the whole property of the family could be defeated by partition. But we think his sympathy is misplaced. A person who lends money to the manager of a joint family by way of simple loan may sue for it, partition or no partition, within the statutory period. If he does not wish to do that but prefers—as many creditors do prefer—to leave his money out at interest, is it too much to expect of him that he should enquire whether the family is still undivided? So that, if it is not, he may obtain acknowledgments of the debt from those members of the family who did not contract with him at the time of the loan.

The question we have to decide is whether after partition by making payments towards the loan and placing them on record as required by section 20 of the Indian Limitation Act, the person who as manager of the family originally contracted the debt can keep it alive against the other members of the family—assuming of course that it is a debt binding on the family. Here, for instance, the plaintiffs could have filed their suit at any time before 23rd April 1922 and could have got a decree against the second and third defendants, not, it is true, executable against them

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STODART J. personally, but capable of being executed by the attachment and sale of any property they had got at the partition and which they still retained. Or, instead of filing a suit, the plaintiffs having learnt of the partition could have secured an acknowledgment from the second and third defendants, though of course this would have given them no lien on the property which the second and third defendants had obtained at the partition. But the debt would have been kept alive as against them. Can we go a step further and say that by accepting part payment of principal and interest from the senior member of the family the plaintiffs actually kept the debt alive as against all the members?

The point has been twice decided recently in this Court and in a sense adverse to the respondents. CURGENVEN J., as he then was, in Civil Revision Petition No. 623 of 1933 (not reported), held, on facts which are similar to the facts of this case, that the point was governed by section 21 (3) (b) of the Limitation Act. He said :

"That payment, being made after partition, was not made by the manager for the time being, as required by section 21 (3) (b) of the Limitation Act, and did not therefore avail to save limitation against the defendant's brother."

And BEASLEY C.J. in *Rama Vadhyar v. Manian Vadhyar*(1) held to the same effect. This present appeal has been referred to a Bench for decision on account of the alleged discrepancy between *Rama Vadhyar v. Manian Vadhyar*(1) and *Munisawmi v. Kutti*(2). There is however no real discrepancy. For the latter case is one where the debt was contracted by a Hindu father before

(1) (1937) 45 L.W. 767.

(2) (1933) I.L.R. 56 Mad. 833.

partition and the question was whether limitation was saved against his sons by payments made by him after partition. It was held that inasmuch as the pious duty of a Hindu son to pay his father's debts was not extinguished by partition, the father's payments operated to keep the debt alive against the sons.

Now, examining the relevant sections of the Limitation Act, section 21 is explanatory of sections 19 and 20. By section 19 the time for a suit is extended by an acknowledgment in writing signed by the person against whom the claim is made. By section 20 the time is extended by a payment of interest or part payment of principal evidenced by the writing or signature of the debtor. In both cases the act which operates to give a fresh period of limitation may be done by an "agent duly authorised in this behalf". And section 21 extends as it were the somewhat strict expression "duly authorised agent" to certain persons in whom authority to acknowledge lawful claims is vested in virtue of their legal relationship to the principal, such as, the lawful guardian of a minor or the committee of a person of unsound mind. Section 21 (3) (b) is :

"For the purpose of the said sections (sections 19 and 20) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family."

CURGENVEN J.'s reasoning in the case cited is that "the person liable to pay the debt", if his liability arises only on the ground that it is a family debt, cannot for the purpose of section 20 be represented after partition by the person who was the family manager. Mr. Sitarama Rao's

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STODART J. contention however is that section 21 (3) (b) does not apply to the case at all. He bases his argument on a strict construction of section 20. That section so far as relevant is :

"Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made."

And this has been interpreted as covering cases where there is a plurality of debtors and the payment is made by only one of them, saving of course the cases specifically excepted in section 21 (2), of joint contractors, partners, executors or mortgagors. In all other cases payment by one gives a fresh period of limitation against all. This interpretation is now well established and it is unnecessary for us to refer in detail to the numerous instances which have been cited at the Bar in which it has been applied. There is the case of the universal donee whose liability for the debts of the donor arises under section 128 of the Transfer of Property Act; limitation against him is saved by a payment made by the donor after the date of the gift, *Velayudam Pillai v. Vaithyalingam Pillai*(1): And the case of payment by one of several heirs towards the debt of a deceased person saving limitation against all who have taken the latter's property at his death, *Narasimha Rama Aiyar v. Ibrahim*(2): And the case where payment by the purchaser of the equity of redemption of interest on a mortgage saves limitation against the mortgagor, of which *Bhuban Mohan*

(1) (1912) 17 I.C. 619,

(2) (1928) 56 M.L.J. 630.

Sinha v. Ram Gobinda Goswami (1) is an example.

The proposition sought to be established by Mr. Sitarama Rao for the respondents is that in the case of a debt lawfully contracted for the necessity of a joint Hindu family all the members of the family are co-debtors; so that part payment by one, acknowledged by writing as prescribed in section 20 of the Limitation Act, gives a fresh period of limitation against all.

Now the legal remedies open to a person who lends money on a promissory note to the managing member of a joint Hindu family have been well defined in a course of authorities which it is unnecessary for us to cite. While the family is still joint, the creditor can file a suit against the managing member alone and can obtain a decree against him on the promissory note; and, if he proves that the debt is binding on the family, a declaration that he, the plaintiff, is entitled to execute his decree by attachment and sale of the joint family property. At the time of execution proceedings however the junior members of the family are at liberty to dispute the binding nature of the debt; and in order to forestall such objections the creditor may implead the junior members in the suit itself and, if they dispute the binding nature of the debt, he can have that question tried. Partition does not put an end to the liability of the junior members but the nature of the remedy is changed. In the first place, the suit must be filed in the first instance against all the members of the family. In the second place, the decree against the junior members will be in

(1) (1926) I.L.R. 54 Cal. 179.

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the form of a declaration that execution may be had by attachment and sale of that portion of the property which each got at partition and of which he still retains possession. This is now a well settled proposition of law and for authority we need only refer to the clear exposition of it by our learned brother, VENKATARAMANA RAO J., in Appeal Against Appellate Order No. 172 of 1933 reported as *Suryanarayana v. Viswanadhan*(1). In the present case, partition had taken place before the respondent took any steps to enforce his debt. The promissory note was executed on 23rd April 1919. Partition was effected in the following year. Up to 23rd April 1922 the respondents could have filed their suit against all these defendants and obtained a decree of the kind just stated. They did not do so. But within that period they secured evidence of a part payment of interest by an endorsement on the promissory note in the handwriting of the first defendant: this, they now contend, by the operation of section 20 of the Limitation Act gave them a fresh period of limitation against all the members of the family; and so with each successive payment. Section 20 is construed as meaning that, when any of the several persons liable to pay a debt, makes a payment of interest, then from the date of that payment a fresh period of limitation shall be computed for a suit on the debt, which suit will lie against all persons liable to pay the debt.

Now, accepting this construction of section 20, it appears to us that the question for decision is reduced to this: Are defendants 2 and 3 persons

(1) (1935) 44 L.W. 476.

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liable to pay the debt within the meaning of section 20? That question we think must be answered in the negative as the trial Court has answered it. The debt is the money now due on account of the money lent to the first defendant on the promissory note. Certainly the second and third defendants are not now liable to pay it. All that the plaintiffs can get by way of relief against them is a decree declaring that if they got any of the family property at partition and if they still retain that property or any part of it, then in execution of the decree that property may be attached and sold. This kind of contingent liability did not in our opinion make the second and third defendants, at the time when the first defendant made the initial payment of interest nor at the times when he made each successive payment, co-debtors of the first defendant in the sense implied in section 20.

Mr. Muthukrishna Ayyar for the appellants is in our opinion right when he contends that the joint liability of the members of an undivided Hindu family for a family debt is not a debt within the meaning of section 20 so that one member by making a part payment can keep the debt alive against all the others. His argument is that if it was that kind of a debt there would have been no necessity for the Legislature in 1928 to enact section 21 (3) (b). The relevant words of that section which we have already set out are:

"For the purposes of the said sections (sections 19 and 20) where a liability has been incurred on behalf of a Hindu undivided family as such, a payment made by the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family."

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Now, according to Mr. Sitarama Rao, section 20 already provided for such cases. It enabled not only the manager but indeed any member of the family by making a payment towards the debt and acknowledging it in writing to give the creditor a fresh period of limitation for a suit against all the members. But if that was the effect of section 20 there was no need for the enactment of section 21 (3) (b).

Reading sections 20 and 21 together therefore we are unable to hold that the members of a joint family are for the purposes of section 20 "persons liable to pay the debt" when the debt in question cannot be levied from them personally but is merely recoverable by the sale of the joint family property on foot of a decree made to that effect. Much less then are the said members "persons liable to pay the debt" when by reason of partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it.

In the result we allow this second appeal. The decree of the District Munsif is restored and the appellants are awarded their costs throughout to be paid by the plaintiffs in the suit.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Abdur Rahman.

KALIAPPA GOUNDAN (PLAINTIFF), APPELLANT,

v.

KANDASWAMI GOUNDAN (DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), Sch. I, art. 1—Subject-matter in dispute in second appeal within meaning of—Appeal by plaintiff to lower appellate Court—Additional court-fee demanded by that Court on memorandum of—Dismissal of appeal on non-payment of—Second appeal by plaintiff against, contending that court-fee paid by him in Court below was the proper fee—Court-fee payable in—Sch. II, art. 17-B, of Court Fees Act—Applicability of.

The plaintiff, who was the appellant in the lower appellate Court, paid a court-fee of Rs. 100 on his memorandum of appeal. The lower appellate Court held that the court-fee payable was Rs. 412-7-0. The plaintiff failed to pay the deficit court-fee and the appeal was dismissed. From the dismissal he filed a second appeal in the High Court. He valued the same at Rs. 312-7-0, being the difference between the amount of court-fee demanded by the lower appellate Court and the amount of court-fee paid by him, and paid court-fee on that valuation. In the second appeal it was held that the proper fee payable thereon was that demanded by the lower appellate Court and an order was made directing the plaintiff to make good the deficiency. The plaintiff did not comply with that order and the second appeal was dismissed. In a Letters Patent Appeal preferred by the plaintiff,

held that article 1, Schedule I, of the Court Fees Act applied to the case and that as the dispute in the lower appellate Court had reference only to the court-fee payable, the difference between the court-fee paid by the plaintiff in the lower appellate Court and the court-fee demanded by that Court and not the subject-matter of the suit itself was the

* Letters Patent Appeal No. 22 of 1936.

1938,
January 18.

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Serial Register No. 1923 of 1923 relied upon.

APPEAL under Clause 15 of the Letters Patent against the judgment of WADSWORTH J. dated 9th August 1935 and made in Second Appeal No. 209 of 1934, preferred against the decree of the District Court of Coimbatore in Court Fees Register No. 2169 of 1933 (Memorandum of appeal sought to be preferred against the decree in Original Suit No. 149 of 1931, Sub-Court, Coimbatore).

T. R. Srinivasa Ayyar for appellant.

M. Krishna Bharati for *S. Muthia Mudaliar* for respondent.

N. Srinivasa Ayyangar for Government Pleader (*K. S. Krishnaswami Ayyangar*) for Government.

Cur. adv. vult.

JUDGMENT.

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VENKATASUBBA RAO J.—In the lower appellate Court the plaintiff, who was the appellant, paid as court-fee on his memorandum of appeal Rs. 100. The District Judge held that the correct fee payable was Rs. 412-7-0. The appellant failed to pay the deficit court-fee and the appeal was dismissed. From the dismissal he filed a second appeal in this Court, which he valued at Rs. 312-7-0, being the difference between Rs. 412-7-0 and Rs. 100. On that valuation he paid a court-fee of Rs. 35-15-0. MADHAVAN NAIR J., holding that on the second appeal the proper fee payable was Rs. 412-7-0, directed the

appellant to bring into Court the balance of Rs. 376-8-0. This order was not complied with and the second appeal was dismissed.

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The question we have to decide is, what was the subject-matter in dispute in the second appeal? A possible argument that the subject-matter is incapable of valuation and that therefore Schedule II, article 17-B, applies, may be at once dismissed. Mr. Srinivasa Ayyangar who appears for the Government Pleader does not put forward any such contention; nor has it found favour in any case dealing with this subject.

The provision then that is applicable is article 1, Schedule I, of the Court Fees Act. In such a case as this, what is the subject-matter in dispute within the meaning of that article? This point has been fully considered in a valuable judgment of SCHWABE C.J., which unfortunately has not been reported and to which the learned Judge's attention was not called.

"I think",

observes SCHWABE C.J.,

"that the subject-matter in dispute, meaning the subject-matter in dispute in appeal, has the simple meaning applicable to this case, namely, the amount of stamp in dispute between the parties." (Serial Register No. 1923 of 1923).

This view receives support from a case decided so far back as in 1882; *Durga Prasad v. Raghubar Dial*(1). The Court Fees Act is a taxing statute and it is settled law that the intention to impose a charge upon the subject must be shown by clear and unequivocal language (Mr. Viswanatha Ayyar's Court Fees Act, pages 4 to 9). If two constructions of a fiscal enactment are equally possible

(1) (1882) 2 All. W.N. 244.

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and reasonable, the construction more favourable to the subject must be enforced; see *Ramaswami Chettiar v. Commissioner of Income-tax*(1). What then is the subject-matter of the appeal? According to SCHWABE C.J., the dispute in the lower Court had reference only to the court-fee payable; the difference between the court-fee paid and the court-fee demanded is the matter in dispute in the second appeal. That seems to be the natural and plain meaning of the words and it would be wrong to put a forced construction on the language. The alternative contention is that the subject-matter in dispute is the subject-matter of the suit itself. In the differing judgments in *Ganpati v. Venkatesh*(2) the two rival views have been fully expounded. In my opinion the view taken by NIYOGI A.J.C. is, with all respect, the sounder one. As he points out, the rejection of a plaint means only a refusal to entertain the suit and can in no case imply a conclusive determination of the rights of the parties. Order VII, rule 13, Civil Procedure Code, which provides that the rejection of a plaint, *inter alia*, for failure to pay the deficit court-fee, shall not preclude the plaintiff from presenting a fresh plaint, lends support to that view. As pointed out in his judgment, granting that the rejection amounts to a decree within the meaning of the Code, it is difficult to see how it affects the question of court-fee. The question that still has to be determined is, what is the subject-matter in dispute? As already said, I see no reason why these words should not receive their natural meaning.

(1) (1928) I.L.R. 52 Mad. 194 (F.B.). (2) A.I.R. 1935 Nag. 83 (F.B.).

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The Letters Patent Appeal is allowed with the plaintiff's costs to be paid by the defendant. The second appeal is restored and must be heard. We make an order expediting its hearing. This being a pauper appeal no question of refund of court-fee on the memorandum of Letters Patent Appeal arises.

ABDUR RAHMAN J.—I concur. The decision of this appeal depends, as pointed out by my learned brother, on the true construction of the words "subject-matter of appeal" employed in Schedule I, article 1, of the Court Fees Act. It is a matter of common experience that the subject-matter of every appeal does not necessarily coincide with the subject-matter of every suit in regard to which the appeal has been filed. In order to ascertain the correct valuation of each appeal for purposes of court-fee, one will have to ascertain the subject-matter of that appeal. What then is the subject-matter of this appeal? A mere cursory glance at the grounds of appeal filed on behalf of the appellant would show that he had come up to the High Court with the object of testing the correctness of the order passed by the District Judge, who had ordered him to pay an additional court-fee of Rs. 312-7-0 and the failure to pay which had resulted in the rejection of his appeal. He had therefore valued his appeal to the High Court at that figure. The learned Judge of the High Court refused to entertain the appeal unless the appellant made up the deficiency between the value placed by him and that ordered by the District Judge. He failed to comply with this order and his appeal was accordingly dismissed. This has given rise to this

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appeal under the Letters Patent. It might be mentioned that this appeal has been valued at the figure which the appellant was required to pay by the learned Judge of this Court in addition to what he had already paid on his appeal.

From what has been stated, it would be clear that the subject-matter of this appeal or the appeal against which the present appeal has been filed was the deficit in the amount of the court-fee which the appellant was called upon to pay, and which he had failed to do. This should be the amount then at which the appeal should be valued. The case might be looked at from a slightly different point of view as well. The Government Pleader contended that it was essential for the appellant to bring the valuation of the appeal to the High Court in a case like this in conformity with the valuation of the suit and to pay a court-fee of Rs. 412-7-0. If this view is allowed to prevail, it would follow that although the appellant allowed his appeal before the District Judge to be rejected by refusing to make up the deficiency, he must have nevertheless paid a court-fee when filing the appeal, necessarily larger than the deficiency which he was required to make up in order to have the point adjudicated whether his action in refusing to comply with the order to pay an additional court-fee was correct or otherwise. The fact that he would be entitled to a refund in the event of his success would hardly be of any consolation to him, as he is all the same running the risk of his appeal, on the question of court-fee alone, being decided against him and losing the whole of the amount paid by him on appeal in the bargain.

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The argument which found favour with the majority of the Full Bench of the Nagpur Judicial Commissioners' Court in *Ganpati v. Venkatesh*(1) does not, with great respect to the learned Judges who held this view, impress me. It is undoubtedly true that the rejection of a plaint brings the litigation in that Court and in that case to an end, but it is incorrect to suggest, I venture to say with deference, that the rights of the parties have been or can be deemed to have been completely or finally determined. The very fact that a second suit is maintainable militates against the theory of finality.

There is no doubt that the order rejecting a plaint has been included by the Legislature within the definition of a decree—but its specific mention in the definition suggests that if it were not so mentioned, it should not have fallen within that definition. This has been obviously done with the object of providing for an appeal against that order and saving it from being otherwise attacked than by an appeal; but, in my opinion, it does not lead to an inference that the rights of the parties also should be deemed to have been conclusively determined. The fact remains that when a plaint is rejected on account of deficiency in the court-fee on the plaint the only thing which has been decided in the suit is the question of court-fee and it is this particular *lis* which forms the subject-matter of this appeal. It would therefore follow that the court-fee should be paid on the difference between the court-fee paid by the appellant and that demanded from him.

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(1) A.I.B. 1935 Nag. 83 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahman.

ADIRAJU SOMANNA, PETITIONER.*

1937,
December 17.

Legal Practitioners Act (XVIII of 1879), sec. 36—Decision, in proceedings under—Revision against—If lies—Government of India Act, 1935, sec. 224 (2)—Effect—Sec. 115, Civil Procedure Code.

The decision of a District Judge, in proceedings under section 36 of the Legal Practitioners Act, declaring a person to be a tout is not open to revision under section 224 of the Government of India Act, 1935, or under section 489 of the Code of Criminal Procedure. Such an order, however, falls within the scope of section 115 of the Code of Civil Procedure and is capable of being revised by the High Court under that section.

The petitioner had been stated to be acting as an agent on behalf of certain parties and going to Court in that connection. There was no evidence on the record to show that he came within the definition of "tout" in section 3 of the Legal Practitioners Act or that he had the reputation of a tout. The District Judge passed an order declaring the petitioner to be a tout. On a petition to the High Court to revise the said order,

held that the order passed by the District Judge should be quashed as he had acted illegally and in any case with material irregularity in the exercise of his jurisdiction.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of East Gōdāvari at Rajahmundry, dated 14th April 1937 and made in Interlocutory Application No. 144 of 1937 in Original Petition No. 77 of 1935.

P. Somasundaram for petitioner.

N. Srinivasa Ayyangar for Government Pleader
(*K. S. Krishnaswami Ayyangar*) for the Crown.

Cur. adv. vult.

* Civil Revision Petition No. 648 of 1937.

JUDGMENT.

This is a petition for revision against the order passed by Mr. Mack, District Judge of East Gōdāvari at Rajahmundry, declaring the petitioner to be a tout under section 36 of the Legal Practitioners Act.

A preliminary objection has been raised by the Government Pleader to the effect that the order passed by the lower Court is not open to revision. The point is of considerable importance as it involves the question of valuable rights of a citizen and has therefore to be carefully examined.

The contention raised by the Government Pleader is based on the addition of sub-clause (2) to section 224 of the Government of India Act, 1935, which did not find a place in the corresponding section 107 of the prior Act of 1919. Sub-clause (2) of section 224 of the present Act reads as follows:—

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

Basing his reliance on the amendment, the Government Pleader contends that the High Courts in India could revise orders, similar to the one in question now, either under section 15 of the High Courts Act or later under section 107 of the Government of India Act (1919) before the new Act came into force, but this power has been taken away by the above stated amendment. He further urges that the provisions contained in section 115 and section 489 of the Code of Civil and Criminal Procedure respectively have no application and the High Court is thus not

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entitled to revise the order although it is admitted by him that in a suitable case, a petition by way of a writ of *certiorari* might be competent.

The amendment contained in the new Government of India Act makes it clear that the High Court would not be entitled to revise the order in question under section 224 of the Act, if it is not capable of being revised under any other provision of law. I am also in agreement with the contention that section 439 of the Code of Criminal Procedure would have no application to the present case. A bare perusal of the section would show that it is inapplicable. The only question then is whether section 115 of the Code of Civil Procedure does not authorise the High Court to revise the order.

The learned Government Pleader has placed reliance in support of his contention on a number of decisions and on going through them I find that the rulings given in *In the matter of the petition of Kedar Nath*(1), *In the matter of the petition of Kashi Nath*(2) and *Maganbhai v. Dinkarrao*(3) have either merely followed *In the matter of the petition of Madho Ram*(4) or held that an order passed under section 36 of the Legal Practitioners Act was capable of being revised under section 15 of the High Courts Act or section 107 of the Government of India Act (1919). The last proposition is undoubtedly sound but, as already held by me, has been rendered useless for this purpose by the addition of the amendment to the present Government of India Act. As for *In the matter of the petition of*

(1) (1908) I.L.R. 31 All. 59.
(3) (1932) I.L.R. 56 Bom. 577.

(2) (1923) I.L.R. 45 All. 676.
(4) (1899) I.L.R. 21 All. 181.

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Madho Ram(1), one would have to examine the pronouncement with the respect and care that it deserves as it comes from an eminent CHIEF JUSTICE like STRACHEY C.J., before one respectfully agrees with his conclusion or begs to differ from it. On an examination of this decision I find that, although it has been stated in general terms that the provisions of section 622 of the Code of Civil Procedure (1882) do not apply, the learned CHIEF JUSTICE has given no reason for this opinion. This was probably considered to be unnecessary as it was found that the High Courts had very wide powers of superintendence under section 15 of the High Courts Act, and could in a suitable case interfere with an order passed by a subordinate Court. Moreover, the ground taken in that decision was that the finding was against the weight of evidence. This ground was not available in revision and the petition was dismissed for that reason. It was unnecessary to decide any further. In the circumstances, any expression of opinion by the learned CHIEF JUSTICE on the point that the provisions of the Code of Civil Procedure are inapplicable must be held to be *obiter*. In view of the situation which has now come into existence on account of the addition of sub-clause (2) to section 224 of the Government of India Act and in the absence of any reasons having been specified in *In the matter of the petition of Madho Ram*(1) or in view of the fact that the finding on this point was not essential, one would have to examine the terms of section 115 of the Code of Civil Procedure carefully before one could arrive at a conclusion one way or the other.

(1) (1899) I.L.R. 21 All. 181.

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Before I examine this section, I must say a few words in regard to a Madras case, *Varadachariar v. Kalyanasundaram Aiyar*(1), which was decided by an eminent Judge of this Court. A study of that decision however shows that the point which I have been called upon to decide in this case was neither raised before nor considered by him. He had merely laid down that inasmuch as no procedure was provided for an enquiry under section 36 of the Legal Practitioners Act, the Court should adopt a procedure which does substantial justice to the parties and the provisions of Order VII, Rule 11, Civil Procedure Code, would not apply to the proceedings. This is surely no authority for the contention raised by the learned Government Pleader.

The Government Pleader has also cited *Chatur Bhuj v. The Crown*(2) in support of his contention. There is an observation in that case by JAI LAL J. that the proceedings under section 36 of the Legal Practitioners Act are of a *quasi* criminal nature but this was made in order to hold that the consent of the person complained against would not validate the otherwise invalid proceedings. It may be that, according to the practice of that Court, revisions from the order passed under section 36 of the Legal Practitioners Act are entertained as criminal revisions but in view of what I have stated above, I am of opinion that section 439 of the Code of Criminal Procedure would not apply to a case of this kind and the proceedings would not be open to revision under the provisions of the Code of Criminal Procedure.

(1) (1922) 44 M.L.J. 437.

(2) (1930) I.L.R. 12 Lah. 385.

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As for the authorities cited by Mr. Somasundaram on behalf of the petitioner, I find that the learned Judges merely assumed jurisdiction in the decisions cited, viz., *In re Somayajulu Ramamurthi*(1), *In re Jounalagedda Sambayye*(2) and *Keramat Ali v. Emperor*(3), without any discussion on the question of jurisdiction which they undoubtedly had in any case before the new Government of India Act (1935) came into force and these cases are therefore of no assistance to me in deciding this point. There are some pertinent observations by an eminent Judge of the Calcutta Court in *Hari Charan Sircar v. District Judge of Dacca*(4) but even this decision affords no help to me. In the absence of any reference in that ruling to section 622 of the Code of Civil Procedure (1882) I must presume that the provisions of that section were not examined by the learned Judge in that case. The other case which was relied on by the Counsel for the petitioner is *Baru Sahib v. The District Judge of Madura*(5), where a portion of the proceedings were ordered to be cancelled under section 622 of the Code of Civil Procedure by a Bench of this Court consisting of no less eminent a Judge than BHASHYAM AYYANGAR J. and another Judge. This case was followed by WALSH J. in *In the matter of the petitions of Kalka Prasad and others*(6) where in spite of the fact that the two cases of the Allahabad Court [viz., *In the matter of the petition of Madho Ram*(7) and *In the matter of the petition of Kedar Nath*(8)] were brought to his notice, he decided to prefer the

(1) 1912 M.W.N. 959.

(3) 1921 62 I.C. 829.

(5) (1903) I.L.R. 26 Mad. 596.

(7) (1899) I.L.R. 21 All. 181.

(2) (1915) 28 I.C. 918.

(4) (1910) 11 C.L.J. 513.

(6) (1917) I.L.R. 40 All. 153.

(8) (1908) I.L.R. 31 All. 59.

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decision in *Bavu Sahib v. The District Judge of Madura*(1) and held that the High Court could interfere in a revision under section 115 of the Code of Civil Procedure and did not consider that it was necessary to invoke the aid of the superintendence section in the Government of India Act.

In this state of divergence of opinion amongst the learned Judges of different High Courts, it becomes all the more necessary to examine the provisions of the Code of Civil Procedure more closely.

A reference to section 115 would show that the High Court is competent to make such order as it thinks fit, if it finds that a *case* has been *decided* by any Court subordinate thereto, and in which no appeal lies, if such subordinate Court has either acted beyond or failed to exercise a jurisdiction or has acted in the exercise of its jurisdiction illegally or with material irregularity. It cannot be denied that the District Judge was acting in this case as a Court and not in an administrative capacity. The question then is whether the finding given by him against the petitioner and declaring him to be a tout would amount to a decision of the case pending before him. It has been held by their Lordships of the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*(2) that the term "case" used in section 115 of the Code is wider than the word "suit" in which a plaintiff seeks to obtain a particular relief. Their Lordships have recorded their finding in the following words :—

"It was next contended that the matter of the four petitions in which the order of the 19th July 1913 was made

(1) (1903) I.L.R. 26 Mad. 596.

(2) (1917) I.L.R. 40 Mad. 793 (P.C.)

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did not constitute a 'case' within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word 'case'. It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code."

Applying the above-mentioned principle enunciated by their Lordships, I see no justification in rejecting the contention that the decision by the District Judge of the proceedings pending before him in which the petitioner was declared to be a tout would fall within the scope of section 115 of the Code of Civil Procedure. In a number of cases arising under other enactments, like the Guardians and Wards Act, Succession Certificate Act, Indian Arbitration Act, Provincial Insolvency Act, etc., it has been held by various High Courts that the orders passed by subordinate Courts, if not declared to be appealable under the Special Acts, would none the less be capable of being revised under section 115, Civil Procedure Code. There is no reason to hold why the Legal Practitioners Act should not be treated *in pari materia* with other special enactments.

Section 36 of the Legal Practitioners Act confers a special jurisdiction on subordinate Courts and, inasmuch as the attendance in Court is an important valuable civil right of a citizen, it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or

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with material irregularity. I would therefore hold that the decision of the District Judge is capable of being revised by me under section 115, Civil Procedure Code.

The revisional jurisdiction which I am now invited to exercise is necessarily of an exceptional character and cannot be invoked except in furtherance of justice. I am consequently competent to scrutinise an order which seriously affects the petitioner's character and prospects with the object of satisfying myself if there has been a compliance by the lower Court with the provisions of the law. If I find that the order passed by the Court is justified by the evidence on the record I would decline to interfere with it. If, on the other hand, I find that there is no legal evidence on the record to justify the conclusion arrived at by the learned District Judge I would be constrained to interfere with his order. I might state here that as a Court of revision I cannot be expected to weigh the evidence which was led before the District Judge but if I find that there was no evidence at all from which the inference as drawn by the learned District Judge could be deduced I would have no alternative but to interfere.

With these remarks, I shall first consider as to what is required by law to be proved against the petitioner before he can be declared to be a tout and then proceed to consider whether these requirements of law have been proved in this case. A tout has been defined by section 3 of the Legal Practitioners Act to be

"a person (a) who procures, in consideration of any remuneration moving from any legal practitioner, the employ-

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ment of the legal practitioner in any legal business; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or (b) who for the purpose of such procurement frequents the precincts of civil or criminal courts or of revenue offices, or railway stations, landing stages, lodging places or other places of public resort".

Before a person can be declared to be a tout, it must be found as a fact that he has acted in a manner which will bring him within this definition. This necessitates an examination of the evidence on which the District Judge has acted in this case in order to ascertain whether there was any material on the record on which he was entitled to act and arrive at the decision that the petitioner was a tout.

Bearing the principles laid down by me in this judgment and the definition of a tout in mind, I shall address myself to the task of examining the facts and evidence in this case. It appears that a petition, Original Petition No. 77 of 1935, was filed by one Venkataratnam under section 84 of the Hindu Religious Endowments Act. He had also instituted a suit, Original Suit No. 41 of 1935, for a declaration that he was a hereditary trustee and could not therefore be divested of the properties under his charge. The newly appointed trustee had filed Original Petition No. 52 of 1935 for delivery of the trust properties which were in the possession of the said Venkataratnam. In the natural course of events the learned District Judge took up Original Petition No. 77 of 1935 first and examined Venkataratnam on 4th March 1937 as P.W. 1. On 5th March 1937 the petitioner before me, Somanna, was examined as a witness

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(P.W. 2). On that day it appears that some unpleasantness occurred between the pleader appearing in that petition and the Court and Venkataratnam had to apply to the Court to discharge the pleader from that case. This request was granted but the prayer for an adjournment of Original Petition No. 77 of 1935 was refused and the Court fixed 9th March 1937 for orders. In the meantime Venkataratnam came over to Madras to move for a transfer of the case (Original Suit No. 41 of 1935) from the Court of the District Judge and swore to an affidavit on 8th March 1937 before an Honorary Presidency Magistrate here (original of Exhibit D). The petition for transfer appears to have been filed on the same day. A letter was then delivered by Mr. Balaparameswari Rao who had presented the petition on behalf of Venkataratnam to his client which is Exhibit C in this case. The name of the addressee is not mentioned in this letter, but it was probably meant to be shown to the lawyer at Rajahmundry with the object of informing him that an application for transfer had been made to the High Court. This letter was evidently produced by Venkataratnam before the District Judge on 9th March 1937 when the case was taken up by him and an adjournment was asked for to await the result of the transfer application. The case was consequently adjourned to 17th March 1937. In the meantime Mr. Balaparameswari Rao wrote another letter and addressed it to Somanna, the petitioner in this case, on 11th March 1937. There is no assertion on the record, much less any proof, that Somanna was known to Mr. Balaparameswari Rao and I must, in view of

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Somanna's statement on the record and in the absence of any allegation or evidence to the contrary, assume that his name must have been given to the Counsel here by Venkataratnam when he left for Rajahmundry. The fact that a demand was made by the pleader for the balance of his fees which was due from Venkataratnam leads me to no conclusion against the petitioner. The petition for transfer was dismissed *in limine* by my learned brother KING J. on 16th March 1937 and that fact was communicated in the ordinary course to the District Judge. This probably reached him on 18th March 1937. The case does not appear to have been taken up on 17th March 1937 by the District Judge but was adjourned to a later date. He, however, decided to initiate proceedings under section 36 of the Legal Practitioners Act against the present petitioner on 23rd March 1937 and directed him to appear before him on 31st March 1937 when a charge was framed against him. In the meantime the other petition filed by the trustees, Original Petition No. 52 of 1935, was proceeded with and one Reddiah was examined as a witness on their behalf. While he was in the witness box certain questions were put to him by the District Judge about Somanna's character to which serious exception has been taken before me by the Counsel for the petitioner. I do not, however, agree with the contention that the learned District Judge was not justified in putting those questions although it is fairly obvious that he must have been led to put them on account of his decision on 23rd March 1937 to proceed against Somanna under section 36 of the Legal Practitioners Act. On 31st March 1937 Somanna was examined by the Court

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He filed two written statements, one at the beginning and one at the end of the proceedings. The case was first adjourned to 1st April 1937 and then to 5th April 1937 for orders. Instead of passing orders on 5th April 1937 the District Judge adjourned the case for Reddiah's examination. This course appears to have been adopted by the District Judge, as he must have considered that, in view of the replies given by Reddiah about Somanna's character, his evidence might be material. The Counsel for the petitioner has taken strong exception to this as well particularly when the case was closed, but I have not been impressed by this objection either. The District Judge was fully justified in summoning any witness with the object of satisfying himself whether an action under section 36 of the Legal Practitioners Act was necessary. Reddiah was then examined on 9th April 1937 when Somanna was also examined. The two letters written by Mr. Balaparameswari Rao and referred to above do not show that Somanna has been guilty of any act which could have justified the Court in declaring him to be a tout. I am thus left with Reddiah's statement who on the District Judge's own showing was inimically disposed towards the petitioner. Whatever Reddiah's attitude may be towards the petitioner, I have to find whether his statement, even if believed, as has been done by the learned District Judge, would satisfy the requirements of section 3 of the Legal Practitioners Act. The three sentences from his deposition on which reliance was placed by the Government Pleader in this connection do not show that the petitioner in this case procured, in consideration of any remuneration moving from any legal practitioner,

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the employment of any legal practitioner in any legal business, or proposed to any legal practitioner, or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or that he frequented for the purpose of such procurement the precincts of Civil or Criminal Courts or revenue offices or railway stations, landing stages, lodging places or other places of public resort. In the absence of any such evidence on the record it is impossible to raise an adverse presumption against the petitioner simply because he had been stated to be acting as an agent on behalf of certain parties and going to Court in that connection. I might here add that there is no evidence on the record of the petitioner having the reputation of a tout.

The learned Government Pleader had to admit, when a question was put to him by me, that it was impossible to deduce any adverse inference against the petitioner from this statement. He however contended that Exhibit A, i.e., the letter written by Mr. Balaparameswari Rao on 11th March 1937, may lend some support to the suspicion that the petitioner was acting on behalf of Venkataratnam. This again in my opinion is not enough. Nobody is prohibited from acting on behalf of a party. The petitioner was apparently taking interest in those proceedings and had actually appeared as a witness in the case himself on behalf of Venkataratnam. In the absence of any evidence, oral or documentary, that any consideration was either received by the petitioner or demanded by him I am constrained to find that

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there is no evidence in this case from which the learned District Judge could have possibly drawn the conclusion against the petitioner. I am afraid the learned District Judge had no clear conception of the law on the subject and even if he had, he has certainly failed to apply it to the facts of this case. If he had taken the trouble of reading section 3 of the Legal Practitioners Act and not relied on his own previous decisions which appear to have had nothing in common with the facts of this case, he would have, I am sure, come to a different conclusion. I may add that it is impossible to arrive at a finding on mere suspicions or conjectures. They can never be substitutes for evidence.

I must therefore hold that the learned District Judge has acted illegally and in any case with material irregularity in the exercise of his jurisdiction. The revision petition must therefore be allowed and the order passed by the District Judge quashed.

I cannot part with this case without adverting to the manner in which the lower Court has written its judgment. I should expect experienced officers to be more dignified and restrained in the expression of their opinion. They should try and avoid expressions which may attract a comment that the Judge had either made up his mind even before he had initiated proceedings or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence before him impartially and without any bias. It is usually unnecessary and in any case unsafe to indulge in generalisations.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Horwill.

T. N. BORAI GOUDER (ACCUSED), PETITIONER,

1938,
May 4.

v.

COMMISSIONER, OOTACAMUND MUNICIPALITY
(COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), ss. 526 and 531—Case pending before Bench Magistrate's Court—Transfer ordered to the Court of Stationary Sub-Magistrate—Case disposed of by the former Court before the order of transfer was communicated—Validity of—Sec. 531 of the Act.

A case pending before a Bench of Magistrates was ordered to be transferred to the Court of a Stationary Sub-Magistrate. Before, however, that order had been communicated to the Bench Magistrate's Court, the case came up before the Bench and on the accused's plea he was convicted and sentenced.

Held that the Bench Court, when it took up the case of the accused and disposed of it, had no jurisdiction to do so.

Held, however, that section 531, Criminal Procedure Code, applied to the case and prevented the order of the Bench Court from being void and that as there had been no miscarriage of justice, the High Court would not interfere in revision and set aside the order.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order and conviction passed by the Court of the Bench of Magistrates at Ooty, dated 9th September 1937, in S.T. Case No. 807 of 1937.

* Criminal Revision Case No. 1005 of 1937 (Criminal Revision Petition No. 940 of 1937).

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P. S. Narayanaswami Ayyar for petitioner.

K. V. Muthukumaraswami and *N. Gopala Menon* for respondent.

N. Somasundaram for Public Prosecutor
(*V. L. Ethiraj*) for the Crown.

ORDER.

The petitioner was charged before the Bench of Magistrates, Ootacamund, under sections 249 and 313 of the District Municipalities Act for storing firewood. During the pendency of the case before the Bench, the accused put in a transfer application in the Court of the Joint Magistrate of Coonoor, who ordered the transfer of the case to the Court of the Stationary Sub-Magistrate, Coonoor. Before however that order had been communicated to the Bench Magistrate's Court, the case came up before the Bench and on the accused's plea he was convicted and sentenced to pay a fine of Rs. 5. This petition has been filed on the ground that the Bench Court ceased to have jurisdiction after the order of the Joint Magistrate and that therefore the order of that Court is illegal.

With regard to stay applications in civil matters it has been held by the Full Bench in *Venkatachalapati Rao v. Kameswaramma*(1) that the stay order operates only from the date on which the order is communicated to the Court whose proceedings are stayed. The reason seems to be that the Court having seisin of the matter in question has jurisdiction to proceed with it and that the appellate Court in ordering stay is merely prohibiting that Court from proceeding further with the matter until further orders.

(1) (1917) I.L.R. 41 Mad. 151 (F.B.).

But the order of prohibition does not take away the jurisdiction of the trial Court; it merely suspends it. If therefore the order has not been received, the Court does not lose its jurisdiction because the order has been passed. It therefore follows that any act done after the order of stay is passed is still valid unless the order of the higher Court has been disobeyed. This reasoning would not however apply to an application for transfer. The ordinary rule is that an order operates from the date on which it is passed, the rule with regard to stay proceedings and injunctions being an exception to that general rule. Although no authority has been quoted which deals with the date on which a criminal order of transfer operates, *Ademma v. Venkata Subbayya*(1) deals with that question with regard to civil suits. It was there held that the order for transfer must operate from the date on which that order is passed and that therefore any Court which continues to do any act after the order is passed—even though a copy of the order has not been received by it—is acting without jurisdiction. The same reasoning would, I think, apply to criminal proceedings; and I am therefore of opinion that in the present case the Bench Court, when it took up the case of the accused and disposed of it, had no jurisdiction to do so.

Nevertheless, it does not follow from the mere fact that the Bench Court had no jurisdiction, that its order is void. I think that section 531, Criminal Procedure Code, would apply to a case of this kind and so prevent the passing of this

(1) (1933) I.L.R. 56 Mad. 692.

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order without jurisdiction from being void. The whole principle underlying the various provisions of Chapter XLV is that no order or sentence shall be void on the mere ground of some irregularity or want of jurisdiction, unless it leads to a miscarriage of justice or prejudices the accused. It seems to me, in the present case, that it is immaterial whether the case of the accused was considered by the Bench Court or by the Stationary Sub-Magistrate. No miscarriage of justice having occurred this Court will not interfere in revision and set aside the order.

The petition is therefore dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice
Madhavan Nair and Mr. Justice Varadachariar.*

MATHUKUMALLI RAMAYYA AND THIRTY OTHERS
(PETITIONERS), PETITIONERS,

1938,
April 12.

v.

VUPPALAPATI LAKSHMAYYA (RESPONDENT),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XLV, r. 7—
Furnishing of security and making of deposit required by
—Extension of time for, beyond the periods mentioned in
the rule—Power of Court as to—Rule 9 of the Judicial
Committee Rules—Sec. 112 of the Code—Applicability and
effect of.*

Held by the Full Bench.—The Court has power under rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by Order XLV, rule 7, of the Code of Civil Procedure beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

The effect of the amendment of Order XLV, rule 7, of the Code is to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has of right and if that provision stood alone the Court would have no discretion to grant time beyond the further period of sixty days. But rule 9 of the Privy Council Rules leaves a discretion in the Court to extend the time and, by reason of section 112 of the Code, that rule must prevail over Order XLV, rule 7, of the Code.

Poornananthachi v. Gopalaswami Odayar(1) overruled.

PETITION praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to enlarge the time for making the

* Civil Miscellaneous Petition No. 1439 of 1938.
(1) (1932) I.L.R. 55 Mad. 835.

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deposit for security for costs in Privy Council Civil Miscellaneous Petition No. 89 of 1938 in Appeals Nos. 571 of 1931 and 260 of 1932 on the file of the High Court.

The petition originally came on for hearing before VARADACHARIAR and PANDRANG ROW JJ. when their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

There is a conflict of decisions both in this Court and in the other High Courts as to the power of the Court to grant an extension of time beyond the period of six weeks provided for in Order XLV, rule 7, of the Code of Civil Procedure. In view of the observations in *Poornananthachi v. Gopalaswami Odayar*(1), we think it proper that this question should be decided by a Full Bench.

The petition came on for hearing in pursuance of the aforesaid order of reference before the Full Bench constituted as above.

ON THE REFERENCE :

K. Kameswara Rao for petitioners.—The Court has power to extend time even under the scheme of Order XLV of the Code of Civil Procedure, i.e., even apart from the Judicial Committee Rules. [Reference was made to Order XLV, rule 7, of the Code of 1908 and to section 602, the corresponding provision in the Code of 1882.] Notwithstanding the change in the language made by the Code of 1908 the reasoning applicable to section 602 of the Code of 1882 still stands good. "Shall" in the new Code is merely directory and not mandatory.

[THE CHIEF JUSTICE.—You want to read the rule as—shall, unless the Court otherwise directs.]

The object of the amendment made by the new Code was to cut down the six months to a lesser period. The Court has even after the amendment a discretion.

[THE CHIEF JUSTICE.—What was the object of saying "not exceeding sixty days" if it was not to take away the discretion of the Court beyond the sixty days?]

(1) (1932) I.L.R. 55 Mad. 835.

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The provision in rule 7 is not mandatory but is only directory because no penalty is attached to failure to furnish security. The change is only in rule 7 of Order XLV. There is no change in the other provisions. "Not exceeding sixty days" is intended merely to fix one limit. Even if the Court has no power to extend time under Order XLV of the Code, it has power under rule 9 of the Judicial Committee Rules printed on page 53 of the Appellate Side Rules of this Court. As regards the words, "or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires", in the concluding part of that rule, one view is that those words apply to orders consequential on the cancellation of the certificate for the admission of the appeal. The other view is that the Court may either cancel the certificate or make such other order as is consistent with the justice of the case. Therefore the Court may grant extension in a proper case. In cases of extension beyond the 150 days prescribed by rule 7 of Order XLV of the Code the Court may grant extension under rule 9 of the Judicial Committee Rules. Order XLV does not say what is to happen if security is not furnished within the 150 days. Rule 9 of the Judicial Committee Rules provides for such a case. It says the Court may cancel the certificate or make such other order, i.e., order extending time. Section 112 of the Civil Procedure Code refers to presentation of appeals. Appeals to the Privy Council are presented in this Court. Therefore under the provisions of section 112 of the Code, rule 9 of the Judicial Committee Rules ought to prevail if there is held to be a conflict between that rule and rule 7 of Order XLV of the Code. Under rule 9 of the Judicial Committee Rules cancellation of the certificate is itself made discretionary. The clause beginning with "or" provides for the contingency arising on non-cancellation of the certificate and for an order being made, i.e., an order alternative to cancellation. The nature of the order to be passed under that part of the rule is an order alternative to cancelling the time order substituting some other security or extending the time for furnishing security. The view that the latter portion of rule 9 of the Judicial Committee Rules must be confined to extension within the time limited by Order XLV, rule 7, of the Code is not sound. No express provision is necessary for such a contingency because Order XLV, rule 7, itself vests a discretion in such a case. In several of the cases which hold that the

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Court has no power, rule 9 of the Judicial Committee Rules is not referred to and the decision is based merely on the language of Order XLV, rule 7, of the Code.

[Reference was made to the following cases as being in support of, and against, the contention of the petitioners:—Civil Miscellaneous Petition No. 3644 of 1931 (REILLY and ANANTAKRISHNA AYYAR JJ.); Civil Miscellaneous Petition No. 4993 of 1931 (RAMESAM and MADHAVAN NAIR JJ.); *Poornananthachi v. Gopalaswami Odayar*(1); *Nagireddi v. Saki Reddi*(2); *Nilkanth Balwant v. Vidya Narsinha Bharati*(3); *Ram Dhan v. Prag Narain*(4); *Bahadur Lal v. Judges of the High Court at Allahabad*(5); *J. N. Surty (Receiver) v. T. S. Chettiyar Firm*(6); *Ma Sein v. Sit Paung*(7); *Raj Kumar Govind Narain Singh v. Shamlal Singh*(8); *Kamala Kanta v. Bindhumukhi*(9); *In re Munna Lal v. Gajraj Singh*(10); and *Hukumchand Kasliwal v. Radha Kishen Moti Lal Chamaria, Messrs.*(11)].

M. Patanjali Sastri for *B. Somayya* for respondent.—There is no conflict between rule 9 of the Judicial Committee Rules and Order XLV, rule 7, of the Code. The two provisions should be read together and the result of reading them together is this: The applicant has an absolute right to a particular period. The amendment also vests in the Court a discretion to grant an extension in a certain case. Rule 9 of the Judicial Committee Rules provides for a state of things arising within the period within which the Court could grant an extension. [VARADACHARIAR J.—Not necessarily so.]

The applicability of section 112 of the Code does not arise until it is held that there is a conflict between rule 9 and Order XLV, rule 7. The portion of rule 9 beginning with "or etc.", assuming it refers to an alternative order, refers to the stage at which the question of the cancellation of the certificate comes in.

[VARADACHARIAR J.—Once you concede that the application of Order XLV, rule 7, of the Code will in any measure interfere

(1) (1932) I.L.R. 55 Mad. 835.

(2) (1922) 18 L.W. 29.

(3) (1927) I.L.R. 51 Bom. 430 (F.B.).

(4) (1921) I.L.R. 44 All. 216.

(5) (1933) I.L.R. 55 All. 432 (F.B.).

(6) (1926) I.L.R. 4 Ran. 265, 268.

(7) (1924) 94 I.C. 590.

(8) (1926) 39 C.W.N. 651.

(9) A.I.R. 1929 Pat. 431.

(10) A.I.R. 1935 Lah. 733.

(11) (1931) I.L.R. 7 Luck. 528 (P.C.).

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with the scope of rule 9 of the Judicial Committee Rules, then section 112 of the Code says that rule 9 must prevail.]

Rule 9 must be read with Order XLV, rule 7, and as referring to the same topic.

[VARADACHARIAR J.—If taking rule 9 alone the Court could grant an extension in a particular case and Order XLV, rule 7, is against its granting an extension in such a case, Order XLV, rule 7, does conflict with rule 9.]

Rule 9 does not apply to extension of time for granting security.

[VARADACHARIAR J.—What other default does the rule refer to?]

Default in making the application referred to in rule 9.

[VARADACHARIAR J.—The Code provides for such an application.]

The Judicial Committee Rules and Order XLV, rule 7, of the Code must be read together as forming part of the same scheme. [Rule 10 of the Judicial Committee Rules was referred to.]

[VARADACHARIAR J.—The Judicial Committee Rules refer to two stages—one, the stage before the admission of the appeal which is done by the High Court and the other the post-admission stage when everything takes place before the Privy Council.]

There seems to be no such clear-cut division; but if it is to be held that there is such a clear-cut division, section 112 of the Code cannot apply to the rules relating to the pre-admission stage.

[VARADACHARIAR J.—But section 112 of the Code refers to presentation of appeals which is done in this Court.]

"Or" in rule 9 of the Judicial Committee Rules does not necessarily provide for an alternative order. The whole of that rule including the last clause really deals with the stage when the appellant has finally failed to give security, i.e., after all possibilities of getting extension have been exhausted. If, therefore, the power of the Court to grant extension in such a case is sought, it must be *dehors* rule 9, under whatever provision it may be. Rule 9 does not provide for what is to happen if the certificate is not cancelled. [Reference was made to the maxim, *Generalia specialibus non derogant*.]

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[VARADACHARIAR J.—Which is general and which is special?]

Rule 9 of the Judicial Committee Rules is the general provision and Order XLV, Rule 7, of the Code is the special provision.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—The question which has been referred is whether in an appeal to His Majesty in Council the Court has power to extend the time for furnishing the security and making the deposit required by Order XLV, rule 7, of the Code of Civil Procedure beyond the periods mentioned therein. The rule provides that where the certificate permitting the appeal is granted the applicant shall furnish the security and make the deposit within ninety days or such further period not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date. The words “within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow” were substituted for the words “within six months” by Act XXVI of 1920. The amendment was made in order to expedite appeals to the Privy Council by restricting the Court's discretion to extend the time. Up to then it had been the uniform practice in the Courts in India to grant extensions of time and it would appear that the impression had been created that they had been too lenient when dealing with such applications. The rule as it stood before the amendment was regarded by the Privy Council itself as being

merely directory although it had intimated that it should not be departed from without cogent reasons; *Burjore and Bhawani Pershad v. Mussumat Bhagana*(1).

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Since the amendment there has been a conflict of judicial opinion on the question whether the amended rule has the effect which the Legislature intended it to have. The conflict has arisen by reason of the provisions of rule 9 of the rules framed by the Privy Council and section 112 of the Code of Civil Procedure. Rule 9 reads as follows :

“Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as, in the opinion of the Court, the justice of the case requires.”

Section 112 (1) (b) of the Code of Civil Procedure states that nothing in the Code shall be deemed

“to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee”.

Stated broadly the conflict is this : Some Judges have regarded the amendment of Order XLV, rule 7, of the Code of Civil Procedure as constituting an overriding statutory prohibition of extension beyond sixty days after the initial period of ninety days, while other Judges have considered that rule 9 of the Privy Council Rules governs

(1) (1883) L.R. 11 I.A. 7.

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LEACH C.J. the situation by reason of section 112 of the Code and still leaves the granting of time a matter of discretion.

In *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) a Full Bench of the Bombay High Court expressed itself strongly in favour of the view that rule 9 has left the Court a discretion in the matter. The question was referred to a Full Bench as SHAH J. and FAWCETT J. had disagreed, SHAH J. being of the opinion that the Court had still power to extend the time for cogent reasons while FAWCETT J. considered that the amendment of Order XLV, rule 7, in 1920 restricted any extension beyond sixty days after the ninety days had expired. The Full Bench consisted of MARTEN C. J. and CRUMP and PATKAR JJ., and they were unanimous in adopting the opinion of SHAH J. After pointing out that there was no express penalty provided by Order XLV, rule 7, for failure to furnish the security and to make the required deposit, MARTEN C.J. observed that as there was an inconsistency between Order XLV, rule 7, and rule 9 of the Privy Council Rules, the Privy Council rule must prevail by virtue of the provisions of section 112. On this basis the Court granted an extension beyond the additional period of sixty days. The appeal was in due course heard by the Privy Council and the judgment of their Lordships is reported as *Nilkanth Balwant v. Vidya Narsinh*(2). The judgment, however, makes no reference to the action of the Bombay High Court in extending the time.

(1) (1927) I.L.R. 51 Bom. 430 (F.B). (2) (1930) I.L.R. 54 Bom. 495 (P.C.).

Nilkanth Balwant v. Vidya Narsinha Bharati(1) was considered by BEASLEY C.J. and CURGENVEN J. in *Poornananthachi v. Gopala-swami Odayar*(2), but they found themselves unable to share the opinion of the Bombay High Court. BEASLEY C.J. considered that rule 9 of the Privy Council Rules gave nothing more than the right to cancel the certificate, but if it could be read as giving the Court power to extend the time, the extension could not exceed the sixty days provided by Order XLV, rule 7. The learned CHIEF JUSTICE did not imagine that rule 9 was to have a different effect from Order XLV, rule 7, as rule 9 and the amendment to Order XLV, rule 7, came into effect on the same date (1st January 1921). CURGENVEN J. delivered a separate judgment to the same effect. In *Nagireddi v. Saki Reddi*(3) OLDFIELD and RAMESAM JJ. also held that the Court had no power to extend the time beyond the sixty days, but this decision was before the decision in *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) and RAMESAM J. later changed his opinion. In *Ramakrishna Ayyar v. Parameswara Ayyar* (Civil Miscellaneous Petition No. 3644 of 1931) REILLY and ANANTAKRISHNA AYYAR JJ. followed *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) and their decision was accepted by RAMESAM J. sitting with MADHAVAN NAIR J. in *Kilaru Ramakotiah v. Dharmabotla Subramanyam* (Civil Miscellaneous Petition No. 4993 of 1931).

The only decision of the Calcutta High Court to which we have been referred is that of *Raj*

(1) (1927) I.L.R. 51 Bom. 430 (F.B.).
(2) (1932) I.L.R. 55 Mad. 835.
(3) (1922) 18 L.W. 29.

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LEACH C.J. *Kumar Govind Narain Singh v. Shamlal Singh*(1) where RANKIN O.J. and GHOSE J. expressed the opinion that rule 9 of the Privy Council Rules did not empower the High Court to grant an extension beyond the sixty days. The Bombay decision is not referred to in the judgment and presumably was not considered. The Allahabad High Court has also decided that there is no power of extension beyond the sixty days: *Ram Dhan v. Prag Narain*(2) and *Bahadur Lal v. Judges of the High Court at Allahabad*(3). The latter case was decided by a Full Bench consisting of MUKERJI A.C.J. and KING and NIAMAT-ULLAH JJ. MUKERJI A.C.J. and KING J. were of the opinion that there was no discretion left in the Court after the expiration of the sixty days, while NIAMAT-ULLAH J. held that there was. KING J. considered that rule 9 could be read as applying to a failure to comply with an order falling within the maximum period allowed by Order XLV, rule 7, and MUKERJI A.C.J. agreed with him. NIAMAT-ULLAH J. did not consider that Order XLV, rule 7, necessarily implied that the Court had no power to grant an extension for more than sixty days, but assuming that it did conflict with rule 9, he agreed with the opinion of the Bombay High Court that the latter rule prevailed. The Patna and the Lahore High Courts have also held that there is no power to extend the time beyond the sixty days: *Kamala Kanta v. Bindhumukhi*(4) and *In re Munna Lal v. Gajraj Singh*(5). The Lahore High Court considers

(1) (1926) 39 C.W.N. 651.

(2) (1921) I.L.R. 44 All. 216.

(3) (1933) I.L.R. 55 All. 432 (F.B.).

(4) A.I.R. 1929 Pat. 431.

(5) A.I.R. 1935 Lah. 733.

that the words "make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires" are intended to cover merely incidental orders necessitated by the cancellation of the certificate.

I have already pointed out that in amending Order XLV, rule 7, the Legislature intended to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has of right—there would be no reason for the amendment otherwise—and I am of the opinion that the words of the amendment effect their object so far as the Code is concerned. Therefore, if Order XLV, rule 7, stood alone, I should have no hesitation in holding that the Court had no discretion to grant time beyond the further period of sixty days. But, if there is conflict between the Code and the Privy Council Rules, the Rules must prevail. Section 112 of the Code says so in very plain language. Consequently the question is reduced to this: Does rule 9 of the Privy Council Rules give a discretion to the Court to extend the time? If it does, nothing in Order XLV, rule 7, can take away that discretion. In my opinion rule 9 does leave a discretion in the Court, and therefore must prevail over Order XLV, rule 7. I read rule 9 in this way: On failure by the applicant for leave to appeal to the Privy Council to furnish the security or make the deposit the Court has two courses open to it. It may cancel the certificate and pass consequential orders or it may instead of cancelling the certificate make such "other" order as it considers requisite. If it does not cancel the

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certificate the only other order it can pass is to extend the time for furnishing security or making the deposit, or doing both, as the case may be. The furnishing of security and the making of the deposit are conditions which must be complied with before the appeal can be lodged in the Privy Council. It must be cancellation or extension.

We have been asked to hold that the words "make such further or other order in the premises, as, in the opinion of the Court, the justice of the case requires" are to be read with the words "may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit", but, with respect to the judicial opinion which has supported this construction, I consider its acceptance would mean violating the plain meaning of the rule.

It is very desirable to guard against delay in the prosecution of appeals to the Privy Council and it is unfortunate that there should be this conflict between Order XLV, rule 7, and rule 9 of the Privy Council Rules, but at the same time I do not think that it is of much practical importance. With the amendment of Order XLV, rule 7, before it, the Court is not likely to grant more than sixty days beyond the initial ninety days, unless the circumstances are very exceptional.

For the reasons indicated I would answer the reference in this way. The Court has power under rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by Order XLV,

rule 7, beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree.

A.S.V.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Madhavan Nair.*

CHOCKALINGAM CHETTIAR (SIXTH DEFENDANT),
APPELLANT,

1938,
March 29.

v.

MUTHUKARUPPAN CHETTIAR AND SEVEN OTHERS
(PLAINTIFF AND DEFENDANTS 1 TO 5 AND 7 AND 8),
RESPONDENTS.*

Hindu law—Joint family—Manager of—Contract of partnership by, with strangers—If, and when, other members of the joint family also become partners—Partition—Consent decree not effecting immediate severance of status but only embodying arrangement to be carried into effect if and when a partition subsequently takes place—Subsequent contract implying the continuance of joint status—Effect of.

In a suit for partition among the members of a joint Hindu family, a consent decree was passed which declared, *inter alia*, that certain members were entitled to a half share and certain other members were entitled to the other half. In a subsequent suit a question arose as to the status of the family after the consent decree. It was found: (i) that the partition decree was not intended to alter the joint family status, but was merely regarded as embodying arrangements to be carried into effect, if and when a partition did in fact take place,

CHOCKALINGAM and (ii) the members of the family never in fact separated and the members regarded themselves as being joint, and even if the intention was originally to divide the family, that intention must in the circumstances be deemed to have been abandoned.

Held that the consent decree did not put an end to the joint family status.

Held further : A contract of partnership by a manager of a joint Hindu family does not *ipso facto* make the other members of the family partners in the business. But when a manager of a joint Hindu family enters into a partnership with strangers for the purpose of carrying on the same kind of business and which could be regarded as an extension of the family business, the other members of the family including minors are liable to the extent of their interests in the family property for the debts binding on the manager in the partnership business.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottah in Original Suit No. 122 of 1931.

S. Venkatesa Ayyangar for appellant.

C. S. Venkatachari and *R. Kesava Ayyangar* for first respondent.

Other respondents were unrepresented.

Cur. adv. vult.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises two questions. One is whether the minor members of a trading family can be held liable to the extent of their interests in the family properties for debts incurred in a business carried on by the father in partnership with strangers. The other question is whether a decree passed by consent in a partition suit puts an end to the joint status, notwithstanding that the terms of the decree are never carried into effect and the members of the family

continue to live together and regard themselves as still being joint.

The appellant is the son of one Narayanan, a Nattukottai Chettiar, who died in 1927. Narayanan had two wives, Unnamalai and Alamelu. By Unnamalai he had three sons, A. M. A. N. Annamalai Chettiar (the third respondent), A. M. A. N. Natesan *alias* Chidambaram Chettiar (the fifth respondent), and A. M. A. N. Sambandam Chettiar (the sixth respondent). By Alamelu he had four sons. The eldest, Annamalai, predeceased his father and the youngest, Yoganandam, was given in adoption. The other two sons are the appellant, and A. M. A. N. Subbayya Chettiar (the seventh respondent). Many years ago Narayanan founded a money-lending business with his brother at Kuala Lumpur in the Federated Malay States. Afterwards they separated and on the partition of the family properties the Kuala Lumpur business fell to the share of Narayanan, who carried it on until his death for the benefit of himself and his sons. This business was continued after his death and it is not disputed that it must be regarded as a family business. In 1907 there was disagreement between the two wives of Narayanan with regard to their stridhanam moneys and it would appear that Unnamalai wished to make certain that her sons would not be prejudiced so far as their shares in the family properties were concerned as the result of other sons being born to Alamelu. At this time the only son born to Alamelu was Annamalai. As the result of the differences between the two wives a suit for partition was filed in the Court of the Subordinate

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Judge, Madura East, by the sons of Unnamalai, who were represented by their maternal grandfather Chidambaram Chettiar. This suit was numbered as Original Suit No. 28 of 1907. The defendants were Narayanan, Unnamalai, Unnamalai's daughter Unnamalai, Alamelu's son Annamalai, and Alamelu. There does not appear to be any doubt that this suit was of a friendly nature. Narayanan, his wives and children were all living together at the time and continued to live together until his death. In fact the sons have always lived in the family house. On 30th September 1908 a decree was passed by consent in the partition suit. It declared, *inter alia*, that the sons of the first wife were to have a half share of the family properties, and the sons of the second wife, including the sons to be born thereafter, the other half. The decree did not, however, result in the division of the family properties and can only be regarded as embodying arrangements to be carried into effect, if and when a partition did in fact take place. In the course of his evidence the third respondent stated that the moveable properties were divided, but as it is clear that he was untruthful on other points we are not prepared to attach any weight to his testimony, and it was not accepted by the learned trial Judge. I will return to this compromise decree later.

After the partition suit had been settled Narayanan entered into a partnership with the second and fourth respondents for the purpose of carrying on a money-lending business at Maubin in Burma under the vilasam of M.P.N. The capital contributed by Narayanan to this partnership must be deemed to have come from the

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common fund of the family. What the amount of the capital is does not appear. The books have not been produced and the appellant must share the responsibility for this. It is common ground that the business was a very successful one for many years and that Narayanan took part in its management during his life. On his death it was not wound up, but continued exactly as before, except that the third respondent as the eldest son took his father's place in the partnership. It was not until the rebellion broke out in Burma in 1930 that business ceased to prosper.

In the course of its business the M.P.N. firm accepted deposits from customers and paid interest on the amounts so received. During the lifetime of Narayanan and in the ordinary course of business the first respondent deposited a sum of money with the firm. On 27th April 1930 it was calculated that there was due by the firm in respect of this deposit Rs. 10,126-9-6, for which a promissory note was executed by the firm's agent and handed over to the first respondent. When he demanded payment the firm failed to comply and the first respondent was compelled to file the suit out of which this appeal arises. The defendants were Narayanan's partners and his sons. The second and the fourth respondents, who with Narayanan founded the firm, pleaded that the firm's agent had no power to accept the deposit. The third, fifth and sixth respondents, Narayanan's sons by Unnamalai, denied that they ever had any interest in the business. Their case was that their father merely represented himself and his sons by Alamelu. The appellant and the seventh respondent contended that they had no

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interest in the business and that their father entered the partnership on behalf of himself and his sons by the first wife. These defences all failed and the suit was decreed with costs, the liability of the appellant and the fifth, sixth and seventh respondents being limited to their shares in the family properties.

The decision of the trial Judge is challenged by the appellant alone. He contends that the business of the M.P.N. firm cannot be regarded as being part of an ancestral business and says that unless it can be so regarded, he is under no liability to the first respondent. He asks the Court to hold that the family became divided as the result of the partition suit and that Narayanan did not enter into the M.P.N. partnership on behalf of himself and all his sons, but only on behalf of himself and his sons by Unnamalai. He says that, even if Narayanan did enter into the partnership on behalf of all, the partnership was dissolved on his death and it could not be continued so as to make him liable. For the first respondent it is denied that the effect of the partition suit was to divide the family. It is contended that the interest in the M.P.N. firm must be regarded as being part of an ancestral business; but if it cannot be so regarded, it is said that the family being a trading family the M.P.N. business must be deemed to be part of the family business, which renders the minor members of the family liable to the extent of their interests in the family properties. It is also contended that the appellant is liable under the pious obligation rule of Hindu law.

The business here cannot be regarded as being ancestral. It is true that Narayanan and his sons are Nattukottai Chettiars and that their family trade is money-lending, but no business came to Narayanan from his forbears. So far as the evidence discloses, his business career commenced in Kuala Lumpur with the firm founded there by him in partnership with his brother and the only other business interest which he had was his interest in the M.P.N. firm. While in these circumstances it cannot be said that Narayanan carried on an ancestral business, it can be said that he managed a family business. This is accepted by the appellant but he says that the family business came to an end with the compromise decree passed in Original Suit No. 28 of 1907 as this decree dissolved the joint status. We do not agree. That decree made no difference to the position of the family at the time it was passed and as far as we know it has never been acted on, not even in part. In *Palaniappa Chettiar v. Alagan Chetti*(1) the Privy Council found that a custom existed among the Nattukottai Chetties inhabiting certain villages in the Madura District whereby when a chettiar during the lifetime of his first wife married another wife he appropriated out of his property a part for the maintenance of his first wife and that the property so appropriated descended to her son and that the rest of the property was notionally divided, a half being allotted to the son or sons by the first wife and the other half to the son or sons by the second wife. There is no evidence of any such custom

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(1) (1921) I.L.B. 44 Mad 740 (P.C.).

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in the present case, but the judgment in *Palaniappa Chettiar v. Alagan Chetti*(1) shows that in some parts of the Madura District there can be a notional division of property, and we consider that the evidence here discloses that this was the intention when the compromise decree was passed. If the family separates, the separation will be deemed to continue unless it is shown that there has been a re-union, and a person who sets up a re-union must prove it; *Govindoss v. Official Assignee, Madras*(2). But here we are concerned with a case where the members of the family never in fact separated and the members regarded themselves as being joint even after Narayanan's death. Exhibits K and III show this beyond doubt. Exhibit K is an affidavit sworn by the fifth respondent on 12th December 1927 in support of an application to bring on the record of a suit which Narayanan had filed the names of his legal representatives. Paragraphs 3, 4 and 5 of this affidavit read as follows :—

"3. To the said late Narayanan Chettiar, his first wife's sons, viz., (1) A. S. Annamalai Chettiar, (2) A. N. Chidambaram Chettiar, and (3) minor Sambandam Chettiar, aged 16 years and his second wife's sons, viz., (4) minor A. N. Chockalingam Chettiar, (5) minor A. N. Subbayya Chettiar and (6) minor A. N. Yoganandam Chettiar, are the undivided sons of the late A. N. Narayanan Chettiar and are the heirs who have succeeded to his estate by 'survivorship' and are his 'legal representatives.'

4. To the plaintiff A. N. Narayanan Chettiar, deceased, except we six persons, there are no other heirs.

5. Therefore, it is just and necessary that the six persons mentioned in the petition, who are the sons of the plaintiff

(1) (1921) I.L.R. 44 Mad. 740 (P.C.). (2) (1934) I.L.R. 57 Mad. 931 (P.C.).

A. N. Narayanan Chettiar deceased, and who have succeeded to his estate by 'right of survivorship' and who are his 'legal representatives', should be brought on record as his 'legal representatives', and the case proceeded with."

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There is here sworn testimony by a member of the family, who was giving evidence on behalf of the family, that Narayanan and his sons by his two wives constituted an undivided family. Exhibit III is the application itself and contains similar statements. Taking into consideration the course of events from the institution of the partition suit and the exhibits to which I have just referred we are of the opinion that the partition decree was not intended to alter the joint status of the family. It did not in fact make any change and even if the intention was originally to divide the family that intention must in the circumstances be deemed to have been abandoned.

When Narayanan embarked upon the M.P.N. partnership he did so as representing the family. That did not, however, make the members of his family partners. It is well settled law that a contract of partnership by a manager does not *ipso facto* make the other members of the family partners; *Sokkanadha Vannimundar v. Sokkanadha Vannimundar*(1), *Gangayya v. Venkataramiah*(2), *Ramanathan Chetty v. Yegappa Chetty*(3) and *Krishnasamy Ayyar v. Ramadhan*(4). But this does not mean that where a manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business the members of the family are not liable to the

(1) (1904) I.L.R. 28 Mad. 344.
(3) (1915) 30 M.L.J. 241.

(2) (1917) I.L.R. 41 Mad. 454.
(4) (1934) 41 L.W. 224.

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extent of the family property for the debts binding on the manager in the partnership business. That they are liable to this extent is pointed out in Mayne's Hindu Law, Ninth Edition, pages 398 and 399, from which I will quote the following passage :

" On the other hand, the manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts such as the incurring of debts and drawing of negotiable instruments are necessities to a trading family, which they would not be to a non-trading family. . . . But with a stranger partner the members of the family who are not actively engaged in the business have no contractual relation and they can seek no direct relief against him. To the creditors of the business they will be liable to the extent of their share of the family property embarked in the business ; and in the case of families whose hereditary occupation is trade, this will be tantamount to saying that their liability extends to their share of the family property as a whole. The business is conducted on the credit of the whole family property, and that property is swelled by the profits of the business, and it would be impossible to say that any particular portion of the family property, less than the whole, is to be regarded as specifically allocated to the business."

The hereditary occupation of Nattukottai Chetties is money-lending and the business which Narayanan the manager of this family embarked on with the second and fourth respondents was a money-lending business. If this is to be regarded as an extension of the family business, and we regard it as such, the appellant is liable to the extent of his share in the family properties for the debt due to the first respondent. In *Ramanathan Chetty v. Yegappa Chetty*(1) OOUTTS TROTTER and SRINIVASA AYYANGAR JJ. pointed out that there may be many cases in which family property may

(1) (1915) 30 M.L.J. 241.

in one way or other be available to the creditors of a partnership carried on by the manager with others, and the present case is in our opinion one of them.

In *Sri Thakur Ramkrishna Muraji v. Ratan Chand*(1) the Privy Council had to consider a case where an ancestral business of a Mitakshara joint family had been carried on in partnership with another person. Upon the retirement of the stranger partner there was a dissolution and winding up of the partnership, but the business was carried on thereafter on behalf of the joint family in the same commodities and upon the same premises. This was held not to be a new business, but a continuation of the ancestral business. In the present case, the business was not an ancestral one, but it was a family one, and when Narayanan died the family continued to be represented in the business of the M.P.N. partnership by the third respondent, the eldest member of the family. It was not really disputed that up to Narayanan's death the appellant was liable to the extent of his share in the family properties, but emphasis was laid on the fact that Narayanan's death effected a dissolution of the M.P.N.'s partnership. If the members of the family were all liable during Narayanan's lifetime it is difficult to see why they should not be liable after his death. The senior member of the family took his place in the partnership, and the firm continued to do business on the same basis as before. Moreover, Narayanan's death made no difference so far as the debt due to the first

(1) (1931) I.L.R. 53 All. 190 (P.C.).

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respondent was concerned as the debt had been incurred during Narayanan's lifetime. The learned Advocate for the appellant has suggested that the present case falls within the decision of the Privy Council in *Benares Bank, Ltd. v. Hari Narain*(1), but there their Lordships were considering a case where the manager had started a new business, not a case where the manager had entered on an extension of the family business. Consequently we hold that the debt due to the first respondent was incurred in the course of the family business and that the appellant is liable to the extent of his interest in the family assets. His brother and his half brothers accept this position so far as they themselves are concerned.

We also consider that the appellant is liable under the pious obligation rule. It is said on behalf of the appellant that this was not pleaded and that the Privy Council refused to allow the question to be raised in *Benares Bank, Ltd. v. Hari Narain*(1) because it was raised for the first time before their Lordships and it involved questions of fact which had not been tried. That case was a very different one. It is impossible for the appellant in this case to raise the plea that this debt was incurred by Narayanan for his own immoral purposes, or that it did not come within the category of a necessity. The debt represented a deposit made in the ordinary course of the family business.

For these reasons we consider that the case has been rightly decided by the trial Court, and the appeal must, therefore, be dismissed with costs.

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(1) (1932) I.L.R. 54 All. 564 (P.C.).

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, Mr. Justice
Varadachariar and Mr. Justice Pandrang Row.

S. N. V. R. NARAYANAN CHETTI (PLAINTIFF),
APPELLANT,

1937,
December 2.

v.
S. PR. AL. PERIAPPAN alias RAMANATHAN CHETTI
MINOR BY MOTHER AND GUARDIAN SIVAGAMI ACHI,
AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7 (iv) (f)—Suit for accounts
—Dismissal of—Plaintiff appealing against preliminary
decree—Value of claim, if can be altered in appeal.

Held by the Full Bench: The appellant in an appeal against a
decree dismissing a suit for an account cannot change his
valuation where the subject-matter of the appeal is the same as
in the trial Court.

The scheme of the Court Fees Act in this respect is to
allow a plaintiff to value his relief at the figure he chooses, but
it does not allow him to change that valuation. He is allowed
to value for the purpose of the litigation and when he has
done so his valuation governs the forum of trial and of appeal.
An appellant may, however, abandon on appeal a portion of
the relief claimed in the lower Court or say that he does not
claim relief beyond the figure corresponding to the value of
the stamp paid by him, but unless he does this he is bound by
the valuation fixed by himself at the commencement of the
litigation.

Faisullah Khan v. Mauladad Khan(1) explained and
distinguished.

APPEAL against the decree of the Court of the
Subordinate Judge of Sivaganga in Original Suit
No. 61 of 1930 (Original Suit No. 68 of 1929, Sub-
Court, Devakottah).

A. V. Viswanatha Sastri for appellant.—The appeal is
against a decree dismissing a suit for taking accounts. Accord-
ing to section 7 (iv) (f) of the Court Fees Act, the plaintiff is

*Appeal No. 77 of 1933.
(1) (1929) I.L.R. 10 Lah. 737 (P.C.).

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entitled to put his own valuation in the plaint. That provision is applicable to appeals also. There is nothing in the statute to make the plaintiff put in appeal the same valuation as in the suit. [*Faizullah Khan v. Mauladad Khan*(1), *Ramiah v. Ramasami*(2), *Arunachalam Chetty v. Rangasawmy Pillai*(3), *C. K. Ummar v. C. K. Ali Ummar*(4), *Maung Nyi Maung v. The Mandalay Municipal Committee*(5) and *The Naranyanganj Central Co-operative Sale and Supply Society, Limited (in liquidation) v. Mafjuddin Ahmad*(6) were referred to.]

Government Pleader (K. S. Krishnaswami Ayyangar) for the Crown.—In a suit for accounts, if the defendant appeals he is required to adopt the valuation of the plaintiff in the trial Court. The same principle applies to the plaintiff also. There is nothing in the section to show that the position of the plaintiff is different from that of the defendant. [Schedule I, article I, of the Court Fees Act was referred to.] There is nothing in the statute which warrants the change of the valuation of the suit in respect of the same subject-matter. When once the valuation is fixed by the plaintiff it is final. Neither the plaintiff nor the defendant can change it. The valuation of the suit decides the forum of the trial Court and the Court of appeal. So the plaintiff, when once he fixes the valuation of the suit, should not be allowed to alter it at the stage of appeal. The practice of this High Court and of the other High Courts has been that when once the plaintiff has fixed the valuation, he is never permitted to depart from it. That practice should not be altered unless it is inconsistent with the provisions of section 7 (iv) (f) of the Court Fees Act. This is the principle which underlies Schedule I and the other provisions of the Court Fees Act except section 7 (iv). The valuation of the subject-matter should not vary from stage to stage. [Order VII, rule 2, Civil Procedure Code, and section 8 of the Suits Valuation Act were referred to.] *Kannayya Chetti v. Venkata Narasayya*(7), though a decision under the Suits Valuation Act, applies to the Court Fees Act also. The plaintiff is allowed to fix the valuation only once: having fixed a certain valuation he is not allowed to alter it at a later stage. A party cannot be allowed to approbate and reprobate regarding the same subject-matter. [*Mahendranarayan Ray Chaudhuri v. Janakinath Ray*(8),

- (1) (1929) I.L.R. 10 Lah. 737 (P.C.). (2) (1912) 24 M.L.J. 233 (F.B.).
 (3) (1914) I.L.R. 38 Mad. 922 (F.B.). (4) (1931) I.L.R. 9 Ran. 165 (F.B.).
 (5) (1934) I.L.R. 12 Ran. 335. (6) (1934) I.L.R. 61 Cal. 796 (F.B.).
 (7) (1916) I.L.R. 40 Mad. 1 (F.B.). (8) (1930) I.L.R. 58 Cal. 66.

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Mutusalamy Jagavera Yettapa Naiker v. Vencataswara Yettia(1), *Alagappa Chetty v. Nachiappan*(2), *Lallubhai Pragji v. Bhimbhai Dajibhai*(3), *Arogya Udayan v. Appachi Rowthan*(4) and *M. E. Moolla & Sons, Ltd. v. Leon Shain Sway*(5) were referred to.] In *Faizullah Khan v. Mauladad Khan*(6) the appeal was from a final decree but in the present case the appeal is from a preliminary decree. There the appeal was valued at a higher figure than what was done in the trial Court. So that case is distinguishable from the present one. The words "shall state" in section 7 (iv) (f) mean shall state for the entire litigation. [*Samiya Mavali v. Minammal*(7), *Srinivasacharlu v. Perindevaramma*(8) and *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan*(9) were referred to.]

M. Patanjali Sastri and N. G. Krishna Ayyangar for respondents.

A. V. Viswanatha Sastri in reply.—The scope of the appeal is different from that of the plaint. The plaintiff can change the valuation even at the stage of appeal according to section 7 (iv) (f) of the Court Fees Act. The case of *Faizullah Khan v. Mauladad Khan*(6) supports my contention. The practice is different after the decision of the Privy Council in the above case. The words in section 7 (iv) (f) should be construed literally. So the plaintiff should be allowed to value the appeal also as he likes.

The ORDER of the Court was delivered by LEACH C.J.—The question which we are called upon now to decide in this case is whether the memorandum of appeal has been properly stamped. The suit out of which the appeal arises was filed in the Court of the Subordinate Judge of Sivaganga for the taking of the accounts of a dissolved partnership. The plaintiff valued his relief at Rs. 16,500 and paid the court-fee of

- (1) (1865) 10 M.L.A. 313. (2) (1922) 43 M.L.J. 728.
 (3) (1929) I.L.R. 53 Bom. 552. (4) (1901) I.L.R. 25 Mad. 543.
 (5) (1925) I.L.R. 4 Ran. 92, 94. (6) (1929) I.L.R. 10 Lah. 737 (P.C.).
 (7) (1892) I.L.R. 23 Mad. 490. (8) (1915) I.L.R. 39 Mad. 725 (F.B.).
 (9) (1875) 15 B.L.R. 167, 173.

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Rs. 1,004-15-0. The trial Court dismissed the suit on the ground that it was barred by the law of limitation. The plaintiff then appealed to this Court and in his memorandum of appeal valued the relief at Rs. 1,000, paying the corresponding court-fee of Rs. 112-7-0. In consequence of the decision of this Court in *In re Venkatanandam*(1), this valuation was accepted by the officer whose duty it was to check the stamping of the memorandum of appeal. But that case has recently been overruled by a Full Bench in *Dhanukodi, In re*(2). The respondents have in consequence contended that the appellant should value his relief in accordance with the figure at which it was valued in his plaint. The appellant contends that, notwithstanding the fact that *In re Venkatanandam*(1) has been overruled, the case is governed by *Faizullah Khan v. Mauladad Khan*(3), and that the memorandum of appeal is properly stamped.

The question resolves itself into this : Can the appellant in an appeal against a decree dismissing a suit for an account change his valuation, although the subject-matter of the appeal is the same as in the trial Court? Section 7 (iv) of the Court Fees Act requires a suit for accounts to be stamped "according to the value at which the relief is valued in the plaint or memorandum of appeal" and adds :

"In all such suits the plaintiff shall state the amount at which he values the relief sought."

It is said that, as there is a reference in this clause to the memorandum of appeal, the appellant is allowed to value his relief on appeal at

(1) (1932) I.L.R. 56 Mad. 705.

(2) I.L.R. [1938] Mad. 598 (F.B.).

(3) (1929) I.L.R. 10 Lah. 737 (P.C.).

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whatever he likes, notwithstanding that he valued it in the trial Court at a higher figure, and that the correctness of this course is expressly recognised in *Faizullah Khan v. Mauladad Khan*(1).

It was held by a Full Bench of this Court in *Ramiah v. Ramasami*(2) and by another Full Bench in *Arunachalam Chetty v. Rangasawmy Pillai*(3) that a plaintiff in a suit of this nature is entitled to value his relief at what he likes, it being no objection to his valuation that it is an arbitrary one ; and these decisions have not been challenged before us. We, therefore, start with this. The plaintiff may in his plaint value the relief at his own figure. But having made the valuation for the purposes of the litigation, can he reduce it when he comes to appeal? It has always been considered in this Court and in the other High Courts in India that he cannot. Until *In re Venkatanandam*(4) was decided, a plaintiff appealing against a decree dismissing a suit for an account was required in this Court to stamp his memorandum of appeal according to the full amount of the valuation in his plaint. Of course he could if he so desired waive some of the relief which he claimed in the trial Court and in this case he would stamp his memorandum of appeal accordingly.

The Court will not change a long established practice unless it is shown that the practice is opposed to law. Before we can hold that the practice which has been followed in this Court until the decision in *In re Venkatanandam*(4) and throughout in other Courts should be altered, it

(1) (1929) I.L.R. 10 Lah. 737 (P.C.).
(3) (1914) I.L.R. 38 Mad. 922 (F.B.).

(2) (1912) 24 M.L.J. 233 (F.B.).
(4) (1932) I.L.R. 56 Mad. 705.

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must be shown that the practice is inconsistent with the provisions of section 7 (iv) (f) of the Court Fees Act. It must be remembered that the valuation of the relief in the plaint decides the forum, for instance, whether the suit shall be filed in the District Munsif's Court or the Subordinate Judge's Court and the valuation affects the forum of the appeal. In this case, if the appellant had valued his relief in the plaint at Rs. 1,000, the figure at which he values it in the memorandum of appeal, the suit would have been filed in the District Munsif's Court, and the appeal would be to the District Court. As the result of valuing his relief in the plaint at Rs. 16,500, he has had the advantage of an appeal direct to this Court.

In *In re Dhanukodi*(1) the Court held that where a defendant appeals from a preliminary decree for accounts, he must value his relief according to the value stated in the plaint. If the appellant's contention here is correct, it would mean that he could value his memorandum at what he likes, but the defendants could not. It certainly could not have been the intention of the Legislature to make any distinction between the plaintiff and the defendant in this respect.

The doctrine that a party cannot approbate and reprobate has been applied to an application for leave to appeal to the Privy Council. In *Mahendranarayan Ray Chaudhuri v. Janakinath Ray*(2) RANKIN C.J. and GHOSE J. held that this doctrine applied to a case where a party appealed to the lower Court upon a valuation inconsistent with the valuation upon which he sought a certificate to enable him to appeal to His Majesty in

(1) I.L.R. [1938] Mad. 598 (F.B.). (2) (1930) I.L.R. 58 Cal. 66.

Council and that a party who sued or appealed in a Court which would have no jurisdiction if the value exceeded Rs. 10,000 would debar himself from claiming at a later stage to have the subject-matter of the suit in the Court of first instance treated for the purpose of an appeal to the Privy Council as exceeding Rs. 10,000. The principle governing this decision was stated by their Lordships of the Privy Council in *Mutusaamy Jagavera Yettapa Naiker v. Vencataswara Yettia*(1) and has been applied by this Court in *Alagappa Chetty v. Nachiappan*(2) and by the Bombay High Court in *Lallubhai Pragji v. Bhimbhai Dajibhai*(3). We see no reason why the doctrine referred to should not apply to a case like the present one.

In *Arogya Udayan v. Appachi Rowthan*(4) BENSON and BHASHYAM AYYANGAR JJ. held that a plaintiff could not change his valuation in the trial Court although he applied for leave to do so. This was a case in which the plaintiff had sued for an account. He obtained a preliminary decree and the account was taken, the result being that he was entitled to a larger sum than that claimed in his plaint and in respect of which he had paid court-fee. When the report of the commissioner who had taken the account was made, the plaintiff applied for leave to amend his plaint and leave was granted. The District Munsif then ordered that the plaint should be returned to the plaintiff for presentation in the proper Court. The Division Bench which heard the appeal held that this was wrong and that the suit had to remain in the

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(1) (1865) 10 M.J.A. 313.
(3) (1929) I.L.R. 53 Bom. 552.

(2) (1922) 43 M.L.J. 728.
(4) (1901) I.L.R. 25 Mad. 543.

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District Munsif's Court for the purpose of the passing of the final decree.

Although there are all these indications that it was not the intention to allow a plaintiff to change his valuation on appeal, the learned Advocate for the appellant has argued, as I have already indicated, that the Judicial Committee has decided that he can. In *Faizullah Khan v. Mauladad Khan*(1) the plaintiff-appellants stamped their memorandum of appeal at a higher sum than that at which they stamped their plaint. They sued for an account valued at Rs. 3,000. Their claim was dismissed by the trial Court and a decree was passed against them for Rs. 19,991. On appeal they asked that the decree against them should be set aside and they valued their relief at Rs. 19,991, but they did not pay court-fee on their own claim for Rs. 3,000. The appellate Court allowed the appeal and remanded the case for re-trial, but, inasmuch as the appellants had not stamped their memorandum of appeal sufficiently to cover their own claim, ordered that they should not have a decree for any sum which might be found due to them and to that extent held that the appeal was barred by limitation. The Privy Council held that the memorandum of appeal had been sufficiently stamped. This was a case in which the appeal was from the final decree, and, therefore, their Lordships were not considering the question of an appeal from a preliminary decree. The question now before us was never under discussion. For these reasons, we are unable to agree that *Faizullah Khan v. Mauladad Khan*(1) declares that the practice of the High

(1) (1929) I.L.R. 10 Lah. 737 (P.C.).

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Courts in India with regard to the stamping of appeals like the present appeal is contrary to law.

In our opinion the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation.

Accordingly we hold that the memorandum of appeal in this case has been insufficiently stamped and, if the appellant wishes to continue the appeal, he must value his relief here in accordance with his valuation in the Court below and pay the corresponding stamp fee. We will allow him time until 5th January 1938 in which to pay the additional court-fee. If the additional fee is paid by that date, the appeal will be placed in the ordinary list for hearing. If it is not paid by that date, the appeal will be rejected. It follows, of course, that if the appellant wishes to limit his relief on appeal to any figure less than Rs. 16,500, he can do so provided the memorandum of appeal is stamped sufficiently.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and
Mr. Justice Pandrang Row.

1938,
February 2.

MASK & Co. BY PARTNERS M. VEDACHALA MUDALIAR
AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF SOUTH ARCOT
(DEFENDANT), RESPONDENT.*

*Sea Customs Act (VIII of 1878), ss. 188, 218 to 220—Land
Customs Act (XIX of 1924), sec. 9—Applicability of Sea
Customs Act under—Finality contemplated by sec. 188—
Scope and effect of—Payment under protest of the higher
duty claimed by customs officials—Suit to recover—Civil
Court—Jurisdiction of.*

There was some dispute between a consignee and the Customs authorities as to the correct duty leviable on certain goods. The former contended that a duty was leviable on an *ad valorem* basis which worked out at a lower figure but the latter contended that the duty was leviable on a tariff valuation basis which worked out at a higher figure. The consignee paid under protest the higher duty demanded and cleared the goods. The Assistant Collector of Customs passed an order that the duty was leviable on the latter basis. The Collector of Customs dismissed the appeal by the consignee against that order. The matter was taken to the Government of India in revision and the order of the Collector was confirmed. The consignee filed a suit in the Civil Court for the recovery of the excess customs duty paid by him under protest. On a contention that the Civil Court had no jurisdiction,

held: (i) The Civil Court had jurisdiction to entertain the suit, (ii) the finality enacted by the last clause of section 188 of the Sea Customs Act is not limited to cases falling under section 182 and the succeeding sections but must be limited to redress available before the executive authorities

* Appeal No. 179 of 1937.

themselves and it must not be understood as precluding the jurisdiction of the Civil Court.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Cuddalore dated 30th March 1937 in Original Suit No. 18 of 1934.

K. Bhashyam and T. R. Srinivasan for appellants.

Government Pleader (K. S. Krishnaswami Ayyangar) for respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit for recovery of excess customs duty paid by the plaintiffs under protest and raises a question as to the jurisdiction of the Civil Court to deal with a matter of this kind. This point as to jurisdiction was raised by issue 3 and was tried as a preliminary issue in the Court below. As the learned Subordinate judge held against the plaintiffs on this question, he dismissed the suit. Hence this appeal by the plaintiffs.

The following are the relevant facts. The plaintiffs are merchants carrying on business in the South Arcot District under the name of "Mask & Company" and towards the end of 1932 and in the course of 1933, they imported several consignments of betelnuts from Java. The consignments were landed in Pondicherry and had to be brought to British India across the land frontier there. To avoid delay in doing so, they put themselves in communication with the Customs authorities, but, as there was a dispute between them as to the correct duty leviable, the plaintiffs paid under protest the higher duty demanded by the authorities and cleared the

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goods. The Assistant Collector of Customs passed his order on 28th February 1933; and an appeal against it was dismissed by the Collector of Customs on 20th June 1933. The matter was taken to the Government of India in revision but by their order dated 13th August 1933, the Government of India confirmed the Collector's order.

The point in dispute between the parties was whether the betelnuts imported by the plaintiffs should be treated as falling under the category of "boiled" betelnuts. If they are not, the goods will be liable to duty on an *ad valorem* basis which works out greatly in the plaintiffs' favour as each cwt. was valued by them only at about Rs. 10. The Customs authorities were of opinion that the betelnuts should be treated as "boiled, split or sliced" which under the notification issued under the Tariff Act were liable to duty on a tariff valuation of Rs. 23 per cwt. during the year 1932 and Rs. 16 per cwt. during the year 1933. The plaintiffs produced a certificate from Java that the betelnuts did not undergo any process of boiling; it would also appear that even in India the result of the chemical examination was that they had not been boiled but subjected to some lime process. The Assistant Collector of Customs nevertheless took the view that they were liable to be taxed as "boiled". When the matter went before the Collector, he stated that though the betelnuts had not undergone the process of boiling they were known in the trade as "boiled"; and as the note in the notification under the Tariff Act prescribed that the various heads in the tariff should be applied in the light of the ordinary trade description of each article, he held that the

order of the Assistant Collector of Customs was right. The plaintiffs challenge the correctness of this view of the Collector. The order of the Government of India in revision was to the effect that the order of the Collector of Customs was correct in law.

The plaintiffs instituted the suit on the ground that the goods imported by them ought not to have been taxed as boiled betelnuts and that the Customs authorities had acted on a wrong interpretation of the Sea Customs Act and the Tariff Act. The objection to the jurisdiction of the Civil Court was stated in paragraphs 8, 9 and 10 of the written statement to the following effect: that the Collector of Customs came to a judicial decision in the matter, that this decision had been confirmed on revision, that these orders are final as a legal adjudication and that their correctness or legality cannot be questioned in a Civil Court.

In dealing with the question thus raised it will be convenient to refer at the outset to the cases that have been decided under the Sea Customs Act itself. In the present case, the Act directly applicable is the Land Customs Act of 1924; but section 9 of that enactment makes various provisions of the Sea Customs Act applicable. As early as in *Hari Bhanji v. The Secretary of State for India*(1) it was observed by INNES J. that the corresponding provisions of the Sea Customs Act VI of 1863 did not by implication exclude the jurisdiction of the Civil Courts in cases like the present. Referring to sections 218 to 220 of the former Act, the learned Judge held that they only

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applied to awards of confiscations and forfeitures and duties increased by way of penalty ; and, as regards section 188 of the Act now in force (namely Act VIII of 1878), the learned Judge said :

"I do not understand the words 'decision or order' passed by a Custom-house Officer in section 188 of Act VIII of 1878 to refer to executive orders levying duty. In his capacity of levying duty he is simply the executive officer to carry out the Act. The words refer, I think, to judicial orders and adjudications under sections 182 and 183. But whether they be so restricted or not, I do not think sections 188 to 192, even by implication, exclude the jurisdiction of the Courts for wrongs done by Custom-house Officers, and section 198 recognizes that there may be suits against them."

We may in this connection refer also to the observation of MORGAN O.J. in *Collector of Sea Customs v. P. Chithambaram*(1) to the following effect :

"It is clear that when a law gives to certain persons or officials the power of adjudicating upon a particular matter, their decision concludes the inquiry."

These passages suggest a distinction between one class of cases contemplated by the Sea Customs Act and another class of cases, namely, instances in which, in respect of offences referred to in the Act, the Customs officers are given a kind of magisterial jurisdiction and instances in which in the ordinary discharge of their duty as executive officers, they assess and collect duty leviable on goods under the Act. The opinion of the learned Judges indicated in the passages above referred to clearly was that it is only in the former class of cases that their orders can be spoken of as "decisions" in the true sense, so as to preclude the Civil Court from questioning them.

(1) (1876) I.L.R. 1 Mad. 89, 104 (F.B.).

In two recent cases, however, there were observations by learned judges of this Court sitting on the Original side which are relied on as supporting a different view. In Civil Suit No. 747 of 1920 COUTTS TROTTER J. (as he then was) had to deal with a suit for recovery of a sum of Rs. 20,000 which had been deducted from the value of certain coins seized by the customs authorities, the Rs. 20,000 representing the *fine* which the authorities adjudged as payable by the importer in view of his attempt to bring these coins clandestinely into British India. Objection was taken by the Government that the trial of the suit was barred by section 188 of the Sea Customs Act and the learned Judge upheld the objection. We think that the decision in that case is, if we may say so, not open to exception and it does not help the Government in this case ; because, the act of the customs authorities in that case was an "adjudication" of a fine in respect of an offence committed by the importer and within the meaning of the passage that we have cited above from *Hari Bhanji v. The Secretary of State for India*(1) that adjudication was a decision of a tribunal which has been given jurisdiction to deal with such offences by the statute. In *Bhiwandiwalla & Co. v. Secretary of State*(2) GENTLE J. had to deal with a claim for recovery of duty alleged to have been levied in excess. As the suit was instituted on the Original Side in respect of what happened in the City of Madras, the learned Judge held that the jurisdiction of the High Court was excluded by section 106 of the Government of India Act.

(1) (1879) I.L.R. 4 Mad. 344.

(2) (1936) 45 L.W. 394.

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He however added that the suit was also barred under section 188 of the Sea Customs Act. The observations on the latter point were only *obiter*. As against this recent judgment in this Court, we may refer to the fact that in two recent cases which came up before the Judicial Committee *Vacuum Oil Co. v. Secretary of State for India*(1) and *Ford Motor Company v. Secy. of State*(2), the Courts in India as well as their Lordships of the Judicial Committee adjudicated upon a question relating to the correct basis of assessment in respect of certain imported goods. It is true that in those two cases the objection to jurisdiction does not appear to have been raised and discussed. But we are unable to assume that, if the objection to jurisdiction was so obvious as has been suggested before us, the learned Counsel who appeared for the Government or their Lordships who dealt with the case on the merits would have overlooked such an objection. The decisions in *Ganesh Mahadev v. The Secretary of State for India*(3) and *Mahadev Ganesh v. Secretary of State for India*(4), to which the learned Subordinate Judge has referred, are clearly distinguishable. They fall within the principle already indicated, that adjudications by Customs Officers dealing with an offence committed under section 182 have *prima facie* to be regarded as adjudications by a special tribunal and as such are not examinable by a Civil Court except where they have acted without jurisdiction or in contravention of fundamental principles of judicial procedure. The learned Subordinate Judge has referred to the judgment of the Judicial Committee in *Vacuum*

(1) (1932) I.L.R. 56 Bom. 313 (P.C.).
(3) (1918) I.L.R. 43 Bom. 221.

(2) A.I.R. 1938 P.C. 15.
(4) (1921) I.L.R. 46 Bom. 732.

Oil Co. v. Secretary of State for India(1) but has tried to distinguish it on a ground which we find difficult to follow.

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Such being the state of the authorities, we may now deal with the arguments advanced before us with reference to the language of the relevant provisions of the Act. The learned Counsel for the appellant contended that the finality enacted by the last clause of section 188 of the Sea Customs Act must be limited to redress available before the executive authorities themselves and must not be understood as precluding the jurisdiction of the Civil Court. He also contended that that finality can attach only to decisions or orders passed by Customs authorities when acting under section 182 of the Act and the succeeding sections. We are not prepared to accede to the latter contention. The opening words of section 188 refer to any decision or order passed by an officer of Customs under this Act and it has not been shown why those words should be limited to cases falling under section 182 and the succeeding sections. For one thing, such a construction may unduly curtail the right of appeal given to a party by section 188 and, unless such a construction is obvious, we are not disposed so to interpret the section. The first contention, namely, that the finality enacted by the last clause of that section should not be interpreted to take away the jurisdiction of the Civil Court, seems to us well founded. Cases have come up before this Court where upon similar provisions in other enactments the same argument against the jurisdiction of the Civil Court has been advanced but has been

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repelled. Many of these cases have been referred to in *Kamaraja Pandiya Naicker v. The Secretary of State for India in Council*(1) and it is unnecessary to deal with them again here.

The learned Government Pleader contended, in the alternative, that even if the exclusion of the Civil Court's jurisdiction is not to be inferred from section 188, the same result must be reached on general principles, on the ground that where the Legislature has created a special tribunal to give redress to a party in respect of particular wrongs it must be presumed that it was intended to be an exclusive remedy. Adopting the language used by the learned Judges in *Ramachandra v. The Secretary of State*(2) he contended:

"When by an Act of the Legislature, powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and, in case of injury, the party cannot proceed by action."

The scope and limits of this principle have been discussed at some length in *Kamaraja Pandiya Naicker v. The Secretary of State for India in Council*(1), already referred to, and *Ramachandra v. The Secretary of State*(2) has also been explained there. The question for consideration in such cases is, whether the order complained of can be regarded as anything in the nature of an *adjudication* by a *tribunal*. It seems to us too much to contend that every order of a Customs Officer under the Customs Act in whatever connection passed must be regarded as in the nature of an *adjudication* by a *tribunal*.

(1) (1934) 69 M.L.J. 695.

(2) (1888) I.L.R. 12 Mad. 105.

The learned Government Pleader also relied on the observations of the Master of the Rolls in *Wake v. Mayor, &c., of Sheffield*(1). No question arose in that case as to the limits of the jurisdiction of the Civil Court. A stipendiary magistrate was empowered to pass orders on the application of the urban authority on a default made by a private owner in carrying out certain works. There was an application for *certiorari* to move unto the High Court an order made by the stipendiary magistrate in connection with such an application. The Master of the Rolls observed that that was a case

"where the statute has imposed on certain persons a liability not known to common law, and has given to other persons powers and duties also not known to common law; and it seems to me to follow that where that is the case, and where there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability, such mode of procedure is the only one to be followed and used for that purpose."

We find it difficult to say that the present case is one of that kind. *Barracough v. Brown*(2), which was also relied on by the learned Government Pleader, is likewise distinguishable. The proposition there laid down was that

"where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the appellant has the right to recover the expenses in a Court of summary jurisdiction."

It was on those facts that Lord WATSON said that

"the right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other."

(1) (1883) 12 Q.B.D. 142, 145.

(2) (1897) A.C. 61

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It has also been held that when executive authorities in the exercise or under colour of statutory powers interfere with the person or property of the subject, improperly or in excess of the limits authorized by law, the subject has the right to resort to the Civil Court, unless its jurisdiction has been taken away by express words or by clear implication. Judged by this test, we do not think it can be said in this case that the jurisdiction of the Civil Court has been excluded. The appeal is accordingly allowed and the case remanded to the lower Court for disposal on the merits. The court-fee paid on the memorandum of appeal will be refunded. The appellant will be entitled to the costs of this appeal.

G R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and
Mr. Justice Abdur Rahman.

VELLA VEERAN CHETTI, PLAINTIFF,

v.

V. VEERAN CHETTI AND ANOTHER, DEFENDANTS.*

Court Fees Act (VII of 1870), sec. 11 as amended by Madras Act V of 1922—Future mesne profits—Decree for, without directing inquiry as indicated by O. XX, r. 12, of Civil Procedure Code (Act V of 1908)—Execution of—Payment of court-fee for amount decreed, condition precedent if—Decree finally determining amount of future mesne profits without directing inquiry—Jurisdiction of Court to pass.

In a suit for recovery of possession of immovable property and for past and future mesne profits, the profits claimed were

* Referred Case No. 1 of 1936.

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Rs. 60, being the estimated amount of past profits, and court-fee was paid thereon. At the close of the trial, the Court passed a decree awarding the sum of Rs. 60 for past profits and also profits from the date of suit until delivery of possession at the rate of Rs. 60 per annum without directing an inquiry as indicated by Order XX, rule 12, of the Code of Civil Procedure. On an execution application filed by the plaintiff for the recovery *inter alia* of Rs. 540, the amount of mesne profits due from the date of plaint to the date of the execution application,

held that on the plain language of clause 1 of section 11 of the Court Fees Act as amended by Madras Act V of 1922, the plaintiff could not execute the decree in respect of the sum of Rs. 540 claimed by way of future profits without payment of court-fee.

Where there is a claim for mesne profits in a suit, whether past or future, the plain language of section 11 (1) of the Court Fees Act would apply to the same if a decree is passed in respect of the future mesne profits.

A preliminary decree under Order XX, rule 12, of the Code is necessary only where the exact amount has to be ascertained after examination of fresh evidence. Where the parties agree or do not object and therefore an inquiry is not necessary, it is perfectly competent to the Court, without directing an inquiry, to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit.

CASE stated under Order XLVI, rule 1, of Act V of 1908 by the District Munsif of Melur in Execution Petition No. 793 of 1935 in Original Suit No. 729 of 1926.

N. Srinivasa Ayyangar for Government Pleader
(K. S. Krishnaswami Ayyangar) for District Munsif.
D. Narasaraju as *amicus curiae*.
Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This matter arises out of a reference made by the learned District Munsif of Melur for a decision on the question whether a

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plaintiff is entitled to execute a decree awarding, without directing an inquiry, mesne profits since the date of the institution of the suit without payment of court-fee. The suit was for recovery of certain immovable property and mesne profits for a period prior to the date of the institution of the suit (13th November 1926) and also subsequent thereto. The Court by its decree dated 23rd October 1929 awarded Rs. 60 for profits prior to suit and also awarded profits from the date of suit until delivery of possession at the rate of Rs. 60 per annum. It was carried in appeal both to the District Court and the High Court and ultimately confirmed. The decree of the High Court is dated 9th September 1935. The present execution application out of which this reference arises was filed on 21st November 1935 praying for delivery of possession of the property and for realization of Rs. 60 the past profits decreed and also of Rs. 540 the amount of mesne profits due and payable from 13th November 1926, the date of plaint, to 21st November 1935, the date of the execution application. The question is, can the relief, so far as it relates to the sum of Rs. 540, be given to the plaintiff without payment of court-fee? The relevant provision of law applicable to the case is section 11 of the Court Fees Act as amended by the Madras Act V of 1922. It runs thus :

"In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

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Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such enquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained, is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court for sufficient cause extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

As the decree was passed at the close of the trial without directing an inquiry as indicated by Order XX, rule 12, Civil Procedure Code, clauses 2 and 3 of section 11 of the Court Fees Act do not apply. Does clause 1 apply? For the application of the said clause the following conditions must be fulfilled :

(a) The suit must be one for mesne profits or for immovable property and mesne profits. No distinction is drawn between mesne profits prior to and subsequent to the institution of the suit. A suit laying claim for mesne profits subsequent to suit solely or in addition to a claim for past profits or for possession of property would be a suit within the meaning of this clause.

(b) There must be a decree awarding mesne profits, that is, a decree determining finally the amount of mesne profits payable so far as the Court passing the decree is concerned and capable of execution. The expression used is "profits decreed". It is general and would comprise profits accruing from date of suit.

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(c) The profits decreed must be in excess of the profits claimed.

All these three conditions are fulfilled in the present case. The suit is for possession of immovable property and mesne profits. There is a decree finally determining the amount of profits subsequent to the date of suit. No doubt the actual amount of mesne profits is not determined, but the rate has been determined; the amount claimable at any particular point of time is only a question of calculation. That a decree of this nature is final and capable of execution has been held by VENKATASUBBA RAO and MADHAVAN NAIR JJ. in *Alagappa Chettiar v. Alim Saheb*(1). The profits decreed in the suit are certainly in excess of the profits claimed. The profits claimed were Rs. 60 being the estimated amount of past profits. What was decreed was the said sum of Rs. 60 *plus* future profits at the rate of Rs. 60 per annum from date of suit till delivery of possession. Therefore, on the plain language of section 11 (1) the plaintiff is bound to pay the court-fee before the decree in respect of the future profits can be executed. But it is contended that it is not competent to a Court to pass a final decree for mesne profits without an inquiry and the only decree it can pass is a preliminary decree under Order XX, rule 12, Civil Procedure Code, and section 11 (1) contemplates only cases where past profits were claimed as it is only in respect thereof the amount can be claimed and court-fee is payable having regard to section 7 of the Court Fees Act and Order VII, rule 2, Civil

(1) (1925) 22 L.W. 347.

Procedure Code. Reliance was placed on a number of cases in support of this contention, some of which we propose to deal with. Mr. Narasaraju laid emphasis on the observations of VENKATASUBBA RAO OFFG. C.J., as he then was, in *Ekanathalingaswami Koil, In re*(1):

"As regards future mesne profits the Court has no such option but is bound in the first instance to pass a preliminary decree."

With due respect to the learned Judge, we are not able to appreciate the force of the expression "is bound". As he himself says, the Court is not bound to pass a decree for future mesne profits, the passing of the decree being in the discretion of the Court (page 682), but if it chooses to pass a decree, should it only be a preliminary decree? What the section says is that in regard to future profits the Court may direct an inquiry and in case an inquiry is directed, it shall pass a decree in accordance with the result of that inquiry. One thing is plain; jurisdiction is conferred on the Court trying the suit to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit. The determination of the said profits is an essential part of the decree in the suit and must be done by the Court which passed the decree and not by the Court which executes it. If this is the principle underlying the section, is there anything to preclude the Court from passing the decree without directing an inquiry if the parties agree or do not object? The section does not say that no final decree should be passed unless there had been a

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(1) I.L.B. [1937] Mad. 284.

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previous inquiry and the Court must pass a preliminary decree, whether an inquiry is necessary or not. In cases where an inquiry is unnecessary, it seems to us that it would be an idle formality to pass such a decree. As pointed out by SULAIMAN C.J. in *A. P. Bagchi v. Mrs. F. Morgan*(1) :

"A preliminary decree becomes necessary where the exact amount has to be ascertained after examination of fresh evidence." In that case the learned Judge observed :

"When the plaintiff made it clear that she confined her relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount was definitely ascertained and there was no occasion for framing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff."

The Court was not bound to pass a preliminary decree in the first instance. It is therefore perfectly competent to the Court, without directing an inquiry, to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit if it is made out that it is not necessary to make such an inquiry, and it cannot be said that such a decree is not final or is incapable of execution nor would it be in contravention of the provisions of Order XX, rule 12, Civil Procedure Code.

We shall now proceed to deal with the other aspect of the contention that section 11 (1) deals only with a case of past profits. The case of *Ramkrishna Bhikaji v. Bhimabai*(2) was strongly relied on in support of this contention. It was a suit for possession and for mesne profits from the date of the suit. The Court gave a decree for possession and directed that mesne

(1) A.I.R. 1937 All. 36, 39.

(2) (1890) I.L.R. 15 Bom. 416.

profits should be determined in execution. After the mesne profits were ascertained, a question arose whether the decree-holder should pay court-fee before he could be allowed to proceed with the execution. It was held that no court-fee need be paid. We may at once state that the case would now be entirely covered by clause 3 of section 11 of the Court Fees Act as amended, so far as this Presidency is concerned. The learned Judges, after referring to *Chedi Lal v. Kirath Chand*(1), observed thus :

"There the plaintiff asked for past as well as future mesne profits, and an amount was claimed and fee paid in respect of the former. If the mesne profits, past and future, be regarded in such a plaintiff as one entire claim for mesne profits, the language of section 11 might perhaps apply."

Therefore, so far as the present case is concerned, it would directly come within the scope of the above observations. We may state that the above observations were followed with approval in two cases, namely, *Dwarka Nath Biswas v. Debendra Nath Tagore*(2) and *Ijjatulla Bhuyan v. Chandra Mohan Banerjee*(3). A Full Bench of our High Court in *In re Parameswara Pattar*(4) has taken the view that a claim for possession of land and for mesne profits should be taken as one entire claim for computation of the court-fee. It purported to follow the decision of the Calcutta High Court in *Kishori Lal Roy v. Sharut Chunder Mozumdar*(5) where at page 596 GARTH C.J. made the following observation :

"The Court could only give him the mesne profits from the time when he was entitled to possession, and whether he was

(1) (1880) I.L.R. 2 All. 682. (2) (1906) I.L.R. 33 Cal. 1232.
(3) (1907) I.L.R. 34 Cal. 954 (F.B.). (4) (1930) I.L.R. 54 Mad. 1 (F.B.).
(5) (1882) I.L.R. 8 Cal. 593 (F.B.).

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so entitled as from the date of suit, or from a time antecedent to the date of suit, the nature of his claim must be the same."

There can therefore be no question that, where a claim is for possession of immovable property and past profits or where a claim is for possession of immovable property and for past profits and future profits, and future mesne profits are decreed, a court-fee will be leviable on such profits under section 11 of the Court Fees Act. A case of our High Court reported as *Maiden v. Janaki-ramayya*(1) which purported to follow *Ramkrishna Bhikaji v. Bhimabai*(2) was also relied on. That was a suit for possession of immovable property, past profits and future profits. There was a decree for possession and for mesne profits coupled with a direction that mesne profits should be paid from the date of suit till delivery of possession, the amount thereof to be determined in execution. There was an appeal against the said decree and a question arose whether court-fee should be paid in respect of the direction as regards the mesne profits subsequent to the institution of the suit. The learned Judges held that no court-fee was payable. The decision was based on quite an intelligible principle because no profits had yet been ascertained and no court-fee is payable in respect of the future mesne profits until they are ascertained; vide *Ekanathalingaswami Koil, In re*(3). But it is hardly an authority for the position that when the mesne profits have been ascertained the plaintiff need not pay the court-fee before he can execute the decree in respect

(1) (1898) I.L.R. 21 Mad. 371.

(2) (1890) I.L.R. 15 Bom. 416.

(3) I.L.R. [1937] Mad. 284.

thereof. It seems to us that where there is a claim for mesne profits in a suit, whether past or future, the plain language of section 11 (1) would apply to the same if a decree is passed in respect of the future mesne profits. It is no doubt true that a claim for mesne profits subsequent to the date of suit is upon a cause of action which was not existing on the date of the suit, but nevertheless the Legislature has made an exception to the general rule by permitting a claim in respect thereof in order to avoid multiplicity of suits. As the claim in respect of future mesne profits will be upon a cause of action arising subsequent to the institution of a suit, whether a plaintiff will be entitled to get a decree in respect thereof, and if so, for any and what amount, are all matters which are dependent on the decision in the suit. There is no provision made in the Court Fees Act for the computation of such a claim. But from that it does not follow that no court-fee is leviable when the claim has been determined and when the mesne profits have been ascertained. The contention which seeks to negative the liability for payment of the court-fee is based on the words "fee actually paid". In the case where the suit is for possession of immovable property and past profits, no difficulty arises because a fee would have been actually paid. In a case where a claim is made only for future mesne profits, no fee could have been actually paid because no fee is leviable; in such cases the fee actually paid would be nil. Therefore the "difference" within the meaning of section 11 (1) would be the entire fee payable on the amount actually decreed. However, it is unnecessary to express any final opinion as in this case the claim

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was for past and future profits and a fee has been actually paid.

Our answer to the reference is that the plaintiff is bound to pay the court-fee on Rs. 540 claimed by him before he can execute the decree in the suit. We acknowledge our indebtedness both to Mr. Srinivasa Ayyangar, who appeared for the Government Pleader, and to Mr. Narasaraaju who appeared as *amicus curiae* for the assistance they have rendered to us.

A.S.V.

ORIGINAL CIVIL.

Before Mr. Justice Gentle.

1938,
January 11.

CHIDAMBARAM, MINOR, BY NEXT FRIEND, NATESA MUDALIAR,
APPLICANT,

v.

NATARAJA MUDALIAR AND SIX OTHERS,
RESPONDENTS. *

Code of Civil Procedure (Act V of 1908), O. XXXIII—Application for leave to sue in forma pauperis—Pendency of—Application for the appointment of a commissioner under O. XXXIX, r. 7—Competency of.

On the presentation of a petition for leave to sue in *forma pauperis* a suit must be deemed to have been instituted. Accordingly an application for the appointment of a commissioner under O. XXXIX, r. 7, of the Code of Civil Procedure can be made after the filing of a petition for leave to sue in *forma pauperis* and before leave is granted.

A. B. Nambiar for applicant.

* Application No. 49 of 1938 in Application No. 30 of 1938.

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In this application, the applicants desire that an order may be passed for the appointment of a commissioner for the taking of an inventory of the movable properties at premises No. 15, Kuppumuthu Street, Triplicane, Madras. I am satisfied on the merits that the applicant is entitled to the appointment of such a commissioner. This application is made after the filing of a petition for leave to sue in *forma pauperis* and before leave has been granted as prayed for in that petition. The question is whether there is a suit pending, inasmuch as the right of the applicant to apply for the appointment of a commissioner arises under Order XXXIX, rule 7, Civil Procedure Code, in which the following words appear:

"The Court may, on the application of any party to a suit, . . . make an order."

If there is no suit, then there can be no parties, and if there are no parties to a suit, this Court is unable to make an order appointing a commissioner. This same matter came on before me in Application No. 1849 of 1937 and upon the arguments and authorities then placed before me, I came to the conclusion that the parties in a contemplated pauper suit whose petition to have their suit admitted under the provisions of Order XXXIII, Civil Procedure Code was pending, were not entitled to the relief of appointment of a commissioner or receiver inasmuch as no suit was in existence unless and until the petition to be admitted as a pauper was granted. In the application I have just mentioned, my attention was not directed to a decision of the Privy Council

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reported as *Skinner v. Orde*(1). In that case, their Lordships of the Privy Council discussed at length the date when a pauper suit commences, and at page 136 the following conclusion is expressed :

"In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed."

The statute referred to is the Statute of Limitations, Act IX of 1871, clause 4. Had my attention been drawn in the previous application to this authority of the Privy Council, my view would have been different from that expressed therein. In my view, on the authority of the above decision, on the presentation of the petition to sue as a pauper the suit is to be deemed to have been instituted, and therefore there must be parties, the parties being those persons cited in the copy of the plaint filed with the petition. I therefore desire to reconsider the decision in Application No. 1849 of 1937. There will be an order for the appointment of a commissioner to take an inventory of the movable property consisting of jewellery, cash, silverware and other items in the possession of the second defendant, Amurthammal, and to be found in premises No. 15, Kuppumuthu Street, Triplicane, Madras. This appointment will be conditional upon Mr. A. B. Nambiar undertaking to me to pay into Court by 15th January 1938 the sum of Rs. 50 in respect of the remuneration of the Commissioner. Mr. M. V. Ganapathi, an Advocate of this Court, is appointed the commissioner. This order can be drawn up and issued forthwith.

G.R.

(1) (1879) L.R. 6 I.A. 126.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Mockett.

BACHU MALLIKARJUNA RAO (PURCHASER—SECOND
RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER, KISTNA, AND THREE OTHERS
(PETITIONER AND RESPONDENTS 1 AND 3), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 51 (3)—Judgment-debtor—Adjudication as an insolvent of—Execution sale of his property after—Validity of—Notice of execution proceedings given to Official Receiver—Effect of.

A Court executing a decree has no power to sell a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent. A sale in execution of a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent is invalid and conveys no title to the purchaser. The fact that the Official Receiver was given a notice in the execution proceedings does not render the sale good and binding on him.

Section 51 (3) of the Provincial Insolvency Act can only refer to all cases of execution sales held before adjudication. It can clearly not operate in cases of sales held after adjudication because (i) it comes in the Act amongst a set of provisions dealing with the effect of insolvency (i.e., adjudication) on antecedent transactions and (ii) after adjudication the debtor has no property which can be sold in execution.

Case-law reviewed.

Distinction between "debtor" and "insolvent" and the lax use of the word "debtor" in the Provincial Insolvency Act pointed out by Mockett J.

APPEAL against the order of the Court of the Subordinate Judge of Bezwada dated 5th August 1936 and made in Execution Application No. 45

*Appeal Against Order No. 341 of 1936.

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of 1936 in Execution Petition No. 87 of 1935 in Original Suit No. 79 of 1932.

P. Satyanarayana Rao for appellant.

V. Govindarajachari for first respondent.

N. Vasudeva Rao for second respondent.

V. Parthasarathi for third respondent.

Cur. adv. vult.

JUDGMENT.

BURN J.

BURN J.—The facts in this case are quite simple. The appellant is the purchaser at a sale held in execution on 10th December 1935. The decree was passed on 16th April 1935 and the execution petition was put in on the next day. An order for sale was passed on 21st October 1935 but four days before that, viz., on 17th October 1935, one of the judgment-debtors (the third defendant in the suit) had been adjudicated insolvent in Insolvency Petition No. 15 of 1935. It was the property of the third defendant that had been attached in Execution Petition No. 87 of 1935 and proclaimed for sale in the order passed on 21st October 1935. On 19th November 1935 one of the creditors of the insolvent judgment-debtor put in an application in which he informed the executing Court of the adjudication of the third defendant, but the learned Subordinate Judge refused to stay the sale. On 4th December 1935 the Official Receiver was impleaded in the execution petition. He did not appear on the 9th December, the date fixed for sale, but in response to the notice served upon him on 4th December he replied to the executing Court that the property of the third judgment-debtor had vested in him upon adjudication, and he requested that the property of the third judgment-debtor might be

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handed over to him. The learned Subordinate Judge allowed the sale to proceed, and the present appellant purchased what was put up for sale as the property of the third judgment-debtor for Rs. 5,000 odd. The Official Receiver applied under section 47 and Order XXI, rule 90, Civil Procedure Code, to have the sale set aside, alleging that after the adjudication of the third judgment-debtor the Court had no jurisdiction to sell his properties in execution, and that the sale after the adjudication was a material irregularity in the conduct of the sale. The learned Subordinate Judge who disposed of this application was the successor of the Subordinate Judge who ordered the sale to proceed. He held that the sale was invalid on the ground that the property of the third judgment-debtor had vested in the Official Receiver under section 28 (2) of the Provincial Insolvency Act, and that therefore no Court had power to proceed to sell the property. The purchaser in execution has preferred this appeal.

The question for consideration therefore is whether a Court executing a decree has power to sell a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent. The case for the Official Receiver (respondent) is, as stated by the learned Subordinate Judge, that upon adjudication the judgment-debtor's property vested at once in the Official Receiver and that therefore the executing Court had no power to sell. The case of the appellant is based upon section 51 (3) of the Provincial Insolvency Act which declares that

"a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver".

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Mr. Satyanarayana Rao, who argued the case for the appellant, points to the wide terms of section 51 (3) and relies very strongly upon the case of *Muthan Chettiar v. Venkituswami Naicken*(1). He relies also upon the cases of *Ramanatha v. Vijayaraghavalu*(2), *Dineshchandra Ray Chaudhuri v. Jahanali Biswas*(3), *Madhu Sudan Pal v. Parbati Sundari Dasya*(4), *Sankaralinga Mudaliar v. Official Receiver of Tinnevely*(5) and *Rajagopala Ayyar v. Ramanujachariar*(6). Mr. Govindarajachari, who appears for the Official Receiver, contends that since immediately upon adjudication the property of the third judgment-debtor vested in the Official Receiver there was nothing left for the executing Court to sell in execution and he relies upon the Privy Council case of *Raghunath Das v. Sundar Das Khetri*(7) followed in this Court in *Anantharama Iyer v. Kuttimalu Kovilamma*(8), some observations of ODGERS J. in *Nainar Rowthen v. Kuppai Pichai Rowthen*(9) and certain observations of WALLER J. in *Sivasami Odayar v. Subramania Aiyar*(10).

Now there is no doubt about the all-embracing character of the words in section 51 (3) of the Provincial Insolvency Act. It does expressly say that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title against the Receiver. But it must be borne in mind that section 51 of the Provincial Insolvency Act comes under the heading "Effect of insolvency on

(1) (1936) I.L.R. 59 Mad. 928.

(3) (1934) I.L.R. 62 Cal. 457.

(5) (1925) 49 M.L.J. 616.

(7) (1914) I.L.R. 42 Cal. 72 (P.C.).

(9) A.I.R. 1929 Mad. 609.

(2) A.I.R. 1927 Mad. 983.

(4) (1916) 35 I.C. 643.

(6) (1923) I.L.R. 47 Mad. 288 (F.B.).

(8) (1916) 30 M.L.J. 611.

(10) (1931) I.L.R. 55 Mad. 316.

antecedent transactions," and although it has been pointed out by WALLER J. in *Sivasami Odayar v. Subramania Aiyar*(1) that section 52 in its present form is entirely out of place under that heading, it has never been suggested that section 51 is out of place. It would seem to follow that section 51 can only govern transactions prior to insolvency, i.e., prior to adjudication. If that is so, the words "in all cases" in section 51 (3) can only mean in all cases prior to adjudication for no part of this section can have any bearing upon transactions subsequent to adjudication. This aspect of the matter has been more fully discussed by my learned brother whose judgment I have had the advantage of reading, and with whom I am in agreement.

Again it must be noticed that section 51 (3) deals with purchase of the "property of a debtor". Now upon adjudication the property of an insolvent vests immediately in the Official Receiver, i.e., the property passes to the Official Receiver, and in so far as the judgment-debtor is concerned, there is no property of his which can be sold by the executing Court. This was very clearly stated by their Lordships of the Privy Council in the case of *Raghunath Das v. Sundar Das Khetri*(2). The judgment of Lord PARKER states that in their Lordships' opinion the sale in that case was altogether "irregular and inoperative". His Lordship goes on to state three grounds for this opinion :

"In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and

(1) (1931) I.L.R. 55 Mad. 316.

(2) (1914) I.L.R. 42 Cal. 72 (P.C.).

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the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property."

It will be seen that the first two grounds stated by Lord PARKER relate to matters of procedure, viz., (i) the sale ought not to have been allowed to go on and (ii) the sale should certainly not have been allowed to go on without notice to the Official Assignee. These clearly are the grounds on which their Lordships held the sale to be "irregular". The third ground however is a matter of substantive right. The right, title and interest of the judgment-debtor having passed to the Official Assignee there was nothing left for the Court to sell in execution. That is why their Lordships say that the sale, besides being irregular, was "inoperative".

This decision of their Lordships of the Privy Council is, in my judgment, conclusive. It has been referred to on many occasions, and in some of the cases quoted by Mr. Satyanarayana Rao as those upon which he relies, but in none of those cases has any attempt been made to explain away the third ground for the decision of their Lordships of the Privy Council. For example, beginning with the earliest case of *Madhu Sudan Pal v. Parbati Sundari Dasya*(1) the learned Judges rely upon section 34 (3) of the Provincial Insolvency Act of 1907 corresponding to section 51

(1) (1916) 35 L.C. 643.

(3) of the Act of 1920, but they make no reference whatever to the decision of the Privy Council in *Raghunath Das v. Sundar Das Khetri*(1). The case of *Rajagopala Ayyar v. Ramanujachariar*(2) was not a case in insolvency. The question referred to the Full Bench in that case was one of limitation, and the Full Bench held that a sale held in execution without notice to the legal representative of the judgment-debtor under Order XXI, rule 22, Civil Procedure Code, was a nullity. The learned CHIEF JUSTICE on page 300 expressly relies upon the Privy Council case of *Raghunath Das v. Sundar Das Khetri*(1) as authority for the proposition that a sale in execution without proper notice under the section of the old Code which corresponds to Order XXI, rule 22, of the present Code, was a nullity. The case of *Sankaralinga Mudaliar v. Official Receiver of Tinnevely*(3) deals with an entirely different point, viz., whether an attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. There is no reference to section 34 (3) of the then Provincial Insolvency Act and no reference to the Privy Council case of *Raghunath Das v. Sundar Das Khetri*(1). The judgment of WALLACE J. in *Ramanatha v. Vijayaraghavalu*(4) was delivered in a case which is hardly parallel. There, the Court had ordered summary administration under section 74

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(1) (1914) I.L.R. 42 Cal. 72 (P.C.).
(3) (1925) 49 M.L.J. 616.

(2) (1923) I.L.R. 47 Mad. 288 (F.B.).
(4) A.I.R. 1927 Mad. 983.

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of the Act. WALLACE J. held that upon the order for summary administration the property of the debtor under section 74 (2) vests in the Court as a Receiver on the date of the admission of the insolvency petition. It is clear that this is not an authority applicable to a case where the property has vested in the Official Receiver. In the case of *Dineshchandra Ray Chaudhuri v. Jahanali Biswas*(1) the question dealt with was the effect of service or non-service of a notice under Order XXI, rule 22, Civil Procedure Code. On page 480 it is stated as follows :

"In support of the appeal to this Court it was urged before us that the sale sought to be avoided by the Receiver was a nullity in view of the non-compliance with the provisions of Order XXI, rule 22, Civil Procedure Code; it was contended that the property, having been sold on the 22nd September 1932, after the judgment-debtor was adjudicated insolvent, and no notices having been served on the legal representative of the judgment-debtor as required by Order XXI, rule 22, the sale was void *ab initio*."

Their Lordships held that the sale in that case was not void because it was not the fault of the decree-holders that no notice had been served upon the Official Receiver. There is a reference to the Privy Council case but their Lordships held that it had no application to the case before them. Their Lordships dealt with the judgment of the Privy Council only on the question of the effect of want of service of notice to the representative of the judgment-debtor. They did not deal with the third ground upon which the judgment of the Privy Council was based. The most recent case, and the one most strongly relied upon by Mr.

(1) (1934) I.L.R. 62 Cal. 457.

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Satyanarayana Rao, is the case of *Muthan Chettiar v. Venkituswami Naicken*(1). That was a case of a sale held after the admission of the insolvency petition but before adjudication and it was decided that the sale was good as against the Receiver. Mr. Satyanarayana Rao relies upon certain observations made *obiter* by VENKATASUBBA RAO J. The learned Judge considers that section 51 (3) applies to all cases, whether the sale is held before the adjudication or after the adjudication. He holds that the Privy Council case of *Raghunath Das v. Sundar Das Khetri*(2) does not apply because in the Indian Insolvency Act there was no provision corresponding to section 51 (3) of the Provincial Insolvency Act. There is however no discussion by the learned Judge of what appears to me, I say it with great respect, to be the most weighty reason for the decision of their Lordships of the Privy Council, viz., that the insolvent's property having vested in the Official Receiver upon adjudication, there is nothing left which an executing Court can sell as the property of the debtor.

On the other hand, Mr. Govindarajachari is able to point to an explicit authority in this Court, *Anantharama Iyer v. Kuttimalu Kovilamma*(3). This case is particularly important because it was decided under the Act of 1907 in which section 34 (3) corresponds precisely with the present section 51 (3). There is a reference to section 34 (3) and, in spite of the existence of that provision, SADASIYA AYYAR and MOORE JJ. held that a sale after adjudication must be a nullity. This they held on two

(1) (1936) I.L.R. 59 Mad. 928. (2) (1914) I.L.R. 42 Cal. 72 (P.C.).
(3) (1916) 30 M.L.J. 611.

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grounds, firstly that the sale was altogether irregular having been made in violation of the provisions of section 34 (1) after the Official Receiver had notified the Court of the presentation of an insolvency petition. They go on to say that the sale was wholly *inoperative*:

"We are also of opinion that the judgment-debtor had at the time of the sale no right, title or interest which could be sold or vested in a purchaser, and that consequently the second respondent acquired no title to the property, which had passed to the Receiver on the adjudication order being made [see *Raghunath Das v. Sundar Das Khetri*(1)]."

So far as I am aware, there is no authority in this Court to the contrary and I am therefore bound to follow it. I do so with greater readiness because, with due respect, I consider it to be altogether sound. This decision is supported by the observations made by WALLER J. in the case of *Sivasami Odayar v. Subramania Aiyar*(2). In that case, the Official Receiver, who had been appointed interim receiver of a debtor's land, applied to the Court under section 52 of the Provincial Insolvency Act to adjourn the sale. The Court refused to adjourn the sale and the sale was held, and subsequently, on the Official Receiver's application to have the sale set aside, his application was dismissed by the executing Court, a decision which was finally upheld by the High Court in *Subramania Aiyar v. The Official Receiver, Tanjore*(3). WALLER J. however held that

"the Official Receiver was quite justified in declining to recognise the title of the auction purchaser under a sale that should not have taken place or been confirmed by a Court which was required peremptorily by the statute to stay its hand and to transfer the attached property to the Receiver".

(1) (1914) I.L.R. 42 Cal. 72 (P.C.). (2) (1931) I.L.R. 55 Mad. 316.
(3) (1925) 50 M.L.J. 665.

In *Nainar Rowthen v. Kuppai Pichai Rowthen*(1) ODGERS J., though not referring to *Raghunath Das v. Sundar Das Khetri*(2), made certain observations which are in point. The learned Judge says on page 611:

"It is perfectly obvious why notice is necessary to the Official Receiver in a special sense, because as the whole right, title and interest of the insolvent's property has after adjudication become vested in the Official Receiver, no title, by sale or otherwise, can be acquired without his concurrence."

I cannot accept the contention that since the Official Receiver was given a notice in the execution proceedings in this case therefore he is bound by the sale. That, as I have already observed, is a question of procedure only. It is quite true that under the decision of the Privy Council the sale would have been bad if the Official Receiver had not been given notice; but it does not follow that since the Official Receiver was given notice the sale is good. If A is the judgment-debtor and the executing Court sells B's property in execution of the decree against A, the sale must be a nullity (it seems to me), whether it is held behind the back of B or before his face. The mere giving of a notice to B in the execution petition cannot confer upon the Court the power to sell his property to satisfy a decree against another.

I do not think that this interpretation leads to any great difficulties. Section 51 (3) in my judgment can only refer to all cases of execution sales held before adjudication. Section 51 (1) provides that no person shall be entitled to the benefit of execution against the Receiver except in respect of assets realised in the course of the execution by

(1) A.I.R. 1929 Mad. 609.

(2) (1914) I.L.R. 42 Cal. 72 (P.C.).

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sale or otherwise before the date of the admission of the petition. If a sale is held before the insolvency petition is admitted, the judgment-creditor can retain the sale proceeds. If it is held after the presentation of the insolvency petition, the judgment-creditor cannot retain the sale proceeds as against the Official Receiver. But under section 51 (3) in all cases the purchaser of the property of the debtor acquires a good title as against the Receiver; in other words, the sale cannot be set aside. It was necessary to make a provision like section 51 (3) by reason of the provisions of section 28. By section 28 (7), an order of adjudication shall relate back to, and take effect from, the date of the presentation of the insolvency petition. This would have the effect of making the insolvent's property vest in the Official Receiver with effect from the date of the insolvency petition and therefore if there were no such provision as section 51 (3), any sales held in execution between the date of presentation of the insolvency petition and the date of adjudication would have to be considered null and void. It is to prevent this effect of the doctrine of relation back that section 51 (3) is introduced; but it clearly cannot operate in cases of sales held after adjudication for the two reasons which I have already indicated, viz., (i) that it comes in the Insolvency Act amongst a set of provisions dealing with the effect of insolvency (i.e., adjudication) on antecedent transactions and (ii) that after adjudication the debtor has no property which can be sold in execution.

I would therefore hold that the decision of the learned Subordinate Judge is correct and that this appeal should be dismissed with costs of the first respondent.

MOCKETT J.—The difficulty in this case is in my opinion due to the lax use of the word “debtor” throughout the Provincial Insolvency Act. In many sections it is used as meaning the insolvent, although in section 55 it is used as meaning the debtor. It seems to be clear that a debtor and an insolvent are strictly speaking different persons. The use of the word “insolvent” in the Indian Acts is represented by “bankrupt” in the English Bankruptcy Act, but in England “insolvency” is used in a rather general sense as indicating a stage prior to adjudication, e.g., *vide* section 94, Bankruptcy Act, 1914, where a trustee against whom a receiving order has been made has to vacate his office by reason of insolvency. Under the Bankruptcy Act, 1914, the word “debtor” is dealt with in section 1, sub-section 2, and the meaning seems to be a person liable to bankruptcy proceedings who is under section 1 (2) amenable to the jurisdiction of the English Bankruptcy Court. *Vide* Williams' notes to section 1, Bankruptcy Act. He is a person liable to adjudication but not yet adjudicated. Section 18 of the Bankruptcy Act emphasises the difference. The section says:

“Where a receiving order is made against a debtor, then (if certain conditions are fulfilled) the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors.”

It seems to me beyond doubt that an insolvent under the Indian Insolvency Act means a person against whom an order of adjudication has been made and that a debtor is a person who had made himself amenable to adjudication but who has not yet been adjudicated. Can it be doubted that it might well be defamatory to describe a debtor against whom a petition was pending as “an

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insolvent" as in England "a bankrupt"? The fact that the draftsman of the Provincial Insolvency Act has had little regard to the special meaning of the words "debtor" and "insolvent" does not seem to me in any way to affect the matter. For instance, in section 27 (1) and (2), Provincial Insolvency Act, a person who has been adjudicated is referred to as a debtor, whereas in section 28 (2) he is quite correctly described as the insolvent; and section 28 (2) says:

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court. . ."

In section 31 (1) a person who has been adjudicated is described as an insolvent, whereas in sub-section 2 he is spoken of as a debtor and in sub-section 3 again he is referred to as an insolvent. It is unnecessary to give further examples but perhaps section 59 is another striking example of an adjudicated person being called both a debtor and an insolvent in the same section. It is therefore necessary, in order to ascertain what meaning is to be given to the word "debtor" in a particular section, to examine that section having regard to its context, and we have to consider in this appeal what is its meaning in section 51 (3) of the Provincial Insolvency Act. If the word "debtor" is to be used as meaning an insolvent, i.e., a person who has been adjudicated, then in spite of the decision of the Judicial Committee in *Raghunath Das v. Sundar Das Khetri*(1), where no provision similar to section 51 (3) of the Provincial Insolvency Act had to be considered, I should feel constrained to hold that the Indian

Legislature intended to give sanctity to sales by the Court in all cases and that "all cases" means sales both before and after adjudication. But, can such a meaning be attached to the word "debtor" in section 51 (3)? I think not. In such a case as this, it is necessary to call in aid the rules of construction of statutes and in this matter I derive from them considerable assistance. Section 51, Provincial Insolvency Act, is the first of five sections under the heading "Effect of insolvency on antecedent transactions" which, paraphrased, means "the effect on transactions which took place before the order of adjudication of the insolvent had been made." In *Eastern Counties, &c., Companies v. Marriage*(1), which concerns the construction of two sections of the Land Clauses Consolidation Act, Baron CHANNELL, in order to ascertain the meaning of the section, discusses the value of headings in interpreting statutes. He says at page 41:

"In different parts of the Act there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, *special* no doubt in one sense, as addressed to the object or purpose, but, where not otherwise provided for, *general* in its application to the enactments passed to accomplish the object. These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow than might be afforded by a mere preamble."

(1) (1860) 9 H.L. Cas. 32.

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Baron CHANNELL was recording his opinion as one of the Judges summoned to the House of Lords. Lord WENSLEYDALE says at page 68 :

" I am of opinion that an Act penned as this is, cannot be read as a continuous enactment would be ; various clauses relating to each separate subject are collected under various heads ; with an appropriate heading to each class, which must apply to the whole of that class to which it is the heading, and the meaning of this heading, ' and with respect to small portions of intersected land, be it enacted as follows,' is equivalent to saying, that all the enactments or sections of the statute contained under that head relate to small portions of intersected land, and they must, therefore, be construed so to relate."

Lord WENSLEYDALE approves the observations of Baron CHANNELL.

" It is a rule of construction that where in the same Act of Parliament, and in relation to the same subject-matter, different words are used, the Court must see whether the Legislature has not made the alteration intentionally, and with some definite purpose ; *prima facie* such an alteration would be considered intentional."—

thus Lord ESHER M.R. observes in *Guardians of Parish of Brighton v. Guardians of Strand Union*(1).

Applying these rules this case seems to me to be free from any difficulty. The words " the property of a debtor " in section 51 (3) read with the heading can only mean the property of a person which has been sold previous to adjudication, the " transaction " being the sale. This leads to a reasonable result, namely, that all sales both before and after the presentation of a petition but before adjudication by the Court are protected so far as passing a good title to a purchaser is concerned. It would have the effect of overriding in such cases the " relation back " ;

(1) [1891] 2 Q.B. 156, 167.

section 28, sub-section (7). To hold that section 51 (3) applies to sales by the Court after adjudication would lead to a most anomalous position. Such a sale must *prima facie* be inoperative because a bankrupt has nothing to sell, his property having vested in the Official Receiver, which position is emphasised by the Judicial Committee in the case above cited. So far from extending the meaning of a word in order to produce such a result, I should require unequivocal words constraining me to arrive at a result so wholly opposed to principles of Insolvency law.

I have had the advantage of reading my learned brother's judgment with which I entirely agree. I have arrived at the same conclusion approaching it from a somewhat different angle which makes it unnecessary for me to deal with the authorities which have been cited and which have been discussed by my learned brother. I would dismiss this appeal with costs of the first respondent.

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APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Horwill.

1938,
January 11.

SWAMINATHAN CHETTIAR *alias* ARUNACHALAM
CHETTIAR (PLAINTIFF), APPELLANT,

v.

V. E. N. K. R. M. V. R. M. SOMASUNDARAM CHETTIAR,
AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 20 (b)—Non-resident foreigner—Cause of action against him arising in British India—Suit against him and others who were not foreigners, but some of whom resided within and others outside the jurisdiction of British Indian Court—Leave to sue all the defendants obtained under sec. 20 (b)—Jurisdiction of the said Court against non-resident foreigner.

C, a non-resident foreigner, on the strength of a rateable distribution order in his favour passed by a British Indian Court, drew a sum of money from the said Court. S and K who claimed to hold a decree against the same judgment-debtor were excluded from the benefits of the said order. S and K took the matter up in revision to the High Court without success. When the matter was pending in the High Court C died. S and K filed a suit under section 73 (2) of the Code of Civil Procedure for reopening the said rateable distribution order. In the said suit they impleaded, as defendants, C's son who also was a non-resident foreigner and a number of others who were also benefited by the said order. Some of the other defendants were also not residing within the territorial jurisdiction of the said Court though residing within British India. Under section 20 (b) of the Code, S and K had obtained leave of the Court to file the suit. A decree was passed against C's son and others. C's son filed a suit, out of which the present appeal arose, against S and K for a declaration that the decree obtained by them against him was void and inoperative on the ground that it was his father and not he who drew the money from Court and that he was a non-resident foreigner who had

not by any act of his own submitted to the jurisdiction of that Court and as such the Court had no jurisdiction to pass a decree against him in an action *in personam*.

Held—(i) So far as the plaintiff was concerned the suit filed by S and K was based on a cause of action which arose in British India since the withdrawal of the sum of money took place in British India. The question of jurisdiction alone was open to the plaintiff and not the one relating to the correctness of the decree.

(ii) In a suit of this kind the Court grants leave to sue under section 20 to include defendants not residing within the local limits of its jurisdiction, and when leave is granted the suit is deemed to have been properly instituted even as against such defendants. It makes no difference for this purpose whether those defendants are residents of British India though outside the local limits of its jurisdiction or they are persons residing outside British India. Some parts of the said section give jurisdiction to British Indian Courts even in actions *in personam* against non-resident foreigners. There is no reason to read clause (b) of the said section as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India.

Girdhar Damodar v. Kassigar Hiragar(1), *Massey v. Heynes*(2) and *The Duc d'Aumale*(3), relied on.

(iii) The Court had jurisdiction to pass the decree.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 43 of 1933.

T. R. Venkatarama Sastri, T. V. Rajagopalan
and *T. R. Srinivasa Ayyar* for appellant.

M. Patanjali Sastri and *T. K. Sundararaman*
for respondents.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by the appellant in the Sub-Court of Ramnad, for a declaration that the decree

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(1) (1893) I.L.R. 17 Bom. 662.
(2) (1888) 21 Q.B.D. 330, 334.
(3) [1903] P. 18.

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obtained against him by the present defendants in Original Suit No. 57 of 1922 on the file of that Court was void and inoperative and for an injunction restraining these defendants from executing that decree either in British India or elsewhere. The declaration was sought substantially on the ground that the plaintiff was a non-resident foreigner domiciled in the Pudukottah State and that the Ramnad Sub-Court had no jurisdiction to pass a decree against him in an action *in personam*. The lower Court dismissed the suit. Hence this appeal by the plaintiff.

Original Suit No. 57 of 1922 was a suit instituted by the present defendants, under the provisions of section 73 (2), Civil Procedure Code, seeking to reopen a rateable distribution ordered by the Sub-Court, Tanjore, to the exclusion of these defendants who claimed to hold a decree against the same judgment-debtor. The present plaintiff's father Chidambara Chetti was one of the creditors who on the strength of a decree obtained by him in the Chief Court at Rangoon claimed rateable distribution in the Tanjore Court and drew a sum of Rs. 5,300 odd in April 1914 from the Tanjore Court by way of rateable distribution. Against that order the present defendants had filed a civil revision petition in this Court which happened to be pending for a period of about seven years and was ultimately dismissed; and it was after the dismissal of the revision petition that the present defendants instituted Original Suit No. 57 of 1922 for recovery of their share in the assets which, according to their contention, had been wrongly distributed to the various creditors who were impleaded as defendants in Original Suit No. 57

of 1922. The circumstances which made it possible for the present plaintiff to impeach the jurisdiction of the Ramnad Sub-Court as against him were that his father who drew the money in 1914 died in 1918 while the civil revision petition was still pending in this Court and that the plaintiff who was impleaded as a defendant in Original Suit No. 57 of 1922 did not himself draw the money in question.

It has not been disputed that the plaintiff is a non-resident foreigner and has not by any act of his own submitted to the jurisdiction of the Ramnad Sub-Court. As against the plaintiff's contention, it has been urged by the defendants that the cause of action on which Original Suit No. 57 of 1922 was founded, viz., the withdrawal of the money by way of rateable distribution, undoubtedly arose in British India and it has been contended that it is now well settled that even as against a non-resident foreigner, the Courts in British India have jurisdiction *in personam* in suits based upon a cause of action arising in British India; see *Girdhar Damodar v. Kassigar Hiragar*(1) referred to with approval by the Privy Council in *Annamali Chetty v. Murugasa Chetty*(2). See also *Rambhat v. Shankar Baswant*(3). Whatever the validity of a decree passed in such circumstances may be, when such a decree is impugned in a foreign Court, it is admitted by the learned Counsel for the appellant that in the present suit which was also instituted in a British Indian Court we can only consider whether according to the Municipal Law in force in British

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(1) (1893) I.L.R. 17 Bom. 662. (2) (1903) I.L.R. 26 Mad. 544. (P.C.).
(3) (1901) I.L.R. 25 Bom. 528.

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India the Ramnad Sub-Court had jurisdiction to decree Original Suit No. 57 of 1922 against the present appellant.

Learned Counsel for the appellant seeks to answer the defendant's argument by drawing a distinction between his clients' liability as the son or legal representative of his father and his client's personal liability and he contends that the Ramnad Sub-Court had no jurisdiction to pass a *personal* decree against his client as it has done in Original Suit No. 57 of 1922. It seems necessary in dealing with this contention to emphasise the distinction between the question of the existence of jurisdiction and that of the correctness or otherwise of the decree passed in the suit. It is admitted that if the Court had jurisdiction over the present plaintiff in Original Suit No. 57 of 1922, it is not open to us in this suit to examine the correctness or otherwise of the decree passed in that suit. In this view the learned Counsel for the appellant rightly refrained from pressing before us many of the issues raised in the lower Court in the present case which really bear on the merits of the decision in Original Suit No. 57 of 1922 and are not strictly relevant to the question of jurisdiction. Bearing this distinction in mind, it is difficult to accede to the contention urged by the learned Counsel for the appellant. The only cause of action relied on in Original Suit No. 57 of 1922 was the withdrawal of money from the Court in British India under the rateable distribution order. It therefore cannot be held that the suit was not based on a cause of action arising in British India. Assuming for the moment that the proper decision for the Court to have given in

Original Suit No. 57 of 1922 as against the present plaintiff would only have been a decree limited to the joint family properties or the assets of the father Chidambara in the hands of the appellant, this is obviously a question relating to the correctness of the decree and not a question of jurisdiction.

Learned Counsel suggested to us, at one stage of his argument that the plaintiff's capacity in his character as legal representative or son of his father is so wholly different from his individual capacity that we should hold that though in his character as his father's son or representative he might have been properly impleaded in Original Suit No. 57 of 1922, he must be dealt with as not a party at all in his individual capacity and he invoked the analogy of the position of a trustee in relation to his personal estate and to the trust estate respectively. But when we drew his attention to the line of cases in this country under section 47 of the Civil Procedure Code holding that even a person who is sued as a representative is a party to the suit within the meaning of section 47 when he is claiming that certain properties belonging to him in his personal right are not to be attached in execution of a decree obtained against him as legal representative, learned Counsel admitted that the analogy of a trustee was not a true analogy. We are therefore unable to accept the appellant's contention that so far as he was concerned Original Suit No. 57 of 1922 was not founded on a cause of action which arose in British India.

There are one or two other grounds advanced in the Court below and also suggested before us

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in support of the defendants' contention that the Ramnad Sub-Court was competent to deal with Original Suit No. 57 of 1922 against the present plaintiff. In the view we have taken above it will be sufficient to deal with these other contentions briefly. One of them is that the plaintiff was one of the partners in the T.A. Firm or family business carried on by his father Chidambara and that the plaintiff's liability for refund of the money drawn by Chidambara under the rateable distribution order was therefore a personal liability and not merely the liability of a son or legal representative. There is certainly some evidence to support the contention that in relation to the T.A. Firm the plaintiff was more than a mere joint family member interested in the business. Admittedly in 1916 the plaintiff was adjudicated insolvent along with his father in respect of the debts due by the T.A. Firm. This could only have been on the footing that he was personally liable for those debts as a partner and his liability was not merely that of a member of a joint Hindu family. At one stage a doubt was raised whether the plaintiff had attained majority at all in 1914 so as to impose upon him a personal liability to refund the money withdrawn by his father under the rateable distribution order; but in view of the affidavit filed by him during the insolvency proceedings we are unable to accept the appellant's suggestion that he had not attained majority in 1914. If therefore plaintiff's father should be held to have withdrawn the money under the rateable distribution order as one of the members of the firm in which the plaintiff was also a partner, the cause of action was one which accrued both

against the plaintiff and his father and in that sense Original Suit No. 57 of 1922 was as against the present plaintiff a suit founded on a cause of action which arose in British India. Alternatively, learned Counsel for the respondents contended that even if that suit was not as against this plaintiff founded on a cause of action that arose in British India, the Court had full jurisdiction in that suit by reason of the provisions of section 20 (b) of the Code of Civil Procedure. As already stated, that suit was instituted against a number of defendants who had obtained rateable distribution under the same order and, as some of the defendants in that suit (including the present plaintiff) were not resident within the limits of the territorial jurisdiction of the Ramnad Court, leave was obtained under section 20 (b) of the Code to implead them in that suit. There can be no doubt that as against most of the defendants to that suit that suit was properly instituted in the Ramnad Court. In these circumstances, learned Counsel for the respondents contends that if in a suit of that kind the Court grants leave to include defendants not resident within the limits of its jurisdiction, the suit must be deemed to have been properly instituted even as against the latter defendants and that it makes no difference for this purpose whether those defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India. This contention receives some support from the reasoning of SARGENT C.J. in *Girdhar Damodar v. Kassigar Hiragar*(1). If in respect of some parts

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of section 20 the Code is to be construed as giving jurisdiction to British Indian Courts even in actions *in personam* as against non-resident foreigners, there is no reason to read clause (b) of section 20 as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. The analogy of Order XI, rule 1 (g), of the English Supreme Court Rules relating to service outside jurisdiction also supports the respondents' contention. It is obvious that that clause of the English rule refers to non-resident foreigners. The considerations justifying the recognition of jurisdiction in the English Courts even as against non-resident foreigners in cases falling under that clause are indicated in the judgment of WILLS J. in *Massey v. Heynes*(1). From the decision in *The Duc d'Aumale*(2) it is clear that in cases falling under that clause it is immaterial that even the cause of action did not arise in England. The danger that by obtaining leave a plaintiff may bring before the English or the British Indian Court a person against whom the domestic Court could not reasonably exercise jurisdiction is sufficiently guarded against by the provision insisting upon the leave of the Court being obtained in such cases ; and, as we have already indicated, Original Suit No. 57 of 1922 was instituted with the leave of the Court. Any argument as to whether the leave was or was not properly granted in the particular circumstances is not one which can be advanced in a separate suit attacking the validity of the decree passed in that suit. We

(1) (1888) 21 Q.B.D. 330, 334.

(2) [1903] P. 18.

accordingly agree with the decision of the learned Subordinate Judge that the contention that as against the present appellant the decree in Original Suit No. 57 of 1922 is void for want of jurisdiction fails.

The learned Counsel for the appellant suggested another argument based on the insolvency proceedings against the plaintiff and his father. It appears that the adjudication was annulled as the result of a scheme of composition. Relying on that circumstance, the learned Counsel contended that the present claim should be regarded as not enforceable by a regular suit and must have been proved in the insolvency itself as a debt. He did not however seriously insist on that contention when it was pointed out to him that before the annulment of that insolvency, the present claim could not have been regarded as a debt proveable in the insolvency. As stated already, Chidambara had withdrawn the money under an order of Court which denied the present defendants' claim to rateable distribution. There was at that stage no relationship of debtor and creditor between Chidambara and the present defendants nor could it be said that any liability had come into existence till in Original Suit No. 57 of 1922 the Court made a decree on the ground that the distribution made under the rateable distribution order was improper. There is accordingly no force in the contention based upon the insolvency proceedings.

The appeal fails and is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and
Mr. Justice Abdur Rahman.

K. KANDASWAMI MUDALIAR (APPELLANT—
DEFENDANT), APPELLANT,

v.

THEVAMMAL (RESPONDENT—PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), sec. 20, proviso—Payment of interest as such—Proof of, by evidence other than the writing referred to in the proviso to the section—Permissibility—Object of recent amendment of the proviso.

Section 20 of the Limitation Act, as it now stands, merely provides that the payment must be of interest as such or of part of the principal—and this can be proved by all lawful means—and that such payment will not however start a fresh period of limitation unless there is an acknowledgment of the payment in writing or signed by the person making the payment. It is not correct to read into the proviso that the writing referred to therein should itself recite in so many words that the payment made was of interest as such or of part of the principal.

Object of the recent amendment of the proviso to section 20 explained.

Case-law referred to.

APPEAL under Clause 15 of the Letters Patent from the judgment of VENKATARAMANA RAO J. dated 20th March 1936 and passed in Second Appeal No. 443 of 1932 preferred to the High Court against the decree of the District Court of Coimbatore in Appeal Suit No. 162 of 1931 preferred against the decree of the Court of the

* Letters Patent Appeal No. 66 of 1936.

District Munsif of Erode in Original Suit No. 16 of 1930. KANDASWAMI
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K. Periaswami Goundan for appellant.
C. V. Subramania Ayyar for respondent.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—The only point that arises in this appeal is whether the payment alleged by the plaintiff of a certain amount as interest due on the suit promissory note can be proved to have been made towards interest as such by evidence other than the writing referred to in the proviso to section 20 of the Limitation Act. The payment is acknowledged in writing by the debtor in the promissory note which was executed in respect of that amount. It is not disputed that payment may be made either in cash or by the execution of a promissory note. There can thus be no doubt in this case that the fact of payment is evidenced by a writing signed by the debtor. The writing however does not itself say that the payment was made towards interest as such due on the suit promissory note. Now the question is whether this fact, viz., that the payment was made towards such interest, can be proved by extrinsic evidence. We fail to see any reason why extrinsic evidence should be excluded. There is no rule of law which requires that the fact of a payment having been made towards interest due on a promissory note should be proved only by documentary evidence. The question also depends upon the interpretation of the words in the proviso to section 20 of the Limitation Act which runs as follows:

“Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment

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of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

The Advocate for the appellant contends that the acknowledgment should not be merely of the payment referred to in the earlier part of section 20 but that it should be an acknowledgment reciting in so many words that the payment was made towards interest as such or part of the principal, and that where the acknowledgment in writing is silent about this there is no such acknowledgment as is contemplated by the proviso. We are of opinion that this contention involves the reading into the proviso of words which are not to be found therein. Secondly, such a construction of the proviso would be unreasonable. Thirdly, the balance of authority is against this view. Apart from the decisions quoted by our learned brother in the judgment under appeal some other comparatively recent decisions have been brought to our notice, viz., those reported as *Pearey Lal v. Mohammad Yusuf*(1), *Idan Sadagar v. Premasukdas Ramchandra*(2) and the Full Bench decision of five Judges in *Udaypal Singh v. Lakshmi Chand*(3). An unreported decision of BEASLEY C.J. in Civil Revision Petition No. 1450 of 1935 on the file of this Court has also been brought to our notice. The decisions in *Idan Sadagar v. Premasukdas Ramchandra*(2) and *Pearey Lal v. Mohammad Yusuf*(1) as well as in the unreported case are opposed to the contention pressed on us by the Advocate for the appellant. In the Allahabad Full Bench case there is nothing said which militates against the view adopted by

(1) A.I.R. 1937 All. 640.

(2) A.I.R. 1937 Pat. 583.

(3) (1935) I.L.R. 58 All. 261 (F.B.).

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our learned brother in the judgment under appeal. We are unable to accept the view that the object of the recent amendment of the proviso was to require that the acknowledgment in writing should in terms recite the payment of interest as such or of part of the principal. The amendment was made, as stated by SULAIMAN C.J. in *Udaypal Singh v. Lakshmi Chand*(1), as it was considered necessary to put a stop to the controversy between creditors and debtors as to whether any amount had in fact been paid. See also the observations of BAJPAI J. on page 304 of the same case. The object of the amendment was, in short, to deprive the creditors of the right, which was often abused, to plead oral payments of interest as such and try to establish them by oral evidence, in the absence of anything in writing by the debtor himself evidencing the payments. So far as we can see, section 20 as it now stands merely provides that the payment must be of interest as such or of part of the principal—and this can be proved by all lawful means—and that such payment will not however start a fresh period of limitation unless there is an acknowledgment of the payment in writing or signed by the person making the payment. It is not correct to read into the proviso that the writing referred to therein should itself recite in so many words that the payment made was of interest as such or of part of the principal. The word acknowledgment cannot be interpreted as necessarily connoting the idea that the acknowledgment must be in a particular form or should contain a particular recital; namely, that payment made is of interest

(1) (1935) I.L.R. 58 All. 261, 274 (F.B.).

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as such or part of the principal. Unless the words in the proviso clearly require that the acknowledgment itself should recite these facts, it does not appear to be just or reasonable that a payment which was really made towards interest as such should be held to be not sufficient to give a fresh period of limitation. On the whole therefore we see no reason to differ from our learned brother's conclusion on this point.

The appeal therefore fails and is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and
Mr. Justice Abdur Rahman.*

1938,
March 30.

RATNASWAMI NADAN AND 11 OTHERS (DEFENDANTS),
APPELLANTS,

v.

THE PRINCE OF ARCOT'S ENDOWMENTS, TRICHINOPOLY, UNDER THE CONTROL OF HIS HIGHNESS THE PRINCE OF ARCOT, G.C.I.E., REPRESENTED BY HIS AUTHORISED AGENT SHAMSUL ULAMA MOULVI MOHAMMAD ABDUR RAHMAN SAHIB BAHADUR "SHAKEER", (PLAINTIFF), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. I, r. 8—
Representative suit for declaration of title and possession
—Institution of, by plaintiff against defendants holding land
under the karaiyedu tenure—Maintainability of—Mesne
profits—If can be granted in the suit.*

A representative suit will lie as much in respect of a declaration as for an injunction. The procedure pertaining to

* Appeal No. 824 of 1933 and Appeal No. 88 of 1934.

representative suits is, however, inapplicable to actions of debt, to money claims or to liabilities in contract or in tort.

The plaintiff sued the defendants under Order I, rule 8, Civil Procedure Code, as representing a large number of villagers (about 150 in number) for a declaration of his title to, and for possession of, lands held by the defendants under the *karaiyedu* tenure under which the lands were temporarily cultivated in separate shares by the co-sharers and were subject to periodical redistribution. The plaintiff also prayed for the recovery of mesne profits. The lower Court granted the plaintiff a decree for possession and for a consolidated sum as representing the mesne profits. What was found due by the lower Court was the amount supposed to be payable by the entire group of the 150 odd villagers and no attempt had been made to apportion the liability.

Held that the lower Court was right in passing a decree for possession but that it was wrong in passing a decree for mesne profits and that as no attempt had been made to apportion the liability, the decree for mesne profits could not be maintained even as against the named defendants.

APPEALS against the decrees of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 84 of 1931 and in Original Suit No. 109 of 1931.

A. V. Narayanaswami Ayyar for appellants.
T. M. Krishnaswami Ayyar for respondent.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—Mr. Narayanaswami Ayyar, the appellants' learned Counsel, set himself the task of showing that the judgment is wrong from the judgment itself, as beyond the pleadings nothing has been printed. His contention that the lower Court's view that the lands form part of an "estate" or that they answer the description of "old waste" is wrong does not require serious notice, as we cannot discover from the judgment that the appellants had any sort of

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possession, whether under the Act or outside it, which would confer on them any legal right.

Then as to his next contention, the facts are briefly these: The defendants were sued under Order I, rule 8, Civil Procedure Code, as representing a large number of villagers (about 150 in number) too numerous to be individually impleaded. In the plaint it is stated that in pursuance of a conspiracy, they combined in order to deny the plaintiff's title and to take unlawful possession of the land. All that we need say is that it does not appear from the judgment that this allegation has been made out. But we think on the facts as found the plaintiffs were entitled to have recourse to Order I, rule 8. The fact seems to be that the tenure obtaining in respect of the lands held by the defendants, is that which goes by the name of *karaiyedu*. Under that system the lands are temporarily cultivated in separate shares by the co-sharers and are subject to periodic redistribution. The defendants' case, as may be inferred from the meagre record, appears to be that in virtue of their holding certain other lands in the village under *karaiyedu* form, they are entitled to similar rights in the suit land. That is to say, the right of the whole community extends to the whole land and the right of each member is similar to the right of every other. We are, therefore, inclined to think that there is sufficient community of interest to render the rule applicable. Even so, the lower Court in our opinion is wrong in passing a decree for mesne profits. Though the point is not covered by Indian authority, the law seems quite clear under the corresponding

English rule, that the procedure pertaining to representative suits is inapplicable to *actions of debt, to money claims or to liabilities in contract or in tort*. The principle has been lucidly explained and the authorities have been fully reviewed by FRASER J. in *Hardie and Lane, Ld. v. Chiltern*(1) whose judgment has been upheld by the Court of Appeal. *Walker v. Sur*(2) is one of the several cases cited by the learned Judge. In a Common Law action of debt for professional services rendered, the plaintiff sued four named defendants on their behalf and on behalf of all other members of an incorporated religious society, most of the members of which resided abroad. BUCKLEY L.J. observed in the course of his judgment in *Walker v. Sur*(2) (page 935):

"If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons . . . But when he had obtained his judgment, he could have had execution only against the share of these persons in that property. There is nothing representative about that."

Then the learned Lord Justice goes on to point out the distinction between an action for declaration and an action of debt:

"The plaintiff has not asked for any declaration of right . . . which, if affirmed in his favour could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party: but that is not the question for our determination. We have

(1) [1928] 1 K.B. 663.

(2) [1914] 2 K.B. 930, 935.

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to determine whether this action ought to go on as that execution could be maintained against all the persons represented. In my judgment that would be impossible." [Cited in *Hardie and Lane, Ltd. v. Chiltern*(1).]

SARGANT L.J. while upholding the judgment of FRASER J. in the case of *Hardie*(1) already referred to, after adverting to two important decisions (one relating to *contract* and the other to *tort*), declares:

"The judgments of this Court in both these reported cases show decisively how impossible it is that the named defendants can adequately represent for the purposes of defence the different individual members of the Association, since these individuals may obviously have defences separate and distinct from those of the named defendants and of each other". (page 699).

In the present case the Judge has granted a decree for a consolidated sum as representing the mesne profits. Is it to be held that each individual of the 150 odd villagers is liable for mesne profits in respect of the entire land, although under the *karaiyedu* form of enjoyment, no ryot is in occupation of more than a fractional share of the whole land? The injustice of such a decree is obvious and the principle of the English decision already quoted clearly applies. Nor can the decree in this respect be maintained as against the named defendants, no attempt having been made to apportion the liability, as what has been found due is the amount supposed to be payable by the *entire* group. We say nothing as to the plaintiff's right to recover mesne profits, future or subsequent, in any separate proceeding; with that we are not concerned and we express no opinion on that matter.

(1) [1928] 1 K.B. 663, 684, 685.

In so far as the decree is for possession, different considerations apply. The facts are common, giving rise to the same liability in regard to each member. Let us apply the test laid down by BUCKLEY L.J. There can be no difficulty in executing the decree against the person either on the record or absent; the liability of one individual does not differ from the liability of another—all being equally liable to be ejected. Then again can it be said in the words of SARGANT L.J. that the absent members have defences separate and distinct from those of the named defendants and of each other? Here also the answer must be in the negative. In so far as the decree is for possession, it should, we think, be upheld.

From the judgment of FRASER J., cited above, it is clear that a representative suit will lie as much in respect of a declaration as for an injunction; *Hardie and Lane, Ltd. v. Chiltern*(1). In respect of these two reliefs also the lower Court's decrees must be confirmed.

In the result, in Appeal No. 324 of 1933 the decree of the Court below is affirmed except in so far as it pertains to the recovery of mesne profits; that portion of the decree, as already stated, is vacated. The order of that Court in regard to costs is maintained; in the appeal each party will bear his costs.

As to Appeal No. 88 of 1934, it is dismissed with costs.

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(1) [1928] 1 K.B. 663, 686.

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APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

KISTA PILLAI (ACCUSED), PETITIONER,

v.

AMIRTHAMMAL (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 488 (4)—“Living in adultery”—Meaning of—Claim for maintenance by wife—Husband putting forward the only defence of “living in adultery”—Procedure to be followed.

To constitute “living in adultery” within the meaning of section 488 (4), Criminal Procedure Code, it is not necessary that the wife should live in the house of the adulterer. The words “living in adultery” are merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by “living in adultery.”

Lakshmi Ambalam v. Andiammal(1) and *In re Fulchand Maganlal*(2) considered.

In the case of a claim for maintenance by a wife against her husband under section 488, Criminal Procedure Code, the husband, who puts forward a charge of “living in adultery” against the wife as his only defence to the claim, ought to begin his case, and the wife ought to have an opportunity of adducing rebutting evidence.

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-divisional Magistrate of Ranipet, dated 12th October 1937 and made in Miscellaneous Case No. 18 of 1937.

* Criminal Revision Case No. 883 of 1937 (Criminal Revision Petition No. 827 of 1937).

(1) (1937) 2 M.L.J. 885.

(2) (1927) I.L.R. 52 Bom. 160.

The petitioner in the High Court (Kista Pillai), ^{KISTA PILLAI} the husband, was married to the respondent ^{v.} AMIRTHAMMAL (Amirthammal) about ten years back. She gave birth to two children, but they died. For about six months prior to the petition, she was in her parents' house and was not under the protection of her husband. A petition was filed by her against her husband for maintenance. She alleged that owing to ill-treatment by her husband and his sister, she had been living in her parents' house and the husband had not cared either to take her back or to give her any money to live upon. The evidence adduced on behalf of the respondent showed that about five months prior to the petition she and one Chinnappa left the village and were living at Wallajapet as husband and wife. The petitioner's witnesses 2 and 3 repeatedly requested her to return to her husband's house but she refused to do so and with great difficulty she was taken by force in a bandy and restored to her parents.

V. T. Rangaswami Ayyangar and *K.A. Chakravarthi Ayyangar* for petitioner.

N. Somasundaram for respondent.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

The petitioner in this case is the husband of the respondent who has obtained an order of maintenance in her favour from the Sub-divisional Magistrate of Ranipet under section 488, Criminal Procedure Code. The main defence to the application for maintenance was that the petitioner was living in adultery. The learned Sub-divisional Magistrate observes on this part of the case merely that there is ample evidence that the

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AMIRTHAMMAL. petitioner was having illicit sexual intercourse with Chinnappa and he then goes on to quote certain observations of NEWSAM J. in *Lakshmi Ambalam v. Andiammal*(1) on the file of the High Court to the effect :

"Living in adultery is something quite different from leading an unchaste life. The principle, it seems to me, is that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife."

The learned Magistrate then comes to the conclusion that

"under this interpretation, the sometime immoral character of the petitioner would not constitute 'living in adultery'."

The facts elicited in evidence are not merely that there was only one individual lapse or even occasional lapses from virtue but that the petitioner actually eloped with Chinnappa and lived with him in another place, viz., Wallajah Road, for some days, that when discovered by her husband's relations and pressed to return, she refused to return, and that she had to be taken by force from her paramour to her parents' house. There is also certain evidence adduced, no doubt at a late stage of the case without giving an opportunity to the petitioner to rebut, to the effect that the petitioner, even when the case was pending before the Sub-divisional Magistrate, was continuing her intrigue with Chinnappa. The learned Sub-divisional Magistrate makes no reference to this evidence, and he appears to have thought that the only evidence against the petitioner was in respect of her immoral character in the past, that is to say,

(1) (1937) 2 M.L.J. 885.

before the application. I am unable to say that this is a satisfactory way of disposing of a claim for maintenance either from the point of view of the petitioner or of the counter-petitioner. I am not prepared to go to the length of saying that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as a wife, the husband will be liable to pay maintenance under section 488, Criminal Procedure Code. Emphasis is no doubt to be laid on the words "is living in adultery". In other words, as was pointed out by the Bombay High Court in *In re Fulchand Maganlal*(1), the clear implication from the words used by the Legislature in this section is that unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance. It is nowhere said in the section, and there is no need to introduce additional words therein, that living in adultery must be in the house of the adulterer. The words "living in adultery" are, in my opinion, merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery". The question, therefore, for the Magistrate to decide in this case was whether there had been such adulterous conduct on the part of the petitioner at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word "shortly" in a reasonable manner. This case has not at all been approached from this

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AMIRTHANMAL. standpoint. The learned Magistrate has decided the case in a way which appears hardly to do justice to the parties. In particular, the serious allegation of subsequent adultery made in the evidence given by the last witness examined for the respondent in the Magistrate's Court should have been allowed to be contradicted or rebutted on the petitioner's side by the petitioner giving evidence on the point if she was so inclined to do or by letting in other evidence. But it does not appear that any opportunity was given to her for giving evidence on the point. My opinion is that in a case of claim for maintenance like this the respondent, who puts forward a charge of "living in adultery" against the petitioner as his only defence to the claim for maintenance, ought to begin his case, and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence. This procedure has not been followed in this case and in my opinion the enquiry must have done prejudice to the petitioning wife.

In these circumstances, I am of opinion that the interests of justice require that the order of the Magistrate should be set aside, and the Magistrate directed to rehear the petition after giving an opportunity to both parties to adduce additional evidence and, in particular, to let the petitioning wife have the last word and to dispose of the petition afresh in the light of the observations contained in this judgment.

V.V.C.

